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ORISSA HIGH COURT, CUTTACK

CHIEF JUSTICE

The Hon'ble Shri Justice KALPESH SATYENDRA JHAVERI *B.Sc., LL.B.*

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Sanju Lenka & Ors. -V- State of Odisha & Ors.
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Articles 226 and 227 – Writ petition claiming compensation by wife, children and parents of deceased, (late Sashi Bhusan Lenka) who suffered a tragic death while coming on road – Question of maintainability raised – Held, the afore-quoted observation of the Hon'ble Apex Court as well as High Courts show the paradigm shift that has taken place in the judicial approach adopted by the courts to provide speedy and efficacious remedy to the needy in distress than to push him to face the traditional technicalities and procedures of Civil Law Forum – In the instant case, even if it is conceded for the sake of argument that the opposite parties-respondents had constructed some humps and had put some cautionary signs, still in our opinion those were not sufficient to escape the liability – Since the road was totally washed out making it absolutely unusable being added with a deep ditch, the road should have been totally closed prohibiting any vehicular traffic, since the humps are created only to slow down and not to stop, we are inclined to hold that the appellants are entitled for compensation to be paid by the State authorities as respondents and their prayer for relief can be granted by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

Sanju Lenka & Ors. -V- State of Odisha & Ors.
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Articles 226 and 227 – Writ petition – Tender – Challenge is made to the tender condition with regard to the eligibility criteria for participating in the tender – Tender for spot contracts by NALCO for sale of 30,000 MT Metallurgical Grade Calcined Alumina – Eligibility condition – Only overseas prospective buyers/companies having sound financial and business credentials and experience in International Trading are eligible to be registered and Overseas offices of Central Public Sector Undertakings of Govt. of India are also eligible to apply for registration – Application by Vedanta Limited for registration to participate in the tender rejected – Plea that the Ministry of Commerce and Industry, Department of Commerce (SEZ Section), Government of India granted approval to Vedanta Limited for setting up of a Specific Economic Zone for Manufacture and Export of Aluminium along with 125 MW Captive Power Plant and extended all facilities and entitlements admissible to the SEZ Unit subject to the provisions of the SEZ Act for undertaking authorized operations of manufacturing unit for Aluminium Ingot, Wire Rods and billets in the industrial capacity of production mentioned therein – The question arose as to whether the tender condition for eligibility that only overseas buyers can participate in the tender is legal and justified? – Held, No. – Reasons indicated.

M/s. Vedanta Ltd. & Anr. -V- National Aluminium Co. Ltd. (NALCO)
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COURT FEES ACT, 1870 – Section 7 – Computation of court fees – Decree which fixed the amount to be paid along with interest thereupon – Appeal against such decree – Court fees payable – Whether the court fees shall be paid upon decreetal amount only or the interest thereupon – Held, the interest forms a part of the decreetal amount and as such the appellant is liable to pay the court fees on the total amount including the interest amount as well.

The Managing Director, O.S.F.C & Anr. -V- Smt. Gita Devi & Anr.
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INTEREST – Motor Accident claim case settled in Lok Adalat – Award amount was to be paid within two months from the date of award – Not paid – Claim of interest on delayed payment of award – Granted by MACT – Writ petition challenging such grant of interest on the ground that the award amount has been paid within two months from the date of receipt of the copy of the award – Further plea was that the claimants have accepted the amount without objection and such a plea has not been taken before the MACT court – Held, pleas cannot be accepted – Grant of interest legal and there exists no error apparent on the face of the impugned order.

Oriental Insurance Company Ltd. -V- Krushna Kamar & Ors.
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LETTERS PATENT APPEAL – Maintainability – Question thereof – It is not disputed that if writ petition is disposed of under Article 226 of the Constitution or by taking recourse to under Articles 226 and 227 of the Constitution, a writ appeal or a letters patent appeal is maintainable – But, if application is filed and disposed of only under Article 227 of the Constitution, then a writ appeal is not maintainable – Whether writ appeal is maintainable or not maintainable in an election dispute? – Held, it depends on many a facet – Scope – Discussed.

Subash Chandra Biswal -V- Bamadev Patra.
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MOTOR VEHICLES ACT, 1988 – Section 173 – Appeal by Insurance Company challenging the award – Plea that the driver of the offending vehicle which was a Tractor fitted with trolley had no valid driving License – The Driver had a driving license for light motor vehicle and Tractor – The question arose as to whether the driver holding a driving license to drive light motor vehicle and tractor is legally authorized to drive a tractor fitted with trolley? – Held, Yes – Reasons discussed.

M/s. Oriental Insurance Company Ltd. Sahid Nagar, Bhubaneswar- V- Smt. Pratima Karmi & Ors
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NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20(b)(ii)(C) – Offence under – Conviction – Plea of non-compliance of mandatory provisions of Section 42 – Effect of – Discussed.

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ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 41(1) – Suit filed after publication of consolidation ROR – Question arose as to whether the civil court has jurisdiction to entertain the suit after a notification has been issued under Sec. 41(1) of the OCH & PFL Act. – Held, Yes. (Gulzar Khan vs. Commissioner of Consolidation and others, 1993 (II) OLR-194 followed)

Uma Rout -V- Ajaya Bhatta & Ors.
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ORISSA FOREST ACT, 1972 – Section 56(2-a) – The question came up before the Full bench as to Whether a provision for imposition of fine in lieu of confiscation can be added into section 56(2-a) of the Act? – Power of the Court – Determined – Held, in view of the authoritative pronouncement of the Apex Court in the case of Govind Singh & amendment to Orissa Forest Act, 1972 the inescapable conclusion is that the court has no power to impose fine in lieu of confiscation.

Sk. Ayub -V- Authorized Officer-Cum-Asst. Conservator of forest & Ors.
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ORISSA GRAMA PANCHAYAT ACT, 1964 – Section 31(1) read with Order 7 Rule 11 of the Code of Civil Procedure, 1908 – The question arose as to whether the mode of deposit has to be through a challan with order of the court or without any order of the court – Held, Section 31 of the Orissa Grama Panchayat Act provides that the election petition shall be presented on one or more of the grounds specified in Section 39 of the Act before the learned Civil Judge (Junior Division) having territorial jurisdiction, together with a deposit of such amount, if any, as may be prescribed in that behalf as security for cost within 15 days after date on which the name of the

person elected is published under Section 15 of the Act read with Rule 88 of the Orissa Grama Panchayat Election Rules, 1965 – Deposit made after the due date – Election petition is liable to be rejected.

Subash Chandra Biswal -V- Bamadev Patra.
2019 (II) ILR-Cut…… 81

ORISSA PREVENTION OF LAND ENCROACHMENT ACT, 1972 – Section 12(3) – Provisions under – Suo motu proceeding initiated by the Revenue Divisional Commissioner, whether maintainable? – Held, No, as there being availability of scope for Appeal and Revision in the Act, 1972.

Adaita Kumar Biswal -V- R.D.C Northen Division, Sambalpur & Anr.
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PREVENTION OF CORRUPTION ACT, 1988 – Section 13(2) read with section 13(1)(d) and Sections 420/468/471/120-B of the Indian Penal Code – Offence under – Order taking cognizance and issuance process for facing the trial – Matter relates to supply of coal to different MSMEs – Policy of the Government – Plea that the persons associated with the process of selecting the MSMEs for being distributed with the coal, which is said to have been done only in pen and paper are no longer in the arena of the trial of the case – Petitioner as the marketing agent, with his limited role and function under the agreement, having absolutely no knowledge as to any other aspects –Whether to be proceeded with? – Held, No.

Debendra Kumar Panda -V- State of Odisha (Vig.)
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PREVENTION OF CORRUPTION ACT, 1988 – Offences alleged under section 13(2) read with section 13(1)(c) and under Sections 409/465/468/471/ 420/120-B,I.P.C. – Charge sheet filed, cognizance taken – Petitioner assails the impugned order on the ground that the cognizance has been taken wrongly in absence of valid sanction of the competent authority to prosecute the petitioner for the alleged offences – Sanction refused by the competent authority – Whether the court can take cognizance of the offences? – Prayer for quashing – Held, in view of the position of law, when the sanction has been

refused by the appropriate authority, the prosecuting agency could not have filed charge-sheet mentioning that no sanction is necessary, which is again a matter to be considered by a competent court of law, and further the learned trial court could not have taken cognizance of the offences even without whispering a single word about the refusal of sanction – Order not sustainable in law.

Madhusudan Dash -V- State of Odisha (Vig.)

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PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 16(1)(a)(i) – Offence under – Conviction – Compliance of mandatory requirements as required under section 13 (2) of the Act – Held, the provision of section 13(2) of the Act which provides a valuable right to the accused in getting the report of the Public Analyst as to the adulteration of the food sample collected from him further tested by re-analysis of the same at the Central Food Laboratory, stands for mandatory compliance in a prosecution for sale of adulterated food item for human consumption – It has also been said in catena of decisions by the Hon'ble Apex Court as also this Court that said provision is mandatory that first of all for the reason that accused must be made aware of the result of the analysis of the food and secondly, that he must be made aware of his right to get it re-analysed in questioning the report of the Public Analyst if he so feels aggrieved, by making an application before the concerned Court where the prosecution has been launched in getting the second part of the sample so sent and in that case the report of Central Food Laboratory supersedes – The evidence let in by the prosecution, this Court finds that due compliance of mandatory provision of section 13(2) of the Act has not been proved in the case through acceptable evidence and thus the findings of the courts below on that score cannot be sustained which appears to have been so returned merely going through the documents and ignoring the fact that there is no evidence as regards their actual dispatch by post – Conviction and sentence set aside.

Bauribandhu Patro -V- State of Orissa.

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PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 17 and 19 – Provisions under – S*hared household* – Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall

have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same and shall not be evicted or excluded from the shared household or any part of it by the respondent save and except in accordance with the procedure established by law – Challenge is made to the order of restraint by the courts below directing the petitioner not to dispossess the Opp. party from the shared household – Question arose as to when the aggrieved person stands dispossessed from the shared household and whether the Court can redress the grievance of the aggrieved person so as to put the cloack back by putting her in possession restoring the position of the said aggrieved person as it was before the said dispossession as complained of – Held, Yes – Circumstances and reasons indicated.

Rajendra Acharya @ Rajendra Kumar Acharya & Ors. -V- Smt. Dharitri Mishra.

2019 (II) ILR-Cut…… 145

REGULATION OF BOARD OF SECONDARY EDUCATION, ORISSA –There is no provision in the Board's Regulation for correction of the father's name of a candidate, who had appeared in the High School Certificate Examination and had been issued with the Board certificate – In the absence of any such provision, change of name or surname of parents in whatever circumstances, except of course for clerical or printing mistake is not permissible in law and as such, no direction can be given to the Board to make such changes.

The question of law referred to the Full Bench: "Whether the change of the name or surname of father and mother of a candidate who had already appeared at the High School Certificate Examination and obtained the Board Certificate (H.S.C.) incorporating the names of the parents is permissible on the basis of a correction in the school record made subsequent to that date." – Held, in the absence of any regulation governing the field, the Board is not powerless to make correction in the certificate issued by it – Such power is inherent – In the appropriate cases, the Board is obliged to exercise such power and to make necessary correction upon production of relevant documents.

We hasten to add that the application for correction of name of the father/mother shall be made within three years of the passing of HSC Examination so that authorities are not put to any difficulty – The application has to be made through the concerned Headmaster of the High School.

The ratio laid down in Ranjit Kumar Mallick is the correct enunciation of law – We do not find any valid reason to look into the matter afresh –The reference is answered accordingly.

Satyasiva Sundar Nayak -V-Secretary, Board of Secondary Education, Orissa & Ors.

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SERVICE LAW – Disciplinary Proceeding – Delay in disposal – Disciplinary proceedings initiated against the petitioner, placing him under suspension, pursuant to order dated 04.08.1994, which was subsequently revoked and fresh order of suspension was passed on 19.09.1996 – Fresh order of suspension was set aside permitting the petitioner to be reinstated in service and directing the opposite party to conclude the proceedings by the end of the year, 2003 – Not yet been concluded nor even charge-sheet filed – Whether such proceedings can be allowed to continue for indefinite period? – Held, the delay in initiation of the disciplinary proceeding against the petitioner being not attributable to him, the same cannot be sustained – Quashed – Direction to pay all service benefits.

Kailash Chandra Sahoo -V- State of Odisha & Ors.

2019 (II) ILR-Cut…… 121

SERVICE LAW – Petitioners appointed in different posts during the period from 1997 to 1998 and after following due procedure they were absorbed – Consequentially, their services were regularized and Finance Department granted necessary concurrence and approval for engagement of the petitioners – Consequentially, on the basis of the decision taken, all the existing staff, including the petitioners, were extended with the benefits of Orissa Revised Scale of Pay Rules, 1998 and allowed to get the pay w.e.f. 01.04.1998 – They were also allowed to draw Dearness Allowance, House Rent and other allowances, as admissible to the State Government employees – But the authority, all on a sudden, on 24.01.2011 passed an order withdrawing the benefits, which were already granted to the petitioners – Whether permissible? – Held, No, once the right has been accrued in favour of an employee, the same cannot be taken away without complying with the principles of natural justice – Therefore, the order impugned cannot sustain in the eye of law on this ground alone.

Sakrajit Das & Ors. -V- State of Orissa & Ors.
2019 (II) ILR-Cut…… 128

SERVICE LAW – Petitioner joined as Lineman-C on 22. 04.1970 in the establishment of erstwhile Orissa State Electricity Board – After 9 years of service, he sustained electric burn, while discharging his official duty and suffered amputation of both arms – However as a compassionate measure he was allowed to continue in service even though he lost two limbs of his body for the cause of the establishment and no compensation was given – After Orissa Electricity Reforms Act came into force he was made to retire before the actual date of superannuation by the subsequent employer – Whether acceptable ? Held, No, as the erstwhile Orissa State Electricity Board considering his permanent incapacitation, allowed him to continue in service till he attained the age of superannuation and he was advised, neither to opt for Employees Voluntary Retirement Scheme, nor to claim compensation under the Workmens' Compensation Act.

Purna Chandra Pradhan -V-CESCO, Represented Through The Chief Executive Officer, Bhubaneswar & Ors.
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2019 (II) ILR - CUT- 1 (S.C.)

ABHAY MANOHAR SAPRE, J & DINESH MAHESWARI, J.

CRIMINAL APPEAL NO. 675 OF 2019
(Arising out of S.L.P.(Crl.) No.1151 of 2018)

Md. ALLAUDDIN KHAN .....Appellant(s)

.Vs.

THE STATE OF BIHAR & ORS. .....Respondent(s)

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power of High Court – Exercise of – Prayer for quashing of criminal proceeding – Principles to be followed – Held, the High court has no jurisdiction to appreciate the evidence of the proceedings under section 482 Cr. P. C. because, whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties.

Case Laws Relied on and Referred to :-

1. (AIR 1992 SC 604) : State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.

For Appellant : Mr. Binay Ku. Das.
For Respondent : M/s. Devashish Bharuka & Shantanu Sagar.

JUDGMENT Date of Judgment : 15.04.2019

ABHAY MANOHAR SAPRE, J.

1. Leave granted.

2. This appeal is directed against the final judgment and order dated 11.09.2017 passed by the High Court of Judicature at Patna in Criminal Miscellaneous Application No.27078 of 2013 whereby the High Court allowed the Criminal Miscellaneous Application filed by respondent Nos.2 & 3 herein and quashed the complaint filed by the appellant herein.

3. A few facts need mention hereinbelow for the disposal of this appeal, which involves a short point.

4. By impugned order, the High Court quashed the order dated 13.02.2013 passed by the Judicial Magistrate 1st Class, Saran at Chapra in Complaint Case No.21/2012 whereby the Judicial Magistrate took cognizance of the complaint filed by the appellant herein against respondent Nos. 2 and 3 for commission of the offences punishable under Sections 323,

379 read with Section 34 of the Indian Penal Code, 1860 (for short "IPC") by holding that a *prima facie* case was made out against respondent Nos.2 and 3 on the basis of allegations made in the complaint.

5. So, the short question which arises for consideration in this appeal filed by the complainant is whether the Judicial Magistrate was right in holding that a *prima facie* case is made out against respondent Nos.2 and 3 for commission of the offences punishable under Sections 323, 379 read with Section 34 IPC so as to call upon them to face the trial on merits or whether the High Court was right in holding that no *prima facie* case has been made out against respondent Nos.2 and 3.

6. Heard Mr. Binay Kumar Das, learned counsel for the appellant, Mr. Prabhat Ranjan Raj, learned counsel for respondent Nos.2 & 3 and Mr. Devashish Bharuka, learned counsel for respondent No.1 State.

7. Having heard the learned counsel for the parties and on perusal of the record of the case, we are constrained to allow the appeal, set aside the impugned order and restore the order of the Judicial Magistrate dated 13.02.2013.

8. The High Court examined the case in para 6, which reads as under:

> **"6. On perusal of complaint petition, I find that the complainant has asserted that firstly, he had contracted for purchasing the shop premises from the land owner, but the petitioners offered more money and got the document registered in their favour. There is no chit of paper on record to support the agreement of sale or payment of any amount to the land owner. The petitioners claim to be bona fide purchaser of the shop premises, which was in tenancy of the complainant. The petitioners have filed an Eviction Suit No.10 of 2012, in which the complainant has filed his written statement admitting tenancy in the said shop premises. The complainant has further asserted that he has been remitting rent of the said shop regularly and when he learnt about the transfer of shop premises in favour of the petitioners, the complainant has filed a Title Suit No.2 of 2012. The dispute between the parties appears to be a civil dispute. The relationship of landlord and tenant stands admitted by the complainant in the eviction suit. I further find that there are contradictions in the statement of witnesses on the point of occurrence. The criminal prosecution of these petitioners in the above background appears to be an abuse of process of Court."**

9. On perusal of the impugned order, we find that it suffers from two errors.

10. First error is that the High Court did not examine the case with a view to find out as to whether the allegations made in the complaint *prima facie* make out the offences falling under Sections 323, 379 read with Section 34 IPC or not.

11. Instead the High Court in Para 6 gave importance to the fact that since there was a dispute pending between the parties in the Civil Court in relation to a shop as being landlord and tenant, it is essentially a civil dispute between the parties.

12. It is on this ground, the High Court proceeded to quash the complaint. This approach of the High Court, in our view, is faulty.

13. Though the High Court referred to the law laid down by this Court in the case of **State of Haryana & Ors.** vs. **Ch. Bhajan Lal & Ors.** (AIR 1992 SC 604) but failed to apply the principle laid down therein to the facts of this case.

14. The High Court failed to see that mere pendency of a civil suit is not an answer to the question as to whether a case under Sections 323, 379 read with Section 34 IPC is made out against respondent Nos. 2 and 3 or not.

15. The High Court should have seen that when a specific grievance of the appellant in his complaint was that respondent Nos. 2 and 3 have committed the offences punishable under Sections 323, 379 read with Section 34 IPC, then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not. In other words, in order to see whether any *prima facie* case against the accused for taking its cognizance is made out or not, the Court is only required to see the allegations made in the complaint. In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.

16. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

17. In our view, the High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482 of the Code Of Criminal Procedure, 1973 (for short "Cr.P.C.") because whether there are contradictions or/and inconsistencies in the statements of the witnesses is

essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. That stage is yet to come in this case.

18. It is due to these two errors, we are of the considered opinion that the reasoning and the conclusion arrived at by the High Court for quashing the complaint filed by the appellant against respondent Nos. 2 and 3 is not legally sustainable and hence it deservers to be set aside.

19. In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. The impugned order is set aside and the order of the Judicial Magistrate dated 13.02.2013 is restored because it records a finding that a *prima facie* case for taking cognizance of the complaint is made out.

20. The Judicial Magistrate is accordingly directed to proceed to conclude the trial on merits on the basis of evidence adduced by the parties in the trial strictly in accordance with law uninfluenced by any observations made by the High Court in the impugned order and in this order made by this Court.

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2019 (II) ILR - CUT- 4

FULL BENCH

K.S. JHAVERI, C.J, DR. A.K. RATH, J & BISWAJIT MOHANTY, J.

O.J.C. NO. 6582 OF 1995

Sk. AYUB .....Petitioner

.*Vs.*

AUTHORIZED OFFICER-CUM-ASST. CONSERVATOR OF FOREST & ORS. .....Opp. Parties

ORISSA FOREST ACT, 1972 – Section 56(2-a) – The question came up before the Full bench as to Whether a provision for imposition of fine in lieu of confiscation can be added into section 56(2-a) of the Act? – Power of the Court – Determined – Held, in view of the authoritative pronouncement of the Apex Court in the case of Govind Singh & amendment to Orissa Forest act,1972 the inescapable conclusion is that the court has no power to impose fine in lieu of confiscation.

Case Laws Relied on and Referred to :-

1.76 (1993) CLT 671 : Gurudev Singh Rai Vs. Authorised Officer-cum-Asst. Conservator of Forests, Rairakhol Division & Anr.

2. AIR 2000 SC 2729 : Karnataka Vs. K. Krishnan.

For Petitioner : Mr.Gautam Mishra, Adv. Amicus Curiae
For Opp. Parties : Mr.B.P. Pradhan, AGA

JUDGMENT Date of Hearing: 29.03.2019 : Date of Judgment: 03.04.2019

DR. A.K. RATH, J.

The following question of law has been referred to the Full Bench:

> "Whether a provision for imposition of fine in lieu of confiscation can be added into Sec.56(2-a) of the Act, though the only punishment provided is confiscation."

2. Section 56(2-a) of the Orissa Forest Act, 1972, which is hub of the issue, is quoted hereunder;

> "56. Seizure of property liable to confiscation –
>
> (1) & (2) xxx
>
> (2-a) Where an authorised officer seizes any forest produce under Sub-section (1) or where any such forest produce is produced before him under Sub-section (2) and he is satisfied that a forest offence has been committed in respect thereof, he may order confiscation of the forest produce so seized or produced together with all tools, ropes, chains, boats, vehicles or cattle used in committing such offence." (as it stood on 24.01.1994 when the vehicle was seized and on the date of reference dtd.16.10.1995)

3. The aforesaid section was the subject-matter of interpretation before a Division Bench of this Court in the case of Gurudev Singh Rai v. Authorised Officer-cum-Asst. Conservator of Forests, Rairakhol Division and another, 76 (1993) CLT 671. The Division Bench held:

> "Having deeply reflected over the question at hand, we are of the firm view that if the deficiency in section 56(2-a), of which reference has been made above, would have come to the knowledge of the legislature, it would have definitely provided for imposition of fine as an alternative punishment in those cases where the authorities may not be satisfied about the desirability of confiscation and may not also feel happy in allowing the owner of the vehicle to go scot-free. We, therefore, read in the aforesaid section a power to impose fine in lieu of confiscation in appropriate cases. What could be the appropriate cases cannot be laid down with rigidity the same has to be left to the satisfaction of the appropriate authority."

4. In the instant writ application, another Division Bench of this Court held that the Court while construing the provision should not easily read something which has not been expressly enacted. While exercising jurisdiction under Articles 226 ad 227 of the Constitution of India, the Court cannot go on expanding the scope of dispute by adding words to the statutory provisions which do not exist. With this factual scenario, the matter has been referred to the Larger Bench.

5. We have heard Mr. Gautam Mishra, learned amicus curiae and Mr. B.P. Pradhan, learned Addl. Government Advocate for the State.

6. Mr. Mishra, learned amicus curiae submitted that an identical provision was the subject-matter of interpretation before the apex Court in the case of State of Jharkhand and another v. Govind Singh, AIR 2005 SC 294. The apex Court held that the High Court was not justified in releasing the vehicle by imposing fine in lieu of confiscation. The matter has been set at rest by the apex Court.

7. Sub-sec. (3) of Section 52 of the Indian Forest Act, 1927, which has been inserted to the Bihar Act 9 of 1990 is pari materia to Section 56(2-a) of the Orissa Forest Act, 1972. In Govind Singh, a truck was found loaded with coal. Confiscation proceeding was instituted against the respondent under the provisions of the Indian Forest Act, 1927. The Divisional Forest Officer, Hazaribagh directed confiscation of the truck. Appeal filed by the respondent before the Deputy Commissioner, Hazaribagh met with the same fate. Then the matter was carried in revision before the Revisional Authority-cum-Secretary, Department of Forest and Environment, which was eventually dismissed. Assailing the orders, he filed writ petition before the High Court. The High Court held that value of the coal was not established and considering the value of coal which was being transported it would be inequitable to direct confiscation. It was held that to meet the ends of justice the power to impose fine in lieu of confiscation can be read into Section 52(3) of the Act. Accordingly, a fine of Rs.50,000/- was imposed. The matter travelled to the apex Court.

7.1. The apex Court held when the words of a statute are clear, plain or unambiguous, the Courts are bound to give effect to that meaning irrespective of consequences. The intention of the Legislature is primarily to be gathered from the language used. A statute is an edict of the Legislature. The elementary principle of interpreting or construing a statute is to gather the mes or sententia legis of the Legislature. The question is not what may be supposed and has been intended, but what has been said. "Statutes should be construed not as theorems of Euclid". Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them".

7.2. The apex Court further held that High Court was not justified in reading into Section 52(3) of the Indian Forest Act, 1927 the power to direct release by imposing fine in lieu of confiscation. It was further held that it is

not the value of the forest produce which is relevant, but the value of the article liable for confiscation.

8. In State of Karnataka v. K. Krishnan, AIR 2000 SC 2729, the apex Court held that the provisions of the Karnataka Forest Act, 1963 are required to be strictly complied with and followed for the purposes of achieving the object for which the Act was enacted. 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.

9. Further, the law has undergone a sea change after Gurudev Singh Rai. The amendment to Orissa Forest Act, 1972 was made by Orissa Act 12 of 2003. The word 'may' appearing in Sec.56(2-a) has been substituted by 'shall'.

10. In view of the authoritative pronouncement of the apex Court in the case of Govind Singh and amendment to Orissa Forest Act, 1972, the inescapable conclusion is that the Court has no power to impose fine in lieu of confiscation. The view taken in Gurudev Singh Rai is not correct enunciation of law, which is accordingly overruled.

11. Before parting with the case, we record our deep appreciation to the sincere efforts made by Mr. Gautam Mishra, Advocate. He has rendered his valuable assistance to the Court. Registry is directed to place the matter before the assigned Bench.

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2019 (II) ILR - CUT- 7

FULL BENCH

K.S. JHAVERI, C.J, DR. A.K. RATH, J & BISWAJIT MOHANTY, J.

W.P.(C) NO.1896 OF 2005

SATYASIVA SUNDAR NAYAK .....Petitioner

.*Vs.*

SECRETARY, BOARD OF SECONDARY EDUCATION, ORISSA & ORS. .....Opp. Parties

REGULATION OF BOARD OF SECONDARY EDUCATION, ORISSA – There is no provision in the Board's Regulation for correction of the father's name of a candidate, who had appeared in the High School

Certificate Examination and had been issued with the Board certificate – In the absence of any such provision, change of name or surname of parents in whatever circumstances, except of course for clerical or printing mistake is not permissible in law and as such, no direction can be given to the Board to make such changes.

The question of law referred to the Full Bench: "Whether the change of the name or surname of father and mother of a candidate who had already appeared at the High School Certificate Examination and obtained the Board Certificate (H.S.C.) incorporating the names of the parents is permissible on the basis of a correction in the school record made subsequent to that date." – Held, in the absence of any regulation governing the field, the Board is not powerless to make correction in the certificate issued by it – Such power is inherent – In the appropriate cases, the Board is obliged to exercise such power and to make necessary correction upon production of relevant documents.

We hasten to add that the application for correction of name of the father/mother shall be made within three years of the passing of HSC Examination so that authorities are not put to any difficulty – The application has to be made through the concerned Headmaster of the High School.

The ratio laid down in Ranjit Kumar Mallick is the correct enunciation of law – We do not find any valid reason to look into the matter afresh –The reference is answered accordingly.

Case Laws Relied on and Referred to :-

1. 83 (1997) CLT 74 : Ranjit Kumar Mallick Vs. Director of Secondary Education, Orissa & Ors.
2. AIR 1999 Orissa 166 : Dipti Baliar Singh Vs. Board of Secondary Education, Orissa.
3. (2000) 7 SCC 372 : State of M.P Vs. Pradeep Kumar.
4. AIR 1951 SC 115 : Rai Brij Raj Krishna Vs. Messrs. S.K. Shaw and Brothers.
5. AIR 1975 SC 1331 : Sukhdev Singh Vs. Bhagatram.
6. AIR 1984 SC 1543 : Maharashtra State Board of Secondary Education and Higher Secondary Education Vs. Paritosh Bhupesh Kurmarsheth.
7. AIR 1958 Orissa 197 : Benudhar Dalai Vs. State of Orissa.
8. (2008) 105 CLT (SC) : Secy.W.B. Council of Higher Secondary Education Vs. Ayan Das.
8. 2012 (2) ILR Cut. 444 : Subash Chandra Mishra Vs. State of Orissa.

For Petitioner : Mr.Gautam Mishra, Adv.Amicus Curiae

For Opp. Parties : Mr.S.S. Rao.

JUDGMENT Date of Hearing: 26.04.2019 : Date of Judgment: 13.05.2019

DR. A.K.RATH, J.

The following question of law has been referred to the Full Bench:

> "Whether the change of the name or surname of father and mother of a candidate who had already appeared at the High School Certificate Examination and obtained the Board Certificate (H.S.C.) incorporating the names of the parents is permissible on the basis of a correction in the school record made subsequent to that date."

2. The reasons set forth in the point of reference are:

The Regulation of the Board of Secondary Education, Orissa ('Board') has been framed under Sec.21 of the Orissa Secondary Education Act ('Act'). There is no provision in the Board's Regulation for correction of the father's name of a candidate, who had appeared in the High School Certificate Examination ('HSC Examination') and had been issued with the Board certificate. In the absence of any such provision, change of name or surname of parents in whatever circumstances, except of course for clerical or printing mistake is not permissible in law and as such, no direction can be given to the Board to make such changes.

2.1. The Division Bench entertained a doubt about the ratio laid down by another Division Bench of this Court in the case of Ranjit Kumar Mallick v. Director of Secondary Education, Orissa and others, 83 (1997) CLT 74. Placing reliance on the decision of another Division Bench in the case of Dipti Baliar Singh v. Board of Secondary Education, Orissa, AIR 1999 Orissa 166, it referred the matter to the larger Bench.

3. We have heard Mr. Gautam Mishra, learned amicus curiae and Mr. S.S Rao, learned counsel for the Board.

4. Mr. Mishra, learned amicus curiae submitted that Ranjit Kumar Mallick's case has been correctly decided by the Division Bench of this Court. After Ranjit Kumar Mallick, the Board has issued a form for correction of original pass certificate. Clause (iii) of the form deals with correction of original pass certificate with regard to parents' name. In Central Board of Secondary Education (CBSE) and Indian Certificate of Secondary Education (ICSE), provisions are there for change/correction in the name of parents. The future of a student will be bleak in the event the mistake creeps in the certificate. He cannot be compelled to institute the suit, which is not an efficacious remedy. The Board has ancillary power to correct the

father's/mother's name in the certificate. In the absence of any provision in the Board's regulation, the circular dated 26.11.1988 issued by the Directorate of Education, Orissa can be relied upon. Where a student's career may be affected and a minor change may not affect the property rights of any of the parties, particularly when a change is sought for pursuing academic goals, relegating a party to the common law forum may not be an alternative efficacious remedy. In appropriate cases, the claim of the student may be entertained in a writ petition in case the Board/Directorate refuses to correct a genuine mistake. But then, when such claims are for the purpose of establishing property rights, the appropriate remedy may be the common law forum. Each case has to be examined keeping in mind the background facts of that particular case. To err is human. To buttress the submission, he placed reliance on the decision of the apex Court in the case of State of M.P v. Pradeep Kumar (2000) 7 SCC 372.

5. Per contra, Mr. Rao, learned counsel for the Board submitted that the Board is an autonomous body and has a set of regulations framed under Section 21 of the 'Act'. Section 21 of the 'Act' provides that any amendment can be only with approval of the State Government. The regulations are statutory. There is no provision in the regulation for correction of change of father's/mother's name. A candidate who appears in the HSC examination usually is a minor. Mistake at the instance of the guardian is likely to occur. Correction of a mistake, clerical or otherwise cannot be equated with change of father's name, which requires factual adjudication. The Board has no power to adjudicate the same. By change of father's/mother's name several legal complications involving property rights, adoptions, securing of some benefit by changing of caste, overcoming the rigors of election law, which restricts number of children to contest may arise. It is open to the aggrieved party to approach the common law forum. He placed reliance on the decisions in the case of Rai Brij Raj Krishna v. Messrs. S.K. Shaw and Brothers AIR 1951 SC 115, Sukhdev Singh v. Bhagatram, AIR 1975 SC 1331, Maharashtra State Board of Secondary Education and Higher Secondary Education v. Paritosh Bhupesh Kurmarsheth, AIR 1984 SC 1543, Benudhar Dalai v. State of Orissa, AIR 1958 Orissa 197, Secy., W.B. Council of Higher Secondary Education v. Ayan Das (2008) 105 CLT (SC) and Subash Chandra Mishra v. State of Orissa 2012 (2) ILR Cut. 444.

6. In Ranjit Kumar Mallick, the petitioner filed a writ petition before this Court praying, inter alia, for a direction to the Board to correct his father'sname in the certificate issued by the Board. It was pleaded that his

father was an employee in the Insurance Company and posted at Calcutta at the time of his admission into the primary school. His maternal grandfather Upendranath Mallick acted as the guardian of the petitioner and admitted him into the primary school signing in the admission register as his guardian. In the records of the primary school, the name of Upendranath Mallick was inadvertently recorded as the father instead of guardian of the petitioner. The mistake was detected at the time of filling up of the form of the HSC Examination. The Headmaster of the school advised to make an application through him to the Inspector of Schools with necessary documents. The petitioner's natural father affirmed the affidavit. His maternal grandfather also affirmed the affidavit testifying that he is the son of Nityananda Mallick and submitted the same to the Headmaster for onward transmission to the Director of Secondary Education through Inspector of Schools, Cuttack. The Headmaster of the school sent the proposal with necessary documents to the Inspector of Schools, Cuttack III Circle for necessary action. On the basis of such application, the Director of Secondary Education, Orissa accorded permission to the petitioner to have his father's name changed from Upendranath Mallick to Nityananda Mallick. The order of the Director was forwarded to different authorities including the Headmaster of the concerned school and the Secretary, Board of Secondary Education, Orissa. Thereafter, necessary correction was incorporated in the admission register of the school duly counter-signed by the Inspector of Schools. However, in the meantime the Board had issued the certificate to the petitioner describing him as the son of Upendranath Mallick on the basis of the entry made in the form submitted by him. After obtaining the permission from the Director of Secondary Education, he approached the Board to make necessary correction in the certificate. But then, the Board refused to make necessary correction. With this factual scenario, he filed the writ petition.

6.1. The Board entered contest and filed a counter affidavit stating, inter alia, that it has no power or authority to make any correction in the certificate in view of Regulation 40 of the Board's Regulation.

6.2. Taking a cue from the circular dated 26.11.1988 issued by the Directorate of Education, Orissa with regard to change of name, surname and father's name of students of different schools, this Court held that there is no regulation of the Board dealing with the question of correction of father's name. Regulation 40 of the Regulation deals with change of name and surname. Although Board has no such regulation, the authorities of the Education Directorate have laid down a clear and uniform procedure for

dealing with the proposal for correction of father's name and have conferred the said authority upon the Director of Secondary Education. There is no conflict between any regulation of the Board and the order or circulars of the Directorate of Secondary Education. Where there is no statutory provision or statutory rule, administrative orders or circular can operate in the field. The plea and stand of the Board that it has no power or authority to correct father's name after a certificate has been issued appears to be absolutely unreasonable, illogical and irrational. There may be many genuine and bona fide cases of mistake in father's name of candidates in the certificate issued by the Board. If case of such bona fide mistake is proved, there is no reason for the Board to refuse to make such correction. The authorities issuing a document have the inherent power of making necessary corrections, if they are satisfied about any incorrectness. In the absence of any regulation governing the field, the Board is not powerless to make correction in the certificate issued by it. Such power is inherent. In the appropriate cases, the Board is obliged to exercise such power and to make necessary correction upon production of relevant documents.

6.3. The State Government has conferred the necessary power and authority upon the Director of Secondary Education to consider proposals for correction of father's name and has prescribed a procedure for it. There being no specific regulation by the Board dealing with such cases, the decision of the Director of Secondary Education is to be followed by the Board. The Board so long as it does not frame its own regulation dealing with such claims, is bound to follow the decision of the Director of Secondary Education, Orissa and to make necessary correction in the records including the certificate issued by it. If the Board's contention that it is not bound to follow the decision of the Director is accepted, an anomalous situation will arise. In the school records, the petitioner's father's name will be one and in the certificate issued by the Board there will be a different name. The Board cannot take such view which will lead to an absurd situation likely to spoil a student's entire career. The Board also cannot assume the role of appellate authority over the Director's decision. However, it is open to the Board to frame regulation to deal with proposals for correction of father's name.

6.4. There cannot be anything under the sun where mistake cannot creep in. What is necessary to be determined is whether there is really a genuine mistake or not ? Therefore, it does not augur well for a statutory authority like the Board dealing with the cases of students to take a stand that

it will not make any correction unless it is so directed by a civil court in a suit. If in every case a suit is required to be filed by the students, it is not clear how and on what basis, the Board will contest such suits. The stand taken by the Board appears to be a thoughtless one inasmuch as such a stand will not only cause injustice to the students with genuine cases of mistake, but will also involve the Board in hundreds of litigation in civil court without having any effective say or defence in the matter. Held so, it allowed the writ petition.

7. The Board filed SLP(C) No.016661 of 1996 before the apex Court. The same was eventually dismissed on 2.9.1996. The matter has thus attained finality.

8. When a minor is admitted in the primary school, the school admission register is maintained by the concerned teacher of that school. If any bona fide mistake occurs in the school admission register, then the same cannot continue. At the time of filling up of the form to appear at the HSC Examination or after issuance of HSC certificate if mistake is detected, the Board can rectify the same. The Division Bench rightly held that the authorities issuing a document have the power of making necessary corrections, if they are satisfied about any incorrectness. Such power is ancillary.

9. The matter may be examined from another angle. The Directorate of Education, Orissa had issued a circular on 26.11.1988 and circulated to different High Schools within the Cuttack III Circle by the Inspector of Schools, Cuttack III Circle dated 7.3.1989. The same was quoted in extenso in Ranjit Kumar Mallick and is reproduced below:

> "Proposals for change of name, surname & father's name of students of different schools are coming to this Directorate, for approval. No provision exists in the Orissa Education Code retarding (sic.) the procedure to be adopted in allowing such changes. No inform (sic) procedure is followed in submitting the prescribed documents in the matter. A circular appears to have been issued from the Director of Public Instruction (Schools) Orissa in the long past.
>
> This has caused considerable difficulties in disposing of all the case (sic). In order to obviate the difficulties it has been decided that proposals for change of name, surname of (sic) Father's name of the students should be accompanied with the documents specified below, duly examined by the concerned D.I. of Schools.
>
> (1) to (3) xxx xxx xxx
>
> (4) Wrong entry on father's name or the clerical error, if any.

(i) Original affidavit from the natural father mentioning sufficient reasons for wrong entry.

(ii) Original affidavit from the person whose name has been recorded wrongly in the school register mentioning the full justification of wrong entry.

(iii) The abstract of Primary School admission register where the boy was first admitted.

(iv) Abstract of the school admission register, where the student is continuing the study.

(v) A copy of the Treasury Challan of Government fee of Rs.1/- only…."

10. Till and until the Board frames appropriate regulation, the future of the students cannot be pushed into uncertainty. Furthermore, the Board has issued a form for correction of original pass certificate. The same reads as follows:

"(iii) Code to be used under NATURE OF DEFECT
Candidates Name – CN
Mother's name – MN
Father's name – FN
Date of Birth – DB
School name with Location – SN"

11. Since website of the Board has a form which allows for correction of father's name, the Board cannot take a stand that in the absence of regulation governing the field, no correction can be made. It is apt to state that the CBSE and ICSE have provisions for change/correction in the name including that of the parents.

12. In Ranjit Kumar Mallick's case there is no time stipulation for making an application for correction of father's/mother's name. Regulation 39 provides for change of date of birth of the candidate. It provides that the application should be made through Headmaster of the concerned High School within three years of the passing of the HSC Examination.

13. We hasten to add that the application for correction of name of the father/mother shall be made within three years of the passing of HSC Examination so that authorities are not put to any difficulty. The application has to be made through the concerned Headmaster of the High School.

14. We are unable to accept the view of the reference court that the circular of the Directorate of Education, Orissa with regard to correction of the records of the school in respect of parents' name and surname is applicable when a student continues in the school and is not yet sent up for filling up the forms to appear the Board examination and not thereafter.

Allowing this at a later stage may encourage unnecessary complication in cases like adoption. The apprehension is unfounded.

15. We are conscious of the socio economic conditions of students admitted into the Government Primary Schools of the State. Some of the students belong to the lower rung of the society. The Board authorities must realise the ground reality. They cannot denude the just claim of a student on jejune grounds.

16. *Ubi Jus Ibi Remedium* - for every wrong, the law provides a remedy. The same is a fundamental principle of equity jurisprudence.

17. When the question of adoption arises, the Board in appropriate cases may reject the same. But when a father's/mother's name has been wrongly entered into the school admission register, the same cannot be allowed to continue.

18. There is no apparent conflict between Ranjit Kumar Mallick and Dipti Baliar Singh. In Dipti Baliar Singh, the petitioner sought to change his name as well as his father's name. The matter pertained to property right involving the change of caste. In the facts of the said case, a Division Bench of this Court held that the question whether there was a valid adoption cannot be adjudicated in a writ petition. Held so, it dismissed the writ petition.

19. The decisions cited by Mr. Rao are distinguishable on facts. In Sukhdev Singh, the Constitution Bench of the apex Court had the occasion to deal with the question whether Oil and Natural Gas Commission, Life Insurance Corporation and Industrial Finance Corporation are the State within the meaning and ambit of Article 12 of the Constitution.

20. In Rai Brij Raj Krishna, the matter pertains to Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 vis-à-vis the jurisdiction of the civil court.

21. In Benudhar Dalai, the matter pertains to Orissa Estates Abolition Act.

22. In Subash Chandra Mishra, a Division Bench of this Court had the occasion to deal with the appointment/promotion to the post of Headmaster of High School.

23. In Ayan Das and Paritosh Bhupesh Kurmarsheth, the matters pertain to evaluation of the answer scripts by the writ court.

24. In view of the discussions made in the preceding paragraphs, we are in consensus ad idem that the ratio laid down in Ranjit Kumar Mallick is the correct enunciation of law. We do not find any valid reason to look into the matter afresh. The reference is answered accordingly.

25. Before parting with the case, we must place on record our deep appreciation of the sincere efforts made by Mr.Gautam Mishra, Advocate. He has rendered valuable assistance to the Court. Registry is directed to place the matter before the assigned Bench.

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2019 (II) ILR - CUT- 16

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

OJC NO. 334 OF 1996

SANJAY KUMAR DAS & ORS. ……..Petitioners

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the amending provisions under Section 25 of the Code of Criminal Procedure, 1973 (Orissa Act 6 of 1995) – Orissa amendment inserted by way of a proviso to Section 25, to Sub-section (2) to the effect that "Provided that nothing in this sub-section shall be construed, to prohibit the State Government from exercising its control over Assistant Public Prosecutors through police officers" – Whether sustainable? – Held, No.

*"The language of the impugned amendment Act is very clear that the APP will be under the administrative control of police officer. The very object of Section 25-A, Cr.P.C. will be frustrated if proviso to Section 25(2) is not reconsidered in view of the recommendation in the fourteenth report of the Law Commission as well as the ratio decided in **S.B. Shahane** - In that view of the matter, the impugned amendment i.e. proviso to Section 25(2), Cr.P.C. is contrary to the very object of the principal section as well as the provision under Section 25-A of Cr.P.C. Accordingly, the same is required to be struck down and it is struck down. The Public Prosecutors including Addl. Public Prosecutors and Asst. Public Prosecutors may at best be under the control of the Director of Prosecution but not under the police officer."*

(Paras 6 & 10)

Case Laws Relied on and Referred to :-

1. 1995 Supp (3) SCC 37 : AIR 1995 SC 1628 : S.B. Shahane & Ors Vs. State of Maharashtra & Anr.

For Petitioners : M/s. S.K. Purohit, Sd. H. Ali Rizwan.
For Opp. Parties : Mr. R.K. Mohapatra, Govt Adv.

JUDGMENT Heard & Decided On : 01.03.2019

K.S. JHAVERI, C.J.

In this writ petition, the petitioners who are practicing lawyers have challenged the Orissa Act 6 of 1995 amending provisions under Section 25 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.").

2. Learned counsel for the petitioners states that the Code of Criminal Procedure (Orissa Amendment) Act, 1994 received the assent of the President on 10th March, 1995 and published in the Orissa Gazette vide notification on 13th April, 1995 (Annexure-1), whereby a proviso to sub-section (2) of Section 25 has been inserted. Section 25 of Cr.P.C. along with Orissa Amendment is reproduced hereunder:

> "25. **Assistant Public Prosecutors**.—
>
> (1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.
>
> [(1-A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the Courts of Magistrates.]
>
> (2) Save as otherwise provided in Sub-Section(3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.
>
> **ORISSA AMENDMENT**
>
> In Section 25, to Sub-section (2), the following proviso shall be inserted, namely:-
>
> "Provided that nothing in this sub-section shall be construed, to prohibit the State Government from exercising its control over Assistant Public Prosecutors through police officers"
>
> *[Vide Orissa Act 6 of 1995 (w.e.f. 10.3.1995),*
> *Published in O.G.E. No.437 dated 13.4.1995]*
>
> (3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case:
>
> Provided that a police officer shall not be so appointed-
>
> (a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or
>
> (b) if he is below the rank of Inspector."

3. Learned counsel for the petitioners contended that the very observations of the Law Commission in its fourteenth report at para-3, which are part of this writ petition at Annexure-2, clearly states that the Public Prosecutors are not subordinate to police. Para-3 of the Law Commission Report which is relevant for our discussion, is reproduced hereunder:

> *"3. There was a time when the Public Prosecutor was inclined to regard himself as the right-hand man of the Superintendent of the Police. Occasionally complaints are still heard that some Public Prosecutors function as though they are a part of the police machinery. But we believe that this tendency has now largely disappeared. Fairly senior members of the Bar are now appointed Public Prosecutors and it is unlikely, that they would sacrifice their independence and self-respect and conduct themselves as subordinate of the District Superintendent of Police."* *(emphasis supplied)*

4. Learned counsel for the petitioners has also brought to our notice the averments made in paras-5 and 6 of the writ petition, which read as under:

> *"5. That the rate of convictions in criminal cases having diminished gradually, the Police department who are the investigating agency became worried to secure the maximum conviction rate as the usual concept in the department is that the efficiency is gauged from the rate of conviction which is to a large extent fallacious. The major contributing factors in the fall of conviction rates being poor knowledge of law of the investigating officers, witnesses turning hostile to the prosecution in the Courts, being gained over by accused persons, general fall in the moral standard of the public to speak the truth in the courts general apathy of the public to become witnesses in a criminal case to avoid the harassment meted out to them in the police station at the investigation stage and on account of repeated attendance in the Court at the cost of their valuable time and wages. But without taking these parameters for securing higher convictions into consideration, the State came out with the impugned amendment bringing the Assistant Public Prosecutors under the control of the Police Department. The issue/cause of grievance here is not to choose, the controlling authority in between the judiciary and the Police Department but the fallibility of the commitment to which all the advocates in general are bound i.e. the effective administration of law in securing conviction as well to secure justice to the innocents. Thus the A.P.Ps. who share one side of the judicial system to prove the offence of the accused being trained to pursue the case with all sincerity and required detachment, the discipline which comes out of long practice in the Bar, for an unbiased proceeding, is being foraged by the pressure of the State in making the Police control, the same only with a view to enhancing convictions by any means. The purpose of criminal jurisprudence being – "the means to achieve the end has to be sacrosanct", but this is going to be reversed to achieve better and, the means adopted are pressure and bias.*
>
> *In Section 25 of the Code of Criminal Procedure, 1973, to sub-section (2), the following proviso shall be inserted, namely:*

"Provided that nothing in this sub-section shall be construed, to prohibit the State Government from exercising its control over Assistant Public Prosecutors through police officers"

Copy of the Gazette notification dated 13.04.95 is ***Annexure-1.***

6. That the Law Commission of India had also taken this aspect of prosecution wherein in their fourteenth report, they have envisaged a total separation of prosecuting agency should be separated from and made independent of its administrative counterpart that is the Police department and that it should not only be responsible for the conduct of the prosecution in the court but it should also have the liberty of scrutinizing the evidence particularly in serious and important cases before the case is actually filed in Court. Such a measure would ensure that the evidence in support of a case is carefully examined by a properly qualified authority before a case is instituted so as to justify the expenditure of public time and money on it. It would also ensure that all the evidence needed for the establishment of the guilt of the accused has been obtained. The actual conduct of the prosecution by such an independent agency will result in a fairer and more impartial approach by the prosecutor to the case.

The aforesaid suggestion of the Law Commission was based on indentifying the limitations of a Police prosecutor. A Police Officer is generally one sided in his approach. The Police department is charged with the duty of the maintenance of Law and order and for the responsibility for the prevention and detection of offences. It is naturally anxious to secure convictions. Not infrequently, relevant witnesses are kept back by the prosecution. Intimidation of defence witnesses is also not unusual. These are the result of an excess of zeal by the Police Officers and a want of a realization of their true function. But, if the purity of judicial administration is to be maintained, such conduct must be sternly checked. It is also told of Police Officers of the lower grade in charge of the prosecution deliberating weakening their cases out of corrupt motives. It is obvious that by the very fact of their being members of the police force and the nature of the duties they have to discharge in bringing a case to Court, it is not possible for them to exhibit that degree of detachment which is necessary in a prosecutor. It is to be remembered that a belief prevails among police officers that their promotion in the department depends upon the number of convictions they are able to obtain as prosecuting officers.

Copy of the 14th report of the Law Commission of India is submitted as ***Annexure-2****."*

5. Learned counsel for the petitioners has also contended that the proviso inserted in sub-Section (2) of Section 25 is violative of the very independence of Public Prosecutor. It has also been pointed out that the impugned provision is violative of Articles 14 and 16 of the Constitution. Therefore, he contended that with a view to conduct a fair trial the Public Prosecutors/APPs are required to be independent and should not be under the administrative control of police administration.

6. Learned counsel for the petitioners lastly submitted that the issue involved in this writ petition is now squarely covered by a decision of the Hon'ble Supreme Court in the case of ***S.B. Shahane and others vs. State of Maharashtra and another,*** reported in 1995 Supp (3) SCC 37 : AIR 1995 SC 1628, wherein at paras-11, 12, 13, 14 and 15, it is held as under:

> "11. The independence of Assistant Public Prosecutors sought to be achieved under the Scheme of the provisions in Section 25 of the Code is also sought to be achieved in respect of Public Prosecutors, becomes obvious from the scheme of the provisions in Section 24 of the Code which runs, thus:
> Section 24 of the Code:
>
> "24. Public Prosecutors. - (1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.
>
> (2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district, or local area.
>
> (3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:
>
> Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.
>
> (4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion, fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.
>
> (5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).
>
> (6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre or Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre;
>
> Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a Person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub section (4).
>
> (7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub- section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor."

12. When Assistant Public Prosecutors are appointed under Section 25 of the Code for conducting prosecutions in courts of Magistrates in a District fairly and impartially, separating them from the police officers of the Police Department and freeing them from the administrative or disciplinary control of officers of the Police Department, are the inevitable consequential actions required to be taken by the State Government which appoints such Assistant Public Prosecutors, in as much as, taking of such actions are statutory obligations impliedly imposed upon it under sub- section (3) thereof. When such consequential actions are taken by the State Government in respect of large number of persons appointed as Assistant Public Prosecutors, it becomes necessary for putting them on a separate cadre of Assistant Public Prosecutors and creating a separate Prosecution Department as suggested by the Law Commission in its Report making those Assistant Public Prosecutors subject to control of their superiors in the hierarchy in matters of administration and discipline, with the head of such Prosecution Department being made directly responsible to the State Government in respect of conduct of prosecutions by the Assistant Public Prosecutors of his department. Since the aforesaid notification dated 1st April, 1974 issued by the Government of Maharashtra under Section 25 of the Code merely appoints the appellants and others, as mentioned in Schedule to the notification, the police prosecutors of the Police Department as Assistant Public Prosecutors without freeing such Assistant Public Prosecutors from the administrative and disciplinary control of the Police Department to which they belonged earlier, and without creating a separate department of prosecution for them with the head of that department or departments being made directly responsible to the Government, the Government of Maharashtra has failed to discharge its statutory obligation impliedly imposed upon it in that regard under sub-section (3) of Section 25 of the Code. We, therefore, answer the question, in the negative by holding that the Government of Maharashtra which made the appointments of Assistant Public Prosecutors by issue of notification dated 1st April, 1974 under Section 25 of the Code, could not have allowed the Assistant Public Prosecutors appointed thereunder to continue as personnel of its Police Department and to continue to function under the control of the head of Police Department, the Inspector General of police.

13. Since the High Court has failed to hold that there was an obligation on the part of the Government of Maharashtra, which issued the aforesaid notification under Section 25 of the Code, appointing officers or prosecutors of the Police Department as Assistant Public Prosecutors to free them from the administrative and disciplinary control of the Police Department and its officers, by creating a separate cadre and department for them, as was sought in the application of the appellants filed before the High Court, the judgment of the High Court under appeal becomes unsustainable.

14. No doubt, when the scheme of the provision in Section 25 of the Code as also the scheme contained in Section 24 of the Code are seen, a police prosecutor cannot

> even become eligible for being appointed as Assistant Public Prosecutor on regular basis, but that question has since not been raised for our consideration in this appeal and further since the appointments of the appellants and other similarly situated police prosecutors as Assistant Public Prosecutors are made under the notification issued as far back as in the year 1974, we refrain from expressing our view on that question at this distance of time.
>
> 15. In the result, we allow this appeal, set aside the judgment of the High Court under appeal, make the rule nisi issued on the application of the appellants before the High Court absolute and direct the Government of Maharashtra to constitute a separate cadre of Assistant Public Prosecutors either on district-wise basis or on state-wise basis, by creating a separate Prosecution Department for them and making the head to be appointed for such Department directly responsible to the State Government for their discipline and the conduct of all prosecutions by them before the Magistrates' courts and further free such Prosecutors fully from the administrative and disciplinary control of the Police Department or its officers, if they still continue to be under such control. No costs"

7. It is submitted that in the case of ***S.B. Shahane*** (supra)**,** the Hon'ble Supreme Court elaborately discussing the scope and ambit of Sections 24 and 25 of Cr.P.C., has clearly held that the public prosecutors are not required to be kept under the control of the police administration.

8. Mr. Mohapatra, learned Government Advocate for the opposite parties, however, has tried to justify the amendment citing the example of Uttar Pradesh and submitted that the *pari materia* provision are still in vogue in the State of Uttar Pradesh. The opposite parties have also drawn our attention to Section 25-A, Cr.P.C. and contended that in view of Section 25-A of Cr.P.C. the amendment in question has to be read down instead of declaring it ultra vires. He further contended that the APPs are being appointed in Odisha under two special statutes namely, (1) State Prosecution Service Rules, 1997 and (2) Law Officers' Rules, 1971 (Vol.10.7775). It has now been contended that the APP are directly appointed by the Odisha Public Service Commission (OPSC) under 1997 Rules, and by the Law Department under the provisions of 1971 Rules. They are under the scanner of Director of Prosecution. As such, the prayer made in the writ petition has essentially become academic.

9. We have heard learned counsel for the petitioner as well as learned counsel for the opposite parties.

It appears that Section 25-A was not in existence on 10th March, 1995 when the impugned Orissa Amendment brought into the statute book. Section 25 A has been brought into effect from 23rd June, 2006. As such, the impugned amendment necessitated reconsideration after Section 25-A brought into the Cr.P.C.

10. The language of the impugned amendment Act is very clear that the APP will be under the administrative control of police officer. The very object of Section 25-A, Cr.P.C. will be frustrated if proviso to Section 25(2) is not reconsidered in view of the recommendation in the fourteenth report of the Law Commission as well as the ratio decided in ***S.B. Shahane*** (supra).

11. In that view of the matter, the impugned amendment i.e. proviso to Section 25(2), Cr.P.C. is contrary to the very object of the principal section as well as the provision under Section 25-A of Cr.P.C. Accordingly, the same is required to be struck down and it is struck down. The Public Prosecutors including Addl. Public Prosecutors and Asst. Public Prosecutors may at best be under the control of the Director of Prosecution but not under the police officer.

12. The writ petition stands disposed of to the extent indicated above. All connected Misc. Cases/I.A. are disposed of accordingly.

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2019 (II) ILR - CUT- 23

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

W.P.(C) NO. 3634 OF 2019

M/S. VEDANTA LTD. & ANR. .....Petitioners

.Vs.

NATIONAL ALUMINIUM COMPANY LTD. (NALCO) .....Opp. Party

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Tender – Challenge is made to the tender condition with regard to the eligibility criteria for participating in the tender – Tender for spot contracts by NALCO for sale of 30,000 MT Metallurgical Grade Calcined Alumina – Eligibility condition – Only overseas prospective buyers/companies having sound financial and business credentials and experience in International Trading are eligible to be registered and Overseas offices of Central Public Sector Undertakings of Govt. of India are also eligible to apply for registration – Application by Vedanta Limited for registration to participate in the tender rejected – Plea that the Ministry of Commerce and Industry, Department of Commerce (SEZ Section), Government of India granted approval to Vedanta Limited for setting up of a Specific Economic Zone for Manufacture and Export of Aluminium along with 125 MW Captive Power Plant and extended

all facilities and entitlements admissible to the SEZ Unit subject to the provisions of the SEZ Act for undertaking authorized operations of manufacturing unit for Aluminium Ingot, Wire Rods and billets in the industrial capacity of production mentioned therein – The question arose as to whether the tender condition for eligibility that only overseas buyers can participate in the tender is legal and justified? – Held, No. – Reasons indicated.

"The point which requires for consideration is the tender conditions which have been imposed by the opposite party company-NALCO regarding company which are "Overseas" can only participate, though the petitioner No.1-Vedanta was established under the SEZ zone under the statute. A conjoint reading of all sections will come to a finding that it is not an Indian Company. They cannot deal with any local company and they cannot dispose of any material or goods within the country nor they can deal in Indian currency. Therefore, the very purpose of the Act is to create a company to compete with the international market and to earn foreign exchange. If the contention which has been raised by the petitioners is not accepted, they have to import the raw material i.e. Calcina through import Alumina and in that process spend huge amount of ship fare which will add cost to the company in question, whereas if it is allowed to purchase from NALCO, then the Indian raw material can be used within India and will serve the purpose of new policy of the Central Government i.e. "Make in India". Merely because some resolution is passed by the opposite party-NALCO in 2005 and it has not been challenged for 15 years, it is not sine qua non nor is it a rule. It has to be interpreted when it is challenged before the Court. The argument of the opposite party-NALCO cannot be accepted because in on one hand, it refuses the petitioner to participate in the tender, on the other hand, the opposite party has allowed the petitioner to apply through its sister concern based in London and spend huge Forex to transport to London and call it back for its use at SEZ, does not find favour with the commercial sense. By allowing them to participate not only there will be a competition as we have seen the first tender has gone 388.5 and the last was gone about 400, 12 Dollars was increased in a month which itself shows that even threat of participation by the petitioners has increased the price of material to be disposed of. In that view of the matter, we are of the opinion that the contention raised by the opposite party is required to be rejected. (Paras 46 to 50)

Case Laws Relied on and Referred to :-

1. (1989) 3 SCC 293 : M/s. Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay.
2. (2017) 8 SCC 282 : CRRC Corporation Limited Vs. Metro Link Express for Gandhinagar and Ahmedabad (Mega) Company Ltd..
3. (2006) 10 SCC 1: Reliance Airport Developers (P) Ltd. Vs. Airports Authority of India & Ors.
4. (2007) 8 SCC 1 : Reliance Energy Ltd.& Anr Vs. Maharashtra State Road Development Corpn. Ltd. & Anr.
5. Civil Appeal No.10582 of 2017 : M/s. Ajar Enterprises Pvt. Ltd. Vs. Satyanarayan Somani & Ors.

6. (2016) 56 GST 229 (Madras) : Nokia India Sales Pvt. Ltd. Vs. The Assistant Commissioner (CT) Sriperumbudur Assessment Circle Varadarajapuram & Ors.
7. AIR 1997 SC 128 : Krishnan Kakkanth Vs. Government of Kerala & Ors.
8. (2002) 2 SCC 617 : AIR India Ltd. Vs. Cochin International Airport Ltd & Ors.
9. (2016) 15 SCC 272 : Montecarlo Limited Vs. National Thermal Power Corpn. Ltd..
10. Special Civil Appeal Nos.9656 of 2008 : Essar Steel Ltd. Vs. Union of India (UOI) decided on 04.11.2009 by the Gujurat High Court.
11. Writ Petition Nos.16932 of 2009 : Tirupatiudyog Ltd. Vs. Union of India decided on July 30, 2010 by the Andhra Pradesh High Court.

For Petitioners : Mr. H.P. Raval, Sr. Adv.
M/s. Prashanta Kumar Nayak, A.K. Mohapatra, S.Mishra, P.K. Behera & S.N. Dash

For Opp. Party : Mr. R.K. Rath, Sr. Adv.
M/s. Nihar Ranjan Rout, P. Rath & J.P. Behera.

JUDGMENT Date of Judgment : 26.03.2019

K.S. JHAVERI, C.J.

By way of this writ petition, the petitioners have challenged the action of the opposite party-National Aluminum Company Ltd. (NALCO) inviting tender vide Tender No.NAL/EXP/T(CA)/S/140 dated 01.02.2019 for sale of 30,000 MT Metallurgical Grade Calcined Alumina.

2. Mr. H.P. Raval, learned Senior Counsel for the petitioners has stated that the petitioner No.1 is a largest manufacturer of aluminum and is engaged in manufacturing and selling of Aluminum products. The company is having 1.6 Million Tonnes Per Annum (MTPA) Aluminum Smelter Plant which includes a Special Economic Zone (SEZ) unit having an Aluminum Smelter Plant with a capacity of 1.25 MTPA at Bhurkamunda, P.O. Siripura, Dist-Jharsuguda, Odisha.

2.1. The petitioner No.1 has also set up a 1215 MW Captive Power Generating Plant and a 2400 MW Thermal Power Plant within the said premises to supply continuous and uninterrupted power to its aluminium smelter units. In addition to the foregoing business unit, the petitioner also operates a 2 MTPA green field alumina refinery and an associated 75 MW captive power plant at Lanjigarh, Odisha.

3. It is submitted that the opposite party-NALCO a Central Public Sector Enterprises under Ministry of Mines, Government of India, is a leading

producer of lowest-cost metallurgical grade alumina in the world. As per NALCO's objective, the Alumina produced is used to meet NALCO's requirements for production of primary aluminium at smelter.

3.1. The surplus alumina is sold to third parties in the export markets; NALCO has bulk shipments facilities at Vizag Port for undertaking the export.

4. It is respectfully submitted that the petitioner No.1 has established a SEZ Unit at Jharsuguda, Odisha for aluminum production with capacity of 12.5 lacs tone per year. A huge investment to the tune of INR 12,000/- crores was made by the petitioner with the understanding that Calcined Alumina would be supplied by Vedanta's Lanjigarh Alumina Refinery. Clacined Alumina is a Smelter grade Alumina used for production of Aluminium.

4.1. It is white powder. One of the outstanding characteristics of Calcined Alumina is its hardness which is 9 on mohs scale. Fired alumina ceramic parts can be harder than tungsten carbide or zircon, two to four times as strong as electrical porcelain, and very resistant to abrasion. Alumina is thus used in grinding media, cutting tools, high temperature bearings, and a wide variety of mechanical parts. Compared to zircon it has a higher thermal conductivity and a higher thermal expansion.

5. Learned counsel for the petitioners brought to our notice the following facts which are necessary for adjudication of the present case:

a) The Special Economic Zones Act, 2005 (Act 28 of 2005) is enacted on 23.06.2005. The provisions of Section 1 to 19, 25 to 30 and 40 to 52 respectively came into force only on 10.02.2006 in view of S.O. 195(E) dated 10.02.2006. Thus, though the Act was enacted but it was not brought into force till 10.02.2006.

b) On 22.07.2005 196th meeting of NALCO-opposite party, Marketing Guidelines was approved for export of Alimina and the same was brought into force with immediate effect.

c) The Marketing Guidelines was published by the opposite party-NALCO on 30.07.2005. Para-5.0 states that out of the total production of Calcined Alumina of 15,75,000 MT around 7,00,000 MT is used for captive consumption in Aluminum Smelter and out of the balance available alumina a small quantity is sold in domestic market and rest is exported in loose bulk condition directly to overseas customers. All exports are on FOB Vizag Port. It also states

that such exports are done through long term and spot contacts entered into with overseas buyers through the process of limited tendering.

d) On 25.03.2013 the opposite party-NALCO in reference to a letter vide letter dated 05.03.2013 of the SEZ Unit of the petitioner No.1 seeking registration informed that as per the policy, the limited tenders floated for export of alumina can only be issued to overseas customers registered with them. It was stated that the registration of the customers for export sale is open to overseas customers only. Hence, it was conveyed that the request of SEZ Unit cannot be acceded to. The opposite advised the petitioners to register their Holding Company i.e. M/s. Vedanta Resources, PLC, London to participate in opposite party-NALCO's export tenders for purchase of alumina.

e) On 27.07.2013 the petitioners persisted with their request for registration for commercial/business for purchase of alumina which once again got rejected by the opposite party on the same day.

f) On 05.11.2013 the request of the petitioners was turned down by the opposite party. The petitioner No.1 being a business and commercial entity was inclined towards pursuing a commercial/business-like approach and avoiding any challenges to the decision of opposite party in the Court lest it may jeoparadise and estrange commercial interests of both the parties.

g) On 23.05.2017, the Ministry of Commerce and Industry, Department of Commerce (SEZ Section), Government of India granted in principal approval to the petitioners for setting up of a Specific Economic Zone for Manufacture and Export of Aluminium along with 125 MW Captive Power Plant at Jharsuguda, Odisha.

h) The Falta Special Economic Zone, Ministry of Commerce & Industry, Govt. of India through Development Commissioner on 09.04.2009 extended all facilities and entitlements admissible to the SEZ Unit subject to the provisions of the Act for undertaking authorized operations of manufacturing unit for Aluminium Ingot, Wire Rods and billets in the industrial capacity of production mentioned therein. On 01.12.2015 the date of commencement of commercial production by the SEZ Unit was declared. It is humbly

submitted that non-pursuance of the matter between 2013 and 2015 cannot be viewed as acquiescence or day since it is urged that the commercial production by the petitioner had not started.

i) On 13.12.2016, an investigation was conducted by the Director General (Safeguards) – Customs & Central Excise (Department of Revenue) under the Customs Tariff (Identification of Assessment of Safeguard Duty) Rules, 1997, on an application being made amongst others, by the petitioners, the Director of Investigation had held that the petitioner though a special economic zone unit was considered as an independent manufacturer and part of domestic industry for various regulations in the country. However, the Director General (Safeguards) considered the provisions of the Act and it was held that the decision of the Director (Investigation) holding Petitioners' SEZ Unit a domestic industry is not acceptable. The DG (Safeguards) therefore excluded the SEZ Unit from the scope of Domestic Industry.

j) The Development Commissioner, FALTA Special Economic Zone issued a notice on 09.05.2018 stating that the date of commercial production as by the Petitioner to be 01.12.2015 was accepted, hence, the validity of the "*Letter of Approval*" extended upto 30.11.2020.

k) Limited tenders issued by the opposite party inviting participation of overseas buyers only in 30,000 MT of sale of Alumina. As per the terms and conditions, the price was to be quoted and payable in US dollars per MT. The petitioner which is a Special Economic Zone Unit is entitled to participate and is willing to make payments in foreign exchange including US dollars.

l) On 05.02.2019 the petitioner No.1 requested the opposite party for registration in the bidding process for sale of Alumina since as an SEZ Unit it is entitled to bid in the said tenders.

m) The petitioner again requested on 06.02.2019 for registration of its SEZ Unit in order to enable it for participation in the sale of 30,000 MT and made an open offer (under constrain) for purchase of $380 US PMT on Ex Vizag Port basis, or on Ex Damanjodi port basis at NALCO's option. Since the petitioner No.1 is a Special Economic Zone Unit, the transaction would be exempted from excise duty, educational cess and VAT etc. It was specifically mentioned that the

buyer shall make payment in US dollars from EEFC account of SEZ unit.

6. Learned counsel for the petitioners contended that the eligibility criteria which has been stipulated in the tender condition is as follows:

> ***"A. Eligibility:***
> ***Tender for Spot Contracts:***
>
> *Only overseas prospective buyers/companies having sound financial and business credentials and experience in International Trading are eligible to be registered with us.*
>
> *Overseas offices of Central Public Sector Undertakings of Govt. of India are also eligible to apply for registration.*
>
> *The annual turnover of the buyers should not be less than USD 15.00 million or equivalent."*

7. The above tender condition is in clear violation of the well settled principles of law.

8. Mr. H.P. Raval, learned Senior Counsel appearing for the petitioners has relied upon different provisions of law and submitted that for all practical purposes the petitioner No.1-company is coming under "overseas" establishment which includes Special Economic Zone (SEZ).

9. To substantiate his argument, Mr. Raval, learned Senior Counsel has taken us to the Special Economic Zones Act, 2005 (hereinafter referred to as the "Act, 2005"). Relevant provisions i.e. Sections 2(g), 2(i), 2(m), 2(o), 2(u), 2(za) and 2(zc), and Section 4(1), 5, 7, 15 and 26 of the Act 2005 are reproduced hereunder:

> **Sec. 2. Definitions**.—In this Act, unless the context otherwise requires,—
>
> xx xx xx
>
> (*g*) "Developer" means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (10) of section 3 and includes an authority and a Co-Developer;
>
> xx xx xx
>
> *(i)* "Domestic Tariff Area" means the whole of India (including the territorial waters and continental shelf) **<u>but does not include the areas of the Special Economic Zones</u>**;
>
> xx xx xx
>
> (*m*) "Export" means—
>
> (*i*) taking goods, or providing services, out of India from a Special Economic Zone, by land, sea or air or by any other mode, whether physical or otherwise; or

(*ii*) supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer; or

(*iii*) supplying goods, or providing services, from one Unit to another Unit or Developer, in the same or different Special Economic Zone;

xx xx xx

(o) "import" means-

(i) goods or receiving services, in a Special Economic Zone, by a Unit or Developer from a place outside India by land, sea or air or by any other mode, whether physical or otherwise; or

(ii) receiving goods, or services by a Unit or Developer from another Unit or Developer of the same Special Economic Zone or a different Special Economic Zone;

xx xx xx

(*u*) "Offshore Banking Unit" means **a branch of a bank located in a Special Economic Zone and which has obtained the permission under clause (*a*) of sub-section (1) of section 23 of the Banking Regulation Act, 1949 (10 of 1949)**;

xx xx xx

(*za*) "Special Economic Zone" means each Special Economic Zone notified under the proviso to sub-section (4) of section 3 and sub-section (1) of section 4 (including Free Trade and Warehousing Zone) and includes an existing Special Economic Zone;

xx xx xx

(*zc*) "Unit" means a Unit set up by an entrepreneur in a Special Economic Zone and includes an existing Unit, an Offshore Banking Unit and a Unit in an International Financial Services Centre whether established before or established after the commencement of this Act;

xx xx xx

Sec. 4. Establishment of Special Economic Zone and approval and authorisation to operate to, Developer.— (1) The Developer shall, after the grant of letter of approval under sub-section (10) of section 3, submit the exact particulars of the identified area referred to in sub-sections (2) to (4) of that section, to the Central Government and thereupon that Government may, after satisfying that the requirements, under sub-section (8) of section 3 and other requirements, as may be prescribed, are fulfilled, notify the specifically identified area in the State as a Special Economic Zone :

Provided that an existing Special Economic Zone shall be deemed to have been notified and established in accordance with the provisions of this Act and the provisions of this Act shall, as far as may be, apply to such zone accordingly :

Provided further that the Central Government may, after notifying the Special Economic Zone, if it considers appropriate, notify subsequently any additional area to be included as a part of that Special Economic Zone.

Sec. 5. Guidelines for notifying Special Economic Zone. — (1) The Central Government, while notifying any area as a Special Economic Zone or an additional area to be included in the Special Economic Zone and discharging its functions under this Act, shall be guided by the following, namely:-

a. generation of additional economic activity;

b. promotion of exports of goods and services;

c. promotion of investment from domestic and foreign sources;

d. creation of employment opportunities;

e. development of infrastructure facilities; and

f. maintenance of sovereignty and integrity of India, the security of the State and friendly relations with foreign States.

Sec.7. Exemption from taxes, duties or cess.— (1) Any goods or services exported out of, or imported into, or procured from the Domestic Tariff Area by,-

(i) a Unit in a Special Economic Zone; or

(ii) a Developer, shall, subject to such terms, conditions and limitations, as may be prescribed, be exempt from the payment of taxes, duties or cess under all enactments specified in the First Schedule.

Sec. 15. Setting up of Unit.— (1) Any person, who intends to set up a Unit for carrying on the authorised operations in a Special Economic Zone, may submit a proposal to the Development Commissioner concerned in such form and manner containing such particulars as may be prescribed :

Provided that an existing Unit shall be deemed to have been set up in accordance with the provisions of this Act and such Units shall not require approval under this Act.

(2) On receipt of the proposal under sub-section (1), the Development Commissioner shall submit the same to the Approval Committee for its approval.

(3) The Approval Committee may, either approve the proposal without modification, or approve the proposal with modifications subject to such terms and conditions as it may deem fit to impose, or reject the proposal in accordance with the provisions of sub-section (8):

Provided that in case of modification or rejection of a proposal, the Approval Committee shall afford a reasonable opportunity of being heard to the person concerned and after recording the reasons, either modify for reject the proposal.

(4) Any person aggrieved by an order of the Approval Committee, made under subsection (3), may prefer an appeal to the Board within such time as may be prescribed.

(5) No appeal shall be admitted if it is preferred after the expiry of the time prescribed therefor: Provided that an appeal may be admitted after the expiry of the period prescribed therefor if the appellant satisfies the Board that he had sufficient cause for not preferring the appeal within the prescribed time.

(6) Every appeal made under sub-section (4) shall be in such form and shall be accompanied by a copy of the order appealed against and by such fees as may be prescribed.

(7) The procedure for disposing of an appeal shall be such as may be prescribed : Provided that before disposing of an appeal, the appellant shall be given a reasonable opportunity of being heard.

(8) The Central Government may prescribe,-

(a) the requirements (including the period for which a Unit may be set up) subject to which the Approval Committee shall approve, modify or reject any proposal referred to in sub-section (3);

(b) the terms and conditions, subject to which the Unit shall undertake the authorised operations and its obligations and entitlements.

(9) The Development Commissioner may, after approval of the proposal referred to in sub-section (3), grant a letter of approval to the person concerned to set up a Unit and undertake such operations which the Development Commissioner may authorise and every such operation so authorised shall be mentioned in the letter of approval.

Sec.26. Exemptions, drawbacks and concessions to every Developer and entrepreneur.— (1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely:-

(a) exemption from any duty of customs, under the Customs Act, 1962 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods imported into, or services provided in, a Special Economic Zone or a Unit, to carry on the authorised operations by the Developer or entrepreneur;

(b) exemption from any duty of customs, under the Customs Act, 1962 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods exported from, or services provided, from a Special Economic Zone or from a Unit, to any place outside India;

(c) exemption from any duty of excise, under the Central Excise Act, 1944 (1 of 1944) or the Central Excise Tariff Act, 1985 (5 of 1986) or any other law for the time being in force, on goods brought from Domestic Tariff Area to a Special Economic Zone or Unit, to carry on the authorised operations by the Developer or entrepreneur;

(d) drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the Domestic Tariff Area into a Special Economic Zone or Unit or services provided in a Special Economic Zone or Unit by the service providers located outside India to carry on the authorised operations by the Developer or entrepreneur;

(e) exemption from service tax under Chapter V of the Finance Act, 1994 (32 of 1944) on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special Economic Zone;

(f) exemption from the securities transaction tax leviable under Section 98 of the Finance (No. 2) Act, 2004 (23 of 2004) in case the taxable securities transactions are entered into by a non-resident through the International Financial Services Centre;

(g) exemption from the levy of taxes on the sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 (74 of 1956) if such goods are meant to carry on the authorised operations by the Developer or entrepreneur.

(2) The Central Government may prescribe, the manner in which, and, the terms and conditions subject to which, the exemptions, concessions, draw back or other benefits shall be granted to the Developer or entrepreneur under sub-section (1)."

10. Learned counsel for the petitioner has taken us to the letter dated 09.04.2009 (Annexure-15 series) to the additional affidavit filed on behalf of the petitioners, which reads as under:

"No.SEZ/LIC/V-10(1)/2009/189

Dated 09.4.2009

To

M/s. Vedanta Aluminium Ltd. (SEZ Unit),
Sipcot, Industrial Complex,
Madurai Bypass Road,
TV Puram, P.O., Tuticoria,
Tamilnadu-628002

Sub: Your proposal for setting up an unit at Vill : Bhurkamunda, Jharsuguda-768201, Orissa.

Ref: Your application No. Nil dated 9th March, 2009.

Dear Sirs,

With reference to the above mentioned application, Development Commissioner Falta Special Economic Zone is pleased to extend to you all the facilities and entitlements admissible to a unit in a Special Economic Zone subject to the provisions of the Special Economic Zone Act, 2005 and rules and order made thereunder and for the establishment of an unit at Vill : Bhurkamunda, Jharsuguda – 768201, Orissa, in the State of Orissa for undertaking authorized operations namely, manufacturing unit for Aluminium Ingot, Aluminium Wire Roads, Aluminium Billets.

ITEM(s) of Manufacture	*: Annual Capacity of production*
Aluminium Ingot	*6,33,000 MT*
Aluminium Wire Rods	*3,96,000 MT*
Aluminium Billets	*4,00,000 MT*

The approval is subject to the following terms and conditions:

(i) You shall export the goods manufactured/goods imported, as per provisions of the Special Economic Zones Act, 2005 and Rules made thereunder for a period of five years from the date of commencement of production. For this purpose, you shall execute the Bond-cum-Legal Undertaking as prescribed under the Special Economic Zones Rules, 2006.

(iii) You shall achieve positive Net Foreign Exchange (NFE) as prescribed in the Special Economic Zone Rules, 2006 for the period you operate as a Unit in the Special Economic Zone from the commencement of production, failing which you shall be liable for penal action under the Foreign Trade (Development and Regulation) Act, 1992.

(iv) You may import or procure from the Domestic Tariff Area all the items required for your authorized operations under this approval, except those prohibited under the ITC (HS) Classification of Export and Import items.

(v) You may supply/sell goods or services in the Domestic Tariff Area in terms of the provisions of the Special Economic Zones Act, 2005 and rules and order made thereunder.

(vi) This Letter of Approval is valid for a period of one year from its date of issue. Your shall implement the project and commence production within one year period or within such period as may be extended.

xx xx xx"

11. Learned counsel for the petitioners has also taken us to the certificate issued by the FALTA Special Economic Zone on 9th May, 2009 where it has been stated that as per Rule 19 (6) of the Special Economic Zones Rules, 2006, the validity of the letter of approval was valid upto 30.11.2020. The said certificate is reproduced hereunder:

"TO WHOM IT MAY CONCERN

This is certify that M/s. Vedanta Ltd., a unit in M/s. Vedanta Aluminum Ltd., SEZ at Jharsuguda, Odisha was issued Letter of Approval on 09.04.2009 and subsequently, the Board of Approval in its meeting dated 28.04.2016 extended the validity of Letter of Approval upto 07.04.2017. In the meantime, the SEZ unit declared date of commencement of production as on 01.12.2015, which was accepted by the Development Commissioner. Hence, the validity of the Letter of Approval of the M/s. Vedanta Ltd. is valid upto 30.11.2020 as per Rule 19(6) of SEZ Rules, 2006."

12. He has also submitted that a notification was published by the Central Government on 29th October, 2009 in which the land belonging to the petitioner has been reflected. The said notification is reproduced hereunder:

"MINISTRY OF COMMERCE AND INDUSTRY
(Department of Commerce)
New Delhi, the 29th October, 2009

S.O. 2725(E).— The Central Government, in exercise of the powers conferred by sub-section (1) of Section 4 of the Special Economic Zone Act, 2005 (28 of 2005) and in pursuance of Rule 8 of the Special Economic Zone Rules, 2006, herby makes the following amendments in the notification of the Ministry of Commerce and Industry Department of Commerce, number S.O. 2394 (E) dated 16th September, 2009 for setting up a sector specific Special Economic Zone for setting up a sector specific Special Economic Zone for Manufacture and Export of Aluminium along with 1215 MW Captive Power Plant at Bhurkamunda, Brundamal and Kurebaga Villages, Tehsil and District Jharsuguda, in the State of Orissa, namely :-

In the said notification:

(i) In paragraph No.2, Date of Letter of Approval i.e. 23rd day of May, 2007 may be read as 23rd day of May, 2007 and 8th April, 2008.

(ii) In paragraph No.2, area may be read as 185.62 hectres.

(iii) In paragraph No.4 and 5, area may be read as 18.57 hectres.

(iv) The Table may be substituted by the following Table:

TABLE

Sl.No.	Name of Village	Khata No.	Plot No.	Area (in Hectres)
(1)	(2)	(3)	(4)	(5)
1.	Kureabaga	2	51	1.943.29
		7	55/1090	0.38866
			55	0.40485
			52	0.73278
			54	0.85019
			57	0.74088
			53	0.46153
			51/1027	0.60728
			58	3.09711
			71	0.02024
			72	0.23886
			61	0.59918
			136	1.05261
			27/1102	0.47368
			24	0.24291
			27/1085	0.19028
			24/1086	0.23077
			45	0.78136
			46	0.668
			47	0.62752
			49	1.78135
			48	0.63562
			22/1023	1.80969
		Total:		18.57864

F.NO.F/2/127/2006-SEZ
ANIL KUMIN, Jt. Secy."

and the additional land was also reflected in another notification published by the Central Government on the 3rd March, 2010, relevant portion of which reads as under:

> "And whereas M/s. Vedanta Aluminium Limited has proposed to include a part of additional area of 35.088 hectares at Brundamal and Kurebaga Village, Tehsil and Dist-Jharsuguda, in the State of Orissa as part of that Special Economic Zone;

12.1. In that view of the matter, learned counsel for the petitioners contended that the petitioner No.1-company for all practical purposes would be legally competent to participate in the tender as it is coming within SEZ Unit.

13. He has relied upon Section 51 of the Act, 2005 which has over riding effect all over the Act. He has also taken us to Section 53(1) and 53(2) as well as Section 26 of the Act, 2005, which read as under:

> **"Sec. 26. Exemptions, drawbacks and concessions to every Developer and entrepreneur**.—(1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely :—
>
> (*a*) exemption from any duty of customs, under the Customs Act, 1962 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods imported into, or services provided in, a Special Economic Zone or a Unit, to carry on the authorised operations by the Developer or Entrepreneur;
>
> (*b*) exemption from any duty of customs, under the Customs Act, 1962 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods exported from, or services provided, from a Special Economic Zone or from a Unit, to any place outside India;
>
> (*c*) exemption from any duty of excise, under the Central Excise Act, 1944 (1 of 1944) or the Central Excise Tariff Act, 1985 (5 of 1986) or any other law for the time being in force, on goods brought from Domestic Tariff Area to a Special Economic Zone or Unit, to carry on the authorised operations by the Developer or entrepreneur;
>
> (*d*) drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the Domestic Tariff Area into a Special Economic Zone or Unit or services provided in a Special Economic Zone or Unit by the service providers located outside India to carry on the authorised operations by the Developer or entrepreneur;
>
> (*e*) exemption from service tax under Chapter V of the Finance Act, 1994 (32 of 1994) on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special Economic Zone;

(*f*) exemption from the securities transaction tax leviable under section 98 of the Finance (No. 2) Act, 2004 (23 of 2004) in case the taxable securities transactions are entered into by a non-resident through the International Financial Services Centre;

(*g*) exemption from the levy of taxes on the sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 (74 of 1956) if such goods are meant to carry on the authorised operations by the Developer or entrepreneur.

(2) The Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1).

xx xx xx

Sec. 51. Act to have overriding effect.— (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

xx xx xx

Sec.53. Special Economic Zones to be ports, airports, inland container depots, land stations, etc., in certain cases.— (1) A Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorised operations.

(2) A Special Economic Zone shall, with effect from such date as the Central Government may notify, be deemed to be a port, airport, inland container depot, land station and land customs stations, as the case may be under section 7 of the Customs Act, 1962 (52 of 1962):

Provided that for the purposes of this section, the Central Government may notify different dates for different Special Economic Zones."

14. Learned counsel for the petitioner has also taken us to the Customs Act, 1962 particularly Section 2 (18) and Section 7 which reads as under:

"Sec. 2. Definitions. –

xx xx xx

(18) "export", with its grammatical variations and cognate expressions, means taking out of India to a place outside India;

xx xx xx

Sec. 7. Appointment of Customs Ports, Airports, etc. – (1) The Central Government may, by notification in the Official Gazette, appoint –

(a) the ports and airports which alone shall be customs ports or customs airports for the unloading of imported goods and the loading of export goods or any class of such goods;

(aa) the places which alone shall be inland container depots for the unloading of imported goods and the loading of export goods or any class of such goods;

(b) the places which alone shall be land customs stations for the clearance of goods imported or to be exported by land or inland water or any class of such goods;

(c) the routes by which alone goods or any class of goods specified in the notification may pass by land or inland water into or out of India, or to or from any land customs station from or to any land frontier;

(d) the ports which alone shall be coastal ports for the carrying on of trade in coastal goods or any class of such goods with all or any specified ports in India;

(e) the post offices which alone shall be foreign post offices for the3 clearance of imported goods or export goods or any class of such goods;

(f) the places which alone shall be international courier terminals for the clearance of imported goods or export goods or any class of such goods;

(2) Every notification issued under this section and in force immediately before the commencement of the Finance Act, 2003 shall, on such commencement, be deemed to have been issued under the provisions of this section as amended by section 98 of the Finance Act, 2003 and shall continue to have the same force and effect after such commencement until it is amended, rescinded or superseded under the provisions of this section.

15. Thereafter he has taken us to Section 3 of the Foreign Trade (Development and Regulation) Act, 1992, which reads as under:

"Sec. 3. Powers to make provisions relating to imports and exports.—(1) The Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.

(2) The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the 1 [import or export of goods or services or technology]:

[Provided that the provisions of this sub-section shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy or is dealing with specified services or specified technologies.]

(3) All goods to which any Order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under section 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly.

(4) Without prejudice to anything contained in any other law, rule, regulation, notification or order, no permit or licence shall be necessary for import or export of any goods, nor any goods shall be prohibited for import or export except, as may be required under this Act, or rules or orders made thereunder.]

16. To further substantiate his argument, learned counsel for the petitioner has also brought to our notice the Policy declared by the Government of India, Ministry of Commerce and Industry under the Foreign Trade Policy, 2015-2020, more particularly Chapter-7 (Special Economic Zones). The relevant portion of Chapter-7 reads as under:

"CHAPTER-7
SPECIAL ECONOMIC ZONES

Note: Special Economic Zones (SEZ) are growth engines that can boost manufacturing, augment exports and generate employment. The private sector has been actively associated with the development of SEZs. The SEZs require special fiscal and regulatory regime in order to impart a hassle free operational regime encompassing the state of the art infrastructure and support services. The proposed legislation on SEZs to be enacted in the near future would cover the concepts of the developer and co- developer, fiscal concessions under the Income Tax and Customs Act, provide for Offshore Banking Units (OBUs) etc . A brief on the facilities available under the SEZ scheme is given as under:

Eligibility 7.1 (a) Special Economic Zone (SEZ) is a specifically delineated duty free enclave and shall be deemed to be foreign territory for the purposes of trade operations and duties and tariffs.

Entitlement for Supplies from the DTA 7.9 Supplies from DTA to SEZ shall be entitled for the following:

(a) DTA supplier shall be entitled for:

(i) Drawback

Or

DEPB in lieu of Drawback

(ii) Discharge of Export performance, if any, on the supplier.

(b) SEZ units shall be entitled for:-

(i) Exemption from Central Sales Tax.

(ii) Exemption from payment of Central Excise Duty on all goods eligible for procurement by the unit.

(iii) Deleted.

(iv) Reimbursement of Duty paid on fuels or any other goods procured from DTA as per the rate of drawback notified by the Directorate General of Foreign Trade from the date of such notification.

(c) Supplier of precious and semi-precious stones, synthetic stones and processed pearls from Domestic Tariff Area to the units situated in SEZ shall be eligible for grant of Replenishment Licenses at the rates and for the items mentioned in the Handbook (Vol. I).

(d) The entitlements under paragraphs (a) and (b) (ii) above shall be available provided the goods supplied are manufactured in India.

17. Similarly, learned counsel for the petitioners has taken us to Chapter-4 of the Foreign Trade Policy [1st April, 2015 – 31st March, 2020] published by the Government of India, more particularly para 4.21 which reads as under:

> ***"4.21 Currency for Realisation of Export Proceeds***.
>
> *(i) Export proceeds shall be realized in freely convertible currency except otherwise specified. Provisions regarding realisation and non realisation of export proceeds are given in paragraph 2.52, 2.53 and 2.54 of FTP.*
>
> *(ii) Deleted*
>
> *(iii) Export to SEZ Units shall be taken into account for discharge of export obligation provided payment is realised from Foreign Currency Account of the SEZ unit.*
>
> *(iv) Export to SEZ Developers / Co-developers can also be taken into account for discharge of export obligation even if payment is realised in Indian Rupees.*
>
> *(v) Authorisation holder needs to file Bill of Export for export to SEZ unit / developer / co-developer in accordance with the procedures given in SEZ Rules, 2006."*

18. Then he has also taken us to the Section 9-A of the Foreign Trade (Development and Regulation) Act, 1992, which reads as under:

> **"Sec. 9A. Power of Central Government to impose quantitative restrictions.—**(1) If the Central Government, after conducting such enquiry as it deems fit, is satisfied that any goods are imported into India in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic industry, it may, by notification in the Official Gazette, impose such quantitative restrictions on the import of such goods as it may deem fit:
>
> Provided that no such quantitative restrictions shall be imposed on any goods originating from a developing country so long as the share of imports of such goods from that country does not exceed three per cent. or where such goods originate from more than one developing country, then, so long as the aggregate of the imports from all such countries taken together does not exceed nine per cent. of the total imports of such goods into India.
>
> (2) The quantitative restrictions imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of four years from the date of such imposition:
>
> Provided that if the Central Government is of the opinion that the domestic industry has taken measures to adjust to such injury or threat thereof and it is necessary that the quantitative restrictions should continue to be imposed to prevent such injury or threat and to facilitate the adjustments, it may extend the said period beyond four years:
>
> Provided further that in no case the quantitative restrictions shall continue to be imposed beyond a period of ten years from the date on which such restrictions were first imposed.
>
> (3) The Central Government may, by rules provide for the manner in which goods, the import of which shall be subject to quantitative restrictions under this section, may be identified and the manner in which the causes of serious injury or causes of threat of serious injury in relation to such goods may be determined.

(4) For the purposes of this section—

(a) "developing country" means a country notified by the Central Government in the Official Gazette, in this regard;

(b) "domestic industry" means the producers of goods (including producers of agricultural goods)—

(i) as a whole of the like goods or directly competitive goods in India; or

(ii) whose collective output of the like goods or directly competitive goods in India constitutes a major share of the total production of the said goods in India;

(c) "serious injury" means an injury causing significant overall impairment in the position of a domestic industry;

(d) "threat of serious injury" means a clear and imminent danger of serious injury.]

19. Learned counsel for the petitioners submits that on 13.12.2016 the Directorate General of Safeguards, Customs and Central Excise vide Notification No.F.NO.22011/10/2016/Pt.VIII issued its final findings regarding Safeguard Investigation concerning Imports of "Unwrought Aluminum (Aluminum not alloyed and Aluminum alloys)". The petitioner No.1 was also a party to the said investigation. One of the contentions before the DG (Safeguards) included deciding on whether the SEZ Unit of the petitioner No.1 is solely for export purposes and therefore, cannot be included in the domestic capacity. It was held by the DG (Safeguards) that the SEZ Unit is to be excluded from the scope of Domestic Industry.

19.1. In the said notification under Annexure-13 to the additional affidavit filed on behalf of the petitioners, in paragraphs-6 to 13, the Central Government has stated as under:

"6. Some of the interested parties have contended that the SEZ plant of M/s Vedanta is only for export and hence cannot be included in the domestic capacity. However, the DI holds that SEZ unit of M/s Vedanta should be treated as domestic industry for the reasons given below:

a. The term used in the safeguard law is "producers -in India" and the SEZ Units established in SEZs are very much producers in India.

b. The relevant criteria for standing and scope of 'domestic industry' are production and not utilization of such production.

c. Under the SEZ Act, import implies bringing goods or receiving services, in a Special Economic Zone, by a Unit or Developer from a place outside India by land, sea or air or by any other mode and export implies taking goods, or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode. Therefore, sale by an SEZ unit into DTA is not an export and is in fact a domestic sale.

d. The sale made by a unit in SEZ are treated as domestic sale in the books of accounts; customs authorities also treat the sales to Indian buyers by SEZ units as domestic sales; civil, criminal or business laws are applicable to SEZs; SEZ is treated as an Indian manufacturer for various regulations.

e. As per Anti Dumping authorities' decisions, an EOU or a unit in SEZ is treated as a domestic industry.

f. In DG Safeguards case of saturated fatty alcohols, a 100% EOU is treated as domestic industry.

g. Exports by Indian SEZs are treated as goods 'originating in India' by other countries. h. Various benefits given to SEZ unit should not impact the treatment of such unit as a domestic industry.

7. In this regard, I observe as under:

(i) The Special Economic Zones Act, 2005 (SEZ Act) enacted on 23rd June, 2005 states that it is:-

"An Act to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto."

(ii) Section 2 (i) of SEZ Act defines Domestic Tariff Area (DTA) as:-

"Domestic Tariff Area" means the whole of India (including the territorial waters and continental shelf) but does not include the areas of the Special Economic Zones;"

(iii) Section 2 (m) (ii) of SEZ Act, 2005 defines export to, inter alia, mean "supplying goods, or providing services, from Domestic Tariff Area to a Unit or Developer''.

(iv) Section 30 of the SEZ Act provides that:- "Subject to the conditions specified in the rules made by the Central Government in this behalf:-

(a) any goods removed from a Special Economic Zone to the Domestic Tariff Area shall be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable, as leviable on such goods when imported; and

(b) the rate of duty and tariff valuation, if any, applicable to goods removed from a Special Economic Zone shall be at the rate and tariff valuation in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of duty."

(v) Section 53 of the SEZ Act further provides that:-

A Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations. (2) A Special Economic Zone shall, with effect from such date as Central Government may notify, be deemed to be a port, inland container depot, land station and land customs stations, as the case may be, under section 7 of the Customs Act, 1962:

Provided that for the purposes of this section, the Central Government may notify different dates for different Special Economic Zones.

(vi) Rule 47 of the Special Economic Zones Rules, 2006 states as under:

"Sales in Domestic Tariff Area — (1) A Unit may sell goods and services including rejects or wastes or scraps or remnants or broken diamonds or by-products arising during the manufacturing process or in connection therewith, in the Domestic Tariff Area on payment of customs duties under section 30, subject to the following conditions, namely:

(a) Domestic Tariff Area sale under sub-rule (1), of goods manufactured by a Unit shall be on submission of import licence, as applicable to the import of similar goods into India, under the provisions of the Foreign Trade Policy"

8. From the aforementioned provisions of the SEZ Act & Rules made thereunder it is observed that:

(i) The fundamental objective of establishing of SEZ units is promotion of exports.

(ii) The areas of the SEZs are excluded from the definition of Domestic Tariff Area (DTA) and removals therefrom are subject to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975.

(iii) Supply of goods from DTA to the SEZ constitutes export.

(iv) Under Section 53 of the SEZ Act, an SEZ is deemed to be a territory outside the customs territory of India and is also deemed to be a port, inland container depot, land station and land customs stations, as the case may be, under section 7 of the Customs Act, 1962.

(v) Domestic Tariff Area sale of goods manufactured by a SEZ unit can be made only on submission of import licence, as applicable to the import of similar goods into India.

9. As discussed below, the contentions of the DI for treating the SEZ unit as part of domestic industry are not acceptable.

a. DI's contention that the term used in the safeguard law is "producers -in India" and the SEZs Units established in SEZs are very much producers in India is not acceptable as an SEZ unit is deemed to be a territory outside the customs territory of India as described under section 53 of SEZ Act, 2005 and all produce therein is treated as if produced outside the territory of India.

b. The DI has argued that relevant criteria for standing and scope of 'domestic industry' are production and not utilization of such production. In my view, as an SEZ is deemed to be a territory outside the customs territory of India, it cannot be treated as domestic producer or domestic industry. At first, eligibility of a unit as domestic producer/industry is to be established and then only its production can be taken into account for the purpose of establishing standing as domestic industry.

c. It has been contended that under the SEZ Act, import implies bringing goods or receiving services, in a Special Economic Zone, by a Unit or Developer from a place outside India by land, sea or air or by any other mode and export implies taking goods, or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode. Therefore, sale by an SEZ unit into DTA is not an export and is in fact a domestic sale. I observe that as per Section 2 (m) (ii) of the SEZ Act, supplying goods or providing services from the Domestic Tariff Area to a Unit or Developer also comes under the definition of export. Also, any goods removed from a Special Economic Zone to the Domestic Tariff Area are chargeable to duties of customs including safeguard duty.

d. The contention of DI pertaining to the treatment of sale made by a unit in SEZ as domestic sale in the books of accounts or by customs authorities; application of civil, criminal or business laws to SEZs or SEZ being treated as an Indian manufacturer for various regulations raised by the applicant are not relevant. The eligibility of a unit in

SEZ as domestic industry has to be decided within the framework of existing legal provisions of Safeguard law read with SEZ Act and rules.

e. Anti Dumping authorities' decisions on treatment of an EOU or a unit in SEZ as a domestic industry are taken within the framework of anti-dumping laws and the same are not applicable to safeguard investigations.

f. The applicants have pointed out that in DG Safeguards case of saturated fatty alcohols, the domestic industry is a 100% EOU. Since SEZs and EOUs are governed by different legal provisions, the same is not applicable in the current investigations.

g. It has been contended that exports by Indian SEZs are treated as goods 'originating in India' by other countries. In my view, the treatment given to the exporters in SEZ by other countries as per their domestic laws is not relevant here.

h. The DI has argued that various benefits given to SEZ unit should not impact the treatment of such unit as a domestic industry. In this regard the eligibility of SEZ as domestic industry is being decided on the basis of various relevant provisions of safeguard rules and SEZ Act & rules made thereunder and not on the basis of any benefits given to them.

10. I also find that in one of the past safeguard findings issued vide F.N0.D-22011/14/2011dated 27.09.2012 concerning imports of electrical insulators into India the issue as to whether an SEZ unit can be included in the scope of SEZ was decided by the Director General (Safeguards) as under:

"A unit operating in SEZ cannot claim market disruption due to imports. These SEZ units are deemed to be outside Indian Customs Territories and not competing with other domestic units. Accordingly, it is decided that the data in respect of the SEZ unit of WSI, situated in Vishakhapatnam, is not to be considered for the purposes of present investigation."

11. In view of the foregoing discussions, I hold that the SEZ unit of M/s Vedanta is to be excluded from the scope of Domestic Industry. Accordingly installed capacity and other data in respect of SEZ unit of M/s Vedanta have not been considered for the purpose of present investigation.

12. The application is filed by (i) M/s. Vedanta Limited –Aluminium & Power, (ii) M/s Bharat Aluminium Company Ltd. and (iii) M/s Hindalco Industries Limited and together they account for more than 50% of the Indian production and hence are major producers. It is evident from the table given below:

Table-1

YEAR	Production of DI (MT)	All India Production (MT)	Share of DI (%)
2011-12	8,77,948	19,18,126	46
2012-13	9,31,324	20,72,915	45
2013-14	10,52,132	20,89,929	50
2014-15	13,61,447	25,57,548	53
2015-16	15,60,141	28,15,481	55

> 13. Accordingly, it is held that the applicant domestic producers constitute and represent the Domestic Industry (DI) (excluding the SEZ Unit of M/s Vedanta) within the definition of DI under Sec 8B(6)(b) of the Customs Tariff Act, 1975."

20. In that view of the matter, it is contended that the SEZ is deemed to be the territorial outside of India in view of legal fiction is created on the petitioner No.1. It is further contended that three consignments which have gone over and above the transportation from the factory to the Port, the offer which was extended by the petitioners, respondents made loss of Rs.102 crores.

20.1. Then on 1st of February, 2019, 30,000 MT price offered by the petitioner is 380 and thereafter 410, whereas the offers received by the opposite party is 372.5, 388.5 and 390. Thus, the first price was disputed by the counsel for the opposite party where he has said that the offer received was Rs.380.5 but the other two prices were not disputed, therefore, the total loss of 12,45,000 US$.

21. Learned counsel for the petitioner has also taken us to the Marketing Guidelines of NALCO in which he relied upon Chapter-05 which deals with Export of Calcined Alumina. Relevant clauses of Chapter-05 i.e. clauses 5.2.1., Para (B) are reproduced hereunder:

> "**5.2.1 <u>REGISTRATION OF CUSTOMERS</u>:**
> Registration of customers is done by NALCO in order to enable them to participate in the limited tenders floated from time to time. Such registration continues to be an ongoing process for expansion of customer base. However, the expansion of Customer base is done keeping in view the credentials and ability of the prospective customers so that contracts if entered into with them could be executed smoothly. The eligibility to get registered with NALCO for Alumina exports is therefore, as follows.
>
> **A) (I) ELIGIBILITY CRITERIA FOR PARTICIPATION IN SPOT TENDERS:**
>
> Only overseas Customers having sound financial and business credentials and experience in International Trading may be registered with Nalco. Overseas offices of Govt. of India undertakings may also be considered for registration.
>
> The annual turnover of the buyers should not be less than USD 15.0 million or equivalent. In case of smelters/end users, the above criteria could be relaxed.
>
> A prospective overseas Customer seeking to source Alumina from NALCO may be requested to furnish the following details:
>
> 1. Name, Address, Telephone, Telefax, E-mail for correspondences along with names of contact persons and their capacities.
>
> 2. Description about the business activities of the company.

3. In case the overseas buyer has an agent in India, details of the agent along with due authorization.

4. Published recent Annual report. If such annual reports are not published, the same should be declared and a certified accounts statement may please be furnished.

5. Banker's certificate regarding solvency and financial capability of buyer.

6. The names of first class International Banks through whom letters of credit are intended to be opened.

7. Any other information/document which is felt to be relevant for registration.

B) PROCEDURE FOR REGISTRATION:

The information regarding registration of customers for Spot tenders along with other relevant details of the Company is available in NALCO's web-site (*www.nalcoindia.com*). Further, during interaction with various agencies the above information would be passed on by NALCO representatives either verbally or if required in writing in order to enable them to take further action in case they are interested. For soliciting customer registration NALCO would publish global notice around once in a year in major daily Newspaper, international Trade Journals and its website.

In case of separate notification for registration in long term tenders such global notices would also be made in major daily newspapers, international trade journals & Nalco's website.

The requests received from the customers against any of the above actions would be examined for the purpose of registration for which the documents/information furnished by the prospective customers should be scrutinized with reference to the criteria cited above and recommendation shall be submitted for consideration and approval of Competent Authority. In case of Long term tenders/responses to global notices such scrutiny shall be done by a designated committee.

Upon approval of Competent Authority the registered customers would be intimated and would also be automatically included in the list of customers to whom subsequent tenders shall be issued."

22. The primary challenge in the writ petition is to the corporate conditions contained in the Tender of spot sale of 30,000 MT of Metallurgical Grade Calcined Alumina floated by the Opposite Party. The eligibility condition has already reproduced hereinabove. It is also contended that stipulation of such a condition in the tender is per se and *ex facie* arbitrary as it has not reasonable nexus namely, augmentation of foreign exchange reserve earnings by the Opposite Party, since the Petitioner which is a Special Economic Zone Unit (SEZ Unit) is entitled to make payments for the said sale in the prescribed foreign exchange.

22.1. Non-registration of the Petitioner No.1, which qualifies the eligibility criteria and is entitled to be registered, as such apart from being ex facie

arbitrary, is contrary to public interest in as much as the Opposite Party is denying the right of petitioner No.1 to even participate in the tender process. The said amount offered by the petitioner in the aforesaid tender contracts dated 01.02.2019, 14.02.2019, 27.02.2019 and 06.03.2019 as tabulated below would show that except in the first tender, the prices offered in the open bid are much higher than the price at which the merchandise in question is sold by the Opposite Party.

22.2. Thus, the decision of opposite Party has adversely affected the public interest of fetching maximum revenue by sale of a Alumina produced from Bauxite (which is readily available to the Opposite Party through mining on account of it being a public sector undertaking).

S.No.	Tender No.	Date	Bid Price by Petitioner	Award Price (in $based) on third party market Sources)
1	NAL/EXP/T(CA)/S/140	01.02.2019	380.00	380.50
2	NAL/EXP/T(CA)/S/142	14.02.2019	410.00	388.50
3	NAL/EXP/T(CA)/S/143	21.02.2019	410.00	391.00
4	NAL/EXP/T(CA)/S/144	27.02.2019	410.00	390.50
5	NAL/EXP/T(CA)/S/145	06.03.2019	411.00	406.00

22.3. Apart from the above price difference, the Petitioners' quoted prices are ex-works which will save between $17-$20/MT on which no rebate has been asked for by the Petitioners.

22.4. It is submitted that Opposite Party's tender involves sale of a natural resource and therefore the policy decision contained in its Marketing Guidelines are required to be just, reasonable and rational and are expected to meet a higher threshold of justness, non-discrimination and non-arbitrariness.

22.5. It is trite to say that the Opposite Party acts as a trustee of natural resources and therefore is bound by the Public Trust Doctrine (PTD) principles. The Court, is thus well within its jurisdiction to examine the policy decision as contained in NALCO's Marketing Guidelines on the tough stone of Article 14 as well as on the PTD.

22.6. There being no definition of overseas buyer, the submission of the Opposite Party that even though the Petitioner is an SEZ Unit it is not entitled to be reckoned as an overseas buyer, should be rejected inasmuch as the said

interpretation by the Opposite Party is not based on a comprehensive consideration of the Act, 2005 and its objectives.

22.7. In arguendo, it is stated that at the time when the Marketing Guidelines of NALCO were adopted, the SEZ Act, 2005 was not even enacted as most of the concerned sections (dealing with the present dispute) were brought into effect only on 10.02.2006. Therefore, by no stretch of imagination the Policy can be held to be valid and be held to have taken into account the objective of setting up of an SEZ Unit covered by the Act of 2005- which was only brought into force in the year 2006.

22.8. It is also trite that any policy decision or even an administrative act of State/statutory authority or a public undertaking falling within the ambit of Article 12 of the Constitution of India would be overridden by the statutory provision. Section 51 of the Act has an express overriding effect and therefore the policy decision cannot stand as an impediment in the registration of the Petitioner which deserves to be treated as eligible.

22.9. The submission of the Opposite Party that permitting the Petitioner No.1 to register and participate in the sale of alumina would lead to a monopolistic market situation apart from being ex-facie illegal is wholly untenable and deserves to be rejected at the very threshold since:

(a) The act to restrict the Petitioner from participating in the tender sale is in itself anticompetitive in nature as the Petitioner is being denied to right to participate in a competitive bidding process;

(b) The participation of the Petitioner would lead to augmentation of the revenue and if the allegations of the Opposite Party are to be believed that the Petitioner is facing shortage of raw material, it would thus require the Petitioner to offer more competitive bids which will augment further revenues.

(c) The submission of the Opposite Party that the decision is non-arbitrary on the face of it deserves to be rejected for the simple reason that it is absolutely unconceivable to persuade this Court that even though it is in the public interest, the present situation entails a scenario wherein by augmenting more revenue on the ground of the petitioner having larger productive capacity, a public authority such as the Opposite Party is choosing to sell a natural resource at a lesser price to an outsider/foreign entity rather than permit the petitioner to even make a bid. The same smacks of arbitrariness. While making such a submission, the Opposite Party over looks its own dominating position; being involved in the production of a monopolistic product by virtue of it being a public sector undertaking, it has been granted the sole right to produce alumina calcine from oxide, making it virtually a monopolistic market player in terms of sale of the product.

23. That the policy of the Opposite Party which has been framed in the year 2005 and continues to be enforce apart from being, on the face of it

arbitrary and discriminatory, is also violative of statutory provisions on the Competition Act, 2002. The said policy is anti-competitive in nature restricting a party to bid.

24. The reliance on a 14 year old policy on the reasoning that it is time-tested holds no bearing and cannot be justified on the principle of reasonableness.

25. That the contention that provisions of the Act are intended 'solely' for the purpose of an SEZ and SEZ Units, is wholly untenable, since if it were so, there was no reason of the Act which has an overriding effect over all other inconsistent and contemporaneous enactment(s).

26. The decision by Gujarat High Court rendered in *Essar Steel vs. Union of India* is writ large for adjudication before the Hon'ble Supreme Court of India which is apparent from the pendency of Review petition No. 1848/2010 in SLP (C) No. 19498/2010. It may be stated that SLP No. 19498/2010 was rejected, presumably, on an erroneous ground of an earlier Special Leave Petition between the same parties having been dismissed, which was an SLP filed against an interim order. The Review petition is therefore entertained.

27. The SLP (Civil) (CC) No. 1303-1307 of 2011 arising from the judgment of the Andhra Pradesh High Court dated 30.07.2010 in *Maruti Udyog v. Union of India* (quoted in Counter Affidavit @ Para 11), which relies upon decision of the Gujarat High Court in Essar Steel, cannot act as confirmation of the judgment of the Andhra Pradesh High Court, which has placed reliance on Division Bench judgment of the Gujarat High Court in *Essar Steel v. Union of India,* which itself is open for judicial scrutiny pending decision of the Hon'ble Supreme Court.

28. In any view of the matter the factual scenario in both the decision relied upon is wholly different.

29. The petitioners are not invoking the principles of Promissory Estoppel & thereafter the submission that the opposite party did not assure the supply of Calcined Alumina is wholly untenable. The petitioner is only legitimately expecting an opportunity for fair participation in the competitive Tenders. The reason for denial thus cannot be fathomed. Participation of the petitioner will promote competition and even encourage Foreign Buyers to match the Petitioner's Bid as is seen from the price of the last tender. After all it is market forces i.e. Supply and demand that determines optimum Sale Price.

Further maximization of revenue is ensued by maximum participation By enabling the petitioner to participate twin objectives are subserved. One for the Respondent to augment Foreign Reserves & the second for the petitioner to augment domestic production of aluminum which is again exported and thus once again generating Foreign Exchange coupled with supporting Indian citizens in the employment generation in the process. These reasons far outweigh considerations as alleged by a near monopolistic market situation.

30. Mr. Raval, learned Senior Counsel for the petitioners submitted that the bidding conditions stipulated by the opposite party are arbitrary and discriminatory. It is permitting even overseas branches of entities based in India to buy the alumina. Since the petitioner No.1 is located in an SEZ any sale to it would constitute as export as well. This export is by way of a deeming fiction and it is well settled law that deeming fiction should be given full effect to. Therefore, the case of the petitioners could be considered as an overseas buyer by way of the deeming fiction.

30.1 The petitioner No.1 being a SEZ unit, is deemed to be foreign buyer located outside the territory of India, hence, it ought to be treated at par with the overseas entities. The provisions of SEZ Act, 2005 is to ensure that the SEZs are categorized as a territory outside of India and supplies from Domestic Tariff Area (DTA) to SEZ is considered as export. All the benefits under Foreign Trade Policy (FTP) including Export Promotion Capital Goods (EPCG) Scheme, export obligation are available to supplies made to SEZ units. A level playing field to SEZ units vis-à-vis the overseas entitles ought to be given to the petitioner No.1.

30.2. The denial of right to participate in tender/bid for procurement of surplus Alumina to the petitioner No.1 will have adverse effect on various other social and revenue parameters. The petitioner No.1 as an SEZ unit has a substantial contribution in Employment generation, Growth of Domestic sector in India, Export Competitiveness and Earning Foreign Exchange. Import dependence would impact global competitiveness and cause slowdown in the business operations.

30.3. The policy of Opposite Party debarring the Petitioner No.1 from procuring Alumina, if not corrected, will in the long run set a bad example and will adversely impact the potential of Indian Aluminum industry. The Indian Aluminum industry has in the previous decade expanded substantially and is on a high trajectory growth path and demand of aluminum is increasing rapidly.

30.4. The decision of the Opposite Party not to permit the Petitioner No.1 to participate in the Tender No.NAL/EXP/T(CA)/S/140 dated 01.02.2019 for sale of 30,000MT Metallurgical Grade Calcined Alumina is arbitrary, illegal, malafide and discriminatory.

30.5. The conduct of Opposite Party in not considering the Petitioner No.1 to participate in the bid is not fair and is discriminatory, arbitrary and is not in consonance with Article 14 of the Constitution of India. Hence, the decisions/action proposed to be taken by the Opposite Party is unreasonable.

30.6. Ultimately the overseas traders would be selling the Alumina to consumers like the Petitioner No.1 who would be consuming the calcined alumina and, therefore, restricting the tender only to overseas traders would be discriminatory. Thus, the action of the Opposite Party in not permitting the Petitioner No.1 to participate in the tender is contrary to the principles laid down by the Hon'ble Supreme Court in *Rashbihari Panda vs. State of Orissa (1969) 1 SCC 414*, wherein it was held as under:

> "In the present case, the right to make offers being open to a limited class of persons it effectively shut out all other persons carrying on trade in kendu leaves as well as new entrants into the trade. Both the schemes, evolved by the Government, namely: the one of offering to enter into contracts with certain named licences, and the other of inviting tenders from licencees who had in the previous year carried out their contracts satisfactorily gave rise to a monopoly in the trade in the leaves to certain traders and singled out other traders for discriminating treatment. Therefore, they were violative of the fundamental right of the petitioners under Arts. 14 and 19(1)(g)……"

31. In support of his submission, Mr. Raval, learned Senor counsel for the petitioners has also relied upon the following decisions:

(i) *M/s. Dwarkadas Marfatia and Sons vs. Board of Trustees of the Port of Bombay, reported in (1989) 3 SCC 293 [Paras-10, 25, 26 and 27]*

(ii) *CRRC Corporation Limited vs. Metro Link Express for Gandhinagar and Ahmedabad (Mega) Company Limited, reported in (2017) 8 SCC 282 [Paras-1, 8, 11, 20, 29, 30, 34 and 40]*

(iii) *Reliance Airport Developers (P) Ltd. Vs. Airports Authority of India and others, reported in (*2006) 10 SCC 1 [Paras-56, 62, and 63]

(iv) *Reliance Energy Ltd. and another vs. Maharashtra State Road Development Corpn. Ltd. and another, (*2007) 8 SCC 1 [Para-36]

(v) *M/s. Ajar Enterprises Private Limited vs. Satyanarayan Somani and others decided on 24th August, 2017 by the Supreme Court in Civil Appeal No.10582 of 2017 (Para-49).*

(vi) *Nokia India Sales Pvt. Ltd. vs. The Assistant Commissioner (CT) Sriperumbudur Assessment Circle Varadarajapuram and Ors., reported in (2016) 56 GST 229 (Madras) (Para-38 and 39).*

31.1 The Hon'ble Supreme Court in the case of ***M/s. Dwarkadas Marfatia (supra),*** in paragraphs *10, 25, 26 and 27,* has held as under:

> *10. The question that survived after the finding of the appellate court and which was urged mainly before the High Court and also in this appeal, was whether the action of the respondent in evicting the appellant and granting the prem- ises in question to M/s Dhanji Mavji was proper and right. It was contended on behalf of the appellant that the action of the respondent in terminating the appellant's contractual tenancy had a public law character attached to it and was accordingly subject to judicial review. It was asserted that every action of the respondent which was 'State' within Article 12 of the Constitution, whether it be in the field of contract, or any other field, was subject to Article 14 of the Constitution and must be reasonable and taken only upon lawful and relevant grounds of public interest. In that light, it was urged that if the eviction of the appellant was not necessary in the public interest and if it had been taken pursuant to any norm or policy which does not permit eviction of the appellant, then the action is arbitrary and discriminatory and not in accordance with any policy which the respondent was enjoined to follow..*
>
> *25. Therefore, Mr Chinai was right in contending that every action activity of the Bombay Port Trust which constituted "State" within Art. 12 of the Constitution in respect of any right conferred or privilege granted by any Statute is subject to Art. 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest. Reli- ance may be placed on the observations of this Court in E.P. Royappa v. State of Tamil Nadu, [1974] 2 SCR 348; Maneka Gandhi v. Union .of India, [1978] 2 SCR 621; R.D. Shetty v. The International Airport Authority of India & Ors., [1979] 3 SCR 1014; Kasturi Lal Lakshmi Reddy v. State of J & K & Anr., [1980] 3 SCR 1338 and Ajay Hasia v. Khalid Mujib Sehravardi & Ors. etc., [1981] 2 SCR 79. Where there is arbitrariness in State action, Art. 14 springs in and judi- cial review strikes such an action down. Every action of the Executive Authority must be subject to rule of law and must be informed by reason. So,, whatever be the Dwarkadas Marfatia & Sons vs Board Of Trustees Of The Port Of ... on 27 April, 1989 activity of the public authority, it should meet the test of Art. 14. The observations in paras 101 & 102 of the Escorts' case (supra) read properly do not detract from the aforesaid principles.*
>
> *26. The High Court had relied on the observations of this Court in Kasturi Lal Lakshrni Reddy v. State of Jammu & Kashmir & Anr., (supra) that the State was not totally freed of the duty to act fairly and rationally, merely because it could do so under a contract. The High Court stated that though it might be accepted that a public body like the respondent should not act unreasonably or unfairly but it did not follow that every time they decided to take action against the contractual tenants, they had to decide the said action in terms of fairness, equity and good faith. In support of this proposition, reliance was placed on the observations of this Court in L.I.C v. Escorts, (supra). In this connection, Mr Chinai appearing for the appellant reiterated before us as he did before the High Court, that the basis of the legitimate assumption or expectation of which the statutory exemption had been granted by the Legislature to the Bombay Port Trust provided a guideline or touch-stone by which the conduct of the public authority which had been granted exemption, should be judged. And, according to him, the necessity of eviction in the instant case, must have been only in public interest. Reliance was placed on several decisions referred to hereinbefore.*

> *27. We are inclined to accept the submission that every activity of a public authority especially in the background of the assumption on which such authority enjoys immunity from the rigours of the Rent Act, must be informed by reason and guided by the public interest. All exercise of discretion or power by public authorities as the respondent, in respect of dealing with tenants in respect of which they have been treated separately and distinctly from other landlords on the assumption that they would not act as private landlords must be judged by that stansdard. If a governmental policy or action even in contractual matters fails to satisfy the test of reasonableness, it would be unconstitutional. See the observations of this Court in Kasturi Lal Lakshrni Reddy, (supra) and R.D. Shettv v. The International Airport Authoritv of India & Ors., [1979] 3 SCR 1014 at 1034."*

31.2. In ***CRRC Corporation Limited*** *(supra),* the Hon'ble Supreme Court, in paragraphs-*1, 8, 11, 20, 29, 30, 34 and 40,* has observed as under:

> "1. The dissension centers around the exposition of an eligibility norm engrafted in the tender conditions qua a prestigious project with global participation. The appellant stands disqualified by the respondent on the touchstone of its perception of the relevant qualifying criterion as endorsed by the High Court vide judgment and order dated 18.11.2016 rendered in CRRC Corpn Ltd. v. Metro Link Express Gandinagar & Ahmedabad (Mega) Co. Ltd., thus propelling it to this Court for redress.
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> xx xx xx
>
> 8. As per the tender prescriptions, an affirmative determination of the eligibility and qualification criteria, on the basis of the particulars furnished in the first envelope was to be the prerequisite for the opening of the envelopes containing the "technical bids" and the "price bids" in that order applying the same test. Prior thereto, pre-bid meetings were held, as referred to hereinabove, in which representatives of various participating bidders attended and submitted their queries for clarifications as per Clause 7 of the Instructions to Bidders, which were accordingly deliberated upon. Clarifications, as sought for, were furnished accordingly. The appellant has averred that it did submit the envelopes, as required, containing all essential documents/certificates, as mandated fulfilling, amongst others, the requirements of the general/specific experiences. On 25-5-2016, as scheduled, the envelopes containing the "Initial Filter-cum-Qualification Requirement Bid" of the four bidders were opened and thereafter on 9-6-2016, the respondent raised 16 queries and required the appellant to submit its response thereto.
>
> xx xx xx
>
> 11. The respondent Corporation, apart from raising preliminary objection to the maintainability of the writ petition filed by the appellant, pleading non-joinder of necessary parties i.e. the surviving tenderers in the fray, asserted that the project was financed through budgetary resources of the State of Gujarat, the Government of India and Japan International Cooperation Agency (for short hereinafter to be referred to as "JICA"). It also mentioned that through international competitive bidding, the General Engineering Consultant, which is a consortium of four renowned companies, had been appointed to provide independent expert professional advice regarding the preparation of tender documents, evaluation of tender offers, etc. for works related to the Ahmedabad Metro Rail Project — Phase I i.e. the project in hand. While generally admitting the facts pertaining to the issuance of the notice inviting tender on 15-1-2016 and the participation of the four bidders including the appellant, MEGA, however,

categorically asserted that in course of the pre-bid meetings, it was clarified in response to a pointed query, that the experience of subsidiary companies/group companies will not be taken into account in any case and that if the parties are desirous of such experience being counted, the subsidiary companies/group companies would have to form a joint venture (hereafter referred to also as "JV") or a consortium.

xx xx xx

20. To reiterate, the parties before us are at issue only on the aspect as to whether the appellant Corporation, to meet the experience norm, as prescribed by Clause 2.4 of the "evaluation and qualification of criteria", can utilise the experience of its subsidiary companies to qualify in the "Initial Filter-cum-Qualification Requirement Bid". No other contention has been raised. The present scrutiny thus would be limited only to this facet of the lis.

xx xx xx

29. It would be advantageous, in view of the striking analogy of the overall perspectives, to recount the relevant observations recorded therein and having a decisive bearing on the issue under scrutiny: (*Consortium of Titagarh Firema Adler S.P.A. case*, SCC pp. 504-11, paras 27, 29-30, 32 & 35-38)

"*27*. The core issue, as we perceive, pertains to acceptance of the technical bid of Respondent 2 by the first respondent and we are required to address the same solely on the touchstone of eligibility criteria regard being had to the essential conditions. The decision on other technical aspects, as we are advised at present, is best left to the experts. We do not intend to enter into the said domain though a feeble attempt has been made on the said count.

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29. What is urged before this Court is that Respondent 2 could not have been regarded as a single entity and, in any case, it could not have claimed the experience of its subsidiaries because no consortium or joint venture with its subsidiaries was formed. With regard to relationship of holding and subsidiary companies, we have been commended to the authorities in *Balwant Rai Saluja* and also the judgment of the Delhi High Court in *Rohde and Schwarz GmbH and Co. K.G.* The essential submission is that Respondent 2 as the owner of the subsidiary companies including their assets and liabilities, cannot claim their experience and there is necessity to apply the principle of "lifting the corporate veil", as has been laid down in *Renusagar Power Co.* and *LIC* v. *Escorts Ltd.* It is also argued that the Government-owned entity cannot be treated differently, for a Government-owned entity is distinct from the Government and, for the said purpose, inspiration has been drawn from the authority in *Western Coalfields Ltd.* v. *Special Area Development Authority* . It has also been urged that when the tender has required a particular thing to be done, it has to be done in that specific manner, for the law envisages that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. For the aforesaid purpose, inspiration has been drawn from the authority in *Central Coalfields Ltd.* wherein reliance has been placed on *Nazir Ahmad* v. *King Emperor* .

30. Before we proceed to deal with the concept of single entity and the discretion used by the first respondent, we intend to deal with role of the Court when the eligibility criteria is required to be scanned and perceived by the court. In *Montecarlo Ltd.*, the Court referred to *Tata Cellular* wherein certain principles, namely, the modern trend pointing to judicial restraint on administrative action; the role of the court is only to review the manner in which the decision has been taken; the lack of expertise on the

part of the court to correct the administrative decision; the conferment of freedom of contract on the Government which recognises a fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere, were laid down. *It was also stated in the said case that the administrative decision must not only be tested by the application of Wednesbury principle of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides*. The two-Judge Bench took note of the fact that in *Jagdish Mandal* it has been held that, (SCC p. 531, para 22) if the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The decisions in *Master Marine Services (P) Ltd.* v. *Metcalfe & Hodgkinson (P) Ltd.*, *B.S.N. Joshi & Sons Ltd.* v. *Nair Coal Services Ltd.* and *Michigan Rubber (India) Ltd.* have been referred to. The Court quoted a passage from *Afcons Infrastructure Ltd.* wherein *the principle that interpretation placed to appreciate the tender requirements and to interpret the documents by owner or employer unless mala fide or perverse in understanding or appreciation is reflected, the constitutional courts should not interfere*. It has also been observed in the said case that it is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given. After referring to the said authority, it has been ruled thus: (*Montecarlo Ltd. case*, SCC p. 288, para 26)

'*26*. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. *But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay*. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.'

* * *

32. In *Reliance Telecom Ltd.* v. *Union of India* , the Court referred to the authority in *Asia Foundation & Construction Ltd.* v. *Trafalgar House Construction (I) Ltd.* wherein it has been observed that: (*Reliance Telecom Ltd. case*[*Reliance Telecom Ltd.* case, SCC p. 317, para 58)

'*58*. … though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, *but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose*.'

Thereafter, the Court in *Reliance Telecom Ltd.* proceeded to state thus: (SCC p. 317, para 58)

'*58*. … In the instant case, we are unable to perceive any arbitrariness or favouritism or exercise of power for any collateral purpose in NIA. In the absence of the same, to exercise the power of judicial review is not warranted. In the case at hand, we think, it is a prudent decision once there is increase of revenue and expansion of the range of service.'

And again: (SCC p. 317, para 59)

'*59*. It needs to be stressed that in the matters relating to complex auction procedure having enormous financial ramification, interference by the courts based upon any perception which is thought to be wise or assumed to be fair can lead to a situation which is not warrantable and may have unforeseen adverse impact. It may have the effect potentiality of creating a situation of fiscal imbalance. In our view, interference in such auction should be on the ground of stricter scrutiny when the decision-making process commencing from NIA till the end smacks of obnoxious arbitrariness or any extraneous consideration which is perceivable.'

***

35. Respondent 2, as is evident, is a company owned by the People's Republic of China and, therefore, it comes within the ambit of Clause 4.1 of the bid document as a Government-owned entity. We have already reproduced the said clause in earlier part of the judgment. As perceived by the first respondent, a single entity can bid for itself and it can consist of its constituents which are wholly-owned subsidiaries and they may have experience in relation to the project. That apart, as is understood by the said respondent, where the singular or unified entity claims that as a consequence of merger, all the subsidiaries form a homogenous pool under its immediate control in respect of rights, liabilities, assets and obligations, the integrity of the singular entity as owning such rights, assets and liabilities cannot be ignored and must be given effect. While judging the eligibility criteria of the second respondent, the first respondent has scanned Article 164 of the Articles of Association of Respondent 2 which are submitted along with the bid from which it is evincible that the Board of Directors of Respondent 2 has been entrusted with the authority and responsibility to discharge all necessary and essential decisions and functions for the subsidiaries as well. According to the first respondent, the term "Government-owned entity" would include a Government-owned entity and its subsidiaries and there can be no matter of doubt that the identity of the entities as belonging to the Government when established can be treated as a Government-owned entity and the experience claimed by the parent of the subsidiaries can be taken into consideration.

36. The learned Senior Counsel for the first respondent has drawn our attention to the "lifting of corporate veil" principle or doctrine of "piercing the veil" and in that context, reliance has been placed on Littlewoods Mail Order Stores Ltd. v. *McGregor*, *D.H.N. Food Distributors Ltd.* v. *Tower Hamlets London Borough Council* and *Harold Holdsworth & Co. (Wakefield) Ltd.* v. *Caddies*. The learned Senior Counsel has also placed reliance upon the principles stated in *Renusagar Power Co.* that have been reiterated in *New Horizons Ltd.* In the written submission filed on behalf of the first respondent, the relevant paragraphs from *Renusagar Power Co.* have been copiously quoted. *It is also urged that in the current global economic regime the multinational corporations conduct their business through their subsidiaries and, therefore, there cannot be a hypertechnical approach that eligibility of the principal cannot be taken cognizance of when it speaks of the experience of the subsidiaries*. It is also contended by Mr Subramaniam that in the context of fraud or evasion of legal obligations, the doctrine of "piercing the veil" or "lifting of the corporate veil" can be applied but the said principle cannot be taken recourse to in a matter of the present nature.

37. With regard to the satisfaction of the first respondent, it has been highlighted before us that the said respondent had thoroughly examined the bid documents and satisfied itself about of the capability, experience and expertise of Respondent 2 and there has been a thorough analysis of the technical qualification of Respondent 2 by the independent General Consultant and the reports of the Appraisal and Tender Committee of the first respondent and also the no objection has been received from KfW Development Bank, Germany which is funding the entire project. Narrating the experience of Respondent 1, it has been stated in the written submission filed on behalf of the first respondent:

'36. That it is further clear from the record that besides being the lowest bidder, the experience of R-2 in supplying metro trains across the world exceeds the petitioner's experience by a huge margin. Where for Clause 12, R-2 has shown a figure of 594 metro cars, petitioner has shown only 72 cars; and for Clause 12.1 where R-2 has shown 432 cars, petitioner has again shown only 72 cars. This vast experience of R-2 would be beneficial for the project and would further public interest.

37. That R-1 without any malice, or mala fide has treated R-2 along with its 100% subsidiaries as one entity. This understanding of the clause has been at the ends of both parties viz. R-1 and R-2, who were ad idem vis-à-vis the eligibility of the parent company to bid using the experience and executing the contract through its various 100% wholly-owned subsidiaries.

38. That the above understanding of R-1 of treating R-2 along with its 100% subsidiaries is supported by the understanding of the Delhi Metro Rail Corporation Ltd., which has on a similarly, if not same, worded bid document granted the tender/agreement to R-2, which had even there bid as a parent company claiming experience of and execution through 100% wholly-owned subsidiaries.

39. That moreover, there is no bar, whatsoever, express or implied, in the tender document to treat the parent company along with its 100% wholly-owned subsidiaries as one entity. Therefore, the scope of judicial review should be limited in adjudging the decision taken by R-1 in the best interest of the project, and thereby, the public.

40. That arguendo, no project, whatsoever, has been caused to the project or to other bidders including the petitioner by the above understanding of the tender conditions by

R-1. It is humbly submitted that R-2 fulfilled all the technical requirements. The bid document itself provided for bidding as a consortium, and did not require in such a case fulfilment of any material condition, which if not fulfilled would prejudice any parties or the project. Moreover, the scheme of the bid document is such that it itself provides for a parent company guarantee. According to this parent company guarantee form, a parent company would have to perform the works under the agreement in case the subsidiary failed. Therefore, the objections raised by the petitioner are hypertechnical and have been raised only to stall the project once it was found to be unsuccessful.'

38. As is noticeable, there is material on record that Respondent 2, a government company, is the owner of the subsidiary companies and subsidiary companies have experience. The first respondent, as it appears, has applied its commercial wisdom in the understanding and interpretation which has been given the concurrence by the Committee concerned and the financing bank. *We are disposed to think that the concept of "Government-owned entity" cannot be conferred a narrow construction. It would include its subsidiaries subject to the satisfaction of the owner. There need not be a formation of a joint venture or a consortium*. In the obtaining fact situation, the interpretation placed by the first respondent in the absence of any kind of perversity, bias or mala fide should not be interfered with in exercise of power of judicial review. Decision taken by the first respondent, as is perceptible, is keeping in view the commercial wisdom and the expertise and it is no way against the public interest. Therefore, we concur with the view expressed by the High Court."

(emphasis supplied)

30. Be that as it may, it would notwithstanding the above, be indispensable to examine and decipher the import of the relevant clauses pertinent to the question to be addressed. Clause 4.1 of Section I of the Instructions to Bidders which define "eligible bidders" is in the following terms:

"*Eligible bidders*.—
4.1. A bidder may be a firm that is a single entity or any combination of such entities in the form of a joint venture (JV) under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent. In the case of a *JV*:
Consortium formation is acceptable.
Tender condition prevails.

(*a*) All members shall be jointly and severally liable for the execution of the contract in accordance with the contract terms, and

(*b*) The JV shall nominate a representative who shall have the authority to conduct all business for and on behalf of any and all the members of the JV during the bidding process and, in the event the JV is awarded the contract during contract execution."

(emphasis supplied)

xx xx xx

34. A plain reading of Clause 4.1 reveals that a bidder can be a single entity or a combination of such entities in the form of a JV or a consortium under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent. Thus, a single entity has been construed to be a valid bidder for all intents and purposes.

xx xx xx

> **40.** In the wake of above determination, the impugned disqualification of the appellant on the ground of deficiency, in experience in terms of Clause 2.4, is unsustainable in law and on facts being grossly illegal, arbitrary and perverse. As a corollary, the judgment and order of the High Court in challenge is also set aside. The tender process in view of the above conclusion, would be furthered hereinafter as per the terms and conditions thereof and in accordance with law and taken to its logical end as expeditiously as possible. We make it clear that the present adjudication is confined only to the issue of disqualification of the appellant on the ground of experience on the touchstone of Clause 2.4 of the "Eligibility and Qualification Criteria" of the tender document and no other aspect."

31.3. In ***Reliance Airport Developers (P) Ltd.,***(supra) the Hon'ble Supreme Court, in para-56, 62 and 63, the Hon'ble Supreme Court has held as under:

> "56. One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary (See State of U.P. and Ors. v. Renusagar Power Co. and Ors. (AIR 1988 SC 1737). At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work Judicial Review of Administrative Action 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarized as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.
>
> 62. Therefore, to arrive at a decision on reasonablenessthe Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view.

63. The principles of judicial review of administrative action were further summarized in 1985 by Lord Diplock in CCSU case as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community. Lord Diplock observed in that case as follows:

....Judicial review has I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call illegality, the second irrationality and the third procedural impropriety. That is not to say that further development on a case-by-case basis may not in course of time add further grounds.

I have in mind particularly the possible adoption in the future of the principle of proportionalitywhich is recognized in the administrative law of several of our fellow members of the European Economic Community."

31.4. The Hon'ble Supreme Court in the case of ***Reliance Energy Ltd.*** (supra), in para-36, has observed as under:

"36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free- standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". In includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of *I.R. Coelho vs. State of T.N.*, Article 21/14 is the heart of the chapter on fundamental rights. It covers various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

31.5. The Hon'ble Supreme Court in the case of ***M/s. Ajar Enterprises*** (supra), in para-49, has observed as under:

> "49 Undoubtedly, disposal of natural resources by auction is not a mandatory principle for, as the Constitution Bench held, individual statutes may provide for modalities of transfer by alternate modes which subserve public interest. In the present case, as we have noted, Rule 5 of the 1975 Rules provides four modalities: (i) direct negotiations; (ii) auction; (iii) inviting tenders; and (iv) concessional terms. Where the statute has provided for several modes of disposal, the choice among one of the available methods must facilitate the fulfilment of public interest. That inter alia requires consideration being given to all aspects of the matter including the nature and value of the land, the purpose of the allotment and the need for the authority to generate funds to facilitate the objects for which it was constituted, such as planned development. The choice of one of a range of permissible choices can never be based on the anvil of conferring an undeserved benefit on a commercial developer. The choice of methods is not left to the unbridled discretion of a public authority. Where a public authority exercises an executive prerogative, it must nonetheless act in a manner which would subserve public interest and facilitate the distribution of scarce natural resources in a manner that would achieve public good. Where a public authority implements a policy, which is backed by a constitutionally recognised social purpose intended to achieve the welfare of the community, the considerations which would govern would be different from those when it alienates natural resources for commercial exploitation. When a public body is actuated by a constitutional purpose embodied in the Directive Principles, the considerations which weigh with it in determining the mode of alienation should be such as would achieve the underlying object. In certain cases, the dominant consideration is not to maximize revenues but to achieve social good such as when the alienation is to provide affordable housing to members of the Scheduled Castes or Tribes or to implement housing schemes for Below the Poverty Line (BPL) families. In other cases where natural resources are alienated for commercial exploitation, a public authority cannot allow them to be dissipated at its unbridled discretion at the cost of public interest".

31.6. In ***Nokia India Sales Pvt. Ltd.*** (supra), the Madras High Court in para-38 and 39 has held as follows:

> "38. What is important for us to note from Section 30 of the Central Act and Section 15 of the State Enactment is that both of them use the every same expression any goods removed from a SEZ to the DTA. Both of them also use the same expression shall be chargeable. Both Sections make the chargeability contingent upon the conditions specified in the Rules made by the respective Governments.
>
> 39. But, there is an essential difference between the field of operation of Section 30 of the Central Act and Section 15 of the State Act. For all practical purposes, a Special Economic Zone is treated as a territory out of India. Therefore, the moment goods are removed from a Special Economic Zone and they enter a Domestic Tariff Area, an import takes place. An importer becomes liable to pay duties of customs, anti-dumping, countervailing and safeguard duties, the moment the imported goods arrive into the territory of India. The chargeability to duties of customs, countervailing duty etc., does not depend upon the question as to whether the importer proposes to make use of the goods for his own consumption or for sale in India. Even in cases where the importer proposes to process those goods to make out of them yet another product so as to re-

export them to the same or another country, the chargeability does not get removed. He would only be entitled, upon re-export, to duty drawback or credit, etc."

32. Mr. R.K. Rath, learned Senior counsel for the opposite party-NALCO has submitted that M/s. Vedanta Limited, the petitioner is the largest manufacturer and export of the aluminum like Hindalco and NALCO. There is competition between the petitioner No.1-M/s. Vedanta Limited and the opposite party-NALCO. The practice has been established by the opposite party right from 2005 in NALCO Marketing Guideline.

32.1. He has taken us to the averments made in the counter affidavit in paragraphs-2, 5, 6, 9, 23, 24, 28 and 39 which are reproduced hereunder:

"2. I say that I am conversant with the facts and circumstances of the present case on the basis of perusal of the records of the Opposite Party maintained in ordinary course of business, and as such competent to depose by way of this affidavit on behalf of the Opposite Party No.1 I have read and understood the contents of the Writ Petition filed by the Petitioner, and emphatically deny all the averments, contentions, allegations and submissions raised therein, which are contrary to and/or inconsistent with what is stated and averred in the instant Counter Affidavit. Unless expressly admitted hereinafter, nothing in the Petition shall be deemed to have been admitted for reason of non-traversal or otherwise. The grounds/averments raised in the Counter Affidavit herein below are to be read in addition to and without prejudice to each other.

xx xx xx

5. At the very outset, I state and submit that the writ petition filed by the petitioner is wholly misconceived and untenable in law. In essence, the Petitioner is praying that the terms and conditions of the spot/term (periodical) contract tender for the sale of Metallurigal Grade Clacined Alumina be so read and understood so as to qualify the petitioner to submit hid bid; whereas the consistent case of the Opposite Party, as will appear hereafter has been that such sale is confined to Overseas customers only.

xx xx xx

6. The case set up by the petitioner and the relief claimed are not amenable to the judicial review in asmuch as it would amount to interfere with the purely commercial and marketing/sales policy of NALCO. It is not the case of the petitioner that it has been signled out for hostile discrimination whereas others like him are permitted to submit their bids for purchse of Calcined Alumina. It is also revealed from a reading of the writ Peititon that the petitioner has filed the instant petition at the present juncture, since its own mining and refinery faciliteisa re not able to supply the alumina that it may need for its smelter plant at Jharsuguda, and it unequivocally evinces that the Writ Petition has been filed only to cater to the busienss and vested requirements/interetrs of the petitioner and no public interest is involved in the matter. It is submitted here that a host of commercial considerations are invfolved in the policy decisions, which have been in force for past several years, whereby the opposie party sells Metallurical Grade Calcined Alumina in bulk quanityy to the 'oversead customers' and small quantity olf Metallurigal Grade Calcined Alumina and Alumina Hydrate by Truck Loads to the small enterprises/companies in the domestic market. The opposite party further respectfully says and submits that the issues raised are not justifiable and any intervention by the Court would result in a situation causing immense loss

internationally recognized status and position of the Opposite party in the alumina market would be severely affect/compromised.

xx xx xx

9. In *Balco Employees' Union vs. Union of India, (2002) 2 SCC 333, Hon'ble Supreme Court has held that unless a decision is contrary to any statutory provision or consideration, the court cannot interfere with it. It cannot examine relevant merits on different economic policies and cannot strike down a policy merely on the ground that another policy would have been fair and better.*

xx xx xx

23. The contents of the para 7 are denied as false and misleading, except to the extent that NALCO is one of the largest producers of Alumina in India, with the Petitioner being the largest producer of Aluminium amongst the competitors. It is stated that for NALCO a part of the production of alumina is self utilized by NALCO and the balance is exported by way of a time-tested tender process to the overseas registered customers. It is submitted that the petitioner does not meet the eligibility criteria for participation in the tender process and NALCO has amply clarified to the petitioner that if it wishes to participate in the NALCO's export tender for purchase of alumina, it may do so with the registration of its holding company, M/s. Vedanta Resources PLC, London in the tender process it is also specified that the details of the registration, its eligibility criteria and documents required to be submitted for registration of M/s Vedanta Resources PLC, London are available on the website www.nalcoindia.com . It is trite that certain preconditions or qualifications for tenders have to be laid down to ensure that the customer has the capacity and the resources to successfully execute the sale order.

A tablular representation showing Comparison of Total Population, Domestic Sale and Exports of Aluminium of NALCO, HINDALCO, and VENDANTA is extracted (from the figures collected from market soruces and given for sharing of market trend for reference purpose) hereinafter for reference of this Hon'ble Court.

YEARS	PARTICULARS (approx. in nature and collected from market sources)	NALCO	HINDALCO	VEDANTA
2017-18	PRODUCTION (MT)	425515	128851	1669741
	% of total population of Three producers	12.58	38.08	49.35
	DOMESTIC SALE (MT)	350469	640617	671946
	% of total sale by three producers	21.07	38.52	40.40
	EXPORT SALE (MT)	75847	649986	998522
	% of total export by three producers	4.40	37.69	57.91

YEARS	PARTICULARS (approx. in nature and collected from market sources)	NALCO	HINDALCO	VEDANTA
2018-1 (Till JAN)	PRODUCTION (MT)	367096	108852	1642685
	% of total population of Three producers	11.85	35.14	53.01
	DOMESTIC SALE (MT)	331887	515737	490408
	% of total sale by three producers	24.80	38.54	36.65
	EXPORT SALE (MT)	30308	539452	1125700
	% of total export by three producers	1.79	31.82	66.39

To produce 1 MT of Aluminium, 1.93 MT approximately of Alumina is required.

That from the aforesaid Table, it is clearly evinced that the petitioner is the largest producer of Aluminium, as also the largest exporter, with its exports to the overseas market amounting to nearly 60% of its total production of aluminum. Therefore, the submission of the petitioner that due to the non-availability of alumina in India on account of exports by NALCO to the overseas customers, domestic industry is suffering is totally baseless and misleading.

24. The contents of para 8 are denied as false and misleading, except to teh extent they are a matter of record. The Petitioner is falsely imputing a palpably erroneous advice/statement to NALCO, is stark contrast to the advice tendered by NALCO to Vedanta NALCO has only advised Vedanta to register their holding company Vedanta Resources PLC, London with NALCO, but not to "take it to high seas and thereafter sell it to the Petitioner No.1". The contents of para 8 are misconceived and merits no response for they are based on a fallacious premise sought to be advanced by the petitioner to prejudice this Hon'ble Court and halt the tender process floated by NALCO.

It is submitted that through the impugned tender process, NALCO is earning valuable foreign exchange every year. It may be stated that NALCO is a major forex to the tune of Rs.3047 crores from the export alumina. Further, it is settled law that the employer should be allowed to carry out the purpose and there has to be allowance of free play in the joints. The Petitioner has stated in its Petition that there is two-way export-import market. Like other commodities, alumina is exported as well as imported. This depends on the relative market conditions abroeda and in India and other factors, such as export incentivizes, foreign exchange fluctuations, etc. NALCO is exporting through competitive international building. If petitioner is offering higher price than the price NALCO is getting through international auction, it can as well find alumina in the international market at cheaper price.

xx xx xx

> 28. The contents of para-12, 13 and 14 are admitted to the extent that they are borne out of the record. It is submitted that NALCO has a transparent and time-tested policy for registration of its overseas customers/companies and floating tenders for exporting alumina to these registered customers alone. It is only the overseas prospective buyers/companies with sound financial credentials and experience who are eligible for such registration the impugned marketing policy and guidelines are in prevalence since 30.07.2005, and wee approved in teh 196th Board Meeting of NALCO held on 22.07.2005. In view of such transparent and fime-tested mechanism which is widely appreciated in world alumina market have registered themselves with NALCO. At present, around 34 overseas customers are registered customers for alumina tender. Due to NALCO's marketing policy, NALCO has been able to generate good competition among the buyers and on account of the turnover and profitability in alumina, this segment has been doing excellent for the Company., It is apprehended that by changing the marketing policy to include SEZ/domestic buyers are also allowed to participate.
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> In such cases, the market and the brand which NALCO has earned over more than 55 years in international alumina market may get completely jeoparadized and may adversely affect the performance of the profitable Navratna PSU-NALCO in times to come. This will neither be in the interest of NALCO nor the country. Further, it is submitted that relaxation or waiver of the eligibility criteria in favour of one bidder-the Petitioner would create justifiable doubts in the minds of other bidders would impair the rule of transparency and fairness and provided room for manipulation to suit the whims of the petitioner, who is in fact a business competitors of the opposite party-NALCO.
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> 39. Incidentally, it may be stated that Metallurgical Grade Calcine Alumina as per the policy in vogue is sole domestically to traders/MSME Units, whose need does not exceed a few truckloads in a year. It may also be stated that the total sale, thus effected domestically, constitutes hardly 1% of sales to foreign buyers as details given above. A true copy of the Marketing Guidelines dated 30.07.2005 as approved in the 196th Board Meetign of NALCO held on 22.07.2005 is annexed herewith and marked as ANNEXURE-C. It is stated at Preamble to Chapter-04 of the said Marketing Guidelines dealing with 'Domestic Sale of Alumina Hydrate, Calina Alumina' that, "*Small quantity of Alimina Hydrate & Calcined Alumina is being sold in the domestic market on Ex-works basis from out Alumina refinery at Damanjodi depending on indigenous requirements & market scenario. The present logistics for sale of Calcined Alumina & Alumina Hydrate in domestic market is capable of handling few truck loads of daily dispatch. Hence, a large scale of Calcined Alumina for metallurgical grade application are not being done"*. It may not be out of place to mention that the Petitioner is fully award of the Opposite Party's domestic sales, and in the year 2013, the Petitioner placed an order for purchase of alumina from the Opposite Party , which could not be executed as the terms and conditions of the said transaction were not acceptable to the Petitioner."

33. In that view of the matter, learned counsel for the opposite party contended that the policy has been prevailing for the last 14 years and in 2012 also the petitioner has been denied registration for purchase of Calcina Alumina as it is not an 'Overseas' purchaser.

34. Mr. Rath, learned Senior counsel for the opposite parties has further submitted that it has been clearly indicated in the counter affidavit, specifically under para 28 of the counter, that the impugned market policy and guidelines are in force since 30.07.2005. Being approved in the 196th Board Meeting of NALCO held on 22.07.2005, such a time tested transparent mechanism has been brought into force, by which a large number of overseas companies, who are major players in the world alumina market, around 34 in number, have registered themselves as customers for aliumina tender. Due to such marketing policy, which is based on commercial considerations, NALCO has been able to generate good competition amongst the overseas buyers, for which NALCO is earning in foreign exchange (huge amount) for the country. NALCO has earned Rs.3047 Crores Forex earning in the F.Y. 2017-18, Rs.2442.98 Cr. in F.Y. 2016-17, Rs.2198.50 Cr. in F.Y. 2015-16 and since last several years NALCO is one of major Forex earning entity in India, if petitioner will be allowed to participate in bid and they become successful bidder, India will lose substantial Forex earning through NALCO as the NALCO is earning Forex from actual overseas customers (not from SEZ entities who will spend from their Forex reserves), available in their Account in India.

34.1. Upon economic and financial consideration and taking into account business factors, such a policy decision has been taken. In view of the aforesaid export, NALCO has achieved Four Star Export House status. If Nalco starts selling within the geographical territory of India, it would not only lose the overseas customers but also the said Four Star Export House status would be lowered.

34.2. For the purpose of sale to the overseas customers, NALCO has created shipping facility, i.e., port facility at Vizag Port by spending several hundred crores. The facilities set up are primarily for the purpose of export of alumina. Nalco has also created the export facility by way of 18 rake of railways (i.e., 900 wagons approximately) for transporting alumina from Damanjodi to Vizag port. If these facilities are not used and get disrupted, huge loss will be sustained by Nalco.

34.3. At Page 13 of the counter, it has been clearly indicated that Vedanta and Hindalco are competitors of NALCO and NALCO is the smallest player in the field. Vedanta in both domestic as well as export market is the biggest player.

34.4. If the parties within India are allowed to compete, overseas customer would back out, as transport cost alone would be a huge difference. Overseas

customer have to bear cost of shipping, port charge, loading/unloading cost, whereas petitioner would transport through rail being within the State. Time tested well run mechanism would collapse which will affect the State revenue (See para-12 of SUR-REJOINDER for dividend paid to State), which reads as under:

> "12. It is submitted that NALCO one of the large profit making PSU of the Government of India and large amount of the profit earns from Export of Alumina to overseas customers and earning 'FOREX' to the Nation since three decades. Further, NALCO has paid dividend of Rs.368.83 Cr. in F.Y. 2015-16, Rs.950.56 Cr. in F.Y. 2016-17 & Rs.656.32 Cr. in F.Y. 2017-18 respectively to the Government of India, which shows that NALCO is continuously doing well and paying substantial amount of divided to the Government exchequer."

34.5. If overseas players because of change in policy back out, the loss that will be suffered in terms of foreign currency cannot be compensated by Vedanta. Rs.3047 crore worth foreign exchange earned by Nalco, if comes down or is reduced, such a loss will be a loss to the country also, and Vedanta will not compensate the said loss to Nalco. If the overseas business would come down, the port facility at Vizag port will be idle and thereby several cores of investment will be lost. The railway facility, i.e., 18 number of rakes (900 wagons) with the employees will be idle and the investment will also be completely lost.

34.6. Once the foreign market would come down because of one party i.e. Vedanta, they (Vedanta) will rule the field. Once foreign traders back out, Vedanta may not even submit bid or submit bid at rate which suits them. In the process, the time tested overseas trade that NALCO has developed in last 14 years would collapse completely.

34.7. The petitioner has admitted in the writ petition at para-6 that the requirement is met mainly from foreign countries like Australia, Indonesia, Vietnama and China. Now it says that it is willing to spend and pay more than the overseas players to NALCO. Then in that case, it can also import by spending that money from foreign market, as it has been doing for several years.

34.8. The petitioner-Vedanta being ultimately a competitor is not authorized/competent to determine the business policy of NALCO. The competitor cannot decide what is good for NALCO. The sole purpose of Vedanta is to ruin the business of NALCO and finally to monopolise the business in their own favour. In this process, the entire business of the PSU NALCO will go down for the following reasons:

(a) Canalization of business in favour of a class of persons for economic and financial reasons is not bad in law.

(b) Award of contract by a private party or by a State is essentially a commercial transaction. It can choose its own methods to arrive at a decision. It is essentially a commercial transaction and in arriving at a commercial decision, considerations which are of paramount importance are commercial considerations.

(c) Wisdom and advisability of economic policies are not amenable to judicial review, unless it is demonstrated that the policy is contrary to statute or constitution.

(d) SEZ territory is not a territory outside India – it is only a territory outside custom territory of India.

(e) Tender condition not open to judicial review.

(f) Delay : The petitioner has ultimately admitted in the writ petition with supporting documents at page-40 and 41 that since 2012 NALCO had rejected the demand made by the petitioner. There is no reason and basis to keep quiet for seven years and as such on that ground alone the writ petition is liable to be dismissed.

(g) It has been clearly pointed out in the counter affidavit that the writ petition is not maintainable it has not been shown how Avijit Pati, Chief Executive Officer of petitioner is competent to file the writ petition. No authorization or decision of the Board of Directors authorizing him to file the case has been filed nor stated in the writ application An individual shareholder is not competent to maintain the writ application.

(h) The petitioner-Vedanta who is a competitor of NALCO in the aluminium market, wants to monopolies the business and that is why the aim and object is to ruin the business of opposite party-NALCO in overseas sector and thereafter control the business either by submitting the tender according to its own rate or by not filing the tender at all.

35. In support of his submission, Mr. Rath, learned Senior Counsel for the opposite party has relied upon the following decisions:

(i) Krishnan Kakkanth vs. Government of Kerala and others, reported in AIR 1997 SC 128 [Para-2, 24, 25, 26, 27, 30 & 34]

(ii) AIR India Ltd. vs. Cochin International Airport Ltd and others, reported in (2002) 2 SCC 617 (Para-7)

(iii) Montecarlo Limited vs. National Thermal Power Corporation Ltd., reported in (2016) 15 SCC 272 (Para-21 to 25).

(iv) Essar Steel Ltd. vs. Union of India (UOI) decided on 04.11.2009 by the Gujurat High Court in Special Civil Appeal Nos.9656 of 2008 and batch of cases, [Paras-37.4]

(v) Tirupatiudyog Ltd. vs. Union of India decided on July 30, 2010 by the Andhra Pradesh High Court in Writ Petition Nos.16932 of 2009 [Para-25 & 26]

35.1. In ***Krishnan Kakkanth*** *(supra),* the Hon'ble Supreme Court in paras-*2, 24, 25, 26, 27 ,* 30 & 34, has held observed as under:

"2. Heard learned counsel for the parties. The constitutional validity of the circular dated 19.5.1995 issued by the Secretary to the Government of Kerala directing that for distribution of pumpsets under comprehensive coconut Development Programme and other similar schemes of the Agriculture Department and in order to streamline the implementation of the schemes specifying specific roles and responsibilities for different agencies involved, M/S Kerala Agro Industries Corporation (KAICO and Regional Agro Industries Corporation (RAIDCO) would arrange supply of pump[sets in the districts of Kesarkoda, Kanner, vyanad, Koznikoda, Malappuram, Palekkao, Trissur and Kottayam and in the remaining districts, supply will be effected by private dealers along with KAICO and RAIDCO, since challenged by the appellants in O.P. No. 16115 of 1995, but upheld by the impugned judgment on the High Court dated February, 1996 is in question in this appeal, Such writ petition was disposed by a common judgment along with other writ petitions being O.A. Nos, 13936 and 14454 of 1995, In the said other writ petitions, the constitutional validity of the circular dated 30.3.1989 issued by the Registrar of Co-operative Societies inter alia directing that all the Land Development Banks, District Co-operative Banks and Service Co-operative Banks in the State of Kerala would patronise RAIDCO to the fullest extent in preference to private dealers in the matter of purchase of Agro Machine under the scheme financed by the Bank/Societies and at in any rate not less than 75% of total requirement of such Agro Machines should be purchased through RAIDCO, was challenged. The High Court has also upheld the validity of such circular by the impugned judgment.

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24. After giving our careful consideration to the facts and circumstances of the case and submissions made by the learned counsel for the parties, it appears to us that the fundamental right for trading activities of the dealers in pump sets in the State of Kerala as guaranteed under Article 19(1) (g) of the Constitution has not been infringed by the impugned circular. Fundamental rights guaranteed under Article 19 of the Constitution are not absolute but the same are subject to reasonable restrictions to be imposed against enjoyment of such rights. Such reasonable restriction seeks to strike a balance between the freedom guaranteed by any of the clauses under Article 19(1) and the social control permitted by the clauses (2) to (6) under Article 19.

25. The reasonableness of restriction is to be determined in an objective manner and from the standpoint of the interests of general public and not from the standpoint of the interests of the persons upon whom the restriction are imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly and even if the persons affected be petty traders (AIR 1958 SC 73- Hanif Versus State of Bihar). In determining the infringement of the right guaranteed under Article 19(1), the nature of right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, enter into judicial verdict (AIR 1981 SC 673 Laxmi) versus State of U.P.; AIR 1968 SC 1323 Treveli Versus State of Gujarat and Herekchand vs. Union of India. India. AIR 1970 SC 1453).

26. Under Clause (1) (g) of Article 19, every citizen has a freedom and right to choose his own employment or take up any trade or calling subject only to the limits as my be imposed by the State in the interests of public welfare and the other grounds mentioned in clause (6) of Article 19. But it may be emphasised that the Constitution does not recognise franchise or rights to business which are dependent on grants by the State or business affected by public interest Saghir vs. State of U.P. 1955 (1) SCR 707).

27. It may be indicated that where a right is conferred on a particular individual or group of individuals to the exclusion of others, the reasonableness of restrictions has to be determined with reference to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of specified individual has been held reasonable by this Court where vital interests of the community are concerned or when the business affects the economy of the country (P.T.C.S Vs. R.T.A. AIR 1960 SC 801: Meenakshi Mills Vs. Union of India, AIR 1979 SC 366 and Lala Harichand Seroa Vs. Mizo District Council and Anr, 1967(1) SCR 1012).

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30. It may be indicated that although a citizen has a fundamental right to carry on a trade or business, he has no fundamental right to insist upon the Government or any other individual for doing business with him. Any government or an individual has got a right to enter into contract with a particular person or to determine person or person with whom he or it will deal.

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34. To ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the policy decision of the State Government. It is immaterial if a better or more comprehensive policy decision could have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision can not be struck down. It should be borne in mind that except for the limited purpose of testing a public policy in the context of illegality and unconstitutionality, court should avoid " embarking on uncharted ocean of public policy."

35.2. In ***AIR India Ltd***.(supra), the Hon'ble Supreme Court in para-7 has observed as under:

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in R.D. Shetty v. International Airport Authority, 1979 (3) SCC 488; Fertilizer Corporation Kamgar Union v. Union of India, ; Asstt. Collector, Central Excise v. Dunlop India Ltd, , Tata Cellular v. Union of India, ;. Ramniklal N. Bhutta v. State of Maharashtra, and Raunaq International Ltd. v. I.V.R. Construction Ltd.,. 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 are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and

arbitrariness. 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 power 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 intervene."

35.3. In ***Montecarlo Limited*** *(supra),* the Hon'ble Supreme Court in paras-21 to 25 has held as under:

"21. In *Jagdish Mandal v. State of Orissa and Ors*.

"…….a contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out."

22. In *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd and Anr*[5], it has been ruled that the State 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 has been 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.

23. In B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Ors.[6] a two-Judge Bench, after referring to series of judgments has culled out certain principles which include the one that where a decision has been taken purely on public interest, the court ordinarily should apply judicial restraint.

24. In *Michigan Rubber (India) Ltd. (supra)* the Court referred to the earlier judgments and opined that before a court interferes in tender or contractual matters, in exercise of power of judicial review should pose to itself the question whether the process adopted or decision made by the authority is mala fide or intended to favour someone or whether the process adopted or decision made is so arbitrary and irrational that the judicial conscience cannot countenance. Emphasis was laid on the test, that is, whether award of contract is against public interest.

25. Recently in Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.[7] a two-Judge Bench eloquently exposited the test which is to the following effect:-

"We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."

35.4. In ***Essar Steel Ltd. (supra),*** the Gujurat High Court has observed, in paragraphs 2, 3, 10, 12, 34, 35, 35.1, 35.2, 35.3, 35.4, 36, 36.1, 36.2, 37.1 and 37.4, as under:

> "2. Special Civil Application Nos. 9656 & 9713 of 2008 are filed by Domestic Tariff Area Units and goods are cleared to SEZ units under LUT/Bond and/ or rebate.
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> 3. Special Civil Application Nos. 11032 & 9806 of 2008 are filed by SEZ Developers and remaining 8 petitions are filed by SEZ Units. The Domestic Tariff Area Suppliers followed the procedure of LUT/Bond while clearing the goods to SEZ Units.
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> 10. The brief facts giving rise to the present group of petitions are as under :
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> The petitioner has been supplying the required quantities of Iron Ore Pellets to the SEZ Unit by following the procedure for the same under Rule 30 of the SEZ Rules, from time to time under cover of ARE-1 's and by following the procedure in Notification No. 42/2001-CE, dated 26-6-2001. The petitioner filed the Bills of Export with the Authorized Officer of the SEZ being the respondent No. 4, who after assessment of the same permitted the goods into the zone. By virtue of Section 114(n) read with the 3rd Schedule to the Finance Act, 2007, Heading No. 11 of the Second Schedule - Export Tariff to the Customs Tariff Act, 1975 was substituted with effect from 1-3-2007 so as to read 'Iron ores and concentrates, all sorts' in place of 'Iron ores, all sorts' and the same were subject to export duty at the rate of Rs. 300 per ton. After the Entry No. 11 in the Second Schedule to the Customs Tariff Act, 1975 was amended with effect from 1-3-2007, the ARE-l's Bills of Export for supply of Iron Ore Pellets by the petitioner to the SEZ unit continued to be assessed and the subject goods were permitted for acceptance by the SEZ unit without any demand for export duty. The petitioners addressed a letter dated 12-3-2007 to the Director in the SEZ Section of Ministry of Commerce requesting for clarification/confirmation for the effect that no export duty will be leviable on sale of iron ore/iron ore pellets to SEZ Units in view of Rule 27 of the SEZ Rules, 2006. The Superintendent of Central Excise, Range-I, Surat-I Commissionerate had also sought clarification from the petitioners vide his letter dated 24-10-2007 regarding levy of export duty on iron ore pellets. The petitioners' Hazira Unit had, vide its letter dated 25-10-2007 clarified the matter by pointing out that no export duty was leviable on supplies of pellets to the SEZ Unit, particularly in view of Rule 21 of the SEZ Rules, 2006, it was also clarified that the provisions of Section 12 of the Customs Act, 1962 were inapplicable for the purpose of levying export duty for the aforesaid movement of goods, as such movement could not be considered as that of 'goods exported from India' for the purpose of Section 12. The petitioners submitted that at the relevant time, the authorities were satisfied with the explanation given, as is evident from the fact that the Bills of Export filed for supply of pellets to the SEZ Unit continued to be assessed without levy of any export duty.....
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> 12. This Court vide its detailed order dated 25-7-2008 admitted the petitions and granted ad interim relief in terms of paragraph 28C(n) whereby the operation and implementation of letters dated 30-6-2008 of the respondent No. 2, letter dated 8-7-2008 of the respondent No. 3 and letter dated 9-7-2008 were suspended and

arrangement regarding supply of goods to the SEZ unit as contained in the letter dated 1-2-2008 was ordered to be continued. This ad interim relief was continued with certain modifications. Even in Special Civil Application Nos. 10444 of 2008,10445 of 2008 and 10446 of 2008, the Court has passed separate order on 14-8-2008 and granted ad interim relief despite the fact that it was urged on behalf of the revenue that there are certain distinguishing features in all these three petitions. The Excise Department has challenged the said order before the Apex Court. Even the earlier order dated 25-7-2008 passed by this Court was challenged before the Apex Court and the Apex Court vide its order dated 9-4-2009 dismissed the Special Leave Petition by observing that the said SLP is against an interim order and hence, there is no reason to interfere. However, this Court was requested by the Apex Court to take up the matter for final hearing as the matter is of an important nature. The Apex Court further observed that the views expressed by the High Court in the impugned order are to be treated as tentative views.

It is in the above background of the matter, the entire group was taken up for final hearing.

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34. Having heard the learned Counsels appearing for the parties and having gone through their rival submissions as well as pleadings in light of the statutory provisions and decided case law on the subjects, we are of the view that the moot question for our consideration is as to whether the levy of export duty on goods supplied from the Domestic Tariff Area to the Special Economic Zone is justified under law. Dealing with this question, three important aspects are to be borne in mind :

Whether export duty can beimposed under the provisions of the Customs Act, 1962?

Whether Export Duty can be levied under the provisions of the Special Economic Zones Act, 2005?

Whether export duty can be imposed under the Customs Act, 1962 by incorporating the definition of the term 'Export' under the SEZ Act, 2005 into the Customs Act, 1962?

35. These three questions are to be dealt with hereunder:

1. Whether such duty can be imposed under the provisions of the Customs Act, 1962?

35.1 Export Duty is a duty of customs leviable under the Customs Act, 1962 on goods exported from India, under Section 12 read with Section 51 of the said Act and Section 2 read with Second Schedule of the Customs Tariff Act, 1975. Such duty is a condition precedent to sending goods out of the country to other lands. Export Duty is an impost with reference to the movement of property by way of export, particularly with a view to regulating trade and commerce with foreign country insofar as such matters are within the competence of the Parliament. Reference is made to the decision of the Apex Court in the case of Sea Customs Act, 1878 AIR 1963 SC 1760.

35.2 The various terms used in Section 12 of the said Act, which is the charging section for the purpose of levy of duty, have been defined under the said Act itself, Section 2(18) defines export to mean taking out of India to a place outside India; Section 2(19) defines export goods as goods which are to be taken out of India to a place outside India; Section 2(27) defines India as including the territorial waters of India. Therefore, the taxable event contemplated under the Customs Act, 1962 for the purpose of levy of Export Duty is taking the goods out of the territorial waters of India

to a place outside India, in which case the goods would be dutiable goods as contemplated under Section 12 of the said Act and attract levy of export duty, to be paid at the time of exportation of such goods. Export under the Customs Act, 1962, therefore, can be said to have taken place only upon movement of the goods outside the territorial waters of India. Reference is made to the decision of the Apex Court in the case of Rajindra Dyeing & Printing Milk Ltd. (supra).

35.3 In the absence of any amendment of the definitions of the terms 'Export' and 'India' in the Customs Act, 1962, or any amendment in the charging section, i.e., Section 12 or insertion of a charging provision contemplating movement of goods from the Domestic Tariff Area to the Special Economic Zone as a taxable event entailing a levy of Export Duty as in the case of export, the levy of Export Duty cannot be justified under the provisions of the Customs Act, 1962.

35.4 The very fact that such a charging provision, i.e., Section 76F had to be introduced by inserting Chapter X-A in the Customs Act, 1962 containing Sections 76A to 76N being Special Provision Relating to Special Economic Zone, clearly indicates that in the absence of the newly added provision, the said movement of goods was not a taxable event attracting levy of Export Duty under the provisions of the said Act. The entire Chapter has been omitted by the Finance Act, 2007 with effect from 11-5-2007 and, therefore, the aforesaid movement of goods is no longer a taxable event under the said Act.

36. Whether Export Duty can be levied under the provisions of the Special Economic Zones Act, 2005?

36.1 The Department has demanded Export Duty on the subject goods by invoking the provisions of Section 12 of the Customs Act, 1962 read with Section 2 and Second Schedule-Export Tariff (Heading No. 11) of the Customs Tariff Act, 1975 and for the purpose of considering the effective rate of duty, has taken into account Notifications issued under Section 25 of the Customs Act, 1962. Therefore even as per the Department, the levy and the procedure adopted for recovery thereof is under the Customs Act, 1962 and the aforesaid issue does not arise for consideration on the stand of the Department itself.

36.2 The provisions of the SEZ Act do not envisage the movement of goods from the Domestic Tariff Area to the Special Economic Zone to be a taxable event as the said provisions do not contain any charging provision providing for the levy and imposition of Export Duty, and the said Act does not contain any provisions for recovery of such duty. In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the revenue establishes that the case falls strictly within the provisions of the law, the subject can be taxed and if on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or analogy or by trying the probe into the intention of the Legislature and by considering what was the substance of the matter. Reference is made to the decision of the Apex Court in the case of E.V. Fernandez (supra)

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37.1 The term 'export' having been defined in the Customs Act, 1962, for the purposes of that Act, there is no question of adopting or applying the meaning of the said term under another enactment for any purpose of levying duty under the Customs Act, 1962.

In other words, a definition given under an Act cannot be displaced by a definition of the same term given in another enactment, more so, when the provisions of the first Act are being invoked. Even in the absence of a definition of the term in the subject statute, a definition contained in another statute cannot be adopted since a word may mean different things depending on the setting and context. Reference is invited to the decisions of the Apex Court in the case of Ellis Bridge Gymkhana (supra), Venkateswara Hatcheries (P.) Ltd.'s case (supra) and Qazi Noorul H.H.H. Petrol Pump s case (supra). In fact, the interpretation canvassed by the department is not merely the adoption of a definition of another statute, but the incorporation of a taxable event itself, which is impermissible under the law.

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37.4 Similarly, reliance on Section 53 of the SEZ Act, 2005 to contend that a Special Economic Zone is a territory outside India, is misconceived. Section 53 provides that the Zone would be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations. The term 'customs territory' cannot be equated to the territory of India and in fact, such term has been defined in the General Agreement of Tariffs & Trade, to which India is a signatory, to mean an area subject to common tariff and regulations of commerce and that there could be more than one customs territory in a country. Moreover such an interpretation would lead to a situation where a Special Economic Zone would not be subject to any laws whatsoever. The entire SEZ Act, 2005 would be rendered redundant since it is stated to extend the whole of India. In any case, various provisions of the SEZ Act would be rendered redundant and unworkable if the Special Economic Zone was to be considered an area outside India. This is apart from the fact that such a declaration would be constitutionally impermissible."

35.5. In ***Tirupatiudyog Ltd. (supra),*** the Andhra Pradesh High Court in paras-25 and 26 has held has under:

"25. Under Section 53(1) of the SEZ At a Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purpose of undertaking authorized operations. Section 53(1) of the SEZ Act creates a legal fiction but the legal fiction but the legal fiction is limited in its scope. In interpreting a provision creating a legal fiction the Court is to ascertain for what purpose the fiction is created, and after ascertaining this, the court is to assume all those facts ad consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so construing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the Section by which it is created. It cannot also be extended by importing another fiction. [Mancheri Puthusseri Ahmed v. Kuthiravattam Estte Rceiver-(1996) 6 SCC 185; CJT v. Shakuntala-AIR 1966 SC 719; CJT v. Moon Mills Ltd.-AIR 1966 SC 870; State of West Bengal v. Sadan K. Bormal-2004 (5) Supreme 29]. The scope of a fiscal provision cannot be enlarged by creating a fiction.[Wilayatullah v. C.S. Sub-Committee-AIR 1950 Nagpur223]. A legal fiction must be limited to the purpose for which it has been created and cannot be extended beyond its legitimate field. [The Modi Sugar Mills Ltd.-(1961) 2 SCR 189]. It is only for the limited purpose of undertaking authorized operations, i.e., operations which the Central Gov ernment may authorize to be undertaken by a developer in a Special Economic Zone, is the Special Economic Zone to be deemed as a territory outside the customs territory of India and not for the purpose of levy of customs duty.

> 26. The term "customs territory", as referred to in Section 53(1) of the SEZ Act, cannot be equated to the territory of India. This term has been defined in the General Agreement of Tariffs & Trade, to which India is a signatory, to mean an area subject to common tariff and regulations of commerce; and there could be more than one customs territory in a country. The contention that Section 53(1) requires an SEZ to be deemed to be a territory outside India, if accepted, would lead to a situation where a Special Economic Zone would not be subject to any Indian laws. The entire SEZ Act, 2005 would be rendered redundant since it is stated to extend to the whole of India. In any case, various provisions of the SEZ Act would be rendered redundant and unworkable if the Special Economic Zone was to be considered an area outside India. This is apart from the fact that such a declaration would be constitutionally impermissible. [Essar Steel Limited-2010 (249) E.L.T. 3(Guj.)].

36. In view of the above, learned Senior counsel for the opposite party contended that the petitioners are not entitled to any relief, otherwise the foreign currency benefit which has been earned by the opposite party will go.

37. Mr. Rath, learned Senior counsel for the opposite party has further contended that the Bauxite is a basic mineral/material. The mining refinery and other activities are carried out by the petitioners. There are 34 overseas customers and the petitioners started its production from 2009. Mr Rath has taken us to paras 2 and 6 of the writ petition which read as under:

> "2. That the petitioner No.1, Vedanta Limited (hereinafter referred as "Petitioner") is a company incorporated under the Companies Act, 1956, having its registered office at 1st Floor, 'C' Wing, Unit 103, Corporate Avenue, Atul Projects, Chakala, Andheri (East), Mumbai 400093, Maharashtra, India and Site Office at Burkhamunda, P.O. Kalimandir, Jharsuguda, Odisha-758202. The company got initially incorporated on 20th January, 2004 in the name and style of Vedanta Alumina Ltd and subsequently become Vedanta Ltd. following necessary process. The petitioner is engaged in the business of manufacturing and selling of Aluminum products. The company is having 1.6 Million Tonnes Per Annum (MTPA) Aluminum Smelter Plant which includes a Special Economic Zone (SEZ) unit having an Aluminum Smelter Plant with a capacity of 1.25 MTPA at Bhurkamunda, P.O. Siripura, Dist-Jharsuguda, Odisha. The petitioner No.1 has also set up a 1215 MW Captive Power Generating Plant and a 2400 MW Thermal Power Plant within the said premises to supply continuous and uninterrupted power to its aluminium smelter units. In addition to the foregoing business unit, the petitioner also operates a 2 MTPA green field alumina refinery and an associated 75 MW captive power plant at Lanjigarh, Odisha.
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> xx xx xx
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> 6. The non-availability of Alumina has adversely impacted the operations of the Aluminium Smelters at Jharsuguda. The requirement of Alumina for Aluminium Smelter (with a capacity of 5 lac tonnes per annum) is met by imports from countries like Australia, Indonesia, Vietnama and China. The SEZ Aluminium Smelter of the petitioner No.1 (with a capacity of 12.5 lac tonnes per anum) is operating on a reduced capacity and has been unable to achieve maximum optimization due to the non-availability of Alumina."

37.1. It is further contended that taking into consideration the business and commercial views, if the petitioner is allowed to participate in the tender, it will create unhealthy competition and destabilize the economic stability of NALCO and the staff are required to be relieved. He further contended that the investment which is made for the purpose of the port and railway line will vanish.

38. We have heard learned counsel for both the sides.

39. Learned counsel for the petitioners had taken us to the affidavit which are filed pursuant to the very contract, therefore, additional affidavit was filed only with a view to put the correct facts on record. He had contended that the opposite party itself has allowed the holding company to be registered with them. The competition is at the International level and price which prevail in the market cannot be controlled by the individual. The petitioners will take delivery of goods from the site that they can save a huge amount on transportation from their site to the port and can use huge human resources and natural resources for other purposes of the country. The opposite party will earn only in foreign exchange, therefore, the apprehension of the opposite party is misconceived. The policy is of 30th July, 2005 whereas the Act, 2005 came into force in February, 2006.

40. The decision in ***Essar Steel Ltd.*** (supra) rendered by Gujarat High Court is to be read with respect to para-2, 3, 10 and 12 which will not apply in the facts of the present case and review against said judgment is pending before the Hon'ble Supreme Court. It has only persuasive value on the facts of the case. Moreover, the decision ***Tirupatiudyog Ltd.*** *(supra)* rendered by the Andhra Pradesh High Court is solely based on ***Essar Steel Ltd.*** (supra). Therefore, dismissal of SLP by the Hon'ble Supreme Court is not confirmation of the judgment.

40.1. Mr. Raval, learned Sr. Counsel for the petitioners has strongly relied upon the decision of the Madras High Court in the case of ***Nokia India Sales Pvt. Ltd.*** reported in (2016) 56 GST 229 (Madras), more particularly in paragraph-38 thereof, which has already been quoted hereinabove (in para 31.5 of this judgment). He has further contended that it will earn foreign exchange to the huge extent. Then he has taken us to the notification dated 13th December, 2016 under Annexure-13 issued by the Ministry of Finance (Department of Revenue) regarding "Safeguard Investigation concerning Imports of "Unwrought Aluminium (Aluminum not alloyed and Aluminium alloys") into India.

40.2. Learned counsel for the petitioners has also strongly relied upon the decision of the Hon'ble Supreme Court in the case of ***M/s. Ajar Enterprises*** (supra), para-49 whereof has already been quoted hereinabove (in para-31.4 of this judgment).

41. The main contention of the petitioners is that the petitioner No.1-company being an SEZ Unit, is an overseas company for all commercial purposes and when the tender is considered, the Court has to consider the commercial implications and the purpose of foreign exchange is achieved by the act of the petitioners.

42. Learned counsel for the opposite party has mainly contended that in view of the decision of Gujarat High Court in ***Essar Steel Ltd.*** referred to above, which has been followed by Andhra Pradesh High Court. In view of para 37 of the judgment of Gujarat High Court, an SLP against Andhra Pradesh High Court has been dismissed. In that view of the matter, the law is final. However, learned counsel for the petitioners has brought on record that the review against the decision rendered by Gujarat High Court is pending and summary dismissal of the SLP is not law declared by the Supreme Court.

43. Apart from the decision of Gujarat High Court, learned counsel for the petitioners has pointed out distinction that it was for the domestic industry giving the goods to the SEZ Unit point was considered. Now the contention which is raised before us is not the subject matter of consideration by the Gujarat High Court.

44. The other contentions of the opposite party is that the policy is of 2005 and the petitioner is holding chunk of the international as well as the local market compared to the petitioners and if the petitioner No.1 is allowed to participate, the foreign buyer will not participate and the opposite party has to dance at the tune of the petitioners. It is a government corporation and it has taken decision in 2005 which has been consistently followed for almost 14 years. In that view of the matter, the petitioners should not be allowed to participate in the tender.

45. Apart from that more profit of Rs.102 crores could have been secured, if the offer of the petitioners would have been accepted and NALCO would have earned in foreign exchange. Aluminium being an international importance, no individual can keep control over the price. The apprehension put forward by the opposite party is misconceived and only with a view to see that the petitioners do not get alumina from NALCO. The Marketing Policy of NALCO is prior to the creation of the Act, 2005 or existence of

Act, 2005 and prior to existence of the petitioners. He has also contended that it is a legal malice only with a view to deprive the petitioners from getting the legitimate right for goods which is available at a distance.

46. We have carefully considered the meaning of "Overseas" as defined in the Cambridge Dictionary, which reads as under:

> "Overseas" dictionary meaning:
> Overseas – across, beyond, or from beyond the sea.
> Oversea(s) *adv.* - in or to lands beyond the sea : abroad.
> Overseas *(n)*- foreign lands"

47. The point which requires for consideration is the tender conditions which have been imposed by the opposite party company-NALCO regarding company which are "Overseas" can only participate, though the petitioner No.1-Vedanta was established under the SEZ zone under the statute. A conjoint reading of all sections will come to a finding that it is not an Indian Company. They cannot deal with any local company and they cannot dispose of any material or goods within the country nor they can deal in Indian currency. Therefore, the very purpose of the Act is to create a company to compete with the international market and to earn foreign exchange.

47.1. If the contention which has been raised by the petitioners is not accepted, they have to import the raw material i.e. Calcina through import Alumina and in that process spend huge amount of ship fare which will add cost to the company in question, whereas if it is allowed to purchase from NALCO, then the Indian raw material can be used within India and will serve the purpose of new policy of the Central Government i.e. "Make in India". Merely because some resolution is passed by the opposite party-NALCO in 2005 and it has not been challenged for 15 years, it is not *sine qua non* nor is it a rule. It has to be interpreted when it is challenged before the Court.

48. The argument of the opposite party-NALCO cannot be accepted because in on one hand, it refuses the petitioner to participate in the tender, on the other hand, the opposite party has allowed the petitioner to apply through its sister concern based in London and spend huge Forex to transport to London and call it back for its use at SEZ, does not find favour with the commercial sense. By allowing them to participate not only there will be a competition as we have seen the first tender has gone 388.5 and the last was gone about 400, 12 Dollars was increased in a month which itself shows that even threat of participation by the petitioners has increased the price of material to be disposed of.

49. In that view of the matter, we are of the opinion that the contention raised by the opposite party is required to be rejected.

50. Coming on the point of last sphere of the field, it is a now open market after 2009. Every company has to meet with international competition. In that view of the matter, the contentions is that at the same price they are disposing of Aluminum Calcina at the International Market and for all practical purposes, the SEZ cannot dispose of the goods at the local market. In that view of the matter, apprehension of competition is also not well founded.

50.1. Taking into consideration the provisions of the SEZ Act, 2005, more particularly, Section 2(u) a Bank Branch situated in the special zone which has taken permission under the Banking Regulation is to be considered "Offshore Banking Unit" coupled with the other provisions which are referred by learned Senior Counsel for the petitioners. The conclusion which is inevitable is that the 'Industry' or the 'Commercial Establishment' situated in Special Economic Zone is not an Indian Company and is Foreign legal entity by legal fiction.

51. The other points which are given in the written submission were not canvassed by learned counsel for the opposite party. The judgments which have sought to be relied upon by the opposite party, the Hon'ble Supreme Court has rightly been distinguished which has adopted by the counsel for the petitioners. Learned counsel for the petitioners has distinguished the decision of the Hon'ble Supreme Court relied upon by the opposite party in the case of ***Krishnan Kakkanth*** (supra), paragraphs-2, 24, 25, 26, 27, 30 and 34 thereof have already been reproduced hereinabove.

52. In that view of the matter, we are of the considered opinion that the petitioner No.1 is required to be allowed to participate in the tender floated by the opposite party, even if the decision of Gujarat High Court which has been relied upon by the counsel for the opposite party, the counsel for the petitioners has taken us to the facts as well as observation made by Gujarat High Court particularly to paras-2, 3, 10, 12, 34, 35, 35.1, 35.2, 35.3, 35.4, 36, 36.1, 36.2, 37.1 and 37.4 which have been reproduced hereinabove.

53. The writ petition deserves to be allowed limited extent of prayer no.(ii). We declare that the petitioner No.1 should be considered eligible to participate with all prevailing conditions of tender. Accordingly, the writ petition is allowed to the extent stated above.

53.1. However, we make it clear that the matter was argued at length. Admission of the writ petition and granting interim relief would amount to final relief. Therefore, we dispose of the writ petition with prayer no. (ii) only at the stage of admission on consent of the parties.

53.2. We make it further clear that we have considered only prayer No.(ii). The other prayers are not pressed by learned counsel for the petitioners.

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2019 (II) ILR - CUT- 81

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

WRIT APPEAL NO. 320 OF 2017

SUBASH CHANDRA BISWAL …… Appellant

.Vs.

BAMADEV PATRA ……Respondent

A) LETTERS PATENT APPEAL – Maintainability – Question thereof – It is not disputed that if writ petition is disposed of under Article 226 of the Constitution or by taking recourse to under Articles 226 and 227 of the Constitution, a writ appeal or a letters patent appeal is maintainable – But, if application is filed and disposed of only under Article 227 of the Constitution, then a writ appeal is not maintainable – Whether writ appeal is maintainable or not maintainable in an election dispute? – Held, it depends on many a facet – Scope – Discussed.

"Keeping in view the aforesaid three authoritative pronouncements, this Court is of the opinion that writ appeal is maintainable against the order passed by the Election Tribunal in a proceeding of election dispute under the Orissa Grama Panchayat Act." *(Paras 5 to 7)*

B) ORISSA GRAMA PANCHAYAT ACT, 1964 – Section 31(1) read with Order 7 Rule 11 of the Code of Civil Procedure, 1908 – The question arose as to whether the mode of deposit has to be through a challan with order of the court or without any order of the court – Held, Section 31 of the Orissa Grama Panchayat Act provides that the election petition shall be presented on one or more of the grounds specified in Section 39 of the Act before the learned Civil Judge (Junior Division) having territorial jurisdiction, together with a deposit of such amount, if any, as may be prescribed in that behalf as security for cost within 15 days after date on which the name of the person elected is published under Section 15 of the Act read with Rule 88 of the Orissa Grama

Panchayat Election Rules, 1965 – Deposit made after the due date – Election petition is liable to be rejected. (Paras 8 & 9)

Case Laws Relied on and Referred to :-

1. 2008 (II) CLR-593 (Full Bench) : Mahammed Saud & Ors Vs. Dr. (Maj) Shaikh Mahfooz & Anr.
2. 2016 (II) OLR-3 : Saswati Patra Vs. Saraswati Biswal & Ors.
3. (O.J.C. No.4025 of 1993) : Dr. Nirmal Chandra Satpathy Vs. Jitu Patnaik @ Jitendranath Patnaik & Ors.
4. 2003(II) OLR-283 : Raj Pal Vs. Election Officer-cum-Block Development Officer & Ors.

For Appellant : M/s. Gopal Agrawal & S.R. Pati,
For Respondent : M/s. Bhaskar Ch. Panda, Khetra Mohan Dhal A, Mohanty, B.P. Sarangi, S.Dash, L. Das, S. Mishra & J.N. Panda

JUDGMENT Date of Judgment:15.04.2019

S.K. MISHRA, J.

In the intra-Court appeal, the appellant-petitioner, i.e. the successful candidate in the election for Sarpach of Jharpada Gram Panchayat under Kantapada Panchayat Samiti, Cuttack assails the judgment passed by the learned Single Judge dismissing his writ petition, wherein he has challenged the order dated 05.07.2017 passed by the learned Civil Judge (Junior Division), 2nd Court, Cuttack in Election Misc. Case No.9 of 2017, thereby dismissing an application under Order 7, Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code" for brevity.)

2. Facts of the case are not disputed. Both the appellant-petitioner and the opposite party-respondent were candidates for the post of Sarpach of Jharpada Grama Panchayat. The appellant was declared elected on 23.02.2017. The opposite party-respondent being unsuccessful candidate filed Election Dispute under Sections 30 and 40 of the Orissa Grama Panchayat Act, 1964, hereinafter referred to as the 'O.G.P.Act' for the brevity, which was registered as Election Misc. Case No.9 of 2017 challenging the election of the present petitioner-appellant. Hereinafter the appellant-petitioner will be referred as 'the returned candidate' and the respondent-opposite party will be referred as 'the election petitioner', for convenience. Immediately after receipt of notice, the returned candidate at the very threshold of the matter filed an application under Order 7, Rule 11 of the Code, seeking rejection of the election petition contending, inter-alia, that there has been a non-compliance of Section 31(1) of the O.G.P. Act, 1964

read with Rule 88 of the Orissa Grama Panchayat Election Rules, 1965. The returned candidate has specifically alleged that even though the election petition was filed on 8.3.2017, the security deposit was made on 14.3.2017, which is beyond the period of limitation and thus the contention was raised that the election dispute is barred by limitation and has to be rejected under provision of Order 7, Rule 11 of the Code. The election petitioner filed his objection to the petition, inter-alia, submitting that it is not correct to say that the security deposit has been deposited at a belated stage. He contended that the election dispute was presented along with challan for deposit the security amount before the registry on 8.3.2017. Only on registration of the case, the records were send to the appropriate court on 9.3.2017 and then the case was posted to 14.3.2017 on which date the Nazir of the court was directed by the concerned court to receive the security amount on the very same day. The election petitioner, thus, contended that it is not correct to say that the opposite party has not deposited the security amount on the date of filing of the petition and the delay, if any, has been caused only due to lack of prompt action by the court in seisin over the election dispute. It is under the circumstance, the election petitioner contended that there is no question of application of Order 7, Rule 11 of the Code to the case in hand. After hearing both the parties, the learned Civil Judge (Junior Division), 2nd Court, Cuttack was pleased to reject the application filed by the returned candidate, which was impugned before the learned Single Judge.

3. The learned Single Judge proceeded with the presumption that an application for challenging the election of returned candidate had to be accompanied by deposit in shape of a chalan, as provided under Section 31 of the Orissa Grama Panchayat Act and only after order of the court, such deposit is tendered by the election petitioner and therefore, he dismissed the writ application.

4. Mr. Agrawal, learned counsel for the appellant submits that the payment of the deposit is a peremptory deposit because of the language used in Section 31 of the Orissa Grama Panchayat Act read with Rule 88 of the Orissa Grama Panchayat Election Rules. It is not necessary to tender the same through a challan with order of the court. Referring to provisions of G.R.C.O. (Civil) Volume-I, he contended that the deposit should have made as a peremptory deposit and as admittedly the deposit has been made beyond the period of limitation prescribed, there has been a contravention of the mandatory provision of deposit to be made along with the election petition or at least before the expiry of limitation, hence, the election petition is clearly

barred by Clause-(d) of Rule 11 of Order-7 of the Code of Civil Procedure. Learned counsel for the respondent, on the other hand, submits that an appeal is not maintainable as the order has been passed by the learned Single Judge under Article 227 of the Constitution of India. He further contends that the order passed by the two concurrent courts should not be disturbed in a writ appeal and prays to dismiss the writ appeal.

5. In order to appreciate the argument, let us 1st take up the contention that an appeal is maintainable or not maintainable in an election case. It is not disputed that if writ petition is disposed of under Article 226 of the Constitution or by taking recourse to under Articles 226 and 227 of the Constitution, a writ appeal or a letters patent appeal is maintainable. But, if application is filed and disposed of only under Article 227 of the Constitution, then a writ appeal is not maintainable. This aspect is not disputed by both the parties. This aspect was examined by the Full Bench of this Court in the case of ***Mahammed Saud & Ors Vs. Dr. (Maj) Shaikh Mahfooz & Anr***, 2008 (II) CLR-593 (Full Bench), wherein Full Bench has held that writ appeal lie against judgment/orders passed by the learned Single Judge in a writ petition under Article 226 of the Constitution of India. In a writ application filed under Article 226 and 227 of the Constitution of India, if any order/judgment/decree is passed in exercise of jurisdiction under Article 226 of the Constitution, a writ appeal will lie, whereas no writ appeal will lie against judgment/order/decree passed by the learned Single Judge exercising powers of superintendence under Article 227 of the Constitution. In a Division Bench of this Court in the case of ***Saswati Patra vs. Saraswati Biswal and others***, 2016 (II) OLR-3, similar question arose. It was a matter under Section 32 of the Orissa Zilla Parishad Act, 1991 regarding the challenge to the election of a Member of the Parishad. At paragraphs-8 and 9, the Division Bench of this Court in the aforesaid case discussed this question. It read as follows:

> "8. Where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these Articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal, the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order, the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under Clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226. If the judgment under appeal falls squarely within four corners of Article 227, it goes without saying that intra-Court appeal from such judgment would not be maintainable. On the other hand, if the petitioner has invoked the jurisdiction of the High Court for issuance of certain writ under Article 226, although Article 227 is also mentioned, and principally the judgment

appealed against falls under Article 226, the appeal would be maintainable. What is important to be ascertained is the true nature of order passed by the learned Single Judge and not what provision he mentions while exercising such powers. A statement by a learned Single Judge that he has exercised power under Article 227, cannot take away the right of appeal against such judgment if power is otherwise found to have been exercised under Article 226. The vital factor for determination of maintainability of intra Court appeal is the nature of jurisdiction invoked by the party and the true nature of principal order passed by the learned Single Judge.

9. Consequently, maintainability of the Letters Patent Appeal would depend upon the pleadings in the writ petition, the nature and character of the order passed by the learned Single Judge, and the type of directions issued, regard being had to the jurisdictional perspectives in the constitutional context. Whether a Letters Patent Appeal would lie against the order passed by the learned Single Judge that has travelled to him from the other tribunals or authorities, would depend upon many a facet. It is clarified that in certain enactments, the District Judges function as Election Tribunals from whose orders a revision or a writ may lie depending upon the provisions in the Act. In such a situation, the superior court, that is, the High Court, even if required to call for the records, the District Judge need not be a party. But how the jurisdiction under the letters patent appeal is to be exercised cannot exhaustively be stated. It will depend upon the Bench adjudicating the *lis* how it understands and appreciates the order passed by the learned Single Judge and as such, there cannot be a straitjacket formula for the same. But the High Court while exercising jurisdiction under Article 227 of the Constitution has to be guided by the parameters laid down by the Supreme Court. The apex Court in Jogendrasinhji Vijaysinghji (supra) * 2015 (II) OLR (SC) 509: (2015) 9 SCC 1: ***Jogendrasinhji v. State of Gujarat***, summarized the guidelines in paragraph-45, which read as follows:

"45. In view of the aforesaid analysis, we proceed to summarise our conclusions as follows:

45.1. Whether a letters patent appeal would lie against the order passed by the learned Single Judge that has travelled to him from the other tribunals or authorities, would depend upon many a facet.

The court fee payable on a petition to make it under Article 226 or Article 227 or both, would depend upon the rules framed by the High Court.

45.2. The order passed by the civil court is only amenable to be scrutinised by the High Court in exercise of jurisdiction under Article 227 of the Constitution of India which is different from Article 226 of the Constitution and as per the pronouncement in Radhey Shyam v. Chhabi Nath, (2015) 5 SSC 423, one writ can be issued against the order passed by the civil court and, therefore, no letters patent appeal would be maintainable.

43.3. The writ petition can be held to be not maintainable if a tribunal or authority that is required to defend the impugned order has not been arrayed as a party, as it is a necessary party.

45.4. The tribunal being or not being party in a writ petition is not determinative of the maintainability of a letters patent appeal." *

6. In applying this principle to the case in hand, this Court comes to conclusion that the returned candidate has filed this petition under Article 226

and 227. The basic difference between under Article 227 and Article 226 (certiorari jurisdiction) is that Article 227 is intended to keep the lower tribunals and courts within the bound of their jurisdiction. The scope of Article 226 is wider. In AIR 1955, page-233 in the case of ***Hari Vishnu Kamath vs. Syed Ahmad Ishaque and Others***, the question came before the court whether the decision of an election tribunal can be challenged under Article 226 or not, wherein a seven judges Bench of Hon'ble Supreme Court has addressed itself to the question whether the High Court has jurisdiction under Article 226 to issue writs against decision of the election tribunal. Then, Hon'ble Supreme Court has laid down that the article confers on the High Court the power to issue appropriate writs to any person or authority within their territorial jurisdiction, in terms absolute and unqualified, and Election Tribunals functioning within the territorial jurisdiction of the High Courts would fall within the sweep of that power.

7. Keeping in view the aforesaid three authoritative pronouncements, this Court is of the opinion that writ appeal is maintainable against the order passed by the Election Tribunal in a proceeding of election dispute under the Orissa Grama Panchayat Act.

8. The next question this Court has to address is, whether the mode of deposit has been done in this case has to be through a challan with order of the court or without any order of the court. Section 31 of the Orissa Grama Panchayat Act provides that the election petition shall be presented on one or more of the grounds specified in Section 39 of the Act before the learned Civil Judge (Junior Division) having territorial jurisdiction, together with a deposit of such amount, if any, as may be prescribed in that behalf as security for cost within 15 days after date on which the name of the person elected is published under Section 15 of the Act read with Rule 88 of the Orissa Grama Panchayat Election Rules, 1965. These provisions provide that for the election petition relating to election of Sarpanch an amount of security deposit should be Rs.150/-. Similar provisions have come for adjudication in several cases in this court. While dealing with the Orissa Municipal, Act, 1950 regarding the deposit of security amount of Rs.200/-, a Division Bench headed by Hon'ble the Chief Justice B.L. Hansaria, as His Lordship was then, in the case of ***Dr. Nirmal Chandra Satpathy vs. Jitu Patnaik @ Jitendranath Patnaik and others***, (O.J.C. No.4025 of 1993) has come to the conclusion that no extension of time has been granted by the District Judge for depositing the security money and secondly because under the law, he has no power to grant extension inasmuchas Section 5 of the Limitation Act

cannot apply to the petition filed under Section 9 of the Municipal Act. In the case of ***Raj Pal vs. Election Officer-cum-Block Development Officer and others***, 2003(II) OLR-283 this Court has held that even though there is no provision similar to Section 86 of the Representation of the People Act, 1951, for dismissal of election petition of the Orissa Panchayat Samiti Act on the ground of non-deposit of security of Rs.2000/- along with election petition, election petition can still be dismissed for such deposit if made beyond the time prescribed under Section 44-B of the Orissa Panchayat Samiti Act. Thus, it is apparent that the election petition has to be presented within 15 days and even if the security deposit is not filed along with the election petition, it must be filed within the limitation prescribed i.e. 15 days of the declaration of the election result, failing which the election petition will not be maintainable and can be dismissed. Now, coming to the mode of deposit there appears to be lot of confusion. Admittedly, neither the G.P. Act nor the G.P. Rules prescribed the mode of deposit. In such situation, the Court has to look into the G.R.C.O. (Civil) Vol.-I Rule 595 provides for heads of accounts and paragraph-(h) thereof defines peremptory receipts. It read as follows:

> "595.Heads of account-The following are the heads of accounts in the public accounts under which the money received and paid by Judicial Officers, or under their orders is classified.
>
> XXX XXX XXX XXX XXX XXX XXX XXX
>
> (h) Peremptory receipts, i.e. witnesses' expenses, prisoners' diet-money, boat-hire, costs of adjournments, amins' travelling allowances, fees and expenses payable to commissioner's daily fees payable under the rules for deputation of peons and other peremptory receipts."
>
> XXX XXX XXX XXX XXX XXX XXX XXX XXX
>
> Rule 605 provides the mode, it is appropriate to quote the same.
>
> "Peremptory receipts under head (h) of Rule 595 shall be tendered to the cashier direct the intervention of the Accountant, a chalan is not required in respect of such payments."

9. In other words, if the deposit is peremptory deposit, then a challan is not necessary to be furnished while tendering the deposit a peremptory cash receipt is enough. The cashier should receive the money and issue a receipt. Whether the deposit made in election petition is peremptory or not has to be decided now. The Concise Oxford English Dictionary 10th Revised edition, defines peremptory as 'insisting on immediate attention or obedience; brusque and imperious'. It also defines that in law 'it is not open to appeal' or 'challenge' or 'it is final'. Now, section 31(1) provides that the election petition must be accompanied by deposit of Rs.150/- and it is final. This

aspect of the case cannot be challenged anywhere in the court and for that reason we are of the opinion that it is a peremptory deposit and there is no need to pass a challan by the Presiding Officer for deposit of the same. A peremptory deposit will be enough for compliance of the same. Admittedly, in this case the same has not been done and the challan deposit has been done much after the expiry of limitation period. Therefore, we are of the opinion that the learned Single Judge on erroneous assumption dismissed the writ petition, which needs to be set-aside.

10. Accordingly, we allow the appeal, set-aside the judgment dated 23.08.2017 passed by the learned Single Judge in W.P.(C) No.13857 of 2017 and also set-aside the order dated 05.07.2017 passed by the learned Civil Judge (Junior Division), 2nd Court, Cuttack in Election Misc. Case No.9 of 2017 rejecting the application filed by the returned candidate under Order-7, Rule-11 of the Code of Civil Procedure. In effect, we allow the application filed by the returned candidate under Order 7, Rule 11 of the Code of Civil Procedure and dismissed the election petition for non-compliance of Section 31(1) of the Orissa Grama Panchayat Act read with Rule 88 of the Odisha Grama Panchayat Election Rules.

The writ appeal is accordingly disposed of. There shall be no orders as to costs.

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2019 (II) ILR - CUT- 88

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

W.A NO. 438 OF 2017

SANJU LENKA & ORS. …….Appellants

.Vs.

STATE OF ODISHA & ORS. …….Respondents

A. CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Claim of compensation by wife, children and parents of deceased, (late Sashi Bhusan Lenka) who suffered a tragic death while coming on road – Plea of Opposite parties that preventive measures had been taken to caution the vehicular traffic not to use the damaged road but the deceased met with the accident due to his negligence and carelessness – Whether the principle of *res ipsa loquitur* (the principle that the mere occurrence of some types of accident is sufficient to imply negligence) applies to the present case – Held, Yes – The petitioners are entitled for compensation. (Paras 9 & 10)

B. CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition claiming compensation by wife, children and parents of deceased, (late Sashi Bhusan Lenka) who suffered a tragic death while coming on road – Question of maintainability raised – Held, the afore-quoted observation of the Hon'ble Apex Court as well as High Courts show the paradigm shift that has taken place in the judicial approach adopted by the courts to provide speedy and efficacious remedy to the needy in distress than to push him to face the traditional technicalities and procedures of Civil Law Forum – In the instant case, even if it is conceded for the sake of argument that the opposite parties-respondents had constructed some humps and had put some cautionary signs, still in our opinion those were not sufficient to escape the liability – Since the road was totally washed out making it absolutely unusable being added with a deep ditch, the road should have been totally closed prohibiting any vehicular traffic, since the humps are created only to slow down and not to stop, we are inclined to hold that the appellants are entitled for compensation to be paid by the State authorities as respondents and their prayer for relief can be granted by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. (Paras 11 & 12)

Case Laws Relied on and Referred to :-

1. 1999 Supl-2 SCR 3412 : Chairman Grid Corporation of Orissa Ltd. & Ors. .Vs. Smt. Sukamani Das & Anr. etc.
2. 2005(II) OLR 389 : Nirmala Nayak & Ors. .Vs. Chairman-cum-Managing Director, Grid Corporation of Orissa Ltd. & Anr.
3. 2006 (Supp-I) OLR 1114 : Pravati Palai .Vs. Chairman-cum-Managing Director, Grid Corporation of Orissa Ltd. & Anr.
4. AIR 2002 SC 551" : M.P. Electricity Board .Vs. Shail Kumar & Ors.
5. 112(2011) CLT 689 : (Abdul Mazid Khan(dead) Vs. Abdul Rasid Khan (dead) & Ors.)
6. AIR 1974 SC 2048 : Smt. Asha Devi .Vs. Dukhi Sao & Anr.
7. 1973(1) CWR 809 : Jagabandhu Senapati & Ors. Vs. Bhagu Senapati & Ors.
8. (2001) 8 SCC 151 : M.S. Grewal .Vs. Deep Chand Sood.
9. (AIR 2005 MP 2) : Ramesh Sing Pawar .Vs. Madhya Pradesh Electricity Board & Ors.

For Appellants : M/s. S.N. Sahu, B. Swain, P. Swain & M. Das-2.

For Respondents: Mr. J. Katikia, Addl. Govt. Adv.

JUDGMENT Date of Hearing :29.01.2019: Date of Judgment : 01.03.2019

J.P. DAS, J.

This intra Court appeal is directed against the judgment dated 23.08.2017 passed by the learned Single Judge in O.J.C. No.10733 of 1998.

The present appellants as wife, children and parents of late Sashi Bhusan Lenka filed the writ application against the opposite parties-respondents claiming compensation of Rs.5,40,000/-(rupees five lakhs forty thousand) with interest to be paid by the respondents due to tragic death of Sashi Bhusan Lenka alleging inaction and negligence on the part of the opposite parties-respondents. It was their submission that the deceased, as usual left his house in the morning of 08.08.1997 informing his family members that after day's work, he would visit her sister's house in village Korei and thereafter would return home. He did not return. On the next day morning, the family members got an information that he has died meeting with an accident. The family members rushed to the spot and found the dead body with multiple injuries and the motorcycle used by the deceased lying nearby in a damaged condition. It was noticed that about 30 feet of the road leading to village Korei has been totally washed out due to heavy rain and the culvert was totally damaged. The position of the road was such that the damaged culvert was not visible to the approach road and any motorcyclist going even in the slowest speed would fall in the ditch, what had happened with the deceased. The petitioners alleged that even though, the road was so badly and dangerously damaged, still the opposite parties specifically, the Executive Engineer and S.D.O. of Rural Development Department, Jajpur district as well as the Block Development Officer of Korei Block, who were in-charge of maintaining the road in question had not taken any step for repair of the road nor they had put any signal or guard on the approaching roads to close the vehicular traffic on the said road. They alleged that due to such negligence on the part of the opposite parties, the deceased met with the fateful accident in the night of 08.08.1997. It was further submitted that the petitioner no.1, namely, Sanju Lenka, wife of the deceased repeatedly approached the authorities for compensation but it was not paid heed to, for which they approached this Court for efficacious remedy claiming compensation as stated earlier. It was also pleaded inter alia on behalf of the petitioners that the deceased was the sole earning member of the family and being a energetic young man of 32 years of age was carrying on business of supplying coal to different coal depots and was also the owner of a Truck using the same for transport business. It was submitted that the husband of the appellant no.1 had an income of about Rs.4,500/- per month and his contribution towards family member was about Rs.3,000/- per month.

2. It was the submission of opposite parties-respondents that the said road was earlier damaged due to heavy rain and flood in the month of July, 1997 and was repaired. Again due to high flood between 03.08.1997 and

06.08.1997, the repairs washed away and there was breach of the bridge on the aforesaid road. On getting information, immediate steps were taken by the concerned authorities to repair the same. It was further submitted that in the evening of 08.08.1997, humps of about 3 feet height were constructed on either side of the bridge with proper cautionary signal showing closure of the road. They counter alleged that in the night of 08.08.1997, the victim was prevented by local passersby from going on the said road but despite the preventive measures, the victim fell into the ditch due to his own negligence. They pleaded that there was absolutely no negligence on the part of the concerned authorities in attending to the damaged road but, the victim met with unfortunate death for his own negligence and carelessness. Hence, they denied any tortuous liability on the part of the opposite parties in order to compensate the petitioners for the accidental death of the deceased. It was further contended on behalf of the opposite parties-respondents that the declaration of any negligence on the part of the opposite parties and granting any amount of compensation cannot be given by the High Court in exercising its jurisdiction under Article 226 of the Constitution of India, for the reason that unless negligence on the part of either of the parties is proved and established on evidence, it cannot be decided or determined in a writ application.

3. It was not in dispute that in the night of 08.08.1997, the husband of the petitioner no.1 died meeting with an accident while using the 1st kilometer road to Korei, which was in damaged condition. It was also not in dispute that the petitioners had a right to claim compensation as has been observed by the learned Single Judge. But, discussing the jurisdiction of this Court while exercising power under Article 226 of the Constitution of India, learned Single Judge observed that as per submission of the parties some negligence was also attributed towards the victim, since statements of some local people by way of affidavits were brought on record, which stated that while going to Korei the victim was advised to take the road from other side but while returning in the night, he seemed to have been drunk and coming on the damaged road met with an accident. Thus, it was observed by the learned Single Judge that the award of compensation or the negligence is to be assessed as to whether it is attributable to the opposite parties or the deceased, which depends upon the factual appreciation of the fact which cannot be decided under Article 226 of the Constitution India. On such observation relying upon a decision of the Hon'ble Apex Court as reported in 1999 Supl-2 SCR 3412 (***Chairman Grid Corporation of Orissa Ltd. and***

others) vrs. Smt. Sukamani Das and another etc. learned Single Judge held that dispute relating to negligence can only be decided by leading evidences and after appreciation of factual aspects of the matter and accordingly, dismissed the writ petition.

4. It has been submitted in the appeal on behalf of the unsuccessful petitioner-appellants that High Court is not deprived of its jurisdiction to entertain petition under Article 226 of the Constitution of India, merely because in considering the petitioners' right to relief, questions of fact may fall to be determined as has been decided in different decisions of the Hon'ble Apex Court. It has further been submitted that learned Single Judge lost sight of the applicability of the principle of *res ipsa loquitur*.

5. Learned counsel for the appellants in respect of such submissions relied upon two decisions rendered by the Division Bench of this Court in "**Nirmala Nayak and others –vrs.- Chairman-cum-Managing Director, Grid Corporation of Orissa Ltd. and another,** reported in 2005(II) OLR 389 and **Pravati Palai-vrs.- Chairman-cum-Managing Director, Grid Corporation of Orissa Ltd. and another,** reported in 2006 (Supp-I) OLR 1114 and also **M.P. Electricity Board –vrs.- Shail Kumar and others,** reported in AIR 2002 SC 551".

6. It was also submitted by learned counsel for the appellants that even in a writ appeal, as the learned Single Judge is not subordinate to the Court, the Division Bench in exercise of the appellate jurisdiction can go into questions relating to issues of fact and law. In this regard, learned counsel relied upon the decision reported in 112(2011) CLT 689 (***Abdul Mazid Khan(dead)-vrs.- Abdul Rasid Khan (dead) and others,*** AIR 1974 SC 2048 (***Smt. Asha Devi –vrs.- Dukhi Sao and another*** and 1973(1) CWR 809 (***Jagabandhu Senapati and others –vrs.- Bhagu Senapati and others.***

7. Learned counsel appearing on behalf of the opposite parties-respondents submitted that finding and observation of the learned Single Judge are well supported by settled principle of law and since negligence is alleged and counter alleged by both the sides, it can only be found out on proper evidence, which is not possible while considering the writ application under Article 226 of the Constitution of India.

8. It was strenuously contended by learned counsel for the appellants that the learned Single Judge categorically observed in the impugned judgment that it was not in dispute that the husband of the petitioner-appellant no.1 met with an accident on 08.08.1997 and died and that such

accident took place while the petitioner was using 1st kilometer road of Korei, which was in damaged condition and that the petitioners have a right to claim compensation. It was submitted that the learned Single Judge erroneously observed that alleged negligence is required to be established on evidence, which cannot be decided in an application under Article 226 of the Constitution of India. It was submitted that negligence on the part of the opposite parties-respondents remained admitted on record, that too on the own documents of the opposite parties-respondents and hence, there is absolutely no necessity of taking of evidence in order to determine as to who was negligent. In this regard, learned counsel for the appellants took us to a letter written by the Executive Engineer R&B, Jajpur addressed to the Superintendent Engineer Central Circle Rural Works, Bhubaneswar vide Annxure-12 to the writ appeal. In the said letter, the concerned Executive Engineer, present respondent no.3 has mentioned that due to heavy rain fall and flood, the Panikoili-Jajpur Road was submerged and he, being informed about the same, instructed the concerned Assistant Engineer and Junior Engineer to immediately proceed to the spot and to start restoration work on war footing basis. It has also been mentioned in the said letter that the bridge at 1st kilometer, i.e., the place of accident was not approachable from Dhaneswar side. In Paragraph-7 it was mentioned that in the night of 08.08.1997, he instructed to his S.D.O. and J.E. to take up the restoration work of the damaged RCC culvert, which was replaced earlier by hume pipes at the 1st kilometer, the next day since the same was not approachable from either side till 10.30 P.M. that night. Thus, it was submitted that on their own documents it remained admitted by the opposite parties that the portion of the damaged road was not approachable from either side for which it could not be repaired in the night of 08.08.1997. In the said night, the husband of the appellant no.1 met with an accident at the spot and hence, it cannot be believed that the opposite parities had taken any cautionary measure to prevent the persons from using the said road.

9. As mentioned herein before, the facts are not disputed. There was a breach of public road and the victim during the night of 08.08.1997 met with an accident falling into the ditch at the said spot and died. The sole contention that has been advanced on behalf of the opposite parties-respondents is that preventive measures had been taken to caution the vehicular traffic not to use the damaged road but the deceased met with the accident due to his negligence and carelessness. In this respect, it would be profitable to refer an observation of the Hon'ble Apex Court reported in AIR 2002 S.C. 551 (***M.P. Electricity Board v. Shail Kumar and others***) as follows:-

> "Even assuming that all such measures have been adopted, a person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability". It differs from the liability, which arises on account of the negligence, or fault in this way i.e. the concept of negligence comprehends that the foreseeable harm would be avoided by taking reasonable precautions. If the defendant did all that which could be done for avoiding the harm he cannot be held liable when the action is based on any negligence attributed. But such consideration is not relevant in cases of strict liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions."

The Hon'ble Apex Court in the case of ***M.P. Electricity Board v. Shail Kumar and others*** (supra) relying upon the decision of Privy Council observed that the company supplying electricity is liable for the damage without proof that they had been negligent. Even the defence that the cables were disrupted on account of a violent wind was held to be not a distinctable defence.

10. In view of the aforesaid settled position of law, we are of the considered view that the principle of *res ipsa loquitur* squarely applies to the present case. It was further submitted by learned counsel for the appellants that some statements were subsequently manufactured by the opposite parties-respondents to show that the victim was drunk while driving and did not obey cautionary words of the local people, only to escape the liability. Thus, we find no serious question of fact as an issue to be decided so as to require material evidences in order to grant compensation to the petitioners-appellants.

11. As regards the maintainability of the writ application, in the present case, reference can be made to the observations of the Hon'ble Apex Court in the case of ***M.S. Grewal v. Deep Chand Sood*** (2001) 8 SCC 151 :

> "This plea of non-maintainability of the writ petition though advanced at the initial stage of the submissions but subsequently the same was not pressed and as such we need not detain ourselves on that score, excepting however recording that the law Courts exist for the society and they have an obligation to meet the social aspirations of citizens since law Courts must also respond to the needs of the people. In this context, reference may be made to two decisions of this Court: the first in line is the decision of *Nilabati Behera v. State of Orissa,* (AIR 1993 SC 1960) wherein this Court relying upon the decision in *Rudal Sah (Rudal Sah v. State of Bihar)* AIR 1983 SC 1086 decried the illegality and impropriety in awarding

> compensation in a proceeding in which the Court's power under Articles 32 and 226 of the Constitution stands involved and thus observed that it was a clear case for award of compensation to the petitioner for custodial death of her son. It is undoubtedly true, however, that in the present context, there is no infringement of the State's obligation, unless of course the State can also be termed to be joint tortfeasor, but since the case of the parties stands restricted and without imparting any liability on the State, we do not deem it expedient to deal with the issue any further except noting the two decisions of this Court as above and without expression of any opinion in regard thereto."

We also feel it appropriate to quote an observation of Madhya Pradesh High Court in the case of ***Ramesh Sing Pawar v. Madhya Pradesh Electricity Board and others*** (AIR 2005 MP 2):

> "Currently judicial attitude has taken a shift from the old draconian concept and the traditional jurisprudentia system – affection of the people has been taken note of rather seriously and the judicial concern thus stands on a footing to provide expeditious relief to an individual when needed rather than taking recourse to the old conservative doctrine of the Civil Court's obligation to award damages. As a matter of fact, the decision in *D.K. Basu* has not only dealt with the issue in a manner apposite to the social need of the country but the leaned Judge with his usual felicity of expression firmly established the current trend of "justice-oriented approach". Law Courts will lose their efficacy if they cannot possibly respond to the need of the society – technicalities there might be many but the justice-oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice."

12. The afore-quoted observation of the Hon'ble Apex Court as well as High Courts show the paradigm shift that has taken place in the judicial approach adopted by the courts to provide speedy and efficacious remedy to the needy in distress than to push him to face the traditional technicalities and procedures of Civil Law Forum. In the instant case, even if it is conceded for the sake of argument that the opposite parties-respondents had constructed some humps and had put some cautionary signs, still in our opinion those were not sufficient to escape the liability. Since the road was totally washed out making it absolutely unusable being added with a deep ditch, the road should have been totally closed prohibiting any vehicular traffic, since the

humps are created only to slow down and not to stop. Hence, we are inclined to hold that the appellants are entitled for compensation to be paid by the State authorities as respondents and their prayer for relief can be granted by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India, thereby setting aside the finding of the learned Single Judge.

13. Now coming to the quantum of compensation, the petitioners-appellants have claimed an amount of Rs.5,40,000/-(rupees five lakhs forty thousand) with the submissions that the deceased was doing coal business and had a truck which was engaged in transport business. However, there being no specific material in support of the income of the deceased, in our opinion calculating the compensation according to the schedule of the Motor Vehicles Act treating the deceased as an unskilled labour would suffice the interest of justice. The deceased was 32 years old at the time of accident on 08.08.1997. Accordingly;

1.	Minimum wages per day for unskilled labour in the year 1997	Rs.35/-
2.	Monthly established income of the deceased.	Rs.35/-x30=1050/-
3.	Yearly income	Rs.1050/-x12=Rs.12,600/-
4.	16 multiplier is applicable to the age group of 30 to 35 in case of death.	Rs.12,600/-x16=Rs.2,01,600/-
5.	Deduction of personal expenses @ 1/3rd.	Rs.2,01,600/- (-) Rs.67,200/- ---------- Rs.1,34,400/-
6.	Future prospect @40%	Rs.53,760/-
	Loss of estate.	Rs.15,000/-
7.	Loss of consortium.	Rs.40,000/-
8.	Funeral expenses.	Rs.15,000/- ---------- Rs.2,58,160/-

Rounding off the figure to Rs.2,60,000/-(rupees two lakhs sixty thousand) in our opinion would be just and proper.

14. Accordingly, the writ appeal is allowed setting aside the impugned judgment dated 23.08.2017 passed by the learned Single Judge, in O.J.C. No.10733 of 1998. It is directed that the appellants-petitioners be paid with a compensation amount of Rs.2,60,000/-(rupees two lakhs sixty thousand only) along with six percent simple interest from the date of accident, i.e., 08.08.1997 till the date of payment by the State-opposite parties-respondents within a period of two months hence. The writ appeal is disposed of accordingly. No order as to cost.

2019 (II) ILR - CUT- 97

DR. A.K. RATH, J.

C.M.P. NO. 285 OF 2018

TULASHI MALLIK & ORS. …….Petitioners

Vs.

JAGANNATH MALLIK & ORS. …….Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 20 Rule 18 (2) – Suit for partition – Decree in suit for partition of the Property – Preliminary decree granting specific share of the parties before the final decree – Whether can be considered and when? – Held, the inevitable conclusion is that Order 20 Rule 18 CPC envisages passing of a decree for the partition of property or for the separate possession of a share therein – Sub-rule (2) mandates that if the decree relates to any other immovable property or movable property, the court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required – The words "declaring the rights of the several parties interested in the property" in sub-rule (2) would indicate that shares of the parties, other than the plaintiffs, have to be taken into account while passing preliminary decree – Preliminary decree for partition is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property – The final decree should specify the division by metes and bounds and it needs to be engrossed on stamped paper – Unless the right of the parties are declared, final decree proceeding cannot be levied. (Para 10)

Case Laws Relied on and Referred to :-

1. A.I.R. 1940 P.C. 11 : Jadunath Roy & Ors. Vs. Parameswar Mullick & Ors.
2. A.I.R. 1977 Orissa 154 : Ghanashyam Martha Vs. Brundaban Pradhan & Anr,
3. A.I.R.1954 Orissa 223 : Basu Behera Vs. Dombaru Behera & Ors.

For Petitioners : Mr.Maheswar Mohanty

For Opp. Party : Mr.Samir Kumar Mishra

JUDGMENT Date of Hearing:19.03.2019 : Date of Judgment:29.03.2019

DR. A.K. RATH, J.

This petition challenges the order dated 1.2.2018 passed by the learned Senior Civil Judge, Balasore in C.S.No.191 of 2011 (F.D). By the said order, learned trial court rejected the application of defendant nos.4 (ka) to 4 (ga), petitioners herein, to provide them opportunity to adduce evidence for allotment of their share.

2. The plaintiff-opposite party no.1 instituted the suit for partition and permanent injunction. The defendant no.4 filed written statement claiming that she has 1/6th share in Lot No.1, ½ share in Lot Nos.4, 5 & 6 and 1/4th share in Lot No.3 of suit schedule properties. The suit was dismissed on contest against defendants 1, 2, 4 & 8 to 20 and 26 to 30 and ex-parte against other defendants. Felt aggrieved, the plaintiff filed RFA No.498 of 2014 in the Court of the learned District Judge, Balasore. Learned District Judge held that the suit property be partitioned amongst the co-sharers according to their legitimate shares. The co-sharers may effect the partition amicably or through the process of the Court. The alienations made out of the suit property be adjusted in the shares of the respective co-sharers/vendors. Held so, it allowed the appeal. The suit was decreed preliminarily. Thereafter the plaintiff levid final decree proceeding. In the final decree proceeding, defendant 4 (ka) to 4 (ga), petitioners herein, filed an application to provide them opportunity to adduce evidence regarding allotment of their share. No share was determined in the preliminary decree. It is not possible on the part of the Civil Court Commissioner to submit report. In the absence of any determination of share, partition is not possible. Learned trial court held that defendant no.4 is entitled to get his share. There is no cloud of suspicion with regard to the share of the parties. The parties can be heard on the point of their respective shares from the pleading and evidence of the parties. No direction was issued by the appellate court to adduce further evidence. Held so, it rejected the petition.

3. Mr.Maheswar Mohanty, learned Advocate for the petitioners submitted that in the preliminary decree share of the parties have not been determined. Learned District Judge held that the suit property shall be partitioned amongst the co-sharers. In view of the same, the petitioners filed an application for determination of the share. He further submitted that under Order 20 Rule 18 (2) CPC the Court shall pass a preliminary decree declaring the rights of the parties interested in the property and giving such further directions as may be required. In absence of any specific share of the parties, the Civil Court Commissioner cannot make allotment of share. He places reliance on a decision of the apex Court in the case of Shankar Balwant Lokhande (dead) by L.Rs. v. Chandrakant Shankar Lokhande and another, AIR 1995 SC 1211.

4. Per contra, Mr.Samir Kumar Mishra, learned Advocate for opposite party no.1 supports the order. He contended that the judgment passed by the learned District Judge, Balasore is perfectly in consonance with the law. The question of adduction of evidence by the petitioners does not arise at all.

5. Before adverting into the contentions raised by the counsel for the parties, it will be necessary to set out sub-rule 2 of Rule 18 of Order 20 CPC.

> "18. Decree in suit for partition of property or separate possession of a share therein.-Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,-
>
> (1) xxx xxx xxx
>
> (2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required."

6. The aforesaid sub-rule was the subject of interpretation in the case of Shankar Balwant Lokhande. The apex Court held :

> "xx xx xx Thus, it could be seen that where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further inquiry, then the court is required to pass a preliminary decree declaring the rights of several parties interested in the property. The Court is also empowered to give such further directions as may be required in this behalf. A preliminary decree in a partition action, is a step in the suit which continues until the" final decree is passed. <u>In a suit for partition by a coparcener or co-sharer, the Court should not give a decree only for the plaintiffs share, it should consider shares of all the heirs after making them parties and then to pass a preliminary decree. The words "declaring the rights of the several parties interested in the property" in sub-rule (2) would indicate that shares of the parties, other than the plaintiff(s), have to be taken into account while passing preliminary decree. Therefore, preliminary decree for partition is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property which is the subject- matter of the suit. The final decree should specify the division by metes and bounds and it needs to be engrossed on stamped paper."</u> (emphasis laid)

7. In Jadunath Roy and others v. Parameswar Mullick and others, A.I.R. 1940 P.C. 11, it was held that a partition suit in which a preliminary decree has been passed is still a pending suit and the rights of the parties have to be adjusted as on the date of the final decree.

8. The same view was reiterated in Ghanashyam Martha v. Brundaban Pradhan and another, A.I.R. 1977 Orissa 154. This Court held that any number of preliminary decrees can be passed therein.

9. In Basu Behera v. Dombaru Behera and others, A.I.R.1954 Orissa 223, this Court held that the Rule empowers the Court to pass a preliminary decree declaring the right of the parties and giving such further directions as may be required from time to time.

10. The inevitable conclusion is that Order 20 Rule 18 CPC envisages passing of a decree for the partition of property or for the separate possession of a share therein. Sub-rule (2) mandates that if the decree relates to any other immovable property or movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required. The words "declaring the rights of the several parties interested in the property" in sub-rule (2) would indicate that shares of the parties, other than the plaintiff(s), have to be taken into account while passing preliminary decree. Preliminary decree for partition is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property. The final decree should specify the division by metes and bounds and it needs to be engrossed on stamped paper. Unless the rights of the parties are declared, final decree proceeding cannot be levid.

11. In view of the forgoing discussions, the impugned order is quashed. The matter is remitted back to the learned trial court for determination of the shares of the parties and to pass a preliminary decree. No costs.

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2019 (II) ILR - CUT- 100

DR. A.K. RATH, J.

C.M.P. NO. 443 OF 2018

UMA ROUT .....Petitioner

.Vs.

AJAYA BHATTA & ORS. .....Opp. Parties

(A) CODE OF CIVIL PROCEDURE, 1908 – Order 7 Rule 11 – Rejection of Plaint – Suit for partition in respect of schedule 'A' and 'B' properties – Defendant no.1 asserts that the plaintiff has no cause of action against her in respect of schedule 'B' land –The question does arise as to whether a part of the plaint can be rejected ? – Answer is no – Held, only part of plaint cannot be rejected – If no cause of action is disclosed the plaint as a whole must be rejected – Other circumstances – Indicated. (Para 14)

(B) ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 41(1) – Suit filed after publication of consolidation ROR – Question arose as to whether the

civil court has jurisdiction to entertain the suit after a notification has been issued under Sec. 41(1) of the OCH & PFL Act. – Held, Yes. (Gulzar Khan vs. Commissioner of Consolidation and others, 1993 (II) OLR-194 followed) (Para 17)

Case Laws Relied on and Referred to :-

1. AIR 1977 SC 2421 : T. Arivandandam Vs. T. V. Satyapal & Anr.
2.(2003) 1 SCC 557 : Saleem Bhai & Ors. Vs. State of Maharashtra & Ors.
3 (2007) 5 SCC 614 : Hardesh Ores (P) Ltd. Vs. . Hede and Company.
4. (2015) 8 SCC 390 : Fatehji and Company & Anr. vVs. L.M. Nagpal & Ors.
5. (1982) 3 SCC 487 : Roop Lal Sathi Vs. Nachhattar Singh Gill.
6. (1989) 2 SCC 163 : A.B.C. Laminart Pvt. Ltd. & Anr. Vs. A.P. Agencies.
7. 1993 (II) OLR-194 : Gulzar Khan Vs. Commissioner of Consolidation & Ors.
8. AIR 1940 PC 105 : Secretary of State Vs. Mask & Co.

For Petitioner : Mr.Prafulla Kumar Lenka.

JUDGMENT Date of Hearing: 27.03.2019 : Date of Judgment:05.04.2019

DR. A.K. RATH, J.

This petition challenges the order dated 16.2.2018 passed by the learned District Judge, Cuttack in C.R. No.08 of 2017. By the said order, learned District Judge dismissed the revision and confirmed the order dated 22.06.2017 passed by learned Civil Judge (Sr. Divn.), 1st Court, Cuttack in C.S. No.888 of 2016, whereby and whereunder learned trial court has rejected the application of the defendant no.1 to reject the plaint under Order 7 Rule 11 CPC.

02. Plaintiff-opposite party no.1 instituted the suit for partition, repurchase of schedule 'B' property and permanent injunction. Briefly stated, case of the plaintiff is that the suit property is the ancestral residential house, homestead and cultivable land of the plaintiff. The dispute arose first time on 15.8.2016 when he came to know that Ratha Bhatta, predecessor-in-interest of defendant nos.5 and 6, had executed a registered sale deed on 01.01.1974 in favour of Labanya, husband of defendant no.1, in respect of schedule 'B' property. Ratha Bhatta had no exclusive right to sell the same in favour of a stranger. No consideration was passed. Notwithstanding the transfer by Ratha Bhatta, the suit property is the joint family property of the parties. Defendant no.1 attempted to forcibly occupy schedule 'B' property on 15.8.2016. The sale is in contravention of Sec.44 of the Transfer of Property Act, Sec.22 of the Hindu Succession Act and Secs.34 and 35 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act ("OCH & PFL Act"). The sale deed is void abinitio. He demanded for exercise of his right of repurchase. But then, the defendant no.1 did not agree. With this factual

scenario, he instituted the suit. The suit is valued at Rs.5,00,100/- for the purpose of court fees and jurisdiction, out of which, Rs.5,00,000/- is the value of partition and Rs.100/- is the relief of injunction.

03. Defendant no.1 entered appearance and filed a petition under Order 7 Rule 11 (a), (b) and (d) CPC to reject the plaint stating inter alia that plaintiff has no cause of action to institute the suit against her. The consolidation authorities have recorded schedule 'B' property in the name of her husband in the year 1981. After death of her husband, her name has been mutated in the ROR of the suit property. The suit is barred under Sec.51 of the OCH & PFL Act. The plaintiff in the guise of seeking repurchase of schedule 'B' land challenges the registered sale deed dated 01.01.1974. The suit is also barred by limitation. Plaintiff was 4 years old in 1974. At that time, his father and other co-sharers were alive. Thus, the question of obtaining the consent by her vendor Ratha Bhatta before execution of the sale deed did not arise. Plaintiff has not valued the relief of repurchase.

04. Learned trial court rejected the petition holding inter alia that the plaintiff instituted the suit for partition. Plaintiff does not challenge the registered sale deed of 1974. The question pertaining to valuation and court fees are matters between the court and the plaintiff. The suit has been filed after closure of consolidation operation. It is not hit under Sec.51 of the OCH & PFL Act. Unsuccessful defendant no.1 assailed the order before learned District Judge, Cuttack in C.R. No.08 of 2017. The revisional court held that for partition suit, the cause of action is recurring. The plaintiff has cause of action. Though no valuation has been made with regard to the relief of purchase, but the said question can be considered by the court at the time of final adjudication and if at all it would be required, the plaintiff can be directed to correct the valuation and to pay the required court fees. There is no prayer seeking a declaration that the registered sale deed of 1974 as invalid or void. Consolidation operation in the suit area is over. The suit is not hit under Sec.51 of the OCH & PFL Act and is not barred by limitation. Held so, it rejected the revision petition.

05. Heard Mr. Prafulla Kumar Lenka, learned Advocate for the petitioner.

06. Mr. Lenka, learned Advocate for the petitioner, submitted that the plaintiff has no cause of action to institute the suit against the defendant no.1 in respect of schedule 'B' property. The suit is barred by Sec.51 of the OCH & PFL Act. The plaintiff has not valued the relief of repurchase and has not paid any court fees. The suit is barred by limitation. Elaborating the

submission, he contended that plaintiff asserts that the sale deed and consolidation ROR are illegal and void. But he has not sought for any decree of declaration to avoid the bar of limitation and Sec.51 of OCH & PFL Act. A major portion of the schedule 'A' property has been sold and not available for partition. Plaintiff averred that the consolidation authority has illegally recorded schedule 'B' land in the name of Labanya Rout and issued ROR. The consolidation ROR has not been challenged. He has not approached the consolidation authority for correction of ROR. Ratha Bhatta executed the sale deed with the consent of other co-sharers. Two of the co-sharers are witnesses to the sale deed. The question of repurchase of schedule 'B' land does not arise. Defendant no.1 is the absolute owner of schedule 'B' property. The sale deed was executed on 1.1.1974. The consolidation ROR was issued in the year 1981. The suit was filed in the year 2016. It is hopelessly barred by law of limitation. To buttress the submission, he placed reliance on the decisions of the apex Court in the case of *T. Arivandandam vs. T. V. Satyapal and another,* AIR 1977 SC 2421, *Saleem Bhai and others vs. State of Maharashtra and others,* (2003) 1 SCC 557, *Hardesh Ores (P) Ltd. vs. Hede and Company,* (2007) 5 SCC 614, *Fatehji and Company and another vs. L.M. Nagpal and others,* (2015) 8 SCC 390.

07. Before adverting to the contention raised by the counsel for the petitioner, it will necessary to set out the provision of Order 7 Rule 11 CPC.

> "11. Rejection of plaint – The plaint shall be rejected in the following cases:
>
> (a) where it does not disclose a cause of action;
>
> (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
>
> (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
>
> (d) where the suit appears from the statement in the plaint to be barred by any law;
>
> Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

08. In *T. Arivandandam*, the apex Court held that if on a meaningful-not formal-reading of the plaint, it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the court should exercise his

power under Order 7 Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10 CPC.

09. In *Hardesh Ores (P) Ltd.,* the apex Court held that the plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Law within the meaning of clause (d) of Order 7 Rule 11 must include the law of limitation as well. It is well settled that whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirely must be held to be correct. The test is whether the averments in the plaint, if taken to be correct in their entirely, a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or substraction of words or change of its apparent grammatical sense.

10. In *Fatehji & Company & Anr.,* the apex Court held that under Order 7 Rule 11 (a) and (d), court has to satisfy that the plaint discloses a cause of action and does not appear to be barred by any law.

11. In *Saleem Bhai and others*, the apex Court held that for the purposes of deciding an application under clauses (a) and 9d) of Order VII Rule 11 of CPC, the averments in the plaint are the germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.

12. Reverting to the facts of the case and keeping in view the enunciation of law laid down by the apex Court, this Court finds that the plaintiff has instituted the suit in respect of schedule 'A' and 'B' properties. The defendant no.1 asserts that the plaintiff has no cause of action against her in respect of schedule 'B' land.

13. The question does arise as to whether a part of the plaint can be rejected ?

14. In *Roop Lal Sathi vs. Nachhattar Singh Gill,* (1982) 3 SCC 487, the apex Court held that only a part of the plaint cannot be rejected and if no cause of action is disclosed, the plaint as a whole must be rejected.

15. In *A.B.C. Laminart Pvt. Ltd. and another vs. A.P. Agencies,* (1989) 2 SCC 163, the apex Court held that a cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.

16. On a reading of the plaint as a whole, it is manifest that the plaint discloses the cause of action.

17. After publication of consolidation ROR, the suit has been instituted. In *Gulzar Khan vs. Commissioner of Consolidation and others,* 1993 (II) OLR-194, question arose whether the civil court has jurisdiction to entertain the suit after a notification has been issued under Sec.41(1) of the OCH & PFL Act. The Full Bench of this Court summarised the following principles.

> "36. We may conclude our views relating to Civil Court's jurisdiction by stating that the same would be available after closure of consolidation operations only in any one of the following circumstances;
>
> (i) The cause of action accruing after the closure of the consolidation operations, a/a Suba Singh.
>
> (ii) If the consolidation authorities had taken the decision without complying with the provisions of the Act or had not acted in conformity with the fundamental principle of judicial procedure (which would take within its fold the case of violation of natural justice), *vide* principle No.(ii) of Magulu.
>
> (iii) Obtaining of order from the hand(s) of consolidation authorities by playing fraud on the party who seeks to approach the Civil Court, as per Karbalai Begum's case."

18. The civil court has plenary jurisdiction. Seventy-five years ago, the Privy Council in the case of *Secretary of State vs. Mask & Co.,* AIR 1940 PC 105 held that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if the jurisdiction is so

excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

19. The orders passed by the courts below cannot be said to be perfunctory or flawed warranting interference of this Court under Article 227 of the Constitution of India.

The petition is dismissed. No costs.

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2019 (II) ILR - CUT- 106

DR. A.K. RATH, J.

C.M.P. NO. 827 OF 2018

PARAYAKUNNIL JOHAN MATHAI (P.J. MATHAI) .....Petitioner

.Vs.

RABI RANJAN SAHOO & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 8 Rule 9 – Provisions under – Leave to file additional written statement – When can be allowed? – Held, ordinarily at a belated stage leave for filing additional written statement is not usually granted but the court should be liberal while allowing the application to amend the pleading – However the court must bear in mind the statutory limitation provided in CPC as per the proviso appended to order 6 Rule 17.

"*Reverting to the facts of this case and keeping in view the law enunciated above, this Court finds that defendant no.1 has filed an application seeking leave to file additional written statement. Trial has commenced. While considering the application under Order 8 Rule 9 CPC, the Court has to bear in mind the statutory limitations contained in proviso to Order 6 Rule 17 CPC. The petition for leave to file additional written statement has been filed to circumvent the proviso to Order 6 Rule 17 CPC. The provision contained in Order 6 Rule 17 CPC cannot be circumvented by filing application under Order 8 Rule 9 CPC. Learned trial court held that basing on the pleading, issues have been framed. Three witnesses have been examined on behalf of plaintiff. Additional written statement is a significant departure from the written statement. There will be no end of the litigation as with every appointment of a counsel, a pleading will undergo change and litigation shall continue till eternity. There is no perversity or illegality in the said finding warranting interference of this Court under Article 227 of the Constitution.*" *(Paras 7 & 8)*

Case Laws Relied on and Referred to :-

1. 76 (1993) C.L.T. 655 : M/s. Gannon Dunkerley & Co. Ltd., Constituted Attorney Sri Sridhar Dubey Vs. Steel Authority of India Ltd. Rourkela Steel Plaint, Rourkela.
2. (2009) 14 SCC 525 : P.A. Jayalakshmi Vs. H.Saradha & Ors.

For Petitioner : Mr. Niranjan Singh-1

JUDGMENT Date of Hearing : 27.03.2019 : Date of Judgment :05.04.2019

DR. A.K. RATH, J.

By this petition under Article 227 of the Constitution, challenge is made to the order dated 7.4.2018, passed by the learned Civil Judge (Senior Division), Talcher, in C.S. No.38 of 2012, whereby and whereunder, learned trial court has rejected the application of the defendant no.1-petitioner under Order 8 Rule 9 CPC to accept the additional written statement.

2. Plaintiffs-opposite party nos.1 and 2 instituted the suit for declaration of title, eviction of defendant no.1 from the suit land and permanent injunction. The defendant no.1 entered contest and filed written statement denying the assertions made in the plaint. While matter stood thus, defendant no.1 filed an application under Order 8 Rule 9 CPC for leave of the court to accept the additional written statement. It is stated that the written statement was filed on 06.03.2014, bereft of some material facts. The same have vital bearing on the suit. After death of the previous counsel, another counsel was engaged. It is found that some vital facts have not been pleaded. Learned trial court rejected the same.

3. Heard Mr. Niranjan Singh-1, learned counsel for the petitioner.

4. Mr. Singh, learned counsel for the petitioner submits that the provisions contained in Order 8 Rule 9 CPC shall be construed liberally. Though the learned trial court came to the conclusion that the provisions contained in Order 8 Rule 9 CPC shall be construed liberally, but then rejected the application of the petitioner on untenable and unsupportable grounds. No new ground is taken in the additional written statement. The foundational facts exist. The additional written statement is not a departure from the written statement.

5. Order 8 Rule 9 CPC provides that :

> "No pleading subsequent to the written statement of a defendant other than by way of defence to set-off or counter claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time

> require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same."

6. Order 8 Rule 9 CPC was the subject-matter of interpretation in the case of *M/s. Gannon Dunkerley & Co. Ltd. represented through its Constituted Attorney Sri Sridhar Dubey Vrs. Steel Authority of India Ltd. Rourkela Steel Plaint, Rourkela,* 76 (1993) C.L.T. 655. This Court held:

> "6. Order 8, Rule 9 of the Code lays down an important rule of pleading that no pleading subsequent to the written statement by a defendant other than by way of defence to a set off shall be presented except by leave of the Court. The rule requires leave of the Court before any party can make a further pleading after written statement has been filed. Where a defendant intends to file additional written statement, he must file an application showing the circumstances as to why he failed to raise the plea in the original written statement, and the other party must be given opportunity to meet the motion. In considering whether leave to file an additional written statement, should be granted or not, the delay that has taken place in raising the contention raised in the additional written statement and the reason why those contentions were not raised before have to be considered. Though the Rule invests the court with wide discretion and enables it to accept written statement filed subsequently, same is not to be accepted where a new case or facts inconsistent with the original written statement are sought to be brought on record. In this context, reference to provisions of Order 6, Rule 7 of the Code is necessary. The said rule stipulates that a new ground of claim or allegation of fact inconsistent with the previous pleading of the party cannot be accepted except by way of amendment. Thus, Order 6, Rule 7 of the Code is subject to the Order 6, Rule 17 of the Code under which the amendments are made. Therefore, provisions of Order 6, Rule 17 of the Code are to be kept in mind while accepting fresh pleadings raising new ground of claim or containing allegations of fact inconsistent with the previous pleadings of the party. A departure takes place when in any pleadings the party deserts ground that he had taken in his previous pleading and resorts to another and different ground. The object of Order 6, Rule 7 of the Code is to prevent such a departure."

7. In *P.A. Jayalakshmi Vrs. H.Saradha & Ors,* (2009) 14 SCC 525, the apex Court held that ordinarily at a belated stage, leave for filing additional written statement is not usually granted. The court should be liberal in allowing applications for leave to amend pleadings. But then, court must bear in mind the statutory limitations brought about by reason of the Code of Civil Procedure (Amendment) Acts; the proviso appended to Order VI Rule 17 being one of them.

8. Reverting to the facts of this case and keeping in view the law enunciated above, this Court finds that defendant no.1 has filed an application seeking leave to file additional written statement. Trial has commenced. While considering the application under Order 8 Rule 9 CPC, the Court has to bear in mind the statutory limitations contained in proviso to Order 6 Rule 17 CPC. The petition for leave to file additional written statement has been

filed to circumvent the proviso to Order 6 Rule 17 CPC. The provision contained in Order 6 Rule 17 CPC cannot be circumvented by filing application under Order 8 Rule 9 CPC. Learned trial court held that basing on the pleading, issues have been framed. Three witnesses have been examined on behalf of plaintiff. Additional written statement is a significant departure from the written statement. There will be no end of the litigation as with every appointment of a counsel, a pleading will undergo change and litigation shall continue till eternity. There is no perversity or illegality in the said finding warranting interference of this Court under Article 227 of the Constitution.

9. In view of the foregoing discussions, the petition is dismissed. There shall be no order as to costs.

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2019 (II) ILR - CUT- 109

DR. A.K. RATH, J.

CMP NO. 121 OF 2019

THE MANAGING DIRECTOR, O.S.F.C & ANR. .....Petitioners

.Vs.

SMT. GITA DEVI & ANR. .....Opp. parties

COURT FEES ACT, 1870 – Section 7 – Computation of court fees – Decree which fixed the amount to be paid along with interest thereupon – Appeal against such decree – Court fees payable – Whether the court fees shall be paid upon decreetal amount only or the interest thereupon – Held, the interest forms a part of the decreetal amount and as such the appellant is liable to pay the court fees on the total amount including the interest amount as well. (Para 8)

For Petitioners : Mr. P.K. Routray, Mr. J. Bhuyan.
For the State : Mr. S.P. Mishra, Advocate General.
For Opp. Party No.1 : Mr. S.N. Senapati.

JUDGMENT Date of Hearing: 03.04.2019 : Date of Judgment: 05.04.2019

DR. A.K. RATH, J.

This petition challenges the order dated 30.01.2018 passed by the learned District Judge, Cuttack in RFA No. 148 of 2016, whereby and

whereunder learned appellate court directed the appellants-petitioners to pay court fees on Rs.2,91,229.40 p. with annual compound interest of 8% till the date of filing of the appeal.

2. Shorn of unnecessary details, the short facts of the case are that the plaintiff-opposite party no.1 instituted C.S. No.548 of 2013 (III) before the learned Civil Judge (Senior Division), 1st Court, Cuttack for realization of Rs.14,96,917.50 p. with P.I & F.I @ 18% per annum till realisation. The suit was decreed in part against defendants 1 and 2. It was held that defendants 1 and 2 are liable to pay Rs.2,91,229.40 p. with annual compound interest of 8% from 31.10.1990 till the date of realization of the amount. Felt aggrieved, defendants 1 and 2 filed RFA No.148 of 2016 before the learned District Judge, Cuttack. The appeal was valued at Rs.2,91,229.40 p. on which court fees of Rs.10,035/- was payable. A petition under Sec.148 CPC was filed for extension of time to pay the court fees. Respondents filed objection stating that under Sec.7 of the Court Fees Act, the appellants are liable to pay the court fees on the decreetal amount i.e. Rs.2,91,229.40 p. with interest.

3. Learned appellate court assigned the following reasons and directed the appellants to pay the court fees:

> "It clearly transpires that the lower court has also awarded interest upon the amount, which the lower Court has directed the appellant to pay to the respondents no.1 and 2. The interest forms a part of the decreetal amount. As such the appellants are liable to pay court fees upon the interest till the date of filing of the appeal. So, it is ordered that the appellants are liable to pay court fees upon Rs.2,91,229.40 paise with annual compound interest of 8% from 31.10.1990 till the date of filing of the Appeal. Office is directed to make calculation of the court fees payable."

4. Heard Mr. P.K. Routray along with Mr.J. Bhuyan, learned counsel for the petitioners, Mr. S.N Senapati, learned counsel for the opposite party no.1 and Mr. S.P. Mishra, learned Advocate General for the State of Odisha.

5. Mr. Routray, learned counsel for the petitioners submitted that the learned trial court decreed the suit in part and directed defendants 1 and 2 to pay Rs.2,91,229.40 p. with annual compound interest of 8% from 31.10.1990 till the date of realization of the amount. Assailing the judgment and decree, defendants 1 and 2 filed RFA No.148 of 2016 before the learned District Judge, Cuttack. The appellants are liable to pay the court fees on the decreetal amount of Rs.2,91,229.40 p. Appellants have filed a petition under Sec.148 CPC for extension of time to pay the court fees of Rs,10,035/-. Learned appellate court travelled beyond its jurisdiction and directed the appellants to pay the court fees of Rs.2,91,229.40 p. with annual compound

interest of 8% from 31.10.1990 till the date of filing of the appeal. To buttress the submission, he placed reliance on the Constitution Bench decision of the apex Court in the case of State of Maharashtra v. Mishrilal Tarachand Lodha, AIR 1964 SC 457.

6. Mr. S.P. Mishra, learned Advocate General for the State of Odisha submitted that the appellants are liable to pay the court fees on the decreetal amount. The decreetal amount includes the interest.

7. Mr. Senapati, learned counsel for the opposite party no.1 submitted that the appellants are liable to pay the court fees on Rs.2,91,229.40 p. with annual compound interest of 8% from 31.10.1990 till the date of filing of the appeal. There is no infirmity in the impugned order.

8. Before adverting to the contentions raised by the learned counsel for the parties, it is apt to refer to the Constitution Bench decision of the apex Court in the case of Mishrilal Tarachand Lodha. The question arose before the apex Court whether the amount of interest decreed for the period subsequent to the institution of a suit comes within the expression 'amount or value of the subject-matter in dispute' in Art.I of Schedule I of the Bombay Court fees Act, 1959 for purposes of court-fee payable on the memorandum of appeal. The apex Court held that the amount of court-fee payable, therefore, depends on the amount or value of the subject-matter in dispute in appeal. The defendant-appellant valued his claim at Rs.13,033-6-6 and paid the requisite court-fee on that amount. It is obvious therefore that he disputes in appeal that part of the decree which awarded Rs.13,033-6-6 against him on account of principal and interest due up to the date of the institution of the suit. He did not dispute, according to the value of his claim, the amount of interest which could be found on calculation for the period between the date of the suit and the date of the decree at 4% per annum on a sum of Rs.10,120/- as had been awarded under the decree. Whether his appeal is competent or not without his including this amount in his claim in appeal, is a question different from that relating to the value of the subject-matter in dispute in appeal. He does not dispute the decree for that amount and therefore the Court has not to decide about it and so the amount cannot be included in the amount of the subject-matter in dispute in appeal covered by the relevant expression. None of his grounds of appeal refers specifically to this amount of interest between the date of the suit and the date of the decree. This makes it further plain that he does not question the propriety of awarding of future interest or the rate at which it was awarded or even the amount on which it could be awarded. It is not possible to say, in these

circumstances, that the value of the subject-matter in dispute in the appeal must include this amount of interest between the date of the suit and the date of the decree.

9. But then, in the instant case, defendants 1 and 2 assail the entire decree. The decision is distinguishable on facts.

10. The learned trial court decreed the suit in part holding that defendants 1 and 2 are liable to pay Rs.2,91,229.40 p. with annual compound interest of 8% from the date of adjustment of the loan amount, i.e. 31.10.1990 till the date of realisation of the amount. Felt aggrieved, defendants 1 and 2 filed RFA No.148 of 2016 before the learned District Judge, Cuttack. Decreetal amount inclues Rs.2,91,229.40 p. plus annual compound interest of 8% from 31.10.1990. Interest was awarded prior to institution of the suit. The interest forms a part of the decreetal amount and as such the defendants-appellants are liable to pay the court fees of Rs. Rs.2,91,229.40 p. plus interest as well.

11. The impugned order does not suffer from any illegality or infirmity warranting interference of this Court under Article 227 of the Constitution. Accordingly, the petition is dismissed. No costs.

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2019 (II) ILR - CUT-112

DR. A.K. RATH, J.

C.M.P. NO.1101 OF 2018

BASANTA BEHERA & ORS. .....Petitioners

.Vs.

MENAKABALA BEHERA & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE,1908 – Order 8 Rule 6-C – Provisions under – Suit for partition – Counter claim filed by one defendant against two other defendants – The question arose as to whether a defendant can file a counter claim against a co-defendant ? – Held, No – Reasons indicated.

"Counter-claim is treated as a cross suit. Even if, the suit is dismissed, the counter claim shall remain alive for adjudication. The question does arise in such an eventuality, whether the counter claim between the co-defendants shall remain alive ? The apex Court in the case of Rohit Singh in no uncertain terms held that a counter claim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it, it may also claim relief against the co-defendants in the

suit. But the counter claim directed solely against the co-defendants cannot be maintained. By filing a counter claim, the litigation cannot be converted into some sort of an inter pleader suit." *(Para 11)*

Case Laws Relied on and Referred to :-

1. 2017 (I) ILR - CUT - 463 : Indumati Sahu Vs. The Secretary, Rotary Club, Puri & Anr.
2. 2017 (I) ILR- CUT -805 : Purna Chandra Biswal Vs. Kiran Kumari Brahma.
3. AIR 1996 SC 2222 : Jag Mohan Chawla & Anr Vs. Dera Radha Swami Satsang & Ors.
4. (2006) 12 SCC 734 : Rohit Singh Vs. State of Bihar (now State of Jharkhand).
5. AIR 2005 SC 294 : State of Jharkhand Vs. Govind Singh.
6. 2003 (5) SCC 134 : J.P.Bansal Vs. State of Rajasthan.
7. (AIR 2000 SC 1578 : Commissioner of Sales Tax, M.P. Vs. Popular Trading Company, Ujjain.

For Petitioners : Mr. D.P. Mohanty
For Opp. Party : Mr. B. N. Bhuyan

JUDGMENT Date of Hearing : 03.04.2019 : Date of Judgment : 08.04.2019

DR. A.K.RATH, J.

The seminal question that hinges for consideration of this Court is as to whether a defendant can file a counter claim against a co-defendant ?

2. The dispute lies in a narrow compass. The facts need not be recounted in detail. Suffice it to say that the plaintiff-opposite party no.1 laid the suit for partition before the learned 1st Addl. Civil Judge (Senior Division), Cuttack. Defendant nos.1 and 4 to 10-petitoners herein filed a joint written statement. Defendant no.14 filed a written statement along with counter claim. The counter claim is confined to defendant nos.7 and 8 only. The suit scheduled properties in the counter claim are different from that of the plaint. While matter stood thus, defendants-petitioners filed an application under Or.VIII R.6-C CPC for exclusion of the counter claim. Defendant no.14 filed objection. Learned trial court rejected the same on 7.5.2018. This petition seeks to laciniate the said order.

3. Heard Mr. D. P. Mohanty, learned counsel for the petitioners and Mr. B. N. Bhuyan, learned counsel for the opposite party no.6.

4. Mr. Mohanty, learned counsel for the petitioner submitted that the property described in the counter claim is not the subject-matter of the suit. Or.VIII R.6-C CPC provides that the defendant can set up a counter claim against the claim of the plaintiff in respect of the cause of action accruing against the plaintiff. Elaborating submissions, he contended that the

defendant no.14 has no claim against the plaintiff. The counter claim has been filed against the co-defendant nos.7 and 8. He further submitted that when defendant no.14 in her counter claim admits that the property mentioned in the counter claim is the joint family property of defendant nos.7, 8 and 14, which is not the subject-matter of the suit and the plaintiff has no connection with the same, the counter claim in respect of the different properties other than the suit properties is not maintainable. To buttress the submission, he placed reliance on the decisions of this Court in the case of *Indumati Sahu Vrs. The Secretary, Rotary Club, Puri & Anr.,* 2017 (I) ILR - CUT - 463 and *Purna Chandra Biswal Vrs. Kiran Kumari Brahma*, 2017 (I) ILR- CUT – 805.

5. Mr. Bhuyan, learned counsel for the opposite party no.6 submitted that in a suit for partition, plaintiffs are the defendants and vice versa. Thus the counter claim can be laid against the co-defendants. To give quietus to the issue and avoid multiplicity of proceedings, the left out property can be included in the counter claim. Or.VIII R.6-C CPC is not a bar to file any counter claim against the co-defendant. He placed reliance on the decision of the apex Court in the case of *Jag Mohan Chawla and another Vrs. Dera Radha Swami Satsang and others,* AIR 1996 SC 2222.

6. R.6-A of Or.8 CPC provides for counter claim by defendant. R.6-C provides for exclusion of counter claim. R.6-A(1) and R.6-C of Or.8, which are relevant, are quoted hereunder :

> 6-A.Counter-claim by defendant –
>
> (1) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired whether such counter-claim is in the nature of a claim for damages or not:
>
> Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.
>
> (2) to (4) xxx xxx xxx.
>
> 6-C. Exclusion of counter-claim – Where any defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.

7. In *Purna Chandra Biswal,* this Court held that the words "any right" appearing in Rule 6(A) (1) of Order 8 C.P.C. mean right over the suit land.

Thus the defendant cannot file a counter claim in respect of the property, which is not the subject-matter of suit.

7.1 In the said case, the subject-matter of the suit as well as counter claim was totally different. The claim was filed in respect of different cause of action, which has no bearing on the suit land. The counter claim was excluded.

8. The apex Court in the case of *Rohit Singh Vrs. State of Bihar (now State of Jharkhand)*, (2006) 12 SCC 734, held that normally, a counter claim, though based on a different cause of action than the one put in suit by the plaintiff could be made. A counter claim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it, it may also claim relief against the co-defendants in the suit. But a counter claim directed solely against the co-defendants cannot be maintained. By filing a counter claim the litigation cannot be converted into some sort of an inter pleader suit. The same view was reiterated in the case of *Indumati Sahu*.

9. Or.8 R6-C CPC does not carve out an exception. The language is plain and unambiguous. The apex Court in the case of *State of Jharkhand Vrs. Govind Singh*, AIR 2005 SC 294 held that a construction which requires, for its support, addition or substitution of words or which results in rejection of words, has to be avoided, unless it is covered by the rule of exception, including that of necessity.

10. The apex Court in the case of *J. P. Bansal Vrs. State of Rajasthan,* 2003 (5) SCC 134 held that when the words of a Statute are clear, plain or unambiguous, i.e., they are reasonably susceptible to only one meaning. The Courts are bound to give effect to that meaning irrespective of consequences. The intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said.

10.1. Taking a cue from the *Commissioner of Sales Tax, M.P. Vrs. Popular Trading Company, Ujjain* (AIR 2000 SC 1578, it was further held that while interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the Legislature to amend, modify or repeal it, if deemed necessary. The legislative casus omissus cannot be supplied by judicial interpretative process.

11. Counter-claim is treated as a cross suit. Even if, the suit is dismissed, the counter claim shall remain alive for adjudication. The question does arise

in such an eventuality, whether the counter claim between the co-defendants shall remain alive ? The apex Court in the case of *Rohit Singh* in no uncertain terms held that a counter claim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it, it may also claim relief against the co-defendants in the suit. But the counter claim directed solely against the co-defendants cannot be maintained. By filing a counter claim, the litigation cannot be converted into some sort of an inter pleader suit.

12. The ratio in *Rohit Singh* proprio vigore applies to the facts of the case.

13. In the instant case, defendant no.14 laid the counter claim against the co-defendants. Learned trial court fell in patent error in law in not excluding the counter claim. If the order is allowed to stand, the same would occasion failure of justice.

14. The decision in the case of *Jag Mohan Chawla and another* is distinguishable on facts. The question arose before the apex Court was whether in a suit for injunction, counter-claim for injunction in respect of the same or a different property is maintainable. Whether counter-claim can be made on different cause of action. The counter-claim could be treated as a cross-suit and it could be decided in the same suit without relegating the parties to a fresh suit. Thereby, it is no longer confined to money claim or to cause of action of the same nature as original action of the plaintiff. The words "any right or claim in respect of a cause of action accruing to the defendant" would show that the cause of action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit.

14.1. The counter-claim expressly is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court-fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit. There is no quarrel over the proposition of law.

15. In the wake of aforesaid, the impugned order is quashed. The petition is allowed. The counter claim filed by defendant no.14 is excluded. There shall be no order as to costs.

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2019 (II) ILR - CUT- 117

BISWAJIT MOHANTY, J.

W.P.(C) NO. 22973 OF 2018

ORIENTAL INSURANCE COMPANY LTD. .....Petitioner

.Vs.

KRUSHNA KAMAR & ORS. .....Opp. Parties

INTEREST – Motor Accident claim case settled in Lok Adalat – Award amount was to be paid within two months from the date of award – Not paid – Claim of interest on delayed payment of award – Granted by MACT – Writ petition challenging such grant of interest on the ground that the award amount has been paid within two months from the date of receipt of the copy of the award – Further plea was that the claimants have accepted the amount without objection and such a plea has not been taken before the MACT court – Held, pleas cannot be accepted – Grant of interest legal and there exists no error apparent on the face of the impugned order.

For Petitioner : M/s. G.P.Dutta, S.K. Mohanty, B.K.Sahoo, S.Parween & R.Mahananda
For Opp. Parties : Nemo

JUDGMENT Date of Judgment: 15.02.2019

BISWAJIT MOHANTY, J.

The present writ application has been filed by the Insurance Company praying for quashing of the order dated 25.11.2017 under Annexure-3 whereby the Additional District Judge-cum-3rd M.A.C.T., Jharsuguda has directed the petitioner to pay interest to the opposite party nos.1 to 5 on account of delayed payment of compensation amount.

The opposite party nos.1 to 5 filed M.A.C. No.52 of 2014 on 5.9.2014 praying for award of compensation. On 12.12.2015 the matter being settled/compromised between the petitioner and opposite party nos.1 to 5, the National Level Lok Adalat passed the award directing that all the cheques be

issued by the petitioner in the shape of account payee cheque/demand draft within 2 months from the date of award failing which the compensation amount would carry interest @ 9% per annum from the date of application till realization. The petitioner never challenged such award. The attested copy of the relevant portion of the award so passed has been filed by the learned counsel for the petitioner along with a memo in the court on 8.2.2019. On 15.12.2015 copy of the award was handed over to the learned counsel for the petitioner, who in turn sent the same to the petitioner, which received the copy on 19.12.2015. As per the award though the cheques should have been issued on or before 11.2.2016, however, the cheques were deposited only on 18.2.2016. Out of the said cheques, the cheque of opposite party no.5 was erroneously issued in the name of opposite party no.4. Accordingly, the corrected cheque was deposited in favour of opposite party no.5 on 9.3.2016. Complaining delay in issuance of the cheques, a petition under Section 174 of the Motor Vehicles Act, 1988 was moved before the learned 3rd M.A.C.T., Jharsuguda vide Annexure-1 praying for issuance of a certificate for realizing the interest amount on delayed payment. Vide Annexure-2, the petitioner filed its show cause taking the plea that as it received the award of Lok Adalat on 19.12.2015, therefore by depositing the cheques on 18.2.2016, they have complied with the direction of Lok Adalat within the time period fixed by the Lok Adalat. Thus, there has been no delay in carrying out the award of Lok Adalat. The petitioner however admitted that the cheque of opposite party no.5 was erroneously issued in the name of opposite party no.4 and the corrected cheque was deposited on 9.3.2016. The petitioner also narrated the events regarding re-validation of cheques after their lapse and submitted that for such lapse the petitioner is in no way responsible. Accordingly, the petitioner denied its liability to pay interest. Considering all these factors and relying on the language used in the award, the learned 3rd M.A.C.T. Jharsuguda rejected the plea of the petitioner and directed it to pay interest @ 9% from the date of application i.e. 5.9.2014 to 18.2.2016 to opposite party nos.1 to 5 and at the same rate from 5.9.2014 to 9.3.2016 to opposite party no.5.

Challenging the same, the present writ application has been filed.

Mr. Dutta, learned counsel for the petitioner contended that the learned Tribunal has gone wrong in awarding interest as in the factual background there has been no delay in depositing the cheques. In this context, he pointed out that though the award was passed on 12.12.2015, but a copy of the same was received by the petitioner only on 19.12.2015. Since, the two months period granted by the award was to expire on 18.2.2016, on

the said date, the cheques were deposited. Thus, there has been no delay in making deposits. Secondly, he submitted that the opposite party nos.1 to 5 having accepted the cheques without any objection cannot now pray for interest. In this context, he relied upon a decision of this Court dated 30.11.2016 passed in W.P.(C) No.12084 of 2015 in the case of **Nityananda Bag and another** –v- **Branch Manager, Oriental Insurance Company and others**. So far as 1st submission of the learned counsel for the petitioner is concerned, the same is liable to be rejected for the following reasons. The language of the Lok Adalat award which was passed on compromise/settlement between the claimants and the petitioner is very clear. The relevant portion of the award is quoted hereunder:-

"xxx xxx xxx

> Out of the awarded amount of Rupees Rs.5,25,000/- (Rupees Five Lakhs Twenty Five Thousand) only, a sum of Rs.1,50,000/- (Rupees One Lakh fifty Thousand) only each shall be kept in shape of fixed deposit in the name of the petitioner No-2 Panchami Kamar and petitioner No.3 Pramila Kamar for a period of five (5) year. An amount of Rs.50,000/- (Rupees Fifty Thousand) only each shall be kept in shape of fixed in the name of the petitioner No.4-Pintu Kamar and petitioner No.5 Pinku Kamar. An amount of Rs.25,000/- (Rupees Twenty Five Thousand) only shall be paid in cash to the petitioner No.1-Krushna Kamar and an amount of Rs.1,00,000/- (Rupees One Lakh) only shall be paid in cash to the petitioner No.2-Panchami Kamar. All the fixed deposit shall be kept in any Nationalised Bank without facility of withdrawal in any manner. All the cheques be issued by the insurance company in shape of A/c payee Cheque/D.D (Demand Draft) within two months from the date of award failing which the compensation amount shall carry interest @ 9% (Nine Per cent) per annum from the date of application till realization in accordance with law."

The above noted para makes it clear that the petitioner therein had agreed that all cheques would be issued within two months "from the date of award" failing which the compensation amount would carry interest @ 9% per annum from the date of application till realization in accordance with law. As indicated above, the date of award is 12.12.2015. Therefore, the period of two months is to be calculated from the said date i.e. 12.12.2015 not from the date of receipt of the copy of award. When a calculation is made on these basis, the cheques should have been deposited on or before 11.2.2016 by the petitioner. In fact, from the date of receipt of copy of award i.e. 19.12.2015 to 11.2.2016, the petitioner had got enough time i.e. around 54 days for depositing the cheques. However, it made the deposits on 18.2.2016 and the corrected cheque was deposited on 9.3.2016. Therefore, without any semblance of doubt, there has been delay in depositing the cheques. In such background, the petitioner having agreed for payment of interest in case of delay cannot now refuse to pay the same.

Now coming to the 2nd contention of Mr. Dutta, learned counsel for the petitioner that since the opposite party nos.1 to 5 received the cheques without objection, now they cannot claim interest; it may be stated here that this ground was never taken in the show cause filed by the petitioner under Annexure-2. Had such a ground been taken, the opposite party nos. 1 to 5 could have got an opportunity to have their say on the said issue and this Court would have the benefit of perusing a reasoned order of the Tribunal also on the said issue. Since the petitioner never raised this plea, they should not be permitted to raise such a plea now. Besides, the petitioner has not pointed out any jurisdictional error in the impugned order as the same has been passed in tune with the mandate of Section 171 of the Motor Vehicles Act, 1988 Moreover, the decision relied by the petitioner in the case of Nityananda Bag (Supra) is factually distinguishable. In that case there is nothing to show that the same involved an award passed by Lok Adalat based on compromise and settlement. Here as indicated earlier the petitioner itself has agreed that all cheques should be issued within 2 months from the date of award, failing which the compensation amount would carry interest @ 9% per annum from the date of application till realization in accordance with law. Here since admittedly there has been a delay in issuing the cheques, the petitioner cannot be permitted to resile from its own commitment for paying interest. Further, as indicated earlier in the present case the petitioner has never pleaded about claimants accepting the cheques without any objection in Annexure-2.

Thus there exists no error apparent on the face of the impugned order.

For all these reasons, this Court is not inclined to interfere with the impugned order under Annexure-3 and accordingly, the writ application is dismissed. However, for the laches of officials, the petitioner should not be allowed to suffer loss. Therefore, it is directed that it should take all necessary steps to recover the amount paid towards interest from the salary of the officer/officers, who is/are responsible for the delay in making deposits.

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2019 (II) ILR - CUT- 121

DR. B.R. SARANGI, J.

W.P.(C) NO. 3728 OF 2013

KAILASH CHANDRA SAHOO .....Petitioner

.Vs.

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

SERVICE LAW – Disciplinary Proceeding – Delay in disposal – Disciplinary proceedings initiated against the petitioner, placing him under suspension, pursuant to order dated 04.08.1994, which was subsequently revoked and fresh order of suspension was passed on 19.09.1996 – Fresh order of suspension was set aside permitting the petitioner to be reinstated in service and directing the opposite party to conclude the proceedings by the end of the year, 2003 – Not yet been concluded nor even charge-sheet filed – Whether such proceedings can be allowed to continue for indefinite period? – Held, the delay in initiation of the disciplinary proceeding against the petitioner being not attributable to him, the same cannot be sustained – Quashed – Direction to pay all service benefits. (Para 16)

Case Laws Relied on and Referred to :-

1. AIR 1990 SC 1308 : 1990 (Supp) SCC 738 : The State of Madhya Pradesh Vs. Bani Singh.
2. AIR 1998 SC 1833 : (1998) 4 SCC 154 : State of Andhra Pradesh Vs. N. Radhakishan.
3. AIR 2006 SC 207 : (2005) 6 SCC 636 : P.V. Mahadevan Vs. M.D., Tamil Nadu Housing Board.
4. AIR 2006 SC 2129 : G.M. Tank Vs. State of Gujarat.
5. AIR 2007 SC 2129 : UCO Bank Vs. Rajinder Lal Capoor
6. 2016 (II) ILR- CUT- 188 : Prabodh Chandra Paikray Vs. Orissa State Electricity Board (deleted) Grid Corporation of Orissa Ltd.,
7. 2018 (II) ILR-CUT-753 : Bhimsen Routa Vs. State of Orissa.
8. AIR 1992 SC 1701 : Abdul Reheman Antulay Vs. V. R. S. Nayak.
9. (1998) 9 SCC 131 : Food Corporation of India and Another Vs. V.P. Bhatia.

For Petitioner : M/s. Sachidananda Sahoo & P.R. Bhuyan.

For Opp.Parties : Mr. A.K. Mishra, Addl. Government Advocate
M/s. D.P. Das, S. Behera & B. Pati.

JUDGMENT Date of Hearing: 03.04.2019 : Dat of Judgment : 09.04.2019

DR. B.R. SARANGI, J.

The petitioner, by means of this writ application, craves the following reliefs:

"(i) why the Opp.parties shall not be directed to drop the disciplinary proceeding which was initiated against the petitioner in the year 1994;

A N D

(ii) why the Opp.Parties shall not be directed to fix the scale of pay of the petitioner as per ORSP Rules 1998 and 2008 respectively within stipulated period;

A N D

(iii) why the Opposite parties shall not be directed to provide annual increments right from 1994 in favour of the petitioner by regularizing his service;

A N D

(iv) Why the opp.parties shall not be directed to calculate the arrear differential salary of the petitioner and to release the same in his favour within stipulate period;

A N D

v) why the opp.parties shall not be directed to release the post retiral benefits of the petitioner in his favour within stipulated period;

A N D

(vi) Why the opp.parties shall not be directed to take steps for sanction of pension in favour of the petitioner within stipulated period;

And if the Opp.parties do not show cause or show insufficient cause then the rule be made absolute by issuing appropriate writ or writs/direction or directions and any other order as deem fit and proper may be passed."

2. The factual matrix of the case, in hand, is that the petitioner had entered into service as a Lower Division Clerk on 25.11.1975. His appointment was approved by the competent authority on 17.09.1987 as a Junior Clerk. On 04.08.1994, he was placed under suspension pending contemplation of initiation of disciplinary proceeding on the allegation of misappropriation and misconduct. The opposite party no.3 – Governing Body of Kendrapara Autonomous College, Kendrapara simultaneously lodged FIR against the petitioner on 04.08.1994 in Kendrapara P.S., pursuant to which G.R. Case No. 788 of 1994 under Sections 477(A)/408/34 I.P.C. was registered in the Court of learned S.D.J.M., Kendrapara. Consequentially, both departmental proceeding and criminal proceeding were initiated against the petitioner on the selfsame facts. Challenging the order of suspension dated 04.08.1994, the petitioner had approached this Court by filing OJC No. 7691 of 1995. During pendency of the said case, the order of suspension dated 04.08.1994 was revoked by opposite party no.3 and vide order dated 27.06.1996 the petitioner was reinstated in service. Consequentially, the writ petition bearing OJC No. 7691 of 1995 became infructuous and was disposed of as such on 22.01.2003.

2.1 Thereafter, the petitioner was again placed under suspension on 19.09.1996 with effect from 20.09.1996. Challenging the said order of suspension, the petitioner again approached this Court by filing OJC No. 10321 of 1996, which was disposed of on 22.01.2003 by setting aside the order of suspension and direction was issued to the Management- opposite party no.3 to reinstate the petitioner forthwith in his former post. It was further directed that the disciplinary proceeding against the petitioner should be concluded as expeditiously as possible, preferably by the end of the year 2003, and that the Director, Higher Education, Orissa – opposite party no.2 should take necessary steps in that regard. Consequentially, the petitioner was reinstated in service and accordingly he joined in his former post on 04.02.2003. The petitioner was acquitted of all the charges in the criminal case by judgment dated 31.01.2011 passed in G.R. Case No. 788 of 1994/Trial No. 1224 of 1996.

2.2 Subsequently, the petitioner retired from service on attaining the age of superannuation on 31.12.2011 and he was instructed to handover the charges of all files and documents with his custody to Sri Debasis Singh, Junior Clerk. Though the petitioner was reinstated in service, pursuant to order of this Court dated 22.01.2003 passed in OJC No. 10321 of 1996, he was paid his salary in old scale of pay till his retirement, including the period of suspension, but neither his annual increment nor his pay scale was fixed in terms of Orissa Revised Scale of Pay Rules, 1998 and Orissa Revised Scale of Pay Rules, 2008 respectively. The petitioner made several representations, but the same could not be considered.

2.3 Though this Court directed, vide order dated 22.01.2003 passed in OJC No. 10321 of 1996, to conclude the departmental proceedings by the end of the year, 2003, but the same has not been concluded and in the meantime more than 10 years have elapsed and, as such, the petitioner has already superannuated from service w.e.f. 31.12.2011. More so, in the criminal case, which was instituted against him on the identical facts, the petitioner has already been acquitted, but till date in the departmental proceedings no charge sheet has been served on the petitioner nor the enquiry commenced as yet. Thereby, the petitioner is continuing in agony since 1994, despite having been acquitted by the criminal court in the year 2011. Hence this application.

3. Mr. S.N. Sahoo, learned counsel for the petitioner contended that since there is delay in disposal of the disciplinary proceeding initiated against the petitioner, in which no charge sheet has been submitted as yet, therefore, the so called disciplinary proceeding, which is said to be continuing since

more than 18 years, should be dropped/ quashed and the petitioner should be granted the revised scale of pay as per Orissa Revised Scale of Pay Rules, 1998 and Orissa Revised Scale of Pay Rules, 2008 with all annual increments as due and admissible from 1994 onwards. As the petitioner is entitled to get pension, his entire period of service should be regularized for release of the post retirement benefits and for sanction of the pension.

To substantiate his contention he has relied upon the judgments in ***The State of Madhya Pradesh v. Bani Singh,*** AIR 1990 SC 1308 : 1990 (Supp) SCC 738; ***State of Andhra Pradesh v. N. Radhakishan,*** AIR 1998 SC 1833 : (1998) 4 SCC 154; ***P.V. Mahadevan v. M.D., Tamil Nadu Housing Board,*** AIR 2006 SC 207 : (2005) 6 SCC 636; ***G.M. Tank v. State of Gujarat,*** AIR 2006 SC 2129; ***UCO Bank v. Rajinder Lal Capoor,*** AIR 2007 SC 2129; ***Prabodh Chandra Paikray v. Orissa State Electricity Board (deleted) Grid Corporation of Orissa Ltd.,*** 2016 (II) ILR- CUT- 188; *and* ***Bhimsen Routa v. State of Orissa,*** 2018 (II) ILR-CUT-753.

4. Mr. A.K. Mishra, learned Addl. Government Advocate appearing for the State opposite parties contended that since opposite party no.3 has initiated disciplinary proceedings against the petitioner and in compliance of the direction given by this Court dated 22.01.2003 in OJC No. 10321 of 1996 the disciplinary proceedings against the petitioner should have been concluded as expeditiously as possible, preferably by the end of the year, 2003. Admittedly, the same has not been concluded and even no charge-sheet has been submitted against the petitioner concerned and in the meantime the petitioner has also retired from service on 31.12.2011. Therefore, there is delay in conclusion of the disciplinary proceedings initiated against the petitioner, to which this opposite party has no role to play.

5. Pursuant to the notice issued by this Court on 10.12.2013, the opposite party no.3 entered appearance through its counsel Mr. D.P. Das and Associates, but none is present at the time of call nor any counter affidavit has been filed on its behalf. Since it is a matter of 2013 and the petitioner is suffering mental agony from 1994, this Court did not feel inclined to grant any further adjournment and proceeded to decide the matter on the basis of the materials available on record and applying doctrine of non-traverse against opposite party no.3.

6. This Court heard Mr. S.N. Sahoo, learned counsel for the petitioner and Mr. A.K. Mishra, learned Addl. Government Advocate appearing for the

State opposite parties, and perused the record. On the basis of the materials available on record and with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. There is no dispute with regard to the facts delineated above. The only consideration which is to be made in this case is whether the disciplinary proceedings initiated against the petitioner, placing him under suspension, pursuant to order dated 04.08.1994, which was subsequently revoked and fresh order of suspension was passed on 19.09.1996, which has also been set aside by order dated 22.01.2003 passed in OJC No. 10321 of 1996 permitting the petitioner to be reinstated in service and directing opposite party no.3 to conclude the proceedings by the end of the year, 2003, which has not yet been concluded nor even charge-sheet filed, but in the criminal case, which was initiated against him for the selfsame facts, he has been acquitted, whether such proceedings can be allowed to continue for indefinite period or not.

8. The question, that delay in conclusion of the disciplinary proceedings is vitiated, no more remains res integra.

9. In the case of ***Bani Singh*** (supra), taking into consideration the fact of the said case wherein the irregularities which were the subject matter of enquiry is said to have been taken place in between the year 1975-77 and the authorities have came to know about the said irregularities in the month of April, 1977 but waiting for 12 years the departmental proceeding was initiated and the apex Court have been pleased to take into consideration that there is no satisfactory explanation for inordinate delay in issuing the charge memo and as such the departmental proceeding has been directed to be quashed.

10. In this respect, reference may be made to the judgment rendered by the apex Court in the case of ***Abdul Reheman Antulay v. V. R. S. Nayak***, AIR 1992 SC 1701 wherein it has been held that right to speedy trial of an accused if infringed the departmental or judicial proceeding shall be quashed.

11. In the case of ***State of Andhra Pradesh v. N. Radhakrishna*** mentioned supra, wherein at paragraphs 19 and 20 it has been held as follows:

> *"19. It is not possible to lay down any pre-determined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to b e examined on the facts and circumstances in that case. The essence of the*

matter is that the court has to take into consideration all relevant factors and to balance and weight them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when delay is abnormal and there is no explanation for the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether delay has vitiated the disciplinary proceedings the Court has to consider the nature of charge, its complexity and on what account the delay has occurred. if the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the court is to balance these two diverse consideration."

20. In the present case we find that without any reference to records merely on the report of the Director General, Anti-Corruption Bureau, charges were framed against the respondent and ten others, and all in verbatim and without particularizing the role played by each of the officers charged. There were four charges against the respondent. With three of them he was not concerned. He offered explanation regarding the fourth charge but the disciplinary authority did not examine the same nor did it choose to appoint any inquiry officer even assuming that action was validly being initiated under 1991 Rules. There is no explanation whatsoever for delay in concluding the inquiry proceedings all these years. The case depended on records of the Department only and Director General, Anti- Corruption Bureau had pointed out that no witnesses had been examined before he gave his report. The Inquiry Officers, who had been appointed one after the other, had just to examine the records to see if the alleged deviations and constructions were illegal and unauthorised and then as to who was responsible for condoning or approving the same against the bye-laws. It is nobody's case that respondent at any stage tried to obstruct or delay the inquiry proceedings. The Tribunal rightly did not accept the explanations of the State as to why delay occurred. In fact there was hardly any explanation worth consideration. In the circumstances the Tribunal was justified in quashing the charge memo dated July 31, 1995 and directing the State to promote the respondent as per recommendation of the DPC ignoring memos dated October 27, 1995 and June 1, 1996. The Tribunal rightly did not quash these two later memos."

This settled proposition has again been reiterated by the apex Court in the case of ***P.V. Mahadevan*** (supra).

In these two judgments facts related are with respect to delay in conclusion of departmental proceeding and Hon'ble Apex Court after taking into consideration the facts of those cases have been pleased to lay down a

proposition of law that if there is inordinate delay in conclusion of departmental proceeding and the delay is not attributable to the delinquent employee, then the departmental proceeding has to be quashed, but if the delay in conclusion of departmental proceeding is attributable to the delinquent employee the departmental proceeding will not be vitiated.

12. In the case of ***Food Corporation of India and Another v. V.P. Bhatia***, (1998) 9 SCC 131 it has been held that undue delay in initiation of departmental proceeding may cause prejudice to the employee concerned in defending himself and, there, the courts insist that departmental proceeding should be initiated with promptitude and should be completed expeditiously. The question as to whether there is undue delay in initiation of disciplinary proceedings or whether they are being unnecessarily prolonged has to be considered in the light of the facts of the particular case.

13. Referring to the judgments noted above, a coordinate Bench of this Court in ***Pravod Ch. Paikray*** (supra) and also this Court in ***Bhimsen Routa*** (supra) have quashed the departmental proceedings on the ground of delay in their initiation.

14. In the case of ***G.M. Tank*** (supra), the apex Court held that departmental inquiry and criminal proceedings based on identical and similar set of facts and evidence if the delinquent employee is honourably acquitted in a criminal case, the findings to contrary recorded in the departmental proceedings are unfair or oppressive. The fact remains, in this case till date the departmental proceeding has not been initiated by framing charge. As such, no delay can be attributable to the petitioner. Therefore, this case is distinguishable to the extent that the departmental proceeding is pending long since, though the petitioner has been acquitted in the criminal case on the selfsame facts.

15. In the case of ***Rajindra Lal Capoor*** (supra), the apex Court, taking into consideration Section 19 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and Regulation 20(3) of UCO Bank Officer Employees' Service Regulations, 1979, held that the disciplinary proceedings against the retired officers cannot be initiated they can only be continued under Regulation 20. But, admittedly, in the present case, though the petitioner has been retired from service on 31.12.2011 and till date no charge-sheet has been submitted in a disciplinary proceeding, though on the selfsame facts the petitioner has been acquitted in the criminal case on 31.01.2011, the disciplinary proceeding cannot be allowed to continue against the petitioner.

16. Taking into consideration the propositions of law laid down by the apex Court as discussed above, this Court is of the considered view that even though the petitioner was initially placed under suspension on 04.08.1994 and was reinstated in service on 12.06.1996, but again he was placed under suspension on 19.09.1996 and by virtue of the order dated 22.01.2003 passed in OJC No. 10321 of 1996 the order of suspension was set aside and consequentially he was reinstated in service on 04.02.2003 pending contemplation of the disciplinary proceedings, but till date no charge-sheet has been submitted against the petitioner, though he has been acquitted in the criminal case vide judgment dated 31.01.2011. Therefore, for the delay in initiation of the disciplinary proceedings against the petitioner, which is not attributable to him, the same cannot sustain and is hereby quashed. Consequentially, the opposite parties are directed to fix the scale of pay of the petitioner as per the Orissa Revised Scale of Pay Rules, 1998 and Orissa Revised Scale of Pay Rules, 2008 by granting him annual increments with effect from 1994. The opposite parties are also directed to regularize the services of the petitioner and pay him the arrear differential salary and also consequential post retiral benefits and take necessary steps for sanction of the pension in favour of the petitioner. The entire exercise shall be done within a period of three months from the date of communication of this judgment.

17. The writ application is accordingly allowed. No order to costs.

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2019 (II) ILR - CUT- 128

DR. B.R. SARANGI, J.

W.P.(C) NO. 2279 OF 2011

SAKRAJIT DAS & ORS. ……Petitioner

.Vs.

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

SERVICE LAW – Petitioners appointed in different posts during the period from 1997 to 1998 and after following due procedure they were absorbed – Consequentially, their services were regularized and Finance Department granted necessary concurrence and approval for engagement of the petitioners – Consequentially, on the basis of the decision taken, all the existing staff, including the petitioners, were extended with the benefits of Orissa Revised Scale of Pay Rules, 1998 and allowed to get the pay w.e.f. 01.04.1998 – They were also allowed

to draw Dearness Allowance, House Rent and other allowances, as admissible to the State Government employees – But the authority, all on a sudden, on 24.01.2011 passed an order withdrawing the benefits, which were already granted to the petitioners – Whether permissible? – Held, no, once the right has been accrued in favour of an employee, the same cannot be taken away without complying with the principles of natural justice –Therefore, the order impugned cannot sustain in the eye of law on this ground alone. (Para 12)

Case Laws Relied on and Referred to :-

1. AIR 2008 SC 336 : BCPP Mazdoor Sangh Vs. N.T.P.C.
2. AIR 1952 SC 16 : Commissioner of Police, Bombay Vs. Gordhandas Bhanji.
3. AIR 1978 SC 851 : Mohinder Singh Gill Vs. The Chief Election Commissioner, New Delhi.
4. (2008) 4 SCC 144 : Bhikhubhai Vithlabhai Patel & Ors Vs. State of Gujarat.

For Petitioners : Mr. B.Routray, Sr. Adv.
M/s S. Mallick, G.Agarwal, A.K. Das & R.K. Mohunta,

For Opp. Parties : Mr. S. Mishra, Addl. Govt. Adv.
M/s. K.K. Mishra & R.K. Mohanty.

JUDGMENT Decided On: 19.04.2019

DR. B.R. SARANGI, J.

The petitioners, who are working under Orissa State Commission for Women, have filed this application to quash office order dated 24.01.2011 in Annexure-2 passed by the Commissioner-cum-Secretary to the Government of Orissa, Women & Child Development Department, by which the revised scale of pay granted to the petitioners have been withdrawn and they have been allowed to draw consolidated remuneration, i.e., minimum of the pay scale (pre-revised) attached to the post in terms of Finance Department circular dated 07.07.2008.

2. The factual matrix of the case, in brief, is that the petitioners were appointed in different posts under opposite party no.3 during the period from 1997 to 1998 and considering their educational qualification and after following due procedure they were absorbed. From the date of their initial absorption, they had been discharging their duties assigned to them. Consequentially, their services were regularized by the authority concerned. In absence of any Rules for recruitment of staff in the establishment of opposite party no.3, the petitioners were absorbed for a period of more than one decade, as it is a statutory organization and an autonomous body, but the State Government has been granting some aid for the day-to-day management of the Commission.

2.1 The High Power Committee of opposite party no.3 in its meeting held on 11.11.2003 under the chairmanship of Development Commissioner-cum-Additional Chief Secretary took a decision to absorb all the existing staff, including the petitioner, on regular basis and such minutes of the proceedings were also communicated to the Finance Department for approval of the proposal. Accordingly, the Finance Department granted necessary concurrence and approval for engagement of the employees, including the present petitioners. Consequentially, on the basis of the decision taken, all the existing staff, including the petitioners, were extended with the benefits of Orissa Revised Scale of Pay Rules, 1998 and allowed to get the pay w.e.f. 01.04.1998. They were also allowed to draw Dearness Allowance, House Rent and other allowances, as admissible to the State Government employees, pursuant to letter dated 03.02.2009. But the authority, all on a sudden, on 24.01.2011 passed an order withdrawing the benefits, which were already granted to the petitioners, vide letter dated 19.12.2008 in Annexure-2, and directed to pay consolidated remuneration, i.e., minimum of the pay scale (pre-revised) attached to the post in terms of Finance Department circular dated 07.07.2008. Hence this application.

3. Mr. B. Routray, learned Senior Counsel appearing along with Mr. J.Biswal, learned counsel for the petitioners contended that the authorities, while passing office order dated 24.01.2011 in Annexure-5 reducing the benefits, which had been granted to the petitioners, pursuant to letter dated 19.12.2008 in Annexure-2, have not complied with the minimum requirement of principles of natural justice, for which the same is liable to be quashed. It is further contended that when a right had already been accrued in favour of the petitioners, pursuant to the decision taken by the High Power Committee and approval made by the Finance Department and consequentially letter dated 19.12.2008 in Annexure-2 had been issued granting revised scale of pay to the petitioners, the subsequent order passed on 24.01.2011 in Annexure-5, without complying with the principles of natural justice, cannot sustain in the eye of law. It is further contended that the reasons assigned in the counter affidavit filed by opposite party no.2 on 02.01.2012; that the benefits of Orissa Revised Scale of Pay Rules, 1998 allowed to the employees of opposite party no.3 with effect from 01.03.2008, were subsequently withdrawn vide Government order dated 06.08.2009, when lapses were pointed out that daily wage employees as well as persons on consolidated remuneration are not appointed against any post and the benefits of Orissa Revised Scale of Pay Rules, 1998 are not applicable to them, and

that Orissa Revised Scale of Pay Rules, 1998 were allowed to 23 persons working against approved posts, but not to 10 persons working on contractual basis on consolidated remuneration or to those who are not drawing pay in regular scales of pay prior to introduction of Orissa Revised Scale of Pay Rules, 1998; have been taken for the first time before this Court, and in absence of such reasons in the order impugned, the same cannot be taken into consideration. To substantiate his contention, he has relied upon a judgment of the apex Court in ***BCPP Mazdoor Sangh v. N.T.P.C.***, AIR 2008 SC 336.

4. Mr. S. Mishra, learned Additional Government Advocate appearing for the State opposite parties contended that the employees working on daily wage and on consolidated remuneration are not entitled to get the benefit of Orissa Revised Scale of Pay Rules, 1998. When it came to the notice that such benefits have been extended to the petitioners, pursuant to Annexure-2 dated 19.12.2008, the same were withdrawn vide impugned order dated 24.01.2011. It is further contended that since the benefits of Orissa Revised Scale of Pay Rules, 1998 granted to the petitioners have been withdrawn, because some of the employees had not been appointed against regular vacancies and rather they were continuing on contractual basis, they are not entitled to get such benefits, thereby the order dated 24.01.2011 under Annexure-5 so passed by the authority is well justified and the same may not be interfered with at this stage.

5. Though Mr. K.K. Mishra and his associate have entered appearance for opposite party no.3, but when the matter called none was present in the Court. Since it is an old case of the year 2011, this Court, instead of adjourning the matter any further, proceeded to decide the same on the basis of the pleadings available on record.

6. This Court heard Mr. B.Routray, learned Senior Counsel appearing along with Mr. J. Biswal, learned counsel for the petitioners; and Mr. S. Mishra, learned Addl. Government Advocate appearing for the State opposite parties. 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.

7. Undisputedly, Orissa State Commission for Women is an autonomous body. It has been created under the statute. For its smooth management, the petitioners were appointed during the period from 1997 to 1998 and they have been discharging the duties assigned to them according to their qualification. Considering their continuous service, in the proceeding of the

review meeting held on 11.11.2005 in the office chamber of the Development Commissioner-cum-Addl. Chief Secretary to discuss the issues relating to State Commission for Women under agenda no.3 it was decided as follows:-

> *"**03. Downsizing of the existing number of staff of SCW***
>
> *Initiating the discussion, the Chairperson, State Commission for Women apprised the Members present in the Review meeting that the workload of the Commission has been increased considerably over the years and it would be very difficult to dispense with the services of any of the present employees. Threadbare discussion was made on the workload and distribution of work among the employees and it was decided to retain all the existing 33 employees working in the Commission. No reduction is further possible without hampering the work and responsibilities of the Commission. The existing staff position is at Annexure-11. This decision supersedes the previous decision taken in the meeting on 14.12.2004 held under the Chairmanship of Development Commissioner-cum-Addl. Chief Secretary.*
>
> *It was decided to intimate Finance Department accordingly. The three Counsellors are essentially required and the number is the barest minimum taking into account the workload. It would not be possible or desirable to take them to Social Welfare Board. Finance Department may be intimated accordingly."*

8. Pursuant to the above proceedings, office note was placed to the following effect:-

> *"This is regarding sanction of continuance to the following 33 posts existing in the office of Orissa State Commission for Women excluding sanctioned posts of one Senior Field Officer (in the rank of D.S.P.) and one Assistant Field Officer (in the rank of S.I. of Police) during current year as per decision taken in the High Power committee meeting held on 11.11.2005 under the Chairmanship of Development Commissioner-cum-Additional Chief Secretary vide proceedings of the meeting at pages 203-200/C (Flag-A) and payment of ORSP 1998 to O.S.C.W. employees.*

1.	*Accountant-cum-Store Keeper*	*01*	*4000-6000*
2.	*Stenographers*	*03*	*4000-6000*
3.	*Junior Clerks*	*07*	*3050-4590*
4.	*Legal Assistants*	*02*	*5500-9000*
5.	*Special Asst. to Chairperson*	*01*	*5500-9000*
6.	*Research Assistant*	*01*	*4750-7500*
7.	*Diarist*	*01*	*3050-4590*
8.	*Despatcher*	*01*	*3050-4590*
9.	*Typist*	*01*	*3050-4590*
10.	*Drivers*	*03*	*3050-4590*
11.	*Counsellors*	*03*	*Rs.6000/- p.m.*
12.	*Peons*	*08*	*2550-3200*
13.	*Sweeper-cum-Night Watchman*	*01*	*2550-3200*
	Total	***33***	

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The proceedings of the meeting has been communicated to Finance Department at page 256/C and the Hon'ble Minister, Finance has also approved the proposal wide page 204/C (Flag-B).

The additional annual financial burden will be Rs.16.26 lakhs as calculated at Flag-C on account of ORSP, 1998.

The continuance of the above posts with O>R.S.P. 1998 for the O.S.C.W. may be agreed to in principle with Government Orders after which concurrence of Finance and P & C Department will be taken as suggested by F.A.-cum-Joint Secretary at Page 130/N."

9. On 21.05.2008, the Finance Minister approved the above note to the following effect:-

"Recall my order dt.20.12.2005 at P.204/C. Since appointments are made by Commission retrenchment will be difficult and may lead to further complications. Besides employees of Commission are no Government servants. As is evident, in absence of rules for recruitment of Staffs to be framed by AD (in pursuance with Section 5 of OSCW Act 1993), the Commission went on appointment to carry out their statutory activities. In this background neither the Commission nor the employee are to be blamed, for irregular recruitment, if committed.

However the High Level Committee dt.11.11.2005 (P.203/C of linked File No.9/2007) has recommended to retain all existing 33 employees basing on which Finance Department has approved to clear their dues (at P.204/C of Linked File).

Further increase to 36 posts may not be prudent, in view of earlier observation of FD, that staff strength is excess while comparing to the staff position of other States.

On other reference of AD, for enhancement of Pay, it is seen that there are different types of payments i.e. Pay Scales, contractual payment etc. Commission is a statutory autonomous body and it is grantee institution of Government. The nature and activity of Commission is such that it has no other Source than Government Grant. But that limitation in their capacity may not consist the remuneration of its employees when the Commission is discharging a statutory function entrusted by Government. In this perspective, the entire issues are to be looked into.

Many employees are getting Pay Scales in ORSP Rates. When pay is revised in Government demand of hike of Pay is quite natural. Since the present pay structure prevalent in Government is ORSP-98, they may be allowed to get pay in the same rate of ORSP-98, but w.e.f. 01.04.2008 as outlined by AD at P.131/N of linked file.

The AD has also suggested the monthly remuneration of Counselors @ Rs.6000/- p.m. Since the job of Counselors are vital input in redressal of women issues, the suggestion of AD at P.131/N of linked file is accepted but the new rate of Rs.6000/- P.M. may be effective from 01.04.2008."

10. Pursuant to the above approval made by the Finance Minister, the petitioners were extended with the benefits of Orissa Revised Scale of Pay Rules, 1998 by passing an order on 19.12.2008 giving effect from 01.04.2008 and, as such, they were enjoying such benefits from the date of passing of the office order dated 19.12.2008. But all on a sudden, vide letter dated

24.01.2011, the benefits granted to the petitioners, were withdrawn stating inter alia as follows:-

> *"The three (3) nos. of Counselors are eligible to get remuneration @ Rs.6,000/- per month w.e.f. 01-04-2008.*
>
> *The three (3) casual employees of Orissa State Commission for Women, namely (1) Sri Dillip Kumar Mohapatra, Jr. Clerk (2) Sri Sisir Kumar Dash, Jr.Clerk and (3) Sri Bibhu Prasad Swain, Peon who were retrenched are to be re-engaged in the office of the Orissa State Commission for Women from the date of their joining in the office of Orissa State Commission for Women.*
>
> *All the ten (10) nos. of casual employees of Orissa State Commission for Women including the aforesaid three retrenched employees are to continue in the office of Orissa State Commission for Women and will get consolidated remuneration i.e. minimum of the pay scale (pre-revised) attached to the post in terms of F.D. circular dated 07-07-08.*
>
> *This has been concurred in by Finance Department on 05-09-2008 vide their UOR No.6-SS II(9) dated 20-06-2007 and UOR No.13-SS II(9) dated 19-8-2008."*

11. The reasons for withdrawal of such benefits are that some of the casual employees were granted benefit of regular scale of pay and thereby they have been fixed consolidated remuneration, i.e., minimum of the pay scale (pre-revised) attached to the post in terms of Finance Department circular dated 07.07.2008. But fact remains, 33 employees of the Commission had been extended with the benefits, pursuant to decision taken by the review committee and duly approved by the Finance Department. Consequentially, a right has been accrued in favour of the petitioners and such right cannot and could not have been withdrawn without following due procedure of law, meaning thereby, without following the principles of natural justice.

12. A similar question had come question had come up for consideration before the apex Court in ***BCPP Mazdoor Sangh*** (supra) and in paragraphs 29 and 30 of the judgment it was held as follows:-

> ***"29**. The Government or its instrumentality cannot alter the conditions of service of its employees and any such alteration causing prejudice cannot be effected without affording opportunity of pre-decisional hearing and the same would amount to arbitrary and violative of Article 14. As pointed out earlier, in the case on hand, the employees are neither party to tripartite Agreement nor they have been heard before changing their service condition. Therefore, the action of the management is violative of Article 14 of the Constitution of India. Similar view has been taken by this Court in H. L. Trehan and others vs. Union of India and others, (1989) 1 SCC 764. In para 11 of the judgment, this Court observed as under :*

".....It is now a well established principle of law that there can be no deprivation or curtailment of any existing right, advantage or benefit enjoyed by a Government servant without complying with the rules of natural justice by giving the Government servant concerned an opportunity of being heard. Any arbitrary or whimsical exercise of power prejudicially affecting the existing conditions of service of a Government servant will offend against the provision of Article 14 of the Constitution. Admittedly, the employees of CORIL were not given an opportunity of hearing or representing their case before the impugned circular was issued by the Board of Directors. The impugned circular cannot, therefore, be sustained as it offends against the rules of natural justice."

***30**. It is useful to refer to the judgment of this Court in Jawaharlal Nehru University vs. Dr. K. S. Jawatkar and others, 1989 Supp (1) SCC 679. In this case, Jawaharlal Nehru University was the appellant before this Court. The main contention of the appellant-University was that the respondent was appointed at the Centre of Post-Graduate Studies, Imphal and when the Centre was transferred to Manipur University his services were automatically transferred to that University and consequently he could not claim to be an employee of the appellant-University. The argument proceeds on the assumption that the Centre of PG studies at Imphal was an independent entity which existed by itself and was not a department of the appellant-University. Rejecting the said contention, this Court held thus:*

"7. . . . The Centre of Post-Graduate Studies was set up at Imphal as an activity of the appellant-University. To give expression to that activity, the appellant-University set up and organised the Centre at Imphal and appointed a teaching and administrative staff to man it. Since the Centre represented an activity of the appellant-University the teaching and administrative staff must be understood as employees of the appellant-University. In the case of the respondent, there can be no doubt whatever that he was and continues to be, an employee of the appellant-University. There is also no doubt that his employment could not be transferred by the appellant-University to the Manipur University without his consent notwithstanding any statutory provision to that effect whether in the Manipur University Act or elsewhere. The contract of service entered into by the respondent was a contract with the appellant-University and no law can convert that contract into a contract between the respondent and the Manipur University without simultaneously making it, either expressly or by necessary implication, subject to the respondent's consent. When the Manipur University Act provides for the transfer of the services of the staff working at the Centre of Post-graduate Studies, Imphal, to employment in the Manipur University, it must be construed as a provision enabling such transfer of employment but only on the assumption that the employee concerned is a consenting party to such transfer. It makes no difference that the respondent was not shown in the list of Assistant Professors of the appellant-University or that the provision was not indicated in its budget; that must be regarded as proceeding from an erroneous conception of the status of the respondent. The position in law is clear, that no employee can be transferred, without his consent, from one employer to another. The consent may be express or implied. We do not find it necessary to refer to any case law in support of this conclusion.

8. Inasmuch as the transfer of the Centre of Post-graduate Studies from the appellant-University to the Manipur University could not result in a transfer of the employment of the respondent from the one to the other, it must be concluded that the respondent continues in the employment of the appellant-University....."

It is clear that no employee could be transferred without his consent from one employer to another. Therefore, in view of the aforesaid rulings the transfer of employees from NTPC - a public sector undertaking to BALCO which is a private organization is bad in law."

In view of the law discussed above, once the right has been accrued in favour of an employee, the same cannot be taken away without complying with the principles of natural justice. Therefore, the order impugned in Annexure-5 dated 24.01.2011 cannot sustain in the eye of law on this ground alone.

13. However, a further contention was raised that the opposite parties have justified their action with reference to the counter affidavit filed on 02.01.2012 on behalf of opposite party no.2, whereas the order impugned does not indicate any such reasons. Therefore, the opposite parties are precluded from supplementing or supplanting any other reasons, bereft of reasons available in the order impugned, by way of filing counter affidavit, in view of the law laid down by the apex Court in **Commissioner of Police, Bombay v. Gordhandas Bhanji**, AIR 1952 SC 16, wherein the apex Court held as follows :

"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older."

14. In view of the ratio decided by the ***Gordhandas Bhanji*** (supra), the apex Court in ***Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi,*** AIR 1978 SC 851, in paragrapgh-8 has held as follows:

" …… when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.

Orders are not like old wine becoming better as they grow old."

Similar view has also been taken in **Bhikhubhai Vithlabhai Patel and others v. State of Gujarat**, (2008) 4 SCC 144.

15. In view of the facts and law, as discussed above, this Court is of the considered view that the order dated 24.01.2011 in Annexure-5 cannot sustain in the eye of law and accordingly the same is liable to be quashed and

is hereby quashed. The petitioners are entitled to get the benefits in terms of the office order dated 19.12.2008 in Annexure-2. Therefore, after excluding the benefits already paid, the opposite parties are directed to pay to the petitioners the balance dues without causing any further delay, preferably within a period of four months from the date of communication of this judgment.

16. The writ application is thus allowed. There shall be however no order as to costs.

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2019 (II) ILR - CUT- 137

DR. B.R. SARANGI, J.

W.P. (C) NO. 3387 OF 2005

PURNA CHANDRA PRADHAN …… Petitioner

.Vs.

CESCO, REPRESENTED THROUGH THE CHIEF EXECUTIVE OFFICER, BHUBANESWAR & ORS. ….…Opp. Parties

SERVICE LAW – Petitioner joined as Lineman-C on 22.04.1970 in the establishment of erstwhile Orissa State Electricity Board – After 9 years of service, he sustained electric burn, while discharging his official duty and suffered amputation of both arms – However as a compassionate measure he was allowed to continue in service even though he lost two limbs of his body for the cause of the establishment and no compensation was given – After Orissa Electricity Reforms Act came into force he was made to retire before the actual date of superannuation by the subsequent employer – Whether acceptable ? Held, No, as the erstwhile Orissa State Electricity Board considering his permanent incapacitation, allowed him to continue in service till he attained the age of superannuation and he was advised, neither to opt for Employees Voluntary Retirement Scheme, nor to claim compensation under the Workmens' Compensation Act.

"The entire action has been taken against the petitioner contrary to the commitment made by his earlier employer and as such, he had 7 years to go for retirement. Without granting any compensation for the loss caused to him while in official duty, the action which has been taken now is contrary to the provisions of law. Considering from other angle, if a person has discharged his duty and sustained some injury, which led to permanent incapacitation, and if he is thrown out

of the job, it will demoralize the employee, more particularly, when the previous employer had shown a good gesture and allowed him to continue till his age of superannuation. Without paying any compensation as due and admissible to him in accordance with law, the subsequent employer under the Transfer Scheme Rules, 1998 cannot act disadvantage to the service of the petitioner, who should have allowed the petitioner to continue till attaining the age of superannuation as per Regulation-3 of Regulation 1979. The petitioner was discharging his duty considering the commitment made by the earlier employer that he would continue till the age of superannuation, which would be a compensation for him for loss caused to him, and accordingly, he planned out the entire life scheme. Keeping in view the aforementioned parameters, this Court is of the considered view that retirement of the petitioner on payment of compensation of 3 months' wage/salary in lieu of 3 months' notice amounting to Rs.27,603/-, pursuant to office order dated 18.07.2003, on completion of 30 years of service/already attained the age of 50 years, who suffered loss of permanent incapacitation for the cause of establishment, on the basis of the decision taken by the Divisional Review Committee, cannot sustain in the eye of law. Accordingly, the office order quashed." (Paras 12 to 14)

Case Laws Relied on and Referred to :-

1. AIR 2000 SC 1596 : Balbir Kaur Vs. Steel Authority of India Ltd.
2. AIR 1965 SC 1069 : Jeejeebhoy Vs. Asst. Collector, Thana.
3. AIR 1969 SC 634 : State of Gujurat Vs. Shantilal Mangal Das.
4. (2003) 7 SCC 197 : KSRTC Vs. Mahadeva Shetty.
5. AIR 1998 Orissa 159 : Kiranbala Bandapat Vs. Secy. Grid Corporation of Orissa Ltd.

For Petitioner : M/s. P. Acharya, Sr. Adv.
M/s S.R. Pati, B. Dash & (Ms.) G. Patra,

For Opp. Parties : M/s. B.K. Patnaik, P.K. Sahoo, P. Sinha,
R.K. Nayak & S.S. Parida.

JUDGMENT Date of Hearing: 16.04.2019 : Date of Judgment: 25.04.2019

DR. B.R. SARANGI, J.

The petitioner, who was an erstwhile employee of Orissa State Electricity Board (OSEB) and after reformation whose services were placed under the opposite parties, has filed this writ petition to quash office order dated 18.07.2003 in Annexure-1 issued by opposite party no.3 retiring him from service on completion of 30 years of service/already attained the age of 50 years under CESCO, w.e.f.31.07.2003 A.N. paying him 3 months' wage/salary in lieu of 3 months' notice amounting to Rs.27,603/-, as per Regulation-3 of OSEB Employees Age of Retirement Regulation, 1979 applicable to CESCO under the Transfer Scheme Rules, 1998.

2. The factual matrix of the case, in brief, is that the petitioner joined as Lineman-C on 22.04.1970 in the establishment of erstwhile Orissa State

Electricity Board. After completing only 9 years of service, he sustained electric burn, while discharging his official duty on 13.07.1979. Consequentially, he faced amputation of both the arms and discharged from S.C.B. Medical College and Hospital, Cuttack on 28.04.1979. But, he was allowed to continue in service even though he lost two limbs of his body for the cause of the establishment. After Orissa Reforms Act came into force, OSEB undergone reformation and accordingly, the petitioner continued under the opposite parties. In Regulation-3 of OSEB Employees Age of Retirement Regulation, 1979 (in short "Regulation 1979") which was framed in exercise of powers conferred by sub-section (c) of Section 79 of the Electricity (Supply) Act, 1948, the age of retirement of an employee has been specified. While continuing in service under the opposite parties, as per Transfer and Reforms principle, the service benefits are admissible to the petitioner, cannot be disadvantage to him. Therefore, as per the provisions contained in Regulation 1979, the petitioner was to continue till he attained the age of retirement. But, while he was so continuing, he received an office order dated 18.07.2003 retiring him from service with effect from 31.07.2003 A.N. on completion of 30 years of service/already attained the age of 50 years, taking recourse to the provisions laid down under Regulation-3 of Regulation, 1979, which is applicable to CESCO under the Transfer Scheme Rules, 1998 paying 3 months' wage/salary in lieu of 3 months' notice amounting to Rs.27,603/-. Hence this application.

3. Miss. G. Patra, learned counsel, appearing on behalf of Mr. P. Acharya, learned Senior Counsel, for the petitioner contended that the impugned order dated 18.07.2003 passed by the authority concerned is illegal, arbitrary and violative of Articles-14, 16 and 300-A of the Constitution of India. It is further contended that before retirement of the petitioner, the basic requirement, i.e., the principle of natural justice has not been complied with. As such, the petitioner has been prematurely retired from service though he had further 7 years of service left for superannuation. While superannuating the petitioner from service, the authority lost sight of the fact that he had lost two valuable limbs and he was permanently incapacitated for the cause of the opposite parties. Therefore, retiring him prematurely on completion of 30 years service/already attained the age of 50 years cannot have justification, save and except the petitioner should have been allowed to continue till he attained the age of retirement as per Regulation-3 of Regulation 1979. She further contended that due to incapacitation of the petitioner, he was allowed to continue in service on

compassionate ground till superannuation and he was advised neither to opt for Employees Voluntary Retirement Scheme, as was being granted to other employees of the opposite parties, nor to claim compensation under the Workmens' Compensation Act, though he was otherwise entitled to claim adequate compensation for loss of two limbs depending upon the degree of incapacitation. The petitioner did not make any such claim, as because the employer had given assurance that he would continue in service till normal age of superannuation. The date of birth of the petitioner being 04.08.1951, normally he should have retired from service w.e.f. 31.08.2009. But, the action of the authorities in prematurely retiring the petitioner from service by issuing office order dated 18.07.2003, when he had to undergo further 7 years of service, is illegal, arbitrary and contrary to the law. Hence, the petitioner seeks for quashing of the office order dated 18.07.2003.

4. Mr. S.S. Parida, learned counsel appearing for the opposite parties, referring to counter affidavit filed by opposite party no.3, contended that the retirement of the petitioner has been done in compliance of the provisions contained under Clause-3(b)(ii) of the Regulation 1979. Thereby, no illegality or irregularity has been committed by issuing the office order dated 18.07.2003 paying the petitioner 3 months wage/salary in lieu of 3 months notice amounting to Rs.27,603/-. It is further contended that CESCO has adopted Regulation 1979 for its employees. On a review being made on the performance and capabilities of its employees, the petitioner was called vide letter dated 14.05.2003 to appear before the Divisional Review Committee held on 03.06.2003, pursuant to which he appeared before the said Committee on the scheduled date. Though the Committee advised him for voluntary retirement, he did not comply with the same. Consequentially, the order impugned in Annexure-1 dated 18.07.2003 was issued. The Committee, having satisfied that the petitioner was incapable to discharge the duty assigned to his post took such step, thereby no fault can be found with the authority in retiring the petitioner from service in consonance with Clause-3(b)(ii) of Regulation 1979. Accordingly, he prays for dismissal of the writ petition.

5. This Court heard Miss. G. Patra, learned counsel for the petitioner and Mr. S.S. Parida, learned counsel appearing for the opposite parties. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission as it is an old case of the year 2005.

6. The admitted fact is that the petitioner joined in service on 22.04.1970 and while discharging the official duty on 13.07.1979, he faced electric burn injury. Consequentially, there was amputation of his both arms and he was discharged from SCB Medical College and Hospital on 28.04.1979. The employer, considering his permanent incapacitation, allowed him to continue in service till he attained the age of superannuation and he was advised, neither to opt for Employees Voluntary Retirement Scheme, nor to claim compensation under the Workmens' Compensation Act. But, due to reformation in electricity organization, the services of the petitioner were placed under the opposite parties and consequentially, he was to continue till 31.08.2009 as his date of birth is 04.08.1951.

7. The Grid Corporation promulgated an Early Voluntary Retirement Scheme known as E.V.R.S. vide Corporate office circular No.2/97 dated 25.08.1997. The scheme is to provide the employee of the company an opportunity to seek early retirement with commensurate monetary benefit to achieve optimum manpower utilization and to rationalize manpower of the company in the light of the age and skill to increase productivity. The said scheme postulates E.V.R.S. benefits in clause-6.0 and the normal benefits in clause-7.0. Pursuant to such Scheme, most of the employees of the CESCO opted for early retirement those who had only less than four to five years of service for superannuation since they were getting salary for 54 months. But, the petitioner did not opt for the same as he was assured not to take voluntary retirement and was allowed to continue in service till the normal age of superannuation. Therefore, the petitioner was deprived of getting the benefit of the Scheme. The petitioner, who became physically incapacitated for his entire life because of electric burn, while discharging his official duty, he was permitted to remain in service till the age of his superannuation otherwise he would have been compensated for the loss of his two limbs for the establishment. But, the loss sustained by him cannot be compensated. Therefore, the erstwhile employer showing a good gesture to him advised him not to opt for any voluntary retirement scheme but to continue in service till attaining the age of superannuation as per Regulation 1979.

8. In exercise of power conferred under sub-section (c) of Section 79 of the Electricity (Supply) Act, 1948, the Orissa State Electricity Board has framed regulation called "The Orissa State Electricity Board Employees Age of Retirement Regulations, 1979". Regulation-3 of Regulation 1979 states as follows:

"3.(a) The age of retirement of an employee (sic) is 58 years;

(b) The age of retirement of an employee in Category IV is 60 years;

Provided that

(i) an employee may retire at any time after completing 30 years of service or after attaining the age of 50 years by giving notice in writing to the appointing authority at least three months before the date on which he wishes to retire and it shall be open to the appointing authority to withhold permission to such an employee who seeks to so retire if he is under suspension of if any disciplinary proceedings against him are pending or is contemplation;

(ii) the appointing authority or the authority to which the appointing authority is administratively subordinate may also require an employee to retire at any time, after he completes 30 years of service or attains the age of 50 years by giving three months' notice in written to the employee, for reasons to be recorded in writing that it is inexpedient or against the interest of the Board to continue to employ him in service; provided that an employee may be retired under this regulations forthwith without complying with the requirement of notice and on such retirement he shall be entitled to an amount equal to three months' wages/salary. The decision of the appointing authority or the authority to which the appointing authority is administratively sub-ordinate requiring an employee to retire from service shall be final and binding on the employee".

9. On reorganization, the services of the petitioner were placed under opposite parties-CESCO, which adopted the Regulation 1979 of OSEB. Therefore, the provisions laid down under Regulation 1979 are applicable to CESCO under the Transfer Scheme Rules, 1998. Accordingly, the petitioner, who had completed 30 years of service/attained the age of 50 years, was called upon to appear before the Divisional Review Committee pursuant to letter dated 14.05.2003 to be held on 03.06.2003. In response to same, the petitioner appeared before the Committee on the scheduled date. Though the Committee advised him to go for voluntary retirement, but as per assurance given by the previous employer that he would continue till the age of superannuation, the petitioner did not opt for such retirement. Consequentially, office order dated 18.07.2003 was issued retiring him from service w.e.f. 31.07.2003 A.N. on payment of 3 months' wage/salary in lieu of 3 months' notice amount to Rs.27,603/-. Accordingly, the petitioner was compelled to retire with short notice which he sought for quashing.

10. The entire action has been taken against the petitioner contrary to the commitment made by his earlier employer and as such, he had 7 years to go for retirement. Without granting any compensation for the loss caused to him while in official duty, the action which has been taken now is contrary to the provisions of law. Considering from other angle, if a person has discharged his duty and sustained some injury, which led to permanent incapacitation,

and if he is thrown out of the job, it will demoralize the employee, more particularly, when the previous employer had shown a good gesture and allowed him to continue till his age of superannuation. Without paying any compensation as due and admissible to him in accordance with law, the subsequent employer under the Transfer Scheme Rules, 1998 cannot act disadvantage to the service of the petitioner, who should have allowed the petitioner to continue till attaining the age of superannuation as per Regulation-3 of Regulation 1979. The petitioner was discharging his duty considering the commitment made by the earlier employer that he would continue till the age of superannuation, which would be a compensation for him for loss caused to him, and accordingly, he planned out the entire life scheme.

11. While considering compassionate appointment under the Steel Authority of India Limited, the apex Court in ***Balbir Kaur v. Steel Authority of India Ltd.,*** AIR 2000 SC 1596 held in paragraph-8 as follows:

> *"8. xxxxxx It is in this factual backdrop, the issue needs an answer as to whether we have been able to obtain the benefit of constitutional philosophy of social and economic justice or not. Have the lofty ideals which the founding fathers placed before us any effect in our daily life-the answer cannot however but be in the negative-what happens to the constitutional philosophy as is available in the Constitution itself, which we ourselves have so fondly conferred on to ourselves. The socialistic pattern of society as envisaged in the constitution has to be attributed its full meaning."*

Further, in paragraph-13 of the said judgment, the apex Court held as follows:

> *"13. The sudden jerk in the family by reason of the death of the bread earner can only be absorbed by some lump sum amount being made available to the family-This is rather unfortunate but this is a reality. The feeling of security drops to zero on the death of the bread earner and insecurity thereafter reigns and it is at that juncture if some lump sum amount is made available with a compassionate appointment, the grief sticken family may find some solace to the mental agony and manage its affairs in the normal curse of events. It is not that monetary benefit would be the replacement of the bread earner, but that would undoubtedly bring some solace to the situation."*

The above observation made by the apex Court, so far as rehabilitation appointment is concerned, can mutatis mutandis apply to the present context, in view of the fact that the petitioner was permanently incapacitated, while he was discharging his official duty. Thereafter, he was rendering service with the hope that he will retire at the age of

superannuation as per Regulation-3 of Regulation 1979. The socialistic pattern of society, as envisaged in the Constitution, has to be attributed its full meaning. If the bread earner of the family will be thrown out of his employment all on a sudden by paying three months salary, knowing fully well that for the cause of establishment he had sustained permanent incapacitation, without paying any compensation as due and admissible to him, this Court cannot remain as mute spectator in the matter of denial of relief to such an employee, who has suffered for the cause of establishment. As such, the sudden jerk in the family of the petitioner by reason of his permanent incapacitation was absorbed with assurance given by the employer that he would continue till the age of superannuation. In the process, the grief stricken family found some solace to the mental agony and managed its affairs in the normal course of events. Therefore, whatever loss was sustained by the petitioner had only been compensated by allowing him to continue till he attained the age of superannuation so that his family would not suffer.

12. Admittedly, for the loss sustained by the petitioner, no compensation was paid to him. The only compensation which was paid to the petitioner was that assurance given by the employer to continue in service till he attained the age of superannuation, as per Regulation-3 of Regulation, 1979.

13. In ***Jeejeebhoy v. Asst. Collector, Thana***, AIR 1965 SC 1069, the apex Court held as follows:

> *"The expression 'compensation' means 'just equivalent of what the owner has been deprived of '."*

In ***State of Gujurat v. Shantilal Mangal Das***, AIR 1969 SC 634, the apex Court held as follows:

> *" 'Compensation' means anything given to make things equivalent, a thing given to or to make amends for loss, recompense, remuneration or pay. It need not therefore necessarily be in terms of money."*

Similar view has also been taken by the apex Court in ***KSRTC v. Mahadeva Shetty***, (2003) 7 SCC 197.

In ***Kiranbala Bandapat v. Secy. Grid Corporation of Orissa Ltd***., AIR 1998 Orissa 159, this Court held as follows:

> "*'Compensation' means anything given to make things equivalent, a thing given or to make amends for loss, recompense, remuneration or pay; it need not, therefore, necessarily be in terms of money, because law may specify principles on which and manner in which compensation is to be determined as given. Compensation is an act which a Court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order*

that thereby the person damified may receive equal value for his loss or be made whole in respect of his injury; something given or obtained as equivalent; rendering of equivalent in value or amount an equivalent given for property taken or for an injury done to another, a recompense in value; a recompense given for a thing received recompense for whole injury suffered, remuneration or satisfaction for injury or damage or every description. The expression 'compensation' is not ordinarily used as an equivalent to 'damage' although compensation may often have to be measured by the same rule as damages in an action for a breach."

14. Keeping in view the aforementioned parameters, this Court is of the considered view that retirement of the petitioner on payment of compensation of 3 months' wage/salary in lieu of 3 months' notice amounting to Rs.27,603/-, pursuant to office order dated 18.07.2003, on completion of 30 years of service/already attained the age of 50 years, who suffered loss of permanent incapacitation for the cause of establishment, on the basis of the decision taken by the Divisional Review Committee, cannot sustain in the eye of law. Accordingly, the office order dated 18.07.2003 in Annexure-1 is liable to be quashed and is hereby quashed.

15. The opposite parties are directed to allow the petitioner to continue in service till he attains the age of superannuation in accordance with Regulation-3 of Regulation 1979, which is applicable to CESCO under the Transfer Scheme Rules, 1998, and grant all consequential service and monetary benefits as due and admissible to him. As he has already attained the age of superannuation on 31.08.2009, his date of birth being 04.08.1951, the differential amount, after adjusting the amount already received by him, shall be paid to the petitioner. The entire exercise shall be completed within a period of three months from the date of production/communication of this judgment.

16. The writ petition is accordingly allowed. However, there shall be no order as to costs.

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2019 (II) ILR - CUT- 145

D. DASH, J.

CRLREV NO. 666 OF 2018

RAJENDRA ACHARYA @
RAJENDRA KUMAR ACHARYA & ORS. .....Petitioners

.Vs.

SMT. DHARITRI MISHRA .....Opp. Party

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 17 and 19 – Provisions under – S*hared household* – Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same and shall not be evicted or excluded from the shared household or any part of it by the respondent save and except in accordance with the procedure established by law – Challenge is made to the order of restraint by the courts below directing the petitioner not to dispossess the Opp. party from the shared household – Question arose as to when the aggrieved person stands dispossessed from the shared household and whether the Court can redress the grievance of the aggrieved person so as to put the cloack back by putting her in possession restoring the position of the said aggrieved person as it was before the said dispossession as complained of – Held, Yes – Circumstances and reasons indicated.

(Paras 7 & 8)

For Petitioners : M/s.Smruti Ranjan Mohapatra, B.R.Mohanty, L.Pattnaik, M.K.Swain, S.Harichandan, S.Mohanty, N.Sahoo & M.K.Modi.

For Opp. Party : Mr.Dharanidhar Nayak, Sr. Adv. M/s.Balaram Nayak, A.Bhuyan, B.R.Swain, D.Jeeban Mishra.

JUDGMENT Date of Hearing :26.02.2019 : Date of Judgment :12.03.2019

D. DASH, J.

The present revision arises from the common order dated 31.7.2018 passed by the learned Sessions Judge, Cuttack in Criminal Appeal No.36 of 2018 and Criminal Appeal No.38 of 2018, which had been filed assailing the order dated 27.3.2018 passed by the learned J.M.F.C., Cuttack in D.V. Misc. Case No.294 of 2014 (T.R. No.1505 of 2017), a proceeding under the Protection of Women from Domestic Violence Act, 2005 (for short, hereinafter called as ‘ the PWDV Act’).

By the said order, in the appeals; one filed by the petitioner-husband and the other by the opposite party no.1-wife, the lower appellate court, while confirming the residence order passed by the court below, has granted the monetary relief of maintenance in favour of opposite party no.1-wife to the tune of Rs.15,000/- commencing from the month of July, 2018 to be paid by the petitioner by the first week of every month.

2. Coming to the prayer made in this revision, it is seen that the same is confined to the direction given in favour of the opposite party no.1 for living

in her in-law's house and restraining the petitioner from dispossessing the opposite party from the shared household.

3. Heard learned counsel for the petitioners and the opposite party. Perused the impugned orders.

4. The restraint order passed by the court below as confirmed by the appellate court runs as under:

> *"(a) the opposite parties (the petitioners herein before this court") are prohibited from committing any act of domestic violence, aiding or abetting in the commission of acts of domestic violence against the aggrieved person under section 18 of the Act; and*
>
> *(b) the aggrieved person is directed to live in her in-laws house at Dolamundai and the opposite parties are restrained from the shared household."*

5. The shared household has been defined in section 2(s) of the PWDV Act and it reads as under:

> *"2.(s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household."*

Sub-section (1) of section 17 of the said Act provides a non-obstante clause that notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same. Sub-section(2) of section 17 of the said Act provides that the wife (aggrieved person) shall not be evicted or excluded from the shared household or any part of it by the respondent save and except in accordance with the procedure established by law.

6. Keeping in view the aforesaid provisions of law, let us come to the main plank of the argument advanced by the learned counsel for the petitioner. To put it, upon making reference to the provision of section 19 of the PWDV Act, it was his submission that the court, upon arriving at a satisfaction that the domestic violence has taken place, has the power to pass a residence order restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the

shared household, whether or not the respondent has a legal or equitable in the shared household. He, therefore, submitted that once the aggrieved person has been dispossessed and is no more remaining in the shared household, the court has no power to restore or alter the position as it was before and thus in such circumstance which is stands in the case at hand, the court has no power to restore the status quo ante.

In refuting the above contention, it was the submission of the learned counsel for the opposite party-wife that when the provision is clear that the court has the power to pass order to restrain the errant person/s in any other manner from creating disturbance in the possession of the shared household by the aggrieved person, it has all the power to restore the status by passing a restraint order against those person by way of a direction in a mandatory form, in appropriate case. He, therefore, submitted that on the admitted facts and circumstances of the case, the impugned order as to the residence of the opposite party in the shared household is not liable to be set at naught in exercise of the revisional jurisdiction of this Court.

7. On a plain reading of clause (a) of sub-section (1) of section 19 of the PWDV Act, it is seen that the court is empowered to restrain the parties from dispossessing and also restrain the parties in any other manner in disturbing the possession of the aggrieved person from the shared household. So, the question arises for answer is as to when the aggrieved person stands dispossessed from the shared household whether the Court in seisin of the proceeding under the PWDV Act can redress the grievance of the aggrieved person so as to put the cloack back by putting her in possession restoring the position of the said aggrieved person as it was before the said dispossession as complained of.

8. Before going to search out the answer, it has to be kept in mind that the Parliament, having though the domestic violence to be human rights issue as seriously standing as a blockade to the development; further keeping in pace with the recommendations of the United Nations Committee on Convention on Elimination of All forms of Discrimination Against Women (CEDAW) and being aware that the civil law of the land either do not address this phenomenon on domestic violence in its entirety as also the loss, the position that the law in force are not capable enough to take care of these situations emerging in the present day taking different dimensions being evolved in view of the technical and other developments; enacted the PWDV Act. In doing so, the rights guaranteed under Articles 15 and 21 of the Constitution to protect the women from being victims of the domestic

violence and to prevent the occurrence of domestic violence in the society, have been sought to be.

The PWDV Act provides for a higher rights and remedies in favour of the aggrieved person. Not only that they acquire a right to be maintained but also thereudner their right of residence stands protected and that even extends over the peroperties in which the husband has a share.

In this context, the word "or" appearing in between the word 'dispossessing' and 'in any other manner disturbing the possession.....' in clause (a) of sub-setion(1) of section 19 has its own significance that had it been in the mind of the legislature that the court was to be only given the power to restrain the violators before the aggrieved person is dispossessed, the subsequent sentences which is disjunctive of the previous in view of the appearance of the word "or" that the court also can pass a restraint order against those violators in any other manner from disturbing the possessing would not have been so placed. Certainly, if a person is in possession of a property, he cannot be said to have been dispossessed merely by a fugitive or stray act which is not legal and thereby those players cannot be said to have remained in possession getting the same shielded. It may so appear to be physical with a very temporary character but that the dispossession at the hands of those players cannot be taken to be their possession in the eye of law so as to say that the prior possessor has been dispossessed for ever and cannot be allowed to so possess again. It may hold water in case the remedial measure sought for is within a reasonable timeframe but not after much delay when that factum of delay in moving for appropriate remedy would enure to the benefit of those actors that they can be said to have remained in possession shunning the character as such wrongdoers. The provision thus in my considered view being given a purposive interpretation, is to come to the rescue of the aggrieved person in such a situation where the dispossession is complained of soon before the initiation of the action.

Thus, I am afraid to accept the submission of the learned counsel for the petitioners being of the considered view that its acceptance would run counter to the aforesaid statutory scheme standing on the way of achievement of the avowed purpose and objective in serving and setting an orderly society.

9. The petitioner no.1 and the opposite party who have tendered evidence are not in dispute that the house in question wherein the residence order is sought is falling within the definition of 'shared household' which has also been amply established in the proceeding through the record of

rights, Exts.1, 2 and 3. The courts below, upon detail discussion of the evidence and taking note of the surrounding circumstances, which prevail concerning the parties and especially their relationship appears to have rightly arrived at a satisfaction that the domestic violence has taken place and there surfaces no such perversity therein.

10. Next coming to the question of right of residence, it is relevant to take note of the state of affair as has been averred by the petitioners in an application subsequently filed hereinbefore this Court at paragraph-6 of the application giving rise to I.A. No.133 of 2019. It has been averred that despite the order dated 10.09.2018 whereby this Court had directed the Inspector-in-Charge of the concerned police station within whose jurisdiction the shared household situates to accompany the opposite party and lodge in her matrimonial house, i.e, shared household for compliance of the earlier order dated 20.08.2018 as to maintenance of status quo by the parties as on the date of possession, the opposite party does not want to stay in her matrimonial house and she was staying at a different place and remained silent till 23.1.2019 by which date, the order dated 10.9.2018 expired. This averment reveals that the petitioners had no objection for the stay of the opposite party in her matrimonial house and rather it is she who did not volunteer to reside therein. In that view of the matter, it can be said that there was no such dispossession of the opposite party from the shared household in the eye of law so as to be taken cognizance of.

For the sake of argument, it is said that the opposite party as on the date of initiation of the proceeding was not staying in that shared household when the fact stands admitted that she was putting up there when the domestic violence took place, the court has all the power to pass such an order of restraint in any other manner even in a mandatory form so as to see that the right of residence of the opposite party is ensured and protected in remaining in possession in the shared household.

In the wake of all the aforesaid, this Court finds no such illegality or impropriety in the impugned order warranting interference in exercise of the revisional jurisdiction.

11. In the result, the CRLREV stands dismissed.
All the interim applications accordingly disposed of.

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2019 (II) ILR - CUT- 151

D. DASH, J.

CRLREV NO. 596 OF 2018

DEBENDRA KUMAR PANDA .....Petitioner

.Vs.

STATE OF ODISHA (VIG.) .....Opp. Party

PREVENTION OF CORRUPTION ACT, 1988 – Section 13(2) read with section 13(1)(d) and Sections 420/468/471/120-B of the Indian Penal Code – Offence under – Order taking cognizance and issuance process for facing the trial – Matter relates to supply of coal to different MSMEs – Policy of the Government – Plea that the persons associated with the process of selecting the MSMEs for being distributed with the coal, which is said to have been done only in pen and paper are no longer in the arena of the trial of the case – Petitioner as the marketing agent, with his limited role and function under the agreement, having absolutely no knowledge as to any other aspects – Whether to be proceeded with? – Held, No.

"One important feature that has appeared in the case is that the then General Manager of the DIC, namely, Srikanta Sarangi and the Industrial Promotion Officer attached to the DIC, namely, Prasanta Kumar Parija, whose role under the policy comes first in identifying and preparing the list of MSMEs for supply of coal under the New Coal Distribution Policy besides the role after delivery of coal are no more in the arena of the case. The Government and competent authority refused to grant sanction for prosecution of those two. They had not been so shown in the charge-sheet as accused persons, to have been placed for trial for the offence under section 13(d) read with section 13(i)(d) of the PC Act and section 420/468/471/120-B of the IPC. It has been specifically mentioned in the charge sheet that although based on the materials collected in the investigation their names had been given for being prosecuted, the sanction of prosecution against them, has been refused by the sanctioning authority. The trial court, on receipt of the charge-sheet, while taking cognizance of the offences, had issued process also against them. Those orders of issuance of process having been challenged in so far as accused Sitakanta Sarangi, the then General Manager of the DIC is concerned, in CLRREV No.907 of 2017 and in so far as accused Prasant Parija, the then Industrial Promotional Officer attached to the DIC is concerned, in CRLREV No.364 of 2018, such orders have been quashed. The prosecution case is that the persons associated in the process at the commencement point of the process of distribution of coal by preparing the list of MSMEs and all other accused persons including the petitioner have conspired amongst themselves and have committed the offence and as such are liable. In so far as this petitioner is concerned, the case against him is conspiracy under section 120-B IPC and it is said that this petitioner finally facilitated the process of supply of coal to those listed MSMEs, which are non-existent. The prosecution has not specially come up with the stand as to which of the MSMEs are not there in the place so as to say that those are non-existent and as such the supply is fake or

which in terms of the guidelines are not eligible. Be that as it may, this petitioner is not said to have any such association with those MSMEs nor it is said that he played any role therein thus having the knowledge. So the persons who are the officials of the DIC associated in preparing the list of MSMEs are not within the arena of this criminal trial for offence under section 13(2) read with 13(1)(d) of the PC Act nor facing trial for offence under section 420/468/471 IPC nor under section 120-B IPC. Therefore, when they are not coming to face the charge of conspiracy under section 120-B IPC, the petitioner cannot be pushed into the arena to face the criminal proceeding as to have conspired with them. The prosecution case against the petitioner is that he entered into a criminal conspiracy with others in finally distributing coal to the non-existent or non-functional MSMEs as given in the list prepared by the persons other than the petitioner as required under the policy. Once the persons preparing the list are kept out of the arena of the case to face trial for offence in relation to conspiracy as also all other offences, the petitioner cannot be proceeded with for the conspiracy. Moreover, in the absence of the persons preparing the list of MSMEs where the petitioner has no role and that very list of those MSMEs which were said to be non-existent or non-functional having no requirement of user of coal and it is said that such distribution was thus to make gain by selling in open market at higher price which has been done, in the trial no such fault can be found with those two personnels of the DIC as to have prepared the bogus list of MSMEs. In view of that issuance of process against the petitioner to face the criminal proceeding for entering into conspiracy with them, who are said to have been involved at the very source and are not within the arena of the case, is not sustainable." *(Para 15)*

For Petitioner : Mr.Asok Kumar Mohanty, Sr. Adv.
M/s.G.M.Rath, S.S.Padhy,
P.Mohanty & A.P.Rath

For Opp. Party : Mr.Sangram Das, Standing Counsel (Vigilance)

JUDGMENT Date of Hearing :07.03.2019 : Date of Judgment :27.03.2019

D. DASH, J.

The petitioner, by filing this revision, has prayed for examination of the legality and propriety of an order dated 19.8.2017 passed by the learned Special Judge (Vigilance), Cuttack in T.R. No.35 of 2017.

2. By the impugned order, the court below, upon receiving the charge-sheet placing several accused persons including the petitioner named therein for trial for commission of offence under section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act (for short hereinafter 'the PC Act') and section 420/468/471/120-B of the Indian Penal Code (in short, 'the IPC'), has taken cognizance of those offences and issued process against all to face that proceeding. Under the said order, the trial court had also issued process against two more persons, for whom there was no sanction by the

Government and competent authority as required under section 19 of the PC Act, to face the criminal proceeding for offence under section 420/468/471/120-B of the IPC. Those two persons who were issued with the process by the above order, are now no more within the arena of the case since that part of the order has been quashed by this court in Criminal Revision No.907 of 2017 and 364 of 2018.

3. Facts necessary for the purpose are stated hereunder:

The Government of India, in the Ministry of Coal, passed a Resolution on 18.10.2007, covering the field of coal distribution, practically putting in place a new policy thereof. As per the said policy, the small and tiny consumers in non-coal sectors having coal consumption of less than 4200 M.T. are eligible to get coal from the State nominated agencies on a base price of about Rs.850/- as against the average auction rate of Rs.1400/- and market rate of Rs.2500/- per M.T. Pursuant to the above policy, the Government of Orissa declared Orissa Consumer Cooperative Federation Limited (for short, 'the OCCF') as the nodal agency for the purpose. The guidelines and orders prescribe that the distribution of linkage coal to the Medium and Small Medium Enterprises (MSMEs) has to be done in a realistic manner upon joint verification by the concerned General Manager of the DIC (for short, 'the DIC') and the personnels of nodal agencies, here, it is OCCF. So, the OCCF in order to carry out the activities as nodal agency in the matter of distribution of coal in consonance with the policy, put the public notice for appointment of a marketing agent. Three bids being received, finally M/s.Vinayak Minerals with which the petitioner is concerned, being the power of attorney holder was appointed as such and that stood approved by the Committee of OCCF, put in place for the purpose. The agreement to that effect was entered into. That is how the petitioner came to the picture in the matter of carrying out the part activity as regards distribution of coal to the consumers as per the above agreement terms and conditions.

4. The first challenge here is that the petitioner has played no role in carrying out the obligations under the said agreement as the marketing agent of the OCCF in the direction of commission of offence as alleged and, therefore, issuance of process against the petitioner in the criminal proceeding for the offences is illegal.

5. The next ground of attack is that when the order of issuance of process in the criminal proceeding as passed by the court below despite lack of sanction against those two officials attached to the DIC, has been quashed by the order of this court passed in CRLREV No.907 of 2017 and 364 of

2018, which have not been further challenged, the petitioner cannot be proceeded in the case as he had only carried out the orders in discharge of the duty entrusted to him under the agreement when there stands no such material to show that he himself carried the coal and sold the same in open market.

6. The allegations constituting offences and as to the role of the petitioner and others, find mention at page 6 and 7 of the charge-sheet. For better appreciation, it is felt necessary to reproduce the same:

> *"During investigation and as per the guidelines of new coal policy, it came to light that the coal consuming MSME unit whose annual consumption is less than 4200 MT are eligible to get coal through State Nodal Agency. The said MSME unit has to first registered his registration in D.I.C. (District Industry Centre) either E.M-I or E.M-II (Entrepreneurs Memorandum). The eligibility of supply and distribution of coal under this policy is that MSME unit has to apply the requirement of coal for his unit and in recommendation of coal has been made by the concerned D.I.C. on the following basis:-*
>
> *'The General Manager of DICs are responsible for proactive identification of the coal consuming MSMEs having Valid Permanent (PMT)/Entrepreneur Memorandum-II (EM-II) and for realistic assessment of other equipment and utilization of coal by the MSMEs. Other coal consuming MSME units not having PMT/EM-II, but having obtained Provisional Registration Certificate (PRC)/Entrepreneur Memorandum Part-I (EM-I) may be inspected by the General Manager/Project Managers and units found in existence and running may be recommended for quantity of coal as per assessed requirement'.*
>
> *Thus as per the recommendation of D.I.C., the same come to State Nodal Agency (OCCF) and O.C.C.F. placed order to MCL authority for supply of coal under this scheme with depositing money and thereafter Road Delivery Orders (R.D.Os) are issued from the MCL authority and with that Delivery Orders, the appointed Marketing Agent (M/s.Vinayak Minerals) has lifted the coal on behalf of OCCF and the coal have been supplied to the different MSMEs.*
>
> *In this case, 5 Nos. Of MSMEs, namely, M/s.Prasanta Ku. Mohanty, M/s.J.B.Enterprisers, M/s.Soumya Industries, M/s.Arati Bricks, and M/s.Maa Biraja Bricks, Jajpur, all are under Jagatpur D.I.C. are registered E.M-II, MSME unit with DIC, Jaghatpur, Sri Sitikanta Sadangi, the G.M. on the recommendation of Sri Banambar Das, Industrial Supervisor, has recommended supply of coal to OCCF in favour of M/s.Prashanta Ku. Mohanty, M/s.J.B. Enterprisers, M/s.Soumya Industries, M/s.Arati Bricks and M/s.Maa Biraja Bricks of during the year 2008-09 and 2009-10 to O.C.C.F.*
>
> *M/s.Prasanta Ku. Mohanty, M/s.J.B.Enterprisers, M/s.Soumya Industries, M/s.Arati Bricks and M/s.Baa Biraja Bricks lifted coal from Ananta OCP Talcher vide R.D.O. No.1426 MT, 2400 MT, 622 MT, 3308 MT, 174 MT and 2950 MT, (3426 MT, 4350.622 MT, 4072.9 MT, 3748.174 MT) respectively from OCCF through the Marketing Agent M/s.vinayak Mineral from MCL, Burla. But, the said 5 MSMEs units are Non-existence units. Thereby there is pecuniary advantage of Rs.58,56,294/- to the Suspect Officials*

namely Srit Sitakanta Sadangi, G.M., Prasnta Ku. Parija, IPO Rasulpur, Nihar Ranjan Parida, IPO Jajpur, all under DIC, Jagatpur, Sri Pravakar Nayak, BM, Cuttack Malgodown Branch, OCCF, Cuttack and the Proprietor Sri Debendra Kumar Panda, M/s.Vinayak Minerals. Thus the law was set in to motion."

7. Mr.Asok Mohanty, learned Senior Counsel for the petitioner submitted that even accepting the allegations, as laid, the petitioner has been unnecessarily arraigned in the case when he has no role in selecting the MSMEs eligible to get the benefit under the Coal Distribution Policy and in the preparation of the list of MSMEs which is said to be bogus. He further submitted that the role of the petitioner, as an marketing agent, in the matter of distribution of coal in favour of MSMEs is based on the recommendation of the DIC and order of the OCCF, the nodal agency. The lifting of coal by MSMEs is done by their own conveyance and the marketing agent is simply to hand over the coal at the ex-colliery point as per the, delivery order and form-G under intimation of DIC in acting as a facilitator. He, therefore, submitted that when the petitioner has no role in selecting the MSMEs after identifying those and has acted strictly in terms of the orders of the nodal agency, in terms of the agreement and in consonance with the direction of the DIC, he cannot be said to be having any involvement in commission of those offences. It was further submitted that when the persons associated with the process of selecting the MSMEs for being distributed with the coal, which is said to have been done only in pen and paper are no longer in the arena of the trial of the case, this petitioner as the marketing agent, with his limited role and function under the agreement, having absolutely no knowledge as to any other aspects, is not liable to be proceeded with. He, thus submitted that the order of issuance of process against the petitioner that too after quashment of the order of issuance of process against those two personnels of the DIC is unsustainable.

8. Mr.Sangarm Das, learned Standing Counsel (Vigilance), submitted that it is too premature a stage to raise all these challenges to the order of issuance of process against the petitioner and the exact role of the petitioner can only be found out in the trial.

9. In order to address the rival contentions, it is felt appropriate to first take note of the job of the petitioner that he had discharged as per his admitted status as the marketing agent on behalf of the OCCF.

The duties and responsibilities of the petitioner as such find mention at Clause-2 of the terms of reference, a document which has been relied upon by the prosecution to fasten the criminal liability upon the petitioner. It is

pertinent to mention here that the OCCF had entered into an agreement called Fuel Supply Agreement with M/s.MCL in furtherance of that New Coal Distribution Policy of Government of India as has been earlier referred to. The marketing agent is to function under the authority and management of the OCCF. The terms and reference make it obligatory on the part of the marketing agent to take necessary step to obtain trading licence for the OCCF for sale of coal, ex-colliery against 'G' Form and submit the list of MSMEs in whose favour bills and 'G" Forms would be issued from the ex-colliery of MCL. There stands no such allegation that the petitioner, acting on behalf of the marketing agent as engaged by the OCCF, has done any such manipulation in the list of MSMEs or to have made any such departure by bringing in any new MSME or reading a new MSME into the list so supplied, as also on any such other aspect as to the quantity of coal allowed to be lifted and supplied and etc.

10. The procedures formulated by the Government of Orissa, in the Department of Industries, on 13.8.2008 as to implementation of the New Coal Distribution Policy formulated by the Government of India on 18.10.2007 are that:-

> *the State Nodal Agency (here is OCCF) will distribute coal to the MSMEs on the recommendation of the General Manager/Project Manager of the DICs (here we are concerned with General Manager) and the distribution to any other MSMEs not so reflected in the list, as above, is impermissible. It is the responsibility of the General Manager of DIC for proactive identification of coal consuming MSMEs having valid Permanent (PMT)/Entrepreneur Memorandum-II (EM-II) and for realistic assessment of other equipment and utilization of coal by the MSMEs. The MSMEs not having the PMT/EM-II, but having obtained the Provisional Registration Certificate (PRC)/Entrepreneur Memorandum Part-I (EM-I) upon being inspected and those units if would be so found to be in existence and running, may be recommended for quantity of coal as per the requirement as would be assessed.*

The General Manager/Project Manager of the DIC accompanied by an officer of Micro, Small and Medium Enterprises Development Institution (MSMEDI)/National Small Industries Corporation (NSIC) etc. dealing with the MSMEs has the responsibility to assess the coal requirement of each of the MSMEs basing on the aspects such as item of production, annual installation capacity in quantity, quantity of finished product produced in the year 2008-09, quantity of coal consumed in the year 2008-09, quantity of coal recommended to OSIC in the year 2008-09, quantity of coal recommended to OSIC in the year 2008-09, projected production during the year 2009-10 and quantity of coal received commensurate with the projected production of the year 2009-10.

11. The procedure of distribution of coal, as provided in the Orissa Coal Distribution Policy, further clarifies that the DICs will assess the coal requirement of the MSMEs scrupulously and furnish the list of coal consuming units to the OCCF/OSIC at the beginning of the year, indicating their annual requirement with the grade of coal. It is then for the MSMEs to choose the nodal agency either OCCF or OSIC for lifting of their coal as per their own conveyance.

12. The policy further provides that the supply of coal to the consuming units are to be done proportionately and a list has to be furnished to the DICs where those will be verified as also more importantly the utilization of the coal by those MSMEs as has been issued to those MSMEs for their consumption in the units and recommend quantum of coal required by the unit for the coming year. Thus the role of officials of the DIC starts at first and is most important which govern the entire exercise of distribution of coal as also its utilization. As per the above, the list of MSMEs is made in the DIC, after supply of coal, its utilization is also to be looked into by the DIC.

13. The responsibility of the General Manager of the DIC is the following:-

> *(I) to identify the coal consuming MSMEs having valid PMT or entrepreneur memorandum recommended for the quantity of the coal for the assessed requirement with the assistance of an officer of MSMEDI/NSIC.*

Next comes the role of the nodal agency, i.e, the OCCF in the present case and so far as this petitioner is concerned, he was entrusted with the job of distribution of the coal among the MSMEs as per the list as has been provided and recommended by the DIC. The MSMEs have the responsibility as to lifting of the coal in their own conveyance. The job of the marketing agent is to facilitate such distribution of coal at the ex-colliery point coming in contact with the MCL personnels in place for the purpose and to handover the Road Delivery Order and Form-'G' followed by the intimation of the DIC.

14. The prosecution case is that those five units recommended by the DIC for supply of the coal, vide their letters dated 4.11.2008, 13.1.2009 and 28.2.2009 are non-existent. Almost all the letters however provide that the concerned units had applied to the DIC for allotment of appropriate graded coal in their favour for own consumption giving all the required details and thus being verified as required under the prescribed policy, the concerned Project Manager of the OCCF has been given with the recommendation in

taking action for onward supply of the coal. The MSMEs thereafter have deposited the cost of the coal directly with the OCCF as also the money towards the value of the coal. Thereafter, the delivery of the coal has been made with the facilitations made by the petitioner in terms of the agreement as such and that being informed, the OCCF has communicated about the delivery by letters dated 16.1.2009, 11.2.2009, 28.2.2009, 6.5.2009, 4.6.2009, 15.7.2009 and 10.8.2009. Then those MSMEs have also confirmed the OCCF about the receipt of the coal in writing. There is no allegation or material on record to the effect that the coal has not been physically lifted by the MSMEs and it is not stated that this petitioner misappropriated the coal from that MCL for illegal use or distribution or sale at his end or that he himself directly did anything for that purpose by creating any false documents and putting those on record. It is also not the prosecution case that the petitioner himself used any document as genuine knowingly and having reason to believe the same to be forged. The very list of MSMEs forming the basis of supply of coal at the final round of the exercise is being said to have been made knowing fully well that those MSMEs were non-existent or non-functional or we may say having no such requirement of coal. But in that, this petitioner appears to have nothing to do.

15. One important feature that has appeared in the case is that the then General Manager of the DIC, namely, Srikanta Sarangi and the Industrial Promotion Officer attached to the DIC, namely, Prasanta Kumar Parija, whose role under the policy comes first in identifying and preparing the list of MSMEs for supply of coal under the New Coal Distribution Policy besides the role after delivery of coal are no more in the arena of the case. The Government and competent authority refused to grant sanction for prosecution of those two. They had not been so shown in the charge-sheet as accused persons, to have been placed for trial for the offence under section 13(d) read with section 13(i)(d) of the PC Act and section 420/468/471/120-B of the IPC. It has been specifically mentioned in the charge sheet that although based on the materials collected in the investigation their names had been given for being prosecuted, the sanction of prosecution against them, has been refused by the sanctioning authority. The trial court, on receipt of the charge-sheet, while taking cognizance of the offences, had issued process also against them. Those orders of issuance of process having been challenged in so far as accused Sitakanta Sarangi, the then General Manager of the DIC is concerned, in CLRREV No.907 of 2017 and in so far as accused Prasant Parija, the then Industrial Promotional Officer attached to the DIC is concerned, in CRLREV No.364 of 2018, such orders have been quashed.

The prosecution case is that the persons associated in the process at the commencement point of the process of distribution of coal by preparing the list of MSMEs and all other accused persons including the petitioner have conspired amongst themselves and have committed the offence and as such are liable. In so far as this petitioner is concerned, the case against him is conspiracy under section 120-B IPC and it is said that this petitioner finally facilitated the process of supply of coal to those listed MSMEs, which are non-existent. The prosecution has not specially come up with the stand as to which of the MSMEs are not there in the place so as to say that those are non-existent and as such the supply is fake or which in terms of the guidelines are not eligible. Be that as it may, this petitioner is not said to have any such association with those MSMEs nor it is said that he played any role therein thus having the knowledge. So the persons who are the officials of the DIC associated in preparing the list of MSMEs are not within the arena of this criminal trial for offence under section 13(2) read with 13(1)(d) of the PC Act nor facing trial for offence under section 420/468/471 IPC nor under section 120-B IPC. Therefore, when they are not coming to face the charge of conspiracy under section 120-B IPC, the petitioner cannot be pushed into the arena to face the criminal proceeding as to have conspired with them. The prosecution case against the petitioner is that he entered into a criminal conspiracy with others in finally distributing coal to the non-existent or non-functional MSMEs as given in the list prepared by the persons other than the petitioner as required under the policy. Once the persons preparing the list are kept out of the arena of the case to face trial for offence in relation to conspiracy as also all other offences, the petitioner cannot be proceeded with for the conspiracy. Moreover, in the absence of the persons preparing the list of MSMEs where the petitioner has no role and that very list of those MSMEs which were said to be non-existent or non-functional having no requirement of user of coal and it is said that such distribution was thus to make gain by selling in open market at higher price which has been done, in the trial no such fault can be found with those two personnels of the DIC as to have prepared the bogus list of MSMEs. In view of that issuance of process against the petitioner to face the criminal proceeding for entering into conspiracy with them, who are said to have been involved at the very source and are not within the arena of the case, is not sustainable.

16. Resultantly, the CRLREV is allowed and the order 19.8.2017 passed by the learned Special Judge (Vigilance), Cuttack in T.R. No.35 of 2017 in so far as the issuance of process against the petitioner is concerned, stands quashed.

2019 (II) ILR - CUT- 160

D. DASH, J.

CRIMINAL REVISION NO. 407 OF 2001

BAURIBANDHU PATRO .....Petitioner.

.Vs.

STATE OF ORISSA .....Opp. Party.

PREVENTION OF FOOD ADULTERATION ACT,1954 – Section 16(1)(a)(i) – Offence under – Conviction – Compliance of mandatory requirements as required under section 13 (2) of the Act – Held, the provision of section 13(2) of the Act which provides a valuable right to the accused in getting the report of the Public Analyst as to the adulteration of the food sample collected from him further tested by re-analysis of the same at the Central Food Laboratory, stands for mandatory compliance in a prosecution for sale of adulterated food item for human consumption – It has also been said in catena of decisions by the Hon'ble Apex Court as also this Court that said provision is mandatory that first of all for the reason that accused must be made aware of the result of the analysis of the food and secondly, that he must be made aware of his right to get it re-analysed in questioning the report of the Public Analyst if he so feels aggrieved, by making an application before the concerned Court where the prosecution has been launched in getting the second part of the sample so sent and in that case the report of Central Food Laboratory supersedes – The evidence let in by the prosecution, this Court finds that due compliance of mandatory provision of section 13(2) of the Act has not been proved in the case through acceptable evidence and thus the findings of the courts below on that score cannot be sustained which appears to have been so returned merely going through the documents and ignoring the fact that there is no evidence as regards their actual dispatch by post – Conviction and sentence set aside. (Para 5)

For Petitioner : M/s. D.P. Dhal, S.K. Gupta, D.K. Das, K. Rath.
For Opp. Party : Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment : 18.04.2019

D. DASH, J.

This revision has been filed questioning the judgment dated 27.7.2001 passed by the learned 2nd Addl. Sessions Judge, Berhampur in Crl. Appeal No. 57 of 1997(Crl. Appeal 256/96-GDC).

The petitioner (accused) having been convicted for offence under section 16(1)(a)(i) of Prevention of Food Adulteration Act (for short, called

'the Act') by the learned S.D.J.M., Berhampur in 2(C)CC no. 560 of 1992 and sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.1000/- in default to undergo rigorous imprisonment for one month had filed the appeal . The appellate court has confirmed the said finding of guilt as also the order of sentence.

2. Prosecution case in short is that on 26.5.1992, P.W. 1 who was then the Food Inspector attached to the Berhampur Municipality had visited the grocery shop of the accused situated at Golapalli Street, in the town of Berhampur and when the accused was very much present in the shop and engaged in selling different variety of grocery articles to the customers for human consumption, the shop being inspected by P.W. 1, he suspected the Ground-nut oil and Turmeric powder kept for sale in the said shop for human consumption to be adulterated. The sample from those two food items being collected observing all such formalities as required under the rules in presence of the accused and the office peon, P.W. 2 when other independent persons did not come forward to cooperate, P.W. 1 prepared all required documents. Finally the samples were sent for analysis by Public Analyst. The Public Analyst while finding the sample of Ground-nut oil to be in conformity with the standards prescribed in the rule, found the sample of Turmeric powder as adulterated for the presence of foreign starches i.e. 10% of rice starches as detected which is in contravention of rule 44 (h) of the P.F.A. rules. The prosecution was then launched with the written consent of the Local Health Authority-cum-CDMO, Berhampur.

The accused took the plea that he was having no shop at the relevant time and P.W. 1 had not purchased those grocery items from his shop. His further plea was that his wife had a grocery shop and P.W. 1 took Ground nut oil and Turmeric powder from his residential house by force asking him to sign on some papers and utilised those for the purpose of launching the false prosecution against him.

The trial court on the basis of the evidence of P.W. 1, the Food Inspector and P.W. 2 the office peon who had accompanied P.W. 1 at the time of said inspection has discarded the plea of this accused on those factual aspects about his not owning and running the shop and the allegations levelled against P.W.1. Finding the Turmeric powder which was being sold by the accused in his shop for human consumption as adulterated, the accused has been convicted visited with the sentence as aforesaid.

The appellate court has concurred with all such findings by examining the evidence both oral and documentary at its level.

3. Mr. D.P. Dhal, learned counsel for the petitioner without going to question those factual findings rendered by the courts below in view of the defence taken by the accused and answered against the accused, attacks the finding of conviction of the accused for commission of offence under section 16(1)(a)(i) of the Act as returned by the trial court and confirmed in appeal on the ground of non-compliance of the mandatory provision of section 13(2) of the Act. According to him, in view of said non-compliance when the accused has been deprived of exercising the valuable right conferred on him under the statute in getting the second part of the sample re-analysed at the Central Food Laboratory and questioning the finding of the Public Analyst, the prejudice is writ large and on that very ground, the prosecution stands vitiated. He thus submits that the report of the Public Analyst Ext.10 cannot be pressed into service to hold that this accused was selling adulterated Turmeric powder for human consumption.

He has next argued as regards the non-compliance of the rule 27 and 28 of the P.F.A rules by contending that no such evidence is there on record to show that P.W. 1 while sending the sample of two food items to the Public Analyst had sent the memorandum containing his specimen of the seal used while collecting the sample along with the sample to the Public Analyst as also a copy of the memorandum containing said specimen impression of the seal separately by registered post or any other mode.

In view of such non-compliance, he contends that the report that has been given by the Public Analyst that the Turmeric powder sample was containing 10% of rice starches which is not permissible cannot be specifically said to be the report given after examination of the sample of Turmeric powder taken from the shop of the accused.

He thus contends that for such non-compliance of mandatory provisions of Act and rules, the finding of conviction cannot be sustained.

4. Learned counsel for the State submits that when the documents relating to compliance of the provision of section 13(2) of the Act have been proved through P.W. 1, the Food Inspector who has also deposed on that score in the court which has remained unshaken, no finding as to non-compliance of the provision of section 13(2) of the Act can be returned and on that ground the conviction recorded against the accused cannot be faulted with. He further submits that when the very report of the Public Analyst finds mention that he had received the food sample with the memorandum containing specimen impression of the seal used at the time of taking the sample and had compared the same with the copy sent separately before the

examination of the food sample, the submission that the finding of conviction is to fail for such non-compliance of rules has to fail.

5. Let me now address the first limb of submission advanced by the learned counsel for the accused.

Law is well settled position that the provision of section 13(2) of the Act which provides a valuable right to the accused in getting the report of the Public Analyst as to the adulteration of the food sample collected from him further tested by reanalysis of the same at the Central Food Laboratory, stands for mandatory compliance in a prosecution for sale of adulterated food item for human consumption. It has also been said in catena of decisions by the Hon'ble Apex Court as also this Court that said provision is mandatory that first of all for the reason that accused must be made aware of the result of the analysis of the food and secondly, that he must be made aware of his right to get it re-analysed in questioning the report of the Public Analyst if he so feels aggrieved, by making an application before the concerned Court where the prosecution has been launched in getting the second part of the sample so sent and in that case the report of Central Food Laboratory superceedes.

So for the purpose it is now necessary to go through the evidence of P.W. 1 on that score. It has been deposed by him that he received the Public Analyst report dated 4.7.98 to the effect that Turmeric powder sample is adulterated. This report has been proved as Ext. 10. It has further been stated that he prepared the prosecution report and presented the same with the documents before the Local Health Authority-cum-CDMO who gave his consent in writing. As regards the compliance of the provision of section 13(2) of the Act during re-examination he has stated that Ext. 16 is the office copy of the intimation sent by the CDMO to the accused along with the report of the Public Analyst relating to the Turmeric powder. He has proved the postal receipt as Ext.17 in support of dispatch of the letter apprising the accused of his right available and the acknowledgement due as Ext. 18. The accused in his statement under section 313 Cr.P.C. has clearly said to have no knowledge about that report and receipt of the same with any letter. P.W. 1 is not stating that it is he who had posted that letter Ext. 16 annexing the copy of report of the Public Analyst to the accused. Although, it is indicated in the provision that the Local Health Authority is to send that letter with the report of the Public Analyst to the accused, when this petitioner is not coming forward to say that he himself had sent it to the accused enclosing the copy of the report of the Public Analyst with letter apprising the petitioner the result

of analysis of the food item and the right as available to him, merely proving the documents such as the copy of the letter, the postal receipt and acknowledgement due would not suffice the purpose and that in my considered view is not enough to conclude that the mandatory provisions contained in section 13(2) of the Act have been complied with in letter and spirit.

In such state of affair in the evidence let in by the prosecution, this Court finds that due compliance of mandatory provision of section 13(2) of the Act has not been proved in the case through acceptable evidence and thus the findings of the courts below on that score cannot be sustained which appears to have been so returned merely going through the documents and ignoring the fact that there is no evidence as regards their actual dispatch by post.

In view of the above, the second limb of submission of the learned counsel for the petitioner is not felt necessary to be answered. With the answer to the first point, the impugned judgments of conviction and orders of sentence passed by the courts below are hereby set aside.

6. The CRLREV stands allowed.

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2019 (II) ILR - CUT- 164

BISWANATH RATH, J.

O.J.C. NO. 11669 OF 2000

ADAITA KUMAR BISWAL .....Petitioner.

.Vs.

R.D.C NORTHEN DIVISION, SAMBALPUR & ORS. .....Opp. Parties.

ORISSA PREVENTION OF LAND ENCROACHMENT ACT, 1972 – Section 12(3) – Provisions under – Suo motu proceeding initiated by the Revenue Divisional Commissioner, whether maintainable? – Held, No, as there being availability of scope for Appeal and Revision in the Act, 1972.

Case Laws Relied on and Referred to :-

1. 1987(II) OLR-241 : Bulla Sahu Vs. Member, Board of Revenue, Orissa, Cuttack.
2. 2016 (Supp.II) OLR-350 : Jaminikanta Das Vs. R.D.C,Central Division, Cuttack.

For Petitioner : M/s. K.K.Jena, B.K. Dagara, N.P. Patra, S.P.Swain & S.K. Ray
For Opp. Party : Mr. S.N. Mishra, Addl Govt. Adv.

ORDER Date of Order : 10. 01. 2019

BISWANATH RATH, J.

Heard Sri K.K.Jena, learned counsel, on behalf of Sri B.K.Dagara, learned counsel for the petitioner and Sri S.N.Mishra, learned Additional Government Advocate for the opposite parties.

2. This writ application involves a challenge to the order dated 29.3.2000 passed by the Revenue Divisional Commissioner, Northern Division cancelling the order of settlement of land in favour of the petitioner involving Encroachment Revision No.28/98 so also the orders dated 17.7.2000 to 14.8.2000 involving OPLE Case No.551/95.

3. Sri K.K.Jena, learned counsel for the petitioner advancing his argument submitted that the proceeding initiated, vide Annexure-2 under Section 12(3) of the OPLE Act, 1972 is not maintainable for there being availability of scope for Appeal and Revision. Taking this Court to the provision indicated herein above and two decisions of this Court in the cases of ***Bulla Sahu vrs. Member, Board of Revenue, Orissa, Cuttack,*** reported in 1987(II) OLR-241 and ***Jaminikanta Das vrs. Revenue Divisional Commissioner, Central Division, Cuttack,*** reported in 2016 (Supp.II) OLR-350, Sri Jena, learned counsel for the petitioner submitted that the above two decisions also support the contention of the petitioner. In view of the above, learned counsel for the petitioner prayed this Court for interference of Annexures-2 & 1.

4. To the contrary, Sri S.N.Mishra, learned Additional Government Advocate for the opposite parties in support of the impugned order submitted that the proceeding being initiated on the reference made by the Collector, the Revenue Divisional Commissioner was well within its right to take up the Revision proceeding. Sri Mishra thus contended that there is no illegality involving the order therein. As a consequence, there is no illegality in Annexure-1. Sri Mishra, learned Additional Government Advocate further contended that the petitioner having not raised the objection with regard to maintainability of the Revision proceeding in the Revision, he is estopped to raise such contentions in this Court.

5. Considering the rival contentions of the parties, this Court finds, there is no dispute amongst the parties that involving the order dated 2.1.1996 involving the very same land, the direction by the Tahasildar for settling the

land in favour of the encroacher has neither been appealed nor any revision is preferred involving the same. There is also no dispute that the proceeding initiated, vide Annexure-2 is a proceeding under Section 12(3) of the OPLE Act and a Suo Motu Revision. Section 12(3) of the OPLE Act reads as follows :-

> "12(3)-The Revenue Divisional Commissioner having jurisdiction may call for and examine the records of any proceedings under this Act before any officer in which no appeal or revision lies and if such officer appears-
>
> a) to have exercised a jurisdiction not vested in him by law; or
>
> b) to have failed to exercise a jurisdiction so vested; or
>
> c) while acting in the exercise of his jurisdiction to have contravened some express provision of law affecting the decision on the merits, where such contravention has resulted in serious miscarriage of justice, it may after giving the parties concerned a reasonable opportunity of being heard pass such order as it deems fit."

Reading the aforesaid provision, it becomes clear that there was scope for Appeal and further a Revision involving the orders of the Tahasildar. For the clear provision of appeal and Revision involving the order of the Tahasildar in the statute and for there being no appeal filed involving the order dated 2.1.1996, this Court finds, the suo motu Revision initiated by the Revenue Divisional Commissioner is not maintainable in the eye of law. This Court here taking into consideration the citations cited at Bar finds, both the citations have support to the case of the petitioner for the clear provision of law under Section 12(3) of the OPLE Act. Further for the settled position of law by the aforesaid decisions, this Court finds, the proceeding, vide Annexure-2 remains illegal. As a consequence, the orders dated 17.7.2000 and 14.8.2000 on re-opening of the encroachment Case No.551/95 by virtue of the direction of the Revenue Divisional Commissioner, vide Annexure-1 is also illegal.

6. For the question of law being raised by the learned counsel for the petitioner on the maintainability of the Revision under Section 12(3) of the OPLE Act, this Court finds for involvement of a question of law, there is no force in the submission of the learned Additional Government Advocate.

7. In the result, this Court interfering with the order at Annexure-2 and the order at Annexure-1 involving the proceeding, vide Encroachment Case No.551/95 from 17.7.2000 to 14.8.2000 sets aside the same. The writ petition succeeds. No order as to cost.

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2019 (II) ILR - CUT- 167

BISWANATH RATH, J.

W.P. (C) NO. 2778 OF 2005

PENNAR ALUMINIUM COMPANY LTD.
SECUNDERABAD-II, (A.P.) ..... Petitioner

.Vs.

CHAIRMAN-CUM-M.D, NALCO. LTD. .....Opp.Party

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition filed out of arbitration proceedings – Whether maintainable? – Held, No – Reasons discussed. (Paras 7 to 9)

Case Laws Relied on and Referred to :-

1. 2005 (Suppl.) Arb. LR 558 (S C)/ 2003 (12) SCC 140 : CDC Financial Services (Mauritius) Ltd. Vs. BPL Communications Ltd. & Ors.
2. AIR 2006 SC 450 : M/s. S.B.P. & Co. Vs. M/s. Patel Engineering Ltd.& Anr.
3. (2014) 7 S.C.C 255 : Lalitkumar Vs. Sanghavi (dead) through LRs Neeta Lalit Kumar Sanghavi and another Vs. Dharamdas V. Sanghavi & Ors.
4. (1994) 6 SCC 485 : State of Rajasthan Vs. Puri Construction Co. Ltd., & Anr.

For Petitioner : M/s. B. Routray, Senior Counsel.
P.R. Das,D.K. Mohapatra, D. Routray, D. Mohapatra, P.K. Sahu, B.N. Satpathy, S.Das & B.B. Routray.

For Opp. Party : M/s. R.K.Rath, Senior Counsel & N.R.Rout.

JUDGMENT Date of Hearing: 07.01.2019 : Date of Judgment: 16.01.2019

BISWANATH RATH, J.

This writ petition involves a challenge to the order dated 29.4.2004 of the sole Arbitrator involving Arbitration Proceeding No.3(N) of 2002 as well as the order dated 15.10.2004 of the District Judge Khurde at Bhubaneswar in Arbitration Appeal No.112 of 2004 appearing at Annexures-1 and 3 respectively.

2. Short background involved in the case is that pursuant to initiation of arbitration proceeding, petitioner filed an application for a direction to the opposite party therein to produce certain documents and information on the premises that the petitioner had no access to the same and further the same were also essential for just decision and proper adjudication of the dispute. Contesting the said claim, the opposite party vehemently resisting the move involving such application contended that there is relevancy involving such document. Further, for the petitioner having responsibility to establish his case, petitioner cannot go on asking the opposite party to produce the document to answer his case. Hearing the rival contentions of the parties, the

Arbitrator vide order dated 19.2.2002 while rejecting the application, however, kept consideration of the same open for being considered if the Arbitrator in course of hearing deems it to be called for at appropriate stage. In the meantime on the demise of the Arbitrator, the proceeding was transferred to a fresh Arbitrator. On commencement of the proceeding, the Director of the Company and the Senior Vice-President (Operation) were examined and cross-examined. On 24.1.2004, before commencement of hearing, the petitioner filed another application praying for a direction to the opposite party to produce the records and information as per the schedule in the said petition. The application was again vehemently objected by the opposite party. Considering the rival contentions of the parties, the Arbitrator vide its order dated 29.4.2004 once again rejected the move of the petitioner in the matter of calling for documents, found place at Annexure-1. Being aggrieved by the said order of the Arbitrator, the petitioner filed an appeal under Section 37(2) of the Arbitration and Conciliation Act, 1966 before the District Judge, Khurda at Bhubaneswar. The opposite party appearing therein objected the same on two folds: firstly on the maintainability of the appeal and secondly on merit of the application. This application being heard by the District Judge, was rejected by his order dated 15.10.2004, as appearing at Annexure-3 giving rise to the present writ petition.

3. Sri B.Routray***,*** learned senior counsel appearing for the petitioner taking this Court to the provisions contained in Section 17 as well as Section 37 (2) of the Arbitration and Conciliation Act, 1996 (hereinafter called as "the Act, 1996") and also taking this Court to the initial order of rejection of the Arbitrator dated 19.2.2002 contended that not only the appeal was maintainable but also the petitioner had also a right to approach the Arbitrator for calling for document for his observation in previous disposal of such an application. For the specific observation of the earlier Arbitrator in the order dated 19.2.2002, Sri Routray further taking to the plea taken in the application contended that the documents as sought to be called for were essential at least for an effective adjudication of the arbitration proceeding.

4. In his opposition, Sri R.K.Rath, learned senior counsel appearing for the opposite party taking this Court to the provision at Section 17 of the Act, 1996 contended that there was no scope for bringing in the provision of Section 17 of the Act, 1996, Sri Rath, learned senior counsel further taking this Court to the provision at Section 5 of the Act contended that for the provision contained therein, there should not be any judicial intervention except as provided in Part-1 of the Act, 1996. Sri Rath, learned senior

counsel further taking this Court to the provision at Section 37 of the Act, 1996 contended that there was no scope for such appeal and therefore, Sri Rath contended that the district Judge has rightly dismissed the appeal after observing that the appeal was not maintainable. Sri Rath, learned senior counsel further taking this Court to the decisions rendered in the cases of ***CDC Financial Services (Mauritius) Ltd. v. BPL Communications Ltd. and Ors***, *2005 (Suppl.) Arb. LR 558 (S C)/ 2003 (12) SCC 140* , ***M/s. S.B.P. & Co. v. M/s. Patel Engineering Ltd. and Anr***, *AIR 2006 Supreme Court 450,* and lastly in the case of***Lalitkumar v .Sanghavi (dead) through LRs Neeta Lalit Kumar Sanghavi and another v. Dharamdas V. Sanghavi and Others,*** (2014) 7 S.C.C 255 and taking this Court to the relevant portions involving the aforesaid judgments submitted that for the decision of the Hon'ble Apex Court including this Court indicated hereinabove, the appeal was not maintainable. Sri Rath also contended that in any event the writ petition involving the situation is even also not maintainable. Sri Rath also contended that for the clear provision under Section 5 of the Act, 1996 and for the decision indicated hereinabove, the scope of interference of the writ court also is very limited. In the above premises, Sri Rath, learned senior counsel appearing for the opposite party submitted that there being no infirmity in the impugned orders, the writ petition ought to be dismissed.

5. Considering the rival contentions of the parties and going through the initial order of rejection of the Arbitrator dated 19.2.2002, this Court finds the Arbitrator observed as follows :-

> "However, I want to make it clear that the present order passed by me today could not stand in the way of my calling for any documents or giving a direction for furnishing any information (including any of the documents/ information mentioned in the petition presently rejected) from any of the parties, if I consider such course is necessary in the interest of justice to come to just decision of any of the issues arising out of the disputes between the parties."

Reading of the aforesaid observation, it appears that it was for the Arbitrator to take a call for some documents subject to his satisfaction at appropriate time. At this stage, therefore, this Court finds the contention of Sri Routray, learned senior counsel that he had the liberty to approach again involving the matter for calling for records was per se wrong. Further, looking to the pleading of the petitioner itself in paragrtaph-9 of the writ petition, it again appears the application was filed after the closure of evidence of the proceeding and the arbitration proceeding was posted for further hearing. This Court again observes, this is no stage for filing any such application, as by this time, evidence was already closed.

6. Now coming to the claim of the petitioner on the application of section 17 of the Act, 1996, this Court going through the provision indicated herein, observes the provision at Section 17 of the Act, 1996 does not prescribe any scope for calling for any records. Application of section 17 of the Act, 1996 is only in the circumstances, as enumerated therein. This Court, therefore, observes, the appellate authority was justified in its finding holding the appeal under Section 37(2) of the Act, 1996 as not maintainable.

7. Now, coming to decide the other question involved herein as to maintainability of the writ petition under Articles 226 and 227 of the constitution of India, this Court finds the provision at Section 5 of the Act, 1996 read as follows:

> "**5. Extent of judicial intervention**- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

Section 5 of the Act, 1996 therefore, restricts unnecessary intervention in the arbitration proceeding by judicial authorities.

8. Now coming to the decision cited at Bar, In the case of ***CDC Financial Services (Mauritius) Ltd. v. BPL Communications Ltd. and Ors***, *2005 (Suppl.) Arb. LR 558 (S C)/ 2003 (12) SCC 140, the Hon'ble Apex Court held in paragraph-14 as follows:*

> " Whatever may be the merits of the writ application, we are of the view and it has been fairly conceded by the learned senior counsel appearing on behalf of respondent 1 that the High Court should have had regard to Section 5 of the 1996 Act before granting the reliefs it did. Under Section 5 of the 1996 Act, courts are restrained from interfering with arbitration except in the manner provided in the 1996 Act. That the orders passed by the High Court would amount to a violation of this mandate is not seriously disputed by the respondents. We, accordingly, set aside the orders of the High Court without expressing our views on the merits of the contentions of the parties in any manner whatsoever. The orders dated 04.07.2002 and 23.07.2002 are accordingly, set aside. The respondents are restrained from moving any applications in the pending writ petition which would have the effect of interfering with the continuance and conclusion of the arbitration proceedings. The appeal of respondent 1 before the Division Bench being preferred from the refusal to grant an interim order, does not survive and is accordingly dismissed. The matter shall now be heard by the learned Single Judge and disposed of in accordance with law."

In the case of M/s. S.B.P. & Co. v. M/s. Patel Engineering Ltd. and Anr, *AIR 2006 Supreme Court 450,* the Hon'ble Apex Court in paragraph-44 of the judgment held as follows*:*

> **"**It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under

Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parries by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Court is not permissible."

In the case of ***Lalitkumar v. Sanghavi (dead) through LRs Neeta Lalit Kumar Sanghavi and another v. Dharamdas v. Sanghavi and Others,*** (2014) 7 S.C.C 255, the Hon'ble Apex Court in paragraph- 8 of the judgment held as follows:

"Within a couple of weeks thereafter, the original applicant died on 7.10.2012. The question is whether the High Court is right in dismissing the application as not maintainable. By the judgment under appeal, the Bombay High Court opined that the remedy of the appellant lies in invoking the jurisdiction of the High Court under Article 226 of the Constitution. In our view, such a view is not in accordance with the law declared by this Court in S.B.P. & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618. The relevant portion of the judgment reads as under:

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India.Such an intervention by the High Courts is not permissible." That need not, however, necessarily mean that the application such as the one on hand is maintainable under Section 11 of the Act."

9. For the settled position of law, as enumerated hereinabove, this Court finds no writ is maintainable involving such situation. Further for the

decision rendered in the case of ***State of Rajasthan v. Puri Construction Co. Ltd., and another*** *(1994) 6 SCC 485,* where the Hon'ble Apex Court clearly observed that a court of competent jurisdiction has both right and duty to decide the *lis* presented before it for adjudication according to the best understanding of law and facts involved in the *lis* by the judge presiding over the Court. Such decision, even if erroneous either in factual determination or application of law correctly, is a valid one and binding *inter se* parties. It does not, therefore, stand to reason that the arbitrator's award will be *per se* invalid and inoperative for the simple reason that the arbitrator has failed to appreciate the facts and has committed error in appreciating the correct legal principle in basing the award. It is also held therein that since the arbitrator is a judge by choice of the parties and more often than not a person with little or no legal background, the adjudication of disputes by an arbitrator by way of an award can be challenged only within the limited scope of several provision of the Arbitration Act.

10. Under the circumstances and for the settled position of law, this Court while observing that the writ petition is not maintainable declines to interfere in the order passed by the appellate authority. The writ petition, thus, stands dismissed. There is no order as to cost.

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2019 (II) ILR - CUT- 172

BISWANATH RATH, J.

W.P.(C) NO. 19785 OF 2018

M/S. AGARWAL RASAYAN, SAMBALPUR .....Petitioner

.Vs.

NATIONAL ALUMINIUM COMPANY LTD., BHUBANESWAR. .....Opp.Party

ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 – Proceeding under – The question arose as to whether the arbitration proceeding can be taken as a civil suit? – Held, No – Reasons discussed.

Case Laws Relied on and Referred to :-

1. (2009) 17 SCC 796 : Fiza Developers and Inter-Trade Pvt. Vs. Amci (I) (P)
2. AIR 2018 S.C 3894 : M/s. Emkay Global Financial Services Ltd. Vs. Giridhar Sondhi,

For Appellants : M/s. G. Mishra, A. Dash, J.R. Deo, A.Khandal
For Respondent : M/s. R.K. Rath, Sr. Adv.

JUDGMENT Date of Hearing & Judgment: 30.04.2019

BISWANATH RATH,J.

The writ petition involves quashing of order dated 7.5.2018 passed by the District Judge, Angul in ARBP No.24 of 2015 under Annexure-1 series as well as the consequential order dated 4.9.2018 in the same appeal under Annexure-1 series and further seeking a direction to the District Judge, Angul to complete the hearing of the application under Section 34 of the Arbitration & Conciliation Act, 1996 (short, the "Act, 1996").

2. Short background involving the case is that the petitioner is a partnership firm represented through its Managing partner. Opposite party, a public sector undertaking initiated an arbitration proceeding involving the petitioner by appointing arbitrator from its own panel of arbitrators. The arbitration proceeding was concluded vide judgment dated 17.3.2015 thereby passing an award in favour of the opp. party, the public sector undertaking while also allowing the counter claim filed by the petitioner. The award of the arbitrator dated 17.3.2015 was challenged by NALCO before the District Judge, Angul involving an application under Section 34 of the Arbitration and Conciliation Act, 1996 registered as ARBP No.24 of 2015. It is alleged that while Section 34 proceeding was taken up for hearing, an attempt was made by the District Judge, Angul to treat the proceeding under Section 34 of the Act, 1996 like that of a suit and by order dated 7.5.2018, the District Judge directed the parties to produce evidence. Finding the direction remaining contrary to the purport of Act and also the settled position of law and referred to therein in the order dated 7.5.2018 itself, on 25.7.2018 a petition was filed by the opp. party to recall the order dated 7.5.2018. On receipt of copy, the present petitioner also filed a memo indicating therein it's no objection to allow such application in recalling the order dated 7.5.2018. By order dated 4.9.2018 petition filed by the opp. party to recall the order dated 7.5.2018 was rejected resulting filing of this writ application.

3. Shri Gautam Mishra, learned counsel appearing for the petitioner while making a statement that the impugned order is being aggrieved by both the sides, took this Court to a judgment of the Hon'ble Apex Court in the case of ***Fiza Developers and Inter-Trade Pvt. Vrs. Amci*** *(I) (P) (2009), 17 SCC-796*, Shri Mishra taking this Court to the discussions and the findings therein submitted that the impugned orders vide Annexure-1 series are all bad and unless interfered and sets aside, the orders will create a bad precedent.

4. Shri Rath, learned Senior Counsel appearing for the opp. parties on the other hand while not disputing the submissions made by Sri Gautam Mishra, further taking this Court to a decision of the Hon'ble apex Court in the case of ***M/s. Emkay Global Financial Services Ltd. v. Giridhar Sondhi,*** *AIR 2018 S.C. 3894* submitted that for the repeated rulings of the Hon'ble apex Court, it appears the District Judge has failed in appreciating the legal position involved herein and thus arrived in a wrong and illegal impugned orders and the opp. party has no objection in the event of interference of this Court in the impugned orders.

5. Considering the rival contentions of the parties, this Court finds the sole point involved herein is as to whether the proceedings under Section 34 of the Act, 1996 can be treated at par with the Civil Suit under the Code of Civil Procedure and consequently, procedures involving trial of the suit, if be followed in the consideration of the application under Section 34 of the Act, 1996?

6. Looking to the provisions involving Arbitration and Conciliation Act, 1996, from the provision, particularly Act, Section 19, this Court finds the Statute provides the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. Under sub-rule 3 provision has been made to the extent failing any agreement between the parties to follow any other procedure in conducting its proceedings, the arbitral Tribunal shall conduct the proceedings in the manner which considers appropriate, so as to include the powers to determine the admissibility, relevance, materiality and weight of any evidence. Section 23 invites the statement of claim and defence whereas Section 24 provides procedure for hearing and written proceedings. From the reading of the above provision, this Court finds even in the original stage of the matter before the Arbitrator, there is no scope for following the procedures of the Code of Civil Procedure except however subject to agreement between the parties to apply any other procedure. The case at hand involves a proceeding at Section 34 of the Act. Now reading the provision at Section 34 of the Act, the provision under Section 34 is also absolutely silent on the applicability of the provisions of Code of Civil Procedure. The provisions rather go simply establishing that these proceedings are summary in nature. It is in this view of the matter, this Court observes the District Judge while undertaking the exercise of Section 34 of the Act, 1996 not justified in asking the parties to come for evidence. As a consequence, the order dated 7.5.2018 as well as the order dated 4.9.2018 refusing to recall the order dated 7.5.2018 becomes bad.

7. Now coming to law of the land involving such disputes, from the decision *Fiza Developers (supra),* this Court finds the Hon'ble apex Court taking up an issue of framing of issues as contemplated under Order 14 Rule 1 of the Code of Civil Procedure involving Section 34 of the Act, proceeding in paragraph 28 to 31 concluded as follows:-

> "28. Before concluding, there is a need to clarify the observation by the High Court that a proceeding under Section 34 may not be in the nature of adversarial proceedings. In an adversarial process, each party to a dispute presents its case to the neutral adjudicator seeking to demonstrate the correctness of his own case and the wrongness of the other. See P. Ramanatha Iyer's Advanced Law Lexicon, 3rd Edn., Vol.I, p.152) While an applicant in an application under Section 34 is interested in getting an order setting aside an award, his opponent is equally interested in ensuring that it is not set aside, but upheld. While an applicant presents his case to the Judge to prove that the award is liable to be set aside, the respondent puts forth his case to refute the claim of the applicant that the award is liable to be set aside. An application under Section 34 in that sense is adversarial in nature. But proceedings under Section 34 differ from regular civil suits in a significant aspect.
>
> *29. In a regular civil suit, in the event of failure to file a defence, it will be lawful for the court to pronounce the judgment on the basis of facts contained in the plaint [vide Order 8 Rule 5(2) of the Code]. But in an application under Section 34, even if there is no contest, the court cannot, on the basis of the averments contained in the application, set aside the award. Whether there is contest or not, the applicant has to prove one of the grounds set out in Sections 34(2) (a) and (b). Even if the applicant does not rely upon the grounds under clause (b), the court, on its own initiative, may examine the award to find out whether it is liable to be set aside on either of the two grounds mentioned in Section 34(2)(b). It is perhaps in this sense, the High Court has stated that the proceedings may not be adversarial. Be that as it may.*
>
> *30. Having regard to the object of the Act, that is, providing an expeditious alternative binding dispute resolution process with minimal court intervention, it is difficult to envisage proceedings under Section 34 of the Act as full-fledged regular civil suits under the Code of Civil Procedure.*
>
> *31. Applications under Section 34 of the Act are summary proceedings with provision for objections by the respondent-defendant, followed by an opportunity to the applicant to "prove" the existence of any ground under Section 34(2). The applicant is permitted to file affidavits of his witness in proof. A corresponding opportunity is given to the respondent-defendant to place his evidence by affidavit. Where the case so warrants, the court permits cross-examination of the persons swearing to the affidavit. Therefore, the court hears arguments and/or receives written submissions and decides the matter. This is of course the routine procedure. The court may vary the said procedure, depending upon the facts of any particular case or the local rules. What is however clear is that framing of issues as contemplated under Rule 1 of Order 14 of the Code is not an integral part of the process of a proceedings under Section 34 of the Act."*

8. Going through this decision, this Court observes the District Judge even though taken care of this decision but appears to have failed to appreciate the decision. The little scope available in the above decision has ever been taken away vide 2015 (6) Arb.L.R., 199 (SC) and AIR 2018 SC 3894.

(A) Now coming to another decision of the Hon'ble Apex Court in the case of ***COCHIN SHIPYARD LTD. vs. APEEJAY SHIPPING LTD***., *2015(6) Arbitration Law Reporter 199 (SC)*, in a similar situation the Hon'ble Apex Court taking into account a catena of decisions in paragraph 20 observed as follows-:

> **"20**. *In the instant case, the High Court has granted liberty to the respondent herein to examine its General Manager to substantiate its claim and further opining that the said evidence should be considered within the parameters of Sections 30 and 33 of the 1940 Act. The learned senior counsel for the parties have pressed their arguments relating to legal misconduct. Both the learned senior counsel for the parties have construed the order that the said liberty has been granted to establish the misconduct and precisely that is the subject matter of challenge before us. Therefore, we have clearly opined that to substantiate a stance of legal misconduct on the part of the arbitrator, examination of any witness in court is impermissible. It is because it must be palpable from the proceedings and learned Single Judge has already directed that the proceedings before the arbitrator to be requisitioned by the civil court. Least to say, it will be open for the respondent to establish the ground of legal misconduct from the arbitral proceedings. We may hasten to add that we have not said anything as regards legal misconduct pertaining to the present case, although we have referred to certain authorities as regards the legal misconduct.*

(B) Similarly, in a recent decision of the Hon'ble Apex Court in the case of *M/s. Emkay Global Financial Services Ltd. (supra)*, the Hon'ble Apex Court again entering into such controversy in paragraph 14 observes as follows :

> *"14. In a summary proceeding, the respondent is given an opportunity to file his objections or written statement. Thereafter, the Court will permit the parties to file affidavits in proof of their respective stands, and if necessary permit cross-examination by the other side, before hearing arguments. Framing of issues in such proceedings is not necessary. We hasten to add that when it is said issues are not necessary, it does not mean that evidence is not necessary."*

Further, the Hon'ble Apex Court in paragraph 22 of the said decision held as follows:

> *"22. It will thus be seen that speedy resolution of arbitral disputes has been the reason for enacting the 1996 Act, and continues to be the reason for adding amendments to the said Act to strengthen the aforesaid object. Quite obviously, if issues are to be framed and oral evidence taken in a summary proceeding under Section 34, this object will be defeated. It is also on the cards that if Bill No.100 of 2018 is*

passed, then evidence at the stage of a Section 34 application will be dispensed with altogether. Given the current state of the law, we are of the view that the two early Delhi High Court judgments, cited by us hereinabove, correctly reflect the position in law as to furnishing proof under Section 34(2)(a). So does the Calcutta High Court judgment (AIR 2012 (NOC) 345 (Cal)) (supra). We may hasten to add that if the procedure followed by the Punjab and Haryana High Court judgment (supra) is to be adhered to, the time limit of one year would only be observed in most cases in the breach. We therefore overrule the said decision. We are constrained to observe that Fiza Developers (2009 AIR SCW 6395) (supra) was a step in the right direction as its ultimate ratio is that issues need not be struck at the stage of hearing a Section 34 application, which is a summary procedure. However, this judgment must now be read in the light of amendment made in Section 34(5) and 34(6). So read, we clarify the legal position by stating that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the Arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2) (a), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties. We, therefore, set aside the judgment of the Delhi High Court and reinstate that of the learned Additional District Judge dated 22.09.2016. The appeal is accordingly allowed with no order as to costs."

9. From the above decision and for the settled position of law, further keeping in view the intention of the law makers to have an alternate and efficacious remedy for adjudication of the dispute through Act, 1996, avoiding the rigor of the process of Code of Civil Procedure, this Court while observing that the District Judge has failed in appreciating the settled principle of law and the intention behind such legislation and thereby committed wrong in passing the orders dated 7.5.2018 as well as 4.9.2018 appearing at Annexure-1 series. As a consequence, this Court interferes in both the orders under Annexure-1 series dated 7.5.2018 and 4.9.2018 involving Arbitration Case No.24 of 2015 sets aside the same and directs to proceed to decide the Arbitration Case No.24 of 2015 confining to the records of the Arbitration Proceeding nothing beyond that and subject to exception as provided in paragraphs 22 of AIR 2018 SC 3894.

10. In the result, the writ petition succeeds. However, there is no cost.

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2019 (II) ILR - CUT-178

S.K. SAHOO, J.

JCRLA NO. 87 OF 2012

BIKAR @ BIKRTAN MALLIK .....Appellant

.Vs.

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Delay in lodging the FIR – Offence under section 376 (2) (f) – Rape of a victim who is below twelve years old – Whether can be fatal for prosecution? – Held, No – This Court can take judicial notice of the fact that ordinarily the family of the victim would not intend to get a stigma attached to the victim – Delay in lodging the first information report in a case of this nature is a normal phenomenon and can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family.

"It is not in dispute that the incident which took place on 09.10.2011 was reported to the police on 20.10.2011. The informant (P.W.5) has stated that after the incident, she felt ashamed and out of shock, she felt sick. She disclosed the incident before her sister-in-law who came to her house and on her advice, she went to the police station and her brother-in-law Sudarsan Das scribed the F.I.R. which was presented before police. The F.I.R. reveals that the husband of the informant was staying outside and the mother-in-law of the informant was bedridden at the time of occurrence. This Court can take judicial notice of the fact that ordinarily the family of the victim would not intend to get a stigma attached to the victim. Delay in lodging the first information report in a case of this nature is a normal phenomenon and can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. In view of the materials available on record, I am of the humble view that the delay in lodging of the F.I.R. has been satisfactorily explained. I also find that there are no such contradictions in the evidence of the material witnesses like the victim (P.W.7), her mother (P.W.5) and also P.W.6 so as to disbelieve the prosecution case." (Para 11)

For Appellant : Mr. Gopal Krishna Nayak
For Respondent : Mr. Arupananda Das, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment: 20.02.2019

S. K. SAHOO, J.

The appellant Bikar @ Bikrtan Mallik faced trial in the Court of the learned Adhoc Addl. Sessions Judge (F.T.C.-II), Balasore in S.T. Case No.16/85 of 2012 for offences punishable under sections 450 and 376(2)(f) of

the Indian Penal Code for committing house trespass on 09.10.2011 at 9.00 a.m. by entering into the house of the informant Smt. X (P.W.5) situated in village Rehenga under Khantapada police station in the district of Balasore and committing rape on the daughter of the informant (hereafter 'the victim'), who was a girl below the age of twelve years. The appellant was found guilty under section 450 of the Indian Penal Code so also under section 376(2)(f)/511 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.1,000/- (rupees one thousand), in default, to undergo rigorous imprisonment for two months for the offence under section 376(2)(f) read with 511 of the Indian Penal Code and further to undergo rigorous imprisonment for three years and to pay a fine of Rs.1,000/- (rupees one thousand), in default, to undergo rigorous imprisonment for one month for the offence under section 450 of the Indian Penal Code with a further direction that both the substantive sentences were to run concurrently.

2. The prosecution case, in short, as per the first information report lodged by Smt. X (P.W.5) before the Inspector in charge of Khantapada police station on 20.10.2011 is that she was a daily wage earner and belonged to scheduled caste. Her husband was staying outside in connection with his work. She was having three children and out of her daily earning, she was maintaining her children as well as her mother-in-law who was bed-ridden. On 09.10.2011 in the morning the informant had gone outside to work and her three children were in the house. On that day at about 9.00 a.m., taking advantage of the absence of the informant from the house, the appellant came to her house and sent the youngest daughter of the informant to a shop and carried the victim (P.W.7) who was the middle daughter of the informant to inside the house, opened her pant and attempted to commit rape on her. When the victim cried, the appellant threatened to kill her by strangulating her and then committed rape on the victim. At that point of time, one of the neighbour namely Sasmita Mallik (P.W.6) came to the house of the informant and found the appellant was putting on his clothes. When P.W.6 confronted the appellant as to why he had come inside the house of the informant and why the victim was crying, the appellant replied that he had done nothing and accordingly he left the house. The victim did not tell anything to P.W.6 out of fear. When the informant returned home and found the victim crying, she asked the victim about the cause of her weeping and limping. The victim disclosed everything before her mother. The informant sent message to her husband but he did not come and then the informant also fell sick for some time for which there was delay in lodging the first information report.

3. On the basis of the first information report, Khantapada P.S. Case No. 244 of 2011 was registered under section 376(2)(f) of the Indian Penal Code by Mr. Manoranjan Biswal (P.W.10), Inspector in charge of the police station who also took up investigation of the case. During course of investigation, P.W.10 examined the informant (P.W.5), the victim (P.W.7) and other witnesses and seized one black colour under garment of the victim under seizure list (Ext.3). He sent the victim for medical examination to Khantapada Hospital on police requisition, visited the spot which is the dwelling house of the informant and prepared spot map (Ext.7). After the medical examination of the victim, the I.O. seized one sealed bottle containing vaginal swab of the victim on production by the constable and prepared seizure list (Ext.8). On 02.04.2012 he received information that the appellant had surrendered in the Court and remanded to judicial custody. On 12.04.2012 he brought the appellant under police remand for medical examination and prepared the medical requisition in favour of the appellant but since before the doctor, the appellant refused to get himself medically examined, he was sent back to judicial custody. The I.O. sent the seized exhibits to R.F.S.L., Balasore through the Court of learned S.D.J.M., Balasore. He received the medical examination report and after completion of investigation, he submitted charge sheet against the appellant under section 376(2)(f) of the Indian Penal Code.

4. After submission of charge sheet, the case was committed to the Court of Session after observing due committal procedure. The learned trial Court charged the appellant under sections 450 and 376(2)(f) of the Indian Penal Code on 16.07.2012 and since the appellant refuted that charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

5. During course of trial, in order to prove its case, the prosecution examined eleven witnesses.

P.W.1 Sudarshan Das is the uncle of the victim and he accompanied the informant and the victim to the police station at the time of lodging of the first information report.

P.W.2 Dr. Sasank Sekhar Das stated that when the appellant was produced for medical examination on police requisition, he refused for getting himself examined and accordingly, the report Ext.2 was prepared.

P.W.3 Sukantimani Barik was the constable who took the victim to the hospital for her medical examination and after her examination, she

handed over two sealed bottles containing vaginal swab of the victim collected by the doctor to the investigating officer.

P.W.4 Dhananjaya Patra is a constable who stated about the seizure of under garment of the victim under seizure list (Ext.3).

P.W.5 Smt. X is the informant and mother of the victim and she stated about the disclosure made by the victim on the date of incident about commission of rape on her by the appellant.

P.W.6 Sasmita Mallik stated to have marked the appellant in a naked position inside the house of the informant sleeping over the victim and at that time the victim was also naked and crying. She further stated that the victim disclosed before her about the commission of rape on her by the appellant which she in turn disclosed before the informant.

P.W.7 is the victim and she stated about the commission of rape on her by the appellant. She further stated about the arrival of P.W.6 in the house at the time of incident and narrating the incident not only before her but also before the informant in the evening.

P.W.8 Prasant Kumar Mallik is the brother of the victim who stated that the appellant came to their house on the date of incident and sent him to field and after he returned from the field, he found the victim crying and subsequently he came to know about the misdeeds committed by the appellant on the victim.

P.W.9 Dr. Kanhu Kishore Mohanty was the radiologist attached to District Headquarters Hospital, Balasore who on radiological examination opined the age of the victim in between six to eight years and proved his report (Ext.5) as well as the X-ray plate (Ext.6).

P.W.10 Manoranjan Biswal was the Inspector in charge of Khantapada police station and he is the investigating officer.

P.W.11 Dr. Arun Kumar Patra examined the victim on police requisition and proved his report Ext.4/2.

The prosecution exhibited eleven documents. Ext.1 is the first information report, Ext.2 is the medical examination report of the accused, Exts.3 and 8 are the seizure lists, Ext.4/2 is the medical examination report of victim, Ext.5 is the X-ray report, Ext.6 is the X-ray plate, Ext.7 is the spot map, Ext.9 is the medical requisition in favour of the appellant, Ext.10 is the copy of forwarding report and Ext.11 is the chemical examination report.

The prosecution also proved the panty of the victim girl as a material object i.e. M.O.I.

6. The defence plea of the appellant was one of the denial and it was pleaded that the victim was cutting grass over the ridge of his field and when he protested her, the informant quarreled with him and he suspected that for such incident, a false case has been foisted against him.

The appellant examined himself as D.W.1 in support of his defence plea.

7. The learned trial Court after analyzing the evidence on record has been pleased to hold that the evidence of P.W.6 who is an eye witness to the occurrence corroborated the evidence of the prosecutrix. It is further held that since the hymen of the victim was intact and there were no tears, the medical evidence belies the victim's statement regarding any sexual assault on her. It is further held that the victim is a reliable and trustworthy witness and there are sufficient corroborative piece of evidence to establish that the appellant came to the house of the victim, lifted her inside the house, undressed her and then he himself removed his lungi and slept over her and pressed his penis over her private part but failed to insert into her vagina. Accordingly, the learned trial Court convicted the appellant under section 450 and section 376(2)(f) read with section 511 of the Indian Penal Code.

8. Mr. Gopal Krishna Nayak, learned counsel appearing for the appellant contended that the inordinate delay in lodging the first information report has not been satisfactorily explained by the prosecution and the medical evidence goes against the oral evidence relating to any kind of sexual assault on the victim. The evidence of the witnesses are contradictory and therefore, the appellant should be given benefit of doubt

Mr. Arupananda Das, learned Addl. Govt. Advocate on the other hand supported the impugned judgment and contended that delay in lodging F.I.R. in a crime of sexual assault on a minor girl cannot be a ground to discard the prosecution case. He argued that since the doctor did not notice any injuries like tears to the hymen or any external injuries on the body of the victim and the victim stated that the appellant pressed his penis over her private part but he had not inserted it, the learned trial Court held that it is a case of attempt to commit rape.

9. Section 376(2)(f) of the Indian Penal Code prescribes punishment for commission of rape on a woman under the age of twelve years. Therefore,

first it is to be seen how far the prosecution has proved that the victim was under the age of twelve years.

The occurrence stated to have taken place on 09.10.2011. The victim (P.W.7) while deposing in Court on 22.08.2012 stated her age to be nine years. P.W.9, the radiologist attached to District Headquarters Hospital, Balasore stated that on 21.10.2011 he conducted radiological examination of the victim girl on police requisition and as per his report (Ext.5) which is based on the X-ray plate (Ext.6), the age of the victim was in between six to eight years. P.W.11 Dr. Arun Kumar Patra who examined the victim on 20.11.2011 at C.H.C., Khantapada stated that as per the radiological examination, the victim's estimated age was in between six to eight years and the victim had not attended her menarche i.e. the first menstrual cycle. P.W.5, the informant who is the mother of the victim stated while giving her deposition on 21.08.2012 that the victim was aged nine years. The age aspect of the victim has not been challenged by the defence. Therefore, one of the ingredients of the offence under section 376(2)(f) of the Indian Penal Code that the victim should be under twelve years of age is satisfied.

In the first information report, P.W.5 mentioned that rape was committed on the victim by the appellant. It is further stated in the F.I.R. that when P.W.6 arrived at the spot, she found that the appellant was putting on his clothes and the victim was crying and shivering. As per the F.I.R., the victim did not tell anything to P.W.6. P.W.5 in her evidence stated that when she asked the victim about the incident, she told that the appellant came and made her naked and then raped her (kharapa kama). The victim was unable to walk and she noticed her private part was swollen. P.W.6 also stated that she found the appellant was naked and he had slept over the victim and the victim was also naked and crying and the victim disclosed before her that the appellant came to their house, made her naked and committed rape on her. The victim (P.W.7) has stated that the appellant lifted her inside the house, removed her pant and then he laid her on the floor and removed his lungi and slept over her and pressed his penis over her private part. She got pain and when she cried, the appellant gagged her mouth and threatened to take away her life. In the cross-examination, the victim stated that the appellant pressed his penis over her private part but he had not inserted it. The doctor (P.W.11) stated that on 20.11.2011 when he examined the victim, he did not find any external injuries on her body. On examination of her genetalia, the general appearance was healthy, hymen was intact without any tear and there was no bleeding and there was no admissibility of finger. He further stated that in

case of forcible sexual intercourse on a virgin girl of aged eight years, there must be presence of injury on her private part and the injuries will subsist for about seven days.

The incident in question took place on 09.10.2011 at about 9.00 a.m. and the doctor (P.W.11) examined the victim on police requisition only on 20.10.2011. In view of the time gap between the date of occurrence and date of medical examination, non-finding of any external injury on the victim cannot be a ground to discard the entire prosecution case. As per Modi's Medical Jurisprudence, twenty-third edition, at pages 897 and 928, to constitute the offence of rape, it is not necessary that there would be complete penetration of the penis with emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and perineum. Since the victim (P.W.7) has stated that the appellant pressed his penis over her private part but had not inserted it and the doctor also found the hymen to be intact, the learned trial Court taking into account the explanation to section 375 of Indian Penal Code, which states that penetration is sufficient to constitute the sexual intercourse necessary to the commission of rape, held that it is a case of attempt to commit rape. In view of the oral evidence adduced by the victim which is corroborated by the informant and P.W.6 and further taking into account the medical evidence, I find no infirmity in the finding of the learned trial Court in that respect. Accordingly, the conviction of the appellant under section 376(2)(f) read with section 511 of the Indian Penal Code is upheld.

10. Section 450 of the Indian Penal Code prescribes punishment for house trespass in order to commit any offence punishable with imprisonment for life. Section 376 of the Indian Penal Code also prescribes punishment for life. House trespass has been defined under section 442 of the Indian Penal Code. If there is criminal trespass into any building used as a human dwelling then it can also come within the purview of house trespass. The victim (P.W.7) has stated that the appellant lifted her inside the house where the crime took place. P.W.6 has also stated that in the house of the victim, she found the appellant in a naked position so also the victim who was crying. Therefore, it

is apparent that on the date of occurrence, the appellant had committed criminal trespass into the house of the victim and therefore, the learned trial Court has rightly convicted the appellant under section 450 of the Indian Penal Code.

11. It is not in dispute that the incident which took place on 09.10.2011 was reported to the police on 20.10.2011. The informant (P.W.5) has stated that after the incident, she felt ashamed and out of shock, she felt sick. She disclosed the incident before her sister-in-law who came to her house and on her advice, she went to the police station and her brother-in-law Sudarsan Das scribed the F.I.R. which was presented before police. The F.I.R. reveals that the husband of the informant was staying outside and the mother-in-law of the informant was bedridden at the time of occurrence. This Court can take judicial notice of the fact that ordinarily the family of the victim would not intend to get a stigma attached to the victim. Delay in lodging the first information report in a case of this nature is a normal phenomenon and can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. In view of the materials available on record, I am of the humble view that the delay in lodging of the F.I.R. has been satisfactorily explained. I also find that there are no such contradictions in the evidence of the material witnesses like the victim (P.W.7), her mother (P.W.5) and also P.W.6 so as to disbelieve the prosecution case.

12. In view of the foregoing discussions, the conviction of the appellant under section 450 of the Indian Penal Code so also under section 376(2)(f) read with section 511 of the Indian Penal Code is quite justified. Keeping in view the nature and gravity of the accusation and particularly the age of the victim, the punishment which has been imposed on the appellant cannot be said to be excessive under any circumstances. It appears that in the meantime, the appellant has already undergone the sentence. Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. Therefore, the impugned judgment and order of conviction and sentence passed by the learned trial Court is upheld.

13. In view of the enactment of the Odisha Victim Compensation Scheme, 2017, keeping in view the age of the victim at the time of occurrence and the nature and gravity of the offence committed and the family background of the victim, I feel it necessary to recommend the case of

the victim to District Legal Services Authority, Balasore to examine the case of the victim after conducting the necessary enquiry in accordance with law for grant of compensation. Let a copy of the judgment be sent to the District Legal Services Authority, Balasore for compliance.

Lower Court's record with a copy of this judgment be communicated to the learned trial Court forthwith for information and necessary action. Accordingly, the Jail Criminal Appeal stands dismissed.

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2019 (II) ILR - CUT- 186

S.K.SAHOO, J.

CRLMA NO.104 OF 2018

SANJIDA BIBI & ORS. .....Petitioners

.Vs.

STATE OF ORISSA & ANR. .....Opp. Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439(2) – Provisions under – Prayer for cancellation of bail – Bail obtained by suppressing material facts which is amounting to fraud on court – Principles for such cancellation – Discussed – Bail cancelled.

Case Laws Relied on and Referred to :-

1. (1987) 2 SCC 684 : Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan.
2. A.I.R. 2002 SC 3040 : Harjeet Singh @ Seeta Vs. State of Punjab.
3. (2013) 55 OCR (SC) 881 : Moti Lal Songara Vs. Prem Prakash @ Pappu & Anr.
4. (2008) 12 SCC 481 : K.D. Sharma Vs. Steel Authority of India Limited & Ors.
5. (2007) 4 SCC 221 : A. V. Papayya Sastry & Ors .Vs. Government of A.P. & Ors
6. (1995)1 SCC 349 : Daulat Ram Vs. State of Haryana.

For petitioners : Mr. M.A. Ali & B.B. Senapati.
For State of Odisha : Mr. Prem Ku. Patnaik, Addl. Govt. Adv.
For Opp. Party no.2 : None

ORDER Date of Order : 11.04 2019

S.K.SAHOO, J.

This is an application under section 439 (2) of Cr.P.C. for cancellation of bail which was granted to the opposite party no.2 Sk. Moji @ Miajan in BLAPL No.3687 of 2017 as per order dated 24.05.2017 in connection with G.R. Case No.600 of 2016 pending on the file of learned S.D.J.M., Bhadrak.

Mr. M.A. Ali, learned counsel for the petitioners submitted that that opposite party no.2 Sk. Moji @ Miajan approached this Court for bail for the first time in an application under section 439 of Cr.P.C. vide BLAPL No.1568 of 2017 which was rejected as per order dated 13.04.2017 taking into account that the opp. party no.2 had set fire to the victim by pouring kerosene on her body in connection with non-fulfillment of demand of dowry and the medical examination report indicated that the victim had sustained 70% of burn injuries and that the burn injuries had completely disfigured the victim who presented herself in Court at the time of hearing of the bail application being identified by her advocate and further taking note of the fact that the act of the petitioner was extremely shocking and inhuman and further keeping in view the nature and gravity of the accusation.

Learned counsel for the petitioners further submitted that the opp. party no.2 again moved an application for bail before this Court during vacation in BLAPL No.3687 of 2017 which was filed on 22.05.2017 and it was not brought to the notice of this Court about the earlier rejection of his bail application in BLAPL No.1568 of 2017. It is further submitted that the learned Court taking into account the submission made on behalf of the opposite party no.2 that he is in judicial custody since 08.07.2016, granted bail to him since final charge sheet had already been submitted. It is further contended that not only at the time of rejection of the earlier bail application in BLAPL No.1568 of 2017, final charge sheet had been submitted but the opposite party no.2 was taken into custody on 24.01.2017 and not on 08.07.2016 as was submitted before the Court and by suppressing material facts and misleading the Court, bail order was obtained during vacation on 24.05.2017 and therefore, since the order has been obtained by playing fraud on the Court, the bail order should be cancelled.

Notice was issued to the opposite party no.2 by Special Messenger and service return is back with noting of valid service. None appears on behalf of the opposite party no.2.

Mr. Prem Kumar Patnaik, learned counsel for the State supported the submission made by the learned counsel for the petitioners and contended that since it is a heinous crime and the victim has sustained 70% burn injuries due to overt act committed by the opposite party no.2 and opposite party no.2 has obtained the bail order by playing fraud on the Court, the bail order is required to be cancelled.

On perusal of the file of BLAPL No.3687 of 2017, it appears that it is mentioned therein that the matter out of which the bail application arose was

never before this Court in any form whatsoever. This is obviously suppression of material fact relating to the earlier rejection of the bail order by this Court. Since the earlier application was rejected in BLAPL No.1568 of 2017 by another Bench, had it been pointed out to the Vacation Judge, it would have been directed to be listed before the Hon'ble Judge who rejected the earlier bail application in view of the standing order of the Hon'ble Chief Justice as well as decisions of the Hon'ble Supreme Court in case of **Shahzad Hasan Khan -Vrs.- Ishtiaq Hasan Khan reported in (1987) 2 SCC 684** and in case of **Harjeet Singh @ Seeta -Vrs.- State of Punjab reported in A.I.R. 2002 SC 3040**.

Law is well settled as held in the case of **Moti Lal Songara -Vrs.- Prem Prakash @ Pappu and another reported in (2013) 55 Orissa Criminal Reports (SC) 881** that anyone who takes recourse to method of suppression in a Court of law, is, in actuality, playing fraud with the Court, and the maxim suppresio veri, expression falsi i.e. suppression of the truth is equivalent to the expression of falsehood, gets attracted. It has been further held that as the order has been obtained by practicing fraud and suppressing material fact before a Court of law to gain advantage, the said order cannot be allowed to stand. In case of **K.D. Sharma -Vrs.-. Steel Authority of India Limited and Ors. 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 the material facts without any reservation, even if those are against him. Suppression or concealment of material facts is not an advocacy. In case of **A. V. Papayya Sastry and others -Vrs- Government of A.P. and others reported in (2007) 4 Supreme Court Cases 221**, it is held that judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non-est in the eye of the law. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceeding.

It is apparent from the order dated 24.05.2017 passed in BLAPL No.3687 of 2017 that not only the period of detention of the petitioner has been stated wrongly but also there was suppression of rejection of earlier bail order in BLAPL No.1568 of 2017. Therefore, the bail order has been obtained by playing fraud on the Court, by suppression of material fact and by misrepresentation of fact. Even though very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted as held by the Hon'ble Supreme Court in the case of **Daulat**

Ram -Vrs.- State of Haryana reported in (1995)1 Supreme Court Cases 349, but in view of the fraud committed and misrepresentation of fact, I am inclined to accept the prayer made by the petitioners in this application. Accordingly, the bail order passed in favour of the opp. party no.2 Sk. Moji @ Miajan in BLAPL No.3687 of 2017 as per the order dated 24.05.2017 stands cancelled.

The opp. party no.2 shall surrender in the Court below within a week from today failing which immediate steps shall be taken for his arrest.

A copy of the order be communicated to the learned S.D.J.M., Bhadrak.

The CRLMA is accordingly allowed.

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2019 (II) ILR - CUT- 189

S.K. SAHOO, J.

CRIMINAL APPEAL NO. 452 OF 2013

SUMIT KUMAR BEHERA & ANR. ……Appellants

.Vs.

STATE OF ODISHA …….Respondent

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20(b)(ii)(C) – Offence under – Conviction – Plea of non-compliance of mandatory provisions of Section 42 – Effect of – Discussed.

"In view of the mandatory provisions of section 42 of the N.D.P.S. Act, the Court is required not only to verify that the reliable information was taken down in writing but also the grounds of belief was also recorded as per the second proviso to section 42(1) of the N.D.P.S. Act and copy of the same was sent to the immediate official superior in view of sub-section (2) of section 42 of the N.D.P.S. Act. In a case of this nature where the prosecution is required to prove the compliance of the mandatory provision under section 42 of the N.D.P.S. Act, all the relevant documents which are connected with such compliance are to be proved before the trial Court in accordance with law and similarly all the concerned witnesses should be examined in Court to prove the vital aspect. In absence of proof of the oral as well as documentary evidence relating to compliance of such provision, the prosecution case should be viewed with suspicion. In view of the forgoing discussions, I am of the humble view that there is non-compliance of mandatory

provision of section 42(2) of the N.D.P.S. Act. When P.W.4 being the officer conducting search and seizure has also investigated the case and submitted the prosecution report and the investigation is not fair and justified, the brass seal was not produced in Court at the time of production of the seized articles, the independent persons examined by the prosecution who have not been declared hostile give a complete different picture regarding detection of contraband ganja, it cannot be said that the prosecution has successfully established the charge under section 20(b)(ii)(C) of the N.D.P.S. Act against the appellants beyond all reasonable doubt. Therefore, the impugned judgment and order of conviction of the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act and the sentence passed thereunder is not sustainable in the eye of law. (Paras 10 & 11)

Case Laws Relied on and Referred to :-

1. A.I.R. 2018 S.C. 3853 : Mohan Lal .Vs. State of Punjab.
2. (2005) 5 SCC 272 : Raja Ram .Vs. State of Rajasthan.
3. (2010) 15 SCC 369 : State by Inspector of Police .Vs. Rajangam.
4. (2010) 45 OCR 606 : Bata Khrushna Sahu .Vs. State of Orissa.
5. (2016) 65 OCR 702 : Panchanan Das .Vs. State of Orissa.
6. 1999 Criminal Law Journal 3672 : State of Punjab .Vs. Baldev Singh.
7. (1999) 8 SCC 257 : Kalema Tumba .Vs. State of Maharashtra & Anr.
8. (2001) 3 SCC 28 : Gurbax Singh .Vs. State of Haryana.
9. (2003) 7 SCC 465 : Madan Lal .Vs. State of H.P.
10. (2000) 9 SCC 541: Birakishore Kar .Vs. State of Orissa.
11. (2004) 2 SCC 186) : Saikou Jabbi .Vs. State of Maharashtra.
12. (2016) 64 OCR (SC) 827 : State of Rajasthan .Vs. Jag Raj Singh @ Hansa.
13. (1994) 7 OCR (SC) 283 : State of Punjab .Vs. Balbir Singh.
14. (2009) 44 OCR (SC) 183: Karnail Singh .Vs. State of Haryana.

For Appellants : Mr. Soura Ch. Mohapatra
For Respondent : Mr. Purna Chandra Das, Addl. Standing Counsel

JUDGMENT Date of Argument: 12.04.2019 :Date of Judgment: 24.04.2019

S. K. SAHOO, J.

The appellants Sumit Kumar Behera and Babu Gouda faced trial in the Court of learned Sessions Judge-cum-Special Judge, Ganjam, Berhampur in 2(a) C.C. No. 02 of 2011 (N) for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 18.02.2011 at about 07.00 a.m. they were found in possession of three quintals of contraband ganja in front of Iswari Dhaba at Podamari under Pattapur police station in the district of Ganjam carrying it in an Ambassador Car bearing registration number OR-02-AE-0200 in contravention of the provision under section 8(c) of the said Act.

The learned trial Court vide impugned judgment and order dated 23.08.2013 found the appellants guilty of the offence charged and sentenced each of them to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh) each, in default, to undergo further rigorous imprisonment for period of two years each.

2. The prosecution case, in short, is that on 17.02.2011 at about 8.00 p.m. Sarat Chandra Bhanja (P.W.4), S.I. of Excise, E.I. and E.B., Unit-II (S.D.), Berhampur received reliable information about illegal transportation of ganja in between Digapahandi and Luhagudi State Highway. He entered the fact in the information register and gave a letter to the Inspector in Charge, E.I. and E.B., Berhampur who directed him to detect the case. On 18.02.2011 at about 4.30 a.m. P.W.4 along with his staff proceeded to Podamari and in front of Iswari Dhaba, they found one Ambassador Car bearing registration number OR-02-AE-0200 was coming towards Digapahandi. When they detained the car, the appellant Babu Gouda was found in the driver's seat and appellant Sumit Kumar Behera was also found in the car. Jerry bags were found loaded on the rear seat of the car. When the appellants were asked about the contents of the jerry bags, they remained silent. P.W.4 asked the appellants to give option if they would like to be searched in presence of Executive Magistrate or Gazetted Officer but they opted to be searched by P.W.4. P.W.4 called independent witnesses to the spot and in their presence, the car was searched and ten numbers of jerry bags emanating smell of ganja were recovered from inside the car. P.W.4 conducted preliminary tests such as burning of a little piece of the contents of the bags and taking smell of the same. By his service experience, P.W.4 was confirmed that the jerry bags were containing ganja. The weight of the bags was taken which was found to be three quintals. Since the appellants did not produce any authority to transport ganja, the car along with its starting key, the jerry bags containing ganja were seized under seizure list Ext.1. P.W.4 sealed the seized bags by using papers and affixing impression of his brass seal. He gave his brass seal to P.W.2 Kalu Charan Jena on zima, recorded the statements of the appellants and witnesses. He gave a copy of the seizure list to each of the appellants by obtaining zimanama, prepared the spot map. The appellants were arrested and produced before the learned Special Court and as per the direction of the learned Special Court, the seized ganja bags were produced before the learned S.D.J.M., Berhampur and in his presence, the samples were collected. P.W.4 sent the sample packets for chemical analysis through Constable Bhagaban Mahanandia. During course of investigation,

P.W.4 issued a letter to the R.T.O., Bhubaneswar for supply of details of the seized car. The R.T.O. issued a letter enclosing xerox copy of the R.C. book that the owner of the vehicle was one Usarani Das. The owner was found dead and her husband submitted an affidavit with a copy of the death certificate of his wife. He received the chemical examination report and on completion of investigation, P.W.4 submitted the prosecution report against the appellants.

3. The learned trial Court framed charge under section 20(b)(ii)(C) of the N.D.P.S. Act on 02.09.2011 and the appellants refuted the charge and pleaded not guilty and claimed to be tried.

4. The defence plea of the appellants was one of denial.

5. In order to prove its case, the prosecution examined four witnesses.

P.W.1 Susanta Gouda who was working as Watchman at Forest Check-gate, Podamari stated that he has no knowledge about any incident and excise staff seized some bags.

P.W.2 Kalu Charan Sahu stated that on 18.02.2011 the excise staff seized ten bags of contraband ganja in front of P.W.D. I.B., Podamari and prepared seizure list in which he put his signature.

P.W.3 Bhagaban Mahanandia was working as Excise Constable attached to E.I. & E.B., Berhampur and he stated about seizure of ten bags of contraband ganja from inside the car on 18.02.2011, weighment of the contraband ganja, preparation of the seizure list and arrest of the appellants. He also proved the spot map (Ext.2) and written consent obtained from the appellants vide Exts. 3 & 4.

P.W.4 Sarat Chandra Bhanja was working as S.I. of Excise, who not only received the reliable information regarding transportation of ganja in a car but also proceeded to the spot with his staff, seized the jerry bags containing contraband ganja from inside the car, took weighment of the contraband ganja and prepared the seizure list as well as other documents. He arrested the appellants, produced them in Court, made prayer for sending the sample collected in Court for chemical examination, seized various documents and after completion of investigation, he submitted prosecution report against the appellants.

The prosecution exhibited eleven documents. Ext.1 is the seizure list, Ext.2 is the spot map, Exts.3 and 4 are the written consent of the appellants,

Ext.5 is the information letter, Ext.6 is the forwarding letter of S.D.J.M., Berhampur for chemical examination, Ext.7 is the letter of the Investigating Officer to the R.T.O., Bhubaneswar, Khurda for supply of particulars of the ownership of the Ambassador car, Ext.8 is the reply given by the R.T.O., Ext.9 is the xerox copy of death certificate of the owner of the offending vehicle, Ext.10 is the affidavit of Prasanna Kumar Dash, the husband of the deceased owner of the offending vehicle and Ext.11 is the chemical examination report.

The prosecution also proved ten material objects. M.Os. I to X are the sealed jerry bags containing residue ganja.

No witness was examined on behalf of the defence.

6. The learned trial Court after analysing the evidence on record came to hold that non-dispatch of a copy of the page of the register containing the entry relating to the reliable information received or an extract of the same in the factual scenario of the case cannot be viewed favouring non-compliance of provisions of section 42(2) of the N.D.P.S. Act. The learned trial Court was of the considered opinion that there has been substantial compliance of section 42(2) of the Act. It was further held that the discrepancy in the evidence of P.W.3 and P.W.4 with regard to the manner of coming of the vehicle is too trivial and such discrepancy is also not unnatural to occur and that itself is not a ground to entertain doubt with regard to search so as to upset the foundation of the prosecution case. The learned trial Court found the evidence of P.Ws.3 and 4 to be quite consistent and free from any doubtful features and held that P.W.1's non-supporting the prosecution case in relation to search, recovery and seizure has absolutely got no significance. It was further held that P.W.3 and P.W.4 during trial specifically identified appellant Babu Gouda as the driver of the car and the other appellant as the passenger and that the prosecution evidence that three hundred kilograms of ganja were recovered from the car which was in occupation of the appellants is wholly acceptable and that the prosecution case regarding search, recovery and seizure of ganja from the conscious possession of the appellants stood established beyond reasonable doubt.

7. Mr. Soura Ch. Mohapatra, learned counsel appearing for the appellants strenuously contended that there is no fair investigation as the Excise Sub-Inspector (P.W.4) conducting search and seizure has himself carried out the entire investigation and submitted the prosecution report. He placed reliance in the case of **Mohan Lal -Vrs.- State of Punjab reported in A.I.R. 2018 S.C. 3853** to show that if an informant police official in a

criminal prosecution is himself asked to investigate the case, serious doubts would naturally arise with regard to his fairness and impartiality and obligation of proof beyond reasonable doubt would take within its ambit fair investigation, in absence of which there can be no fair trial. It is further contended that Exts.3 and 4 have been created subsequently which reflects unfairness in the investigation. The evidence of two independent seizure witnesses i.e. P.Ws.1 and 2 are not in consonance with the seizure list (Ext.1) and even they have not stated about the presence of the appellants at the time of preparation of seizure list and those two witnesses have not been declared hostile by the prosecution and therefore, their evidence is binding on the prosecution and cannot be sidelined. He placed reliance in the case of **Raja Ram -Vrs.- State of Rajasthan reported in (2005) 5 Supreme Court Cases 272**. It is further submitted that even though P.W.3 and P.W.4, the two official witnesses arrived at the spot at the same time, their evidence relating to the position of car is completely different. P.W.3 stated that the Ambassador Car bearing Regd. no.OR-02-0200 was found parking near a road side Dhaba whereas P.W.4 stated that the Ambassador Car bearing Regd. No.OR-02-AE-0200 was found coming towards Digapahandi and they detained the vehicle. Mr. Mohapatra, learned counsel highlighted that P.W.3 has not stated that the two persons who were sitting inside the car were the appellants and he has not even stated that ten bags containing ganja were found inside that car. It is contended that when the car owner was not examined, it is doubtful as to how the offending car came into the possession of the appellants. It is argued that in the seizure list (Ext.1) as well as in the prosecution report, it is not mentioned that ten bags containing ganja were found on the rear seat of the car. The learned counsel further argued that though P.W.3 and P.W.4 have stated that the brass seal was handed over to P.W.2 but the evidence of P.W.2 is totally silent in that respect and even the brass seal was not produced in Court either when the seized contraband articles were produced for collection of sample and its dispatch for the chemical examination or during trial. It is further contended that after production of the contraband articles in Special Court, there is nothing to show regarding its production before the Magistrate for drawal of sample and there is also nothing on record to show as to how the samples were dispatched for chemical analysis. He argued that mandatory provision under section 42(2) of the N.D.P.S. Act has not been complied with and the copy of the information taken down in writing by P.W.4 has not been sent to the immediate official superior within stipulated hours, which has vitiated the search and seizure. According to him, proving Ext.5 as it is, is not the

sufficient compliance of section 42(2) of the N.D.P.S. Act and the material witnesses regarding receipt of the intimation letter (Ext.5) by the I.I.C., E.I. & E.B., Berhampur have neither been examined nor material documents relating to the receipt of such letter by the concerned I.I.C. have been proved during trial and everything has been subsequently stage managed to show the compliance of section 42(2) of the N.D.P.S. Act. It is argued that since punishment prescribed under the N.D.P.S. Act are very stringent in nature, it was required on the part of the prosecution to prove that the mandatory provisions under section 42(2) of the N.D.P.S. Act are being duly complied with and in the case in hand, the prosecution has failed to bring clinching materials on record on several important aspects relating to search and seizure and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellants.

Mr. Purna Chandra Das, learned Addl. Standing Counsel on the other hand supported the impugned judgment and contended that since the vehicle was detained and search and seizure was made in a public place, therefore, section 43 of the N.D.P.S. Act and not section 42 of the N.D.P.S. Act is applicable in the case. He further contended that both the appellants were found in the offending car when it was detained and the appellant no.2 was in the driver's seat and commercial quantity of contraband ganja in ten jerry bags were found in it and therefore, the learned trial Court is justified in convicting the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act.

Contention relating to unfair investigation

8. It is not in dispute that P.W.4 Sarat Ch. Bhanja, S.I. of Excise conducted search and seizure on 18.02.2011 and he also conducted investigation and submitted the prosecution report on 28.03.2011. The investigation of a case under N.D.P.S. Act is required to be carried out by a person who is absolutely impartial, unbiased and unmotivated.

In the case of **Mohan Lal** (supra), it is held as follows:-

> "11. A fair trial to an accused, a constitutional guarantee Under Article 21 of the Constitution, would be a hollow promise if the investigation in a NDPS case were not to be fair or raises serious questions about its fairness apparent on the face of the investigation. In the nature of the reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstances that may raise doubts about its veracity. The obligation of proof beyond reasonable doubt will take within its ambit a fair investigation, in absence of which there can be no fair trial. If the investigation itself is unfair, to require the accused to demonstrate prejudice will be fraught with danger vesting

arbitrary powers in the police which may well lead to false implication also. Investigation in such a case would then become an empty formality and a farce. Such an interpretation therefore naturally has to be avoided.

xx xx xx xx xx

14. In a criminal prosecution, there is an obligation cast on the investigator not only to be fair, judicious and just during investigation, but also that the investigation on the very face of it must appear to be so, eschewing any conduct or impression which may give rise to a real and genuine apprehension in the mind of an accused and not mere fanciful, that the investigation was not fair. In the circumstances, if an informant police official in a criminal prosecution, especially when carrying a reverse burden of proof, makes the allegations, is himself asked to investigate, serious doubts will naturally arise with regard to his fairness and impartiality. It is not necessary that bias must actually be proved. It would be illogical to presume and contrary to normal human conduct, that he would himself at the end of the investigation submit a closure report to conclude false implication with all its attendant consequences for the complainant himself. The result of the investigation would therefore be a foregone conclusion."

In case of **State by Inspector of Police -Vrs.-Rajangam reported in (2010) 15 Supreme Court Cases 369**, it is held as follows:-

"8. The short question which falls for consideration of this Court is: whether P.W.6 who registered the crime could have investigated the case or an independent officer ought to have investigated the case?

9. The learned Counsel appearing for the accused submitted that the controversy involved in this case is no longer res integra. In ***Megha Singh -Vrs.- State of Haryana : 1995 Criminal Law Journal 3988***, this Court has taken a categorical view that the officer who arrested the accused should not have proceeded with the investigation of the case. The relevant paragraph reads as under:

"4....We have also noted another disturbing feature in this case. P.W.3, Sri Chand, Head Constable arrested the accused and on search being conducted by him, a pistol and the cartridges were recovered from the accused. It was on his complaint, a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161 Cr.P.C. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation."

10. The ratio of ***Megha case*** has been followed by other cases. In another case in ***Balasundaran -Vrs.-. State: (1999) 113 ELT 785 (Mad)***, the Madras High Court took the same view. The relevant portion reads as under:

"16. Learned Counsel for the appellants also stated that P.W. 5 being the Inspector of Police who was present at the time of search and he was the investigating officer and as such it is fatal to the case of the prosecution. P.W. 5, according to the

> prosecution, was present with P.Ws. 3 and 4 at the time of search. In fact, P.W.5 alone took up investigation in the case and he had examined the witnesses. No doubt the successor to P.W.5 alone had filed the charge sheet. But there is no material to show that he had examined any other witness. It therefore follows that P.W.5 was the person who really investigated the case. P.W.5 was the person who had searched the appellants in question and he being the investigation officer, certainly it is not proper and correct. The investigation ought to have been done by any other investigating agency. On this score also, the investigation is bound to suffer and as such the entire proceedings will be vitiated."
>
> 11. In this view of the legal position, as crystallized in ***Megha Singh's case*** (supra), the High Court was justified in acquitting the accused."

In case of **Bata Khrushna Sahu -Vrs.- State of Orissa reported in (2010) 45 Orissa Criminal Reports 606** wherein it has been held that P.W.8 who was the person who conducted the search and allegedly recovered gunny bags M.Os. I, II and III and therefore, the investigation of the case by P.W.8 himself renders the charge against the petitioner vulnerable.

In case of **Panchanan Das -Vrs.- State of Orissa reported in (2016) 65 Orissa Criminal Reports 702**, it is held that where stringent punishment has been prescribed, ordinarily if a police officer is the informant in a case, in the fairness of things, the investigation should be conducted by some other empowered police officer or at least the investigation should be supervised by some other Senior police officer as the informant police officer is likely be interested in the result of the case projected by him. However, if the informant police officer in the exigencies of the situation conducts investigation and submits final form, it cannot be per se illegal. The defence has to prove in what way such investigation is impartial, unfair, biased or has caused prejudice to the accused.

In the case in hand, the search and seizure took place on 18.02.2011 and the prosecution report along with connected papers were filed in the Court of learned Sessions Judge –cum- Special Judge, Berhampur on 28.03.2011. When P.W.4 received the reliable information, searched the vehicle and seized the contraband articles, in all fairness of things, he should not have investigated the matter without any exigencies of the situation. P.W.4 has not stated anything as to what were the exigencies of the situation on his part to conduct investigation and to submit the prosecution report. There is nothing on record as to why any other competent officer was not assigned the investigation of the case. It is the duty of the prosecution to bring on record by adducing cogent evidence regarding the exigencies of the situation which compelled an officer conducting search and seizure of

contraband articles to carry forward with the investigation and to submit the prosecution report or charge sheet. In absence of such evidence, serious doubts would arise with regard to the fairness and impartiality in the investigation.

Coming to the contentions raised by the learned counsel for the appellants that Exts.3 and 4 have been created subsequently which reflects unfairness in the investigation, it appears that both these documents relate to compliance made on the spot as per the provisions of section 50 of the N.D.P.S. Act. There is no dispute that since it is a case of search of a car from where the jerry bags containing contraband ganja were recovered, section 50 of the N.D.P.S. Act would not be applicable which relates to a case of a search of a person. (**Ref:- State of Punjab -Vrs.- Baldev Singh: 1999 Criminal Law Journal 3672; Kalema Tumba -Vrs.- State of Maharashtra and another: (1999) 8 SCC 257; Gurbax Singh -Vrs.- State of Haryana: (2001) 3 SCC 28; Madan Lal -Vrs.- State of H.P: (2003) 7 SCC 465; Birakishore Kar -Vrs.- State of Orissa: (2000) 9 SCC 541; and Saikou Jabbi -Vrs.- State of Maharashtra: (2004) 2 SCC 186**). P.W.4 stated that when he asked the appellants to give option if they would like to be searched in presence of Executive Magistrate or Gazetted Officer, they opted to be searched by him. Ext.3 and Ext.4 are two computer printed formats where blank spaces are provided for inserting the names and addresses of the accused persons, which have been filled up by P.W.4. However, in those formats, it is already being printed that the accused was given the option of search in terms of section 50 of the N.D.P.S. Act but he opted to be searched by P.W.4. It is too difficult to believe that P.W.4 could prophesize that the accused persons might not be interested to be searched by any other Gazetted Officer or a Magistrate rather they would opt to be searched by him and that is how he carried the computer forms printed in that way to the spot. Such documents apparently have been prepared afterwards in the office but those have been anti-timed to show compliance of section 50 of the N.D.P.S. Act. The manner in which Exts.3 and 4 have been prepared, which were not necessary, reflects unfair investigation by P.W.4. Therefore, since the investigation conducted by P.W.4 was not fair and judicious, adverse inference is to be drawn against the prosecution.

Evidence of independent witnesses vis-à-vis official witnesses

9. Two independent witnesses have been examined in the case and they are P.W.1 and P.W.2. Both the witnesses have not stated anything against the

appellants. P.W.1 has stated that the spot is about 1 km. away from Iswari Dhaba and the spot was P.W.D. Bunglow Chowk of Podamari. He further stated that the bags were kept in front of P.W.D. I.B., which were seized and carried to Berhampur. P.W.2 has also stated that ten bags of contraband ganja were seized in front of P.W.D. I.B., Podamari. None of these witnesses have stated anything regarding the seizure of ten jerry bags containing contraband ganja from a car in front of Iswari Dhaba. They have not been declared hostile by the prosecution. If a witness resiles from his earlier statement given either to police or before the Magistrate, the Public Prosecutor can declare him as a hostile witness and with the permission of the Court, can put any questions to him which might be put in the cross-examination by the defence counsel in view of section 154 of the Evidence Act. If the Public Prosecutor fails to do so, the defence can take advantage from such unchallenged testimony to strengthen the defence plea. Of course, the Public Prosecutor can advance his argument that even though a particular prosecution witness has not been declared hostile but his evidence is not otherwise trustworthy and should be discarded and then it is for the Court to decide the acceptability of such argument. In case of **Raja Ram** (supra), it has been held that when P.W.8 has not been declared hostile by the Public Prosecutor for reasons only known to him, the evidence of P.W.8 is binding on the prosecution and such testimony cannot be sidelined. Basing on the ratio laid down in the aforesaid Supreme Court judgment, I am of the humble view that the evidence of P.W.1 and P.W.2 cannot be totally sidelined and their evidence creates doubt with regard to the prosecution case that the contraband ganja was seized in front of Iswari Dhaba from a car and the appellants were found in the car.

P.W.3, the Excise Constable stated that the Ambassador car was found parking near a road side Dhaba when he along with P.W.4 reached there. P.W.4, on the other hand, stated that the Ambassador car was coming from Digapahandi side and they detained the vehicle in front of Iswari Dhaba. It cannot be lost sight of the fact that both P.W.3 and P.W.4 proceeded together to the spot and reached at one point of time. P.W.3 stated that two persons were found sitting inside the car but he has not stated that the appellants were those two persons. Even if it is held that the Public Prosecutor inadvertently could not bring such things on record through P.W.3, but P.W.3 is silent in his chief-examination as to wherefrom the ten jerry bags containing contraband ganja were found and seized? P.W.3 has stated that no contraband ganja was found in the dickey of the car. He has stated the car registration number to be OR-02-0200 whereas P.W.4 stated

that the registration number of the car was OR-02-AE-0200. P.W.4 stated that samples were collected from the seized ganja bags before the learned S.D.J.M., Berhampur whereas from the cross-examination of P.W.3, it appears that at the spot, from each bag sample of 50 grams was drawn which were sealed with the seal of P.W.4. Even though P.W.3 and P.W.4 stated that the brass seal was handed over to P.W.2 but P.W.2 is totally silent in that respect. The zimanama of the brass seal in favour of P.W.2 has not been proved by the prosecution. The brass seal was also not produced before the Court by P.W.2 for verification when the seized jerry bags containing contraband ganja were produced in Court for drawal of samples for chemical examination. It is the requirement of law that when the contraband articles are seized and sealed with the seal impression then the brass seal has to be left in the zima of a reliable person under zimanama and instruction is to be given to such person to produce it before the Court for verification at the time of production of articles. The brass seal was also not produced at the time of trial.

The order sheet dated 18.02.2011 of the learned Special Judge, Berhampur indicates that when the appellants were produced before him on that day and the Investigating Officer prayed to draw samples to send the same for chemical analysis, the learned Special Judge directed the learned S.D.J.M., Berhampur for drawing samples from the seized ganja. There is no order sheet to show that the seized jerry bags containing ganja were placed before the learned S.D.J.M., Berhampur where samples were drawn. The forwarding letter of the learned S.D.J.M., Berhampur dated 18.02.2011 indicates that the seized properties were produced before him with a prayer to draw samples and to send it for necessary chemical analysis. There is nothing to show that the learned S.D.J.M., Berhampur verified the seized jerry bags to be under proper seal at the time of its production and that he broke open the seals of each jerry bags and collected samples separately. Therefore, it is doubtful as to whether the jerry bags after its seizure at the spot were properly sealed.

Non-compliance of Section 42 of the N.D.P.S. Act

10. Adverting to the contentions raised by the learned counsel for the appellants regarding non-compliance of the provision under section 42(2) of the N.D.P.S. Act, let me analyse the oral as well as documentary evidence adduced by the prosecution in that respect.

P.W.4 has stated that on 17.02.2011 at 8.00 p.m. he received information from reliable source about illegal transportation of ganja in

between Digapahandi and Luhagudi State Highway and accordingly, he entered the fact in the information register and gave a letter to the Inspector-in-charge, E.I. & E.B., Berhampur, who directed him to detect the case. P.W.4 proved the said information letter as Ext.5, his signature thereon as Ext.5/1 and the endorsement of I.I.C., E.I. & E.B., Berhampur as Ext.5/2.

The information letter (Ext.5) reads as follows:-

To,

The Inspector in Charge,
E.I. & E.B., Unit-II (SD), Berhampur

Sub : Intimation regarding detection of N.D.P.S. case.

Ref : Section 42(2) of N.D.P.S. Act.

Sir,

On dated 17.02.2011 at about 8.00 p.m., I got information from reliable sources that illegal transportation of Ganja (Cannabis) is going on through 4 wheeler in between Digapahandi to Luhagudi State Highway. Then I entered the details of information in the information Register i.e. C-1.

I would therefore request you that necessary instruction may kindly be passed to move for the enforcement purpose.

Yours faithfully,
Sd/-Illegible
17.02.2011

(Sarat Chandra Bhanja)
S.I. of Excise, E.I. & E.B.
Unit-II, Berhampur

(Received the intimation letter from Sri S. Ch. Bhanja, S.I. of Excise, E.I. & E.B., Berhampur. Directed to detect the case successfully.)

Sd/-Illegible
17.02.2011
I.I.C., E.I. & E.B.
Berhampur

Under section 42(1) of the N.D.P.S. Act, if the empowered officer receives reliable information from any person relating to commission of an offence under the N.D.P.S. Act that the contraband articles and incriminating documents have been kept or concealed in any building, conveyance or enclosed place and he reasonably believes such information, he has to take down the same in writing. However, if the empowered officer reasonably believes about such aspects from his personal knowledge, he need not take

down the same in writing. Similarly recording of grounds of belief before entering and searching any building, conveyance or enclosed place at any time between sunset and sunrise is necessary under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act if the concerned officer has reason to belief that obtaining search warrant or authorization for search during that period would afford opportunity for the concealment of evidence or facility for the escape of an offender. Section 42(2) of the N.D.P.S. Act states that when an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall *send a copy thereof* to his immediate official superior within seventy-two hours.

In case of **State of Rajasthan -Vrs.- Jag Raj Singh @ Hansa reported in (2016) 64 Orissa Criminal Reports (SC) 827** while discussing regarding the compliance of section 42 of the N.D.P.S. Act in case of a vehicle which was seized at the public place carrying contraband articles, it was held that since the jeep cannot be said to be a public conveyance within the meaning of Explanation to section 43 of the N.D.P.S. Act, hence, section 43 was clearly not attracted and provisions of section 42(1) proviso were required to be complied with and it was further held that the aforesaid statutory mandatory provisions having not complied with, the High Court did not commit any error in setting aside the conviction.

The present is not a case where P.W.4 suddenly carried out search in the vehicle at a public place rather according to P.W.4, the reliable information was received on the previous day in the evening hours. He has stated in the cross-examination that on 17.02.2011 at 08.00 p.m. he received information while he was in his office and he mentioned the details of information received and the ground of his satisfaction in the information register (C-1). He admits that his case diary does not reveal that he sent the extract of C-1 register to his Senior Officer. The intimation letter (Ext.5) according to him, did not bear any letter number though it was entered in the dispatch register. P.W.4 himself has come up with a case of compliance of section 42 of the N.D.P.S. Act but from his evidence, it is clear that he has not sent the copy of the details of reliable information received and the ground of his satisfaction which was mentioned in the information register (C-1) to the I.I.C., E.I. & E.B., Berhampur. What P.W.4 has intimated to the I.I.C. vide Ext.5 was only receipt of reliable information regarding illegal transportation of ganja and entering the same in the information Register C-1. Even if the intimation letter was received by the I.I.C., E.I. & E.B.,

Berhampur who is the immediate official superior of P.W.4 on the very day but according to my humble view, this would not be sufficient compliance of section 42(2) of the N.D.P.S. Act. P.W.4 was required to send the copy of the details of reliable information received and the ground of his satisfaction which was mentioned by him in the information register (C-1) to the I.I.C., E.I. & E.B., Berhampur. The salutary provision has a very useful purpose. Not only the superior official is required to be aware about the receipt of the reliable information by the concerned officer and his grounds of belief beforehand but also by sending such documents to the superior official, it would check any kind of tampering by the concerned officer with the nature of information received and reduced to writing. It would also safeguard the interest of an accused against false implication.

The Hon'ble Supreme Court while discussing the provision under section 42 of the N.D.P.S. Act in case of **State of Punjab -Vrs.- Balbir Singh reported in (1994) 7 Orissa Criminal Reports (SC) 283** has been pleased to hold that the object of N.D.P.S. Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those officers mentioned therein, on receiving information, should reduce the same to writing and also record reasons for the benefit while carrying out arrest or search as provided under the proviso to section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore, vitiates of the trial. The decision rendered in the case of **Balbir Singh** (supra) was further considered by a five-Judge Bench in the case of **Karnail Singh -Vrs.- State of Haryana reported in (2009) 44 Orissa Criminal Reports (SC) 183** wherein it was held in the concluding paragraph as follows**:-**

> "17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:
>
> (a) The officer on receiving the information (of the nature referred to in sub-section (1) of section 42 from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001."

Ext.5 does not reveal as to the type of four wheeler and its registration number in which the illegal transportation of ganja was stated to be going on and when it is likely to arrive at the spot where it was detected. The information that was received at 08.00 p.m. while P.W.4 was at the Excise office was to the effect that the illegal transportation was in between Digapahandi and Luhagudi State Highway and he proceeded towards Podamari with his staff at 4.30 a.m. i.e. about eight and half hours after the receipt of reliable information. As per the Google map, the distance between Digapahandi and Luhagudi State Highway is only 30.1 kms. and Podamari comes in between the two. If that was the distance factor, it is not understood as to how even after receipt of the information at 08.00 p.m., P.W.4 left to the spot after so many hours and in spite of that he was successful in getting the

offending vehicle. In absence of any previous information regarding the type of four wheeler and its registration number and the time of arrival at the particular place, it must have been daunting task in detecting the vehicle. The evidence of P.W.3 and P.W.4 regarding detecting the offending vehicle easily creates doubt about the prosecution case from its beginning.

According to the prosecution case, the owner of the vehicle namely Usharani Das was dead and her husband submitted an affidavit with a copy of the death certificate of his wife. The husband of the registered owner has not been examined during trial. There is no evidence as to how the offending vehicle came to the possession of the appellants. Neither any driving licence nor any other personal belongings of the appellants were found in the vehicle. When P.W.4 issued letter to R.T.O. to supply particulars of the seized car, the R.T.O. gave a letter enclosing the xerox copy of R.C. book which has been marked as Ext.8/1 which shows that it is a 'non-transport vehicle'. Thus the offending vehicle was not coming within 'public conveyance'. Therefore, in view of the ratio laid down in case of **Jag Raj Singh @ Hansa** (supra), the statutory mandatory provisions of section 42 of the N.D.P.S. Act are required to be complied with.

In view of the mandatory provisions of section 42 of the N.D.P.S. Act, the Court is required not only to verify that the reliable information was taken down in writing but also the grounds of belief was also recorded as per the second proviso to section 42(1) of the N.D.P.S. Act and copy of the same was sent to the immediate official superior in view of sub-section (2) of section 42 of the N.D.P.S. Act.

In a case of this nature where the prosecution is required to prove the compliance of the mandatory provision under section 42 of the N.D.P.S. Act, all the relevant documents which are connected with such compliance are to be proved before the trial Court in accordance with law and similarly all the concerned witnesses should be examined in Court to prove the vital aspect. In absence of proof of the oral as well as documentary evidence relating to compliance of such provision, the prosecution case should be viewed with suspicion.

11. In view of the forgoing discussions, I am of the humble view that there is non-compliance of mandatory provision of section 42(2) of the N.D.P.S. Act. When P.W.4 being the officer conducting search and seizure has also investigated the case and submitted the prosecution report and the investigation is not fair and justified, the brass seal was not produced in Court

at the time of production of the seized articles, the independent persons examined by the prosecution who have not been declared hostile give a complete different picture regarding detection of contraband ganja, it cannot be said that the prosecution has successfully established the charge under section 20(b)(ii)(C) of the N.D.P.S. Act against the appellants beyond all reasonable doubt.

Therefore, the impugned judgment and order of conviction of the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act and the sentence passed thereunder is not sustainable in the eye of law.

Accordingly, the Criminal Appeal is allowed. The appellants are acquitted of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act. The appellants who are in jail custody shall be set at liberty forthwith if their detention is not required in any other case.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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2019 (II) ILR - CUT-206

K.R. MOHAPATRA, J.

MACA NO. 519 OF 2009

M/S. ORIENTAL INSURANCE COMPANY LTD., SAHID NAGAR, BHUBANESWAR. ……...Appellant

.Vs.

SMT. PRATIMA KARMI & ORS. ……Respondents

MOTOR VEHICLES ACT, 1988 – Section 173 – Appeal by Insurance Company challenging the award – Plea that the driver of the offending vehicle which was a Tractor fitted with trolley had no valid driving License – The Driver had a driving license for light motor vehicle and Tractor – The question arose as to whether the driver holding a driving license to drive light motor vehicle and tractor is legally authorized to drive a tractor fitted with trolley? – Held, Yes – Reasons discussed.

(Paras 10 to 12)

Case Laws Relied on and Referred to :-

1. 2009 (II) OLR (SC) 442 : (Oriental Insurance Co. Ltd. Vs. Angad Kol & Ors).
2. AIR 1999 SC 3181 : (Ashok Vs. Oriental Insurance Company Co. Ltd.)
3. AIR 2001 SC 3356 : (Nagashetty Vs. United India Insurance Co. Ltd. & Ors.)
4. AIR 2008 SC 1418 : (National Insurance Co. Ltd. Vs. Annappa Irappa Nesaria)

5. 2010 (II) OLR 401 : M/s. United India Insurance Company Limited, Divisional Manager Vs. Prakash Chandra Patra & Anr.
6. (2001) 8 SCC 56 : Nagashetty Vs. Untied India Insurance Co. Ltd. & Ors.
7. 2005(3) T.A.C. 894 : Untied India Insurance Co. Ltd. Vs. Ghanashyam Majhi & Ors.
8. (2017) 14 SCC 663 : Mukund Dewangan Vs. Oriental Insurance Company Limited.
9. (2017) 8 SCC 590 : Sant Lal Vs. Rajesh & Ors.

For Appellant : M/s. D.P. Dash, B.K. Misra, & P.K. Barik
For Respondents : M/s. Manoj Ku. Pati, R.K. Mohapatra, B.P. Satpathy & S.K. Panigrahi
M/s. Geetanjali Majhi & S. Soren

ORDER Heard & Disposed of on 12.04.2019

K.R. MOHAPATRA, J.

This appeal has been filed by the appellant-Insurance Company under Section 173 of the Motor Vehicles Act, 1988 (for short 'the Act') assailing the judgment and award dated 02.04.2009 passed by the Additional District Judge-cum-MACT, Bolangir (for short 'learned Tribunal') in M.A.C. Case No. 82/18 of 2006-09 awarding a compensation of Rs.1,84,500/- along with interest @ 6% per annum in favour of the claimants-respondent nos.1 to 4 with certain conditions.

2. Heard Mr.Das, learned counsel for the appellant-Insurance Company and Mr. Pati, learned counsel for the claimants-Respondent Nos.1 to 4.

3. The owner of the vehicle involved in the accident, namely, respondent no.5 has not appeared. Although the driver of the vehicle, namely, respondent No.6 is represented, but no one appears for him at the time of call.

4. Short narration of facts necessary for proper adjudication of the case are that the Claimant-respondent Nos.1 to 4 who are widow and sons of one Bhagaban Karmi (for short, 'the deceased'), filed Claim Petition under Section 166 of the Act claiming compensation of Rs.4.50 lakh contending that on the ill-fated day, i.e., on 28.03.2004, when the deceased was travelling as a Coolie sitting on the trolley bearing registration No.OR-15-C-2096 fitted with Tractor bearing registration No.OR-15-C-2095 (for short 'the tractor'), it met with an accident due to rash and negligent driving of the driver-respondent no.6, as a result of which the deceased sustained severe bleeding injuries and succumbed to the same. Respondent No.5 was the registered owner of the said Tractor and Trolley. The Tractor and Trolley were insured with the appellant-Insurance Company, which was valid on the date of accident.

5. The owner of the tractor-respondent No.5 filed written statement denying the averments made in the claim petition. Although he admitted the accident, but denied the allegation that respondent no.6 was driving the Tractor in a rash and negligent manner. However, he contended that the tractor was insured with the appellant-Insurance Company covering the date of the accident. As such, compensation, if any, should be indemnified by the Insurance Company.

6. The appellant-Insurance Company filed its written statement refuting allegations made in the claim petition. Although it was admitted that the tractor was insured with the appellant-Insurance Company, but it was specifically contended that the driver-respondent No.6 was not authorized to drive the said vehicle, i.e., tractor fitted with trolley, as the driver held a driving license authorizing him to drive a 'light motor vehicle' and 'Tractor' only. As such, the Insurance Company is not liable to pay compensation.

7. Mr. Das, learned counsel for the appellant-Insurance Company submits that learned Tribunal while saddling the liability on the Insurance Company has not granted the right of recovery although a specific plea was taken by the Insurance Company that there was violation of the policy condition. The driver of the Tractor was authorized to drive light motor vehicle and Tractor only, but not a Tractor fitted with trolley, which is a goods carriage. Admittedly, the deceased was travelling in the tractor as a collie sitting on the trolley of the tractor loaded with sand. Thus, according to him, even if Section 147 of the Act makes it clear that the risk of the collie in a goods carriage is covered under the policy and no extra premium is required to be paid for him, but in view of the fact that the respondent No.6 was not authorized to drive the Tractor fitted with trolley, there is breach of policy condition and the Insurance Company is not required to indemnify the owner of the tractor. He also draws attention of this Court to the relevant portion of paragraph-5 of the written statement filed by the Insurance Company, which reads as under:

> "……Hence, the opposite party No.1 cannot be held liable to indemnify the owner of the vehicle. The driving license bearing No.401/92 issued by R.T.A., Bolangir in favour of Santosh Kumar Das, was authorized to drive light motor vehicle and tractor only. But the insurance policy was issued in favour of a goods carrying commercial vehicle, as such the driving license issued in favour of the driver was not a valid and effective one."

As such, learned Tribunal has committed error in saddling the liability on the Insurance Company without granting a right of recovery of compensation amount from the owner of the Tractor.

8. Mr. Pati, learned counsel for the claimants-respondent nos.1 to 4, however, supported the impugned judgment and award and prayed for dismissal of the appeal. He also prayed for a direction for early disbursal of compensation awarded.

9. Heard learned counsel for the parties and perused the materials available on record. Admittedly, the driver-respondent No.6 was authorized to drive light motor vehicles and tractor. A light motor vehicle is defined under Section 2(21) of the Act, reads as follows:-

> "2(21) "**light motor vehicle**" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms."

Goods Carriage is defined under Section 2(14) of the Act, which as follows:-

> "2(14) "**goods carriage**" means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods;"

Thus, the question arises, whether the respondent No.6 who was holding a license to drive 'light motor vehicle' and 'tractor' is legally authorized to drive a tractor fitted with a trolley?

10. This Court, relying upon case laws settled by Hon'ble Supreme Court in 2009 (II) OLR (SC) 442 ***(Oriental Insurance Co. Ltd. –v- Angad Kol and others)***, AIR 1999 SC 3181 ***(Ashok -v- Oriental Insurance Company Co. Ltd.)***, AIR 2001 SC 3356 ***(Nagashetty -v- United India Insurance Co. Ltd. and others)***, AIR 2008 SC 1418 ***(National Insurance Co. Ltd. –v- Annappa Irappa Nesaria)*** came to hold in the case of ***M/s. United India Insurance Company Limited***, ***represented through Divisional Manager Vs. Prakash Chandra Patra and another***, reported in 2010 (II) OLR 401, as under:-

> "On a reading of the aforesaid provisions clearly goes to show that the definition of a 'light motor vehicle', as given in Section 2(21) of the M.V. Act would also include a 'transport vehicle', whose gross vehicle weight does not exceed 7500 Kgs. It can apply only to a 'light goods vehicle' or a 'light transport vehicle'. A 'light goods vehicle' having not been defined in the M.V. Act, the definition of 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle, whose gross vehicle weight does not exceed 7500 Kgs. Therefore a 'light mother vehicle' can also mean a light passenger carriage vehicle and light goods carriage vehicle." (*emphasis supplied*)

It appears from the materials available on record that respondent no.6 was authorized to drive a Light Motor Vehicle and Tractor. A 'tractor' has been defined under Section 2(44) of the Act, which reads as follows:

> "2(44) "**tractor**" means a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road-roller."

11. Thus, a Tractor by itself is not designed to carry any load. It has to be fitted with or fastened with equipment like trolley to carry a load. A trolley may be a 'trailer" as defined under section 2(46) of the Act as intended to be drawn by a motor vehicle including a tractor. The issue as to whether a person authorized to drive Tractor can drive Tractor fitted or fastened with a trolley, has been answered by the Hon'ble Supreme Court in the case of ***Nagashetty -v- Untied India Insurance Co. Ltd. and others***; reported in (2001) 8 SCC 56, which reads as follows:

> "10. We are unable to accept the submissions of Mr. S.C. Sharda. It is an admitted fact that the driver had a valid and effective licence to drive a tractor. Undoubtedly under Section 10 a licence is granted to drive specific categories of motor vehicles. The question is whether merely because a trailer was attached to the tractor and the tractor was used for carrying goods, the licence to drive a tractor becomes ineffective. If the argument of Mr. S.C. Sharda is to be accepted then every time an owner of a private car, who has a licence to drive a light motor vehicle, attaches a roof carrier to his car or a trailer to his car and carries goods thereon, the light motor vehicle would become a transport vehicle and the owner would be deemed to have no licence to drive that vehicle. It would lead to absurd results. Merely because a trailer is added either to a tractor or to a motor vehicle by itself does not make that tractor or motor vehicle a transport vehicle. The tractor or motor vehicle remains a tractor or motor vehicle. If a person has a valid driving licence to drive a tractor or a motor vehicle he continues to have a valid licence to drive that tractor or motor vehicle even if a trailer is attached to it and some goods are carried in it. In other words a person having a valid driving licence to drive a particular category of vehicle does not become disabled to drive that vehicle merely because a trailer is added to that vehicle."

This Court in the case of ***Untied India Insurance Co. Ltd. –v- Ghanashyam Majhi and others***, reported in 2005(3) T.A.C. 894(Ori) relying upon ***Nagashetty (supra)*** has taken a similar view.

Hon'ble Supreme Court in the case of ***Mukund Dewangan –v- Oriental Insurance Company Limited***, reported in (2017) 14 SCC 663 held as follows:

> "30. The state Government has to maintain a register of motor vehicles under Rule 75 as provided in Form 41 which includes gross vehicle weight, unladen weight, etc. The Central Government has the power to frame rules under Section 27, inter alia, regarding minimum qualification, forms, and contents of the licences, etc. Thus, we are of the considered opinion that the definition of "light motor vehicle" under Section 2(21) of the Act includes transport vehicle of the class and weight defined therein. The transport vehicle or omnibus would be light motor vehicle, gross vehicle weight of which, and also a motor car or tractor or roadroller, unladen weight of which, does not exceed 7500 kg, and can be driven by holder of licence to drive light motor vehicle and no separate endorsement is required to drive such transport vehicle"

It is not the case of the appellant-Insurance Company that the tractor in question fitted with trolley had an unladen weight more than 7500 Kilograms. There is also no material on record to that effect.

In the case of ***Sant Lal -v- Rajesh and others***, reported in (2017) 8 SCC 590, following the ratio in ***Mukund Dewangan (supra),*** it is held as follows:

> "2. This Court has considered the question whether the holder of licence for light motor vehicle can drive tractor attached to the trolley carrying goods and also whether separate endorsement is required authorizing him to drive such a transport vehicle?
>
> 3. We have answered the question that the driver having licence to drive light motor vehicle can drive such a transport vehicle of LMV class and there is no necessity to obtain separate endorsement, since tractor attached with the trolley was transport vehicle of the category of light motor vehicle. Hence, there was no breach of the conditions of the policy.
>
> 4. Accordingly, in view of the answer given to reference by the three-Judge Bench of this Court in *Mukund Dewangan v. Oriental Insurance Co. Ltd.*, these appeals have to be allowed and are hereby allowed. The right given to the insurer to recover amount from the owner is hereby set aside. The liability is held to be joint and several of the owner, driver and insurer. No costs."

Thus, it can be safely concluded that respondent no.6, who was holding a driving license to drive a light motor vehicle and tractor was also authorized to drive tractor fitted/fastened with trolley on the date of accident.

12. Further, proviso to Section 147 of the Act reads as follows:-

> "**147. Requirements of policies and limits of liability:-**
>
> xx xx xx xx xx
>
> Provided that a policy shall not be required:–
>
> (i) to cover liability in respect of the death, arising out of and in the course of this employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee-
>
> (a) engaged in driving the vehicle, or
>
> (b) if it is a public service vehicle, engaged as a conductor of the vehicle or in examining tickets on the vehicle; or
>
> (c) if it is a goods carriage, being carried in the vehicle, or (ii) to cover any contractual liability."

Thus, the risk of the deceased, who was under the employment of the owner of the vehicle as a Coolie, is covered under the policy. As such, the Insurance Company is liable to indemnify the owner of the Tractor-respondent no.5.

13. Admittedly, respondent No.6 was authorized to drive Tractor fastened with trolley and both tractor was validly insured with the appellant-Insurance Company covering the date of the accident. As such, learned Tribunal has committed no error in fastening the liability of appellant-Insurance Company to indemnify the owner of the Tractor to pay compensation awarded in favour of claimants-respondent Nos.1 to 4.

14. In that view of the matter, I am not inclined to accept the contention raised by Mr. Das, learned counsel for the Insurance Company. Hence, the appeal being devoid of any merit deserves to be dismissed and the same is dismissed.

15. On deposit of the entire compensation amount along with interest before learned Tribunal as awarded, within a period of six weeks hence, the statutory deposit made before this Court along with interest accrued thereon shall be refunded to the appellant-Insurance Company on furnishing a certificate/proof of deposit of the awarded amount along with interest before learned Tribunal. Needless to say that the awarded amount along with interest to be deposited by the appellant-Insurance Company shall be released in favour of the claimants-respondent nos.1 to 4 on proper identification.

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2019 (II) ILR - CUT- 212

J.P. DAS, J.

CRIMINAL MISC CASE NO. 453 OF 2018

MADHUSUDAN DASH ……..Petitioner.

.Vs.

STATE OF ODISHA (VIG.) ……..Opp-Party.

PREVENTION OF CORRUPTION ACT, 1988 – Offences alleged under section 13(2) read with section 13(1)(c) and under Sections 409/465/468/471/ 420/120-B,I.P.C. – Charge sheet filed, cognizance taken – Petitioner assails the impugned order on the ground that the cognizance has been taken wrongly in absence of valid sanction of the competent authority to prosecute the petitioner for the alleged offences – Sanction refused by the competent authority – Whether the court can take cognizance of the offences? – Prayer for quashing – Held, in view of the position of law, when the sanction has been refused by the appropriate authority, the prosecuting agency could not have filed

charge-sheet mentioning that no sanction is necessary, which is again a matter to be considered by a competent court of law, and further the learned trial court could not have taken cognizance of the offences even without whispering a single word about the refusal of sanction – Order not sustainable in law. (Para 13)

Case Laws Relied on and Referred to :-

1. (2007) 36 OCR (SC) Page 233 : Prakash Singh Badal & Anr .Vs. State of Punjab & Ors)
2. AIR 2014 SCW 5924 : (Rajiv Ranjan & Ors Vs. R.Bijay Kumar)
3. (2015) 60 OCR (SC) 390 : State of Punjab Vs. Labh Singh
4. (2010) 14 SCC 527 : State of Himachal Pradesh Vs. Nishant Sarin)

For Petitioner : M./s. D.P. Dhal, B.S. Dasparida, M.K. Agarwalla, A.K. Srichanda S.S.Mohanty, S.R. Pati

For Opp. Party : Mr. Niranjan Moharana, Addl.Standing Counsel,(Vig.)

JUDGMENT Date of Hearing : 28.03.2019 : Date of Judgment : 25.04.2019

J.P. DAS, J.

This is an application under Section 482 of the Code of Criminal Procedure (in short, "Cr.P.C.") assailing the order of cognizance passed by the learned Special Judge, Vigilance, Cuttack against the present petitioner and others in T.R. Case No.47 of 2016 by order dated 25.11.2016 for the offences punishable under section 13(2) read with section 13(1)(c) of the Prevention of Corruption Act, 1988 (in short, "P.C.Act") read with Sections 409/465/468/471/ 420/120-B,I.P.C.

2. The petitioner assails the impugned order so far as he only is concerned on the ground that the cognizance has been taken wrongly by the learned trial court in absence of valid sanction of the competent authority to prosecute the petitioner for the alleged offences.

3. The prosecution case is that while the petitioner was working as Block Development Officer of Rasulpur Block, an allegation of misappropriation of Government money was reported and an enquiry was taken up. In course of enquiry, it was found out that one "Dapanala" an industrial canal located in Odisho Grama Panchayat of Rasulpur Block, Jajpur belongs to the Minor Irrigation Division, Cuttack. The said Irrigation Division framed estimate of Rs.3,00,000/-(three lakh) on 04.10.2008 for renovation work of the canal and completed the work between 25.02.2009 to 26.03.2009. But, it was alleged that the same work was again taken up for execution by Odisho Grama Panchay at under NREGS 2008-09. One

co-accused, Junior Engineer, prepared an estimate of Rs.5,00,000/-(five lakh) on 19.05.2009 and it was sanctioned by another co-accused Assistant Engineer. The Sarpanch of concerned Grama Panchayat provided administrative approval and issued Work Order on 20.05.2009 in favour of the Executive Officer of the said Grama Panchayat. The said work was shown to be completed on 15.06.2009 and final bill of Rs.2,22,260/- was paid. It was found out that neither the permission of the Irrigation Division was taken to undertake the said work nor it was actually taken up since it was completed earlier by the concerned Irrigation Division. It was found out that the present petitioner as the then B.D.O. of Rasulpur Block, had instructed for preparation of estimate in the month of May, 2009 and had also passed orders for issuance of muster rolls to the concerned Executive Engineer and Junior Engineer of the Block for the alleged project. He had also recommended some job cards without recommendation of the concerned Grama Panchayat. Finding the allegations to be prima-facie true, the charge-sheet was prepared and sanction was sought for from the concerned competent authority of the present petitioner and separately for other co-accused persons. So far as the other co-accused persons are concerned, sanction was accorded by the concerned authority. But so far as the present petitioner is concerned the appropriate authority namely, General Administration Department of the Government of Odisha refused to accord sanction against the present petitioner mentioning that orders have been passed for initiation of departmental proceeding against the present petitioner for his lack of supervision of the work on the grounds of gross negligence of duty in violation of NREGS guidelines and loss of government money. The said rejection order was issued on 22nd August, 2016.

4. The Vigilance Department submitted charge-sheet dated 29.09.2016 against all the accused persons including the present petitioner for the offences as aforesaid mentioning therein that no sanction was necessary for the present petitioner since he was no more holding the post of B.D.O., Rasulpur Block which he was holding during the check period for having been transferred on promotion and holding a different post in view of the decision of the ***Hon'ble Apex Court in Criminal Appeal No.721 of 2016 (L.Narayana Swamy vs State of Karnatake and others).*** The learned Special Judge, Vigilance by his order dated 25.11.2016 took cognizance of all the offences against the present petitioner and all other co-accused persons by the impugned order.

5. It was submitted by the learned counsel for the petitioner that in absence of a valid sanction as required under Section 19 of the Prevention of

Corruption Act as well as Section 197 of the Code of Criminal Procedure, the learned trial court could not have taken cognizance against the petitioner and hence, the impugned order is liable to be set-aside. That is the sole contention raised on behalf of the petitioner in assailing the impugned order.

6. Per contra, it was strenuously contended by Mr.Maharana, Additional Standing Counsel for the Vigilance, that in view of the specific observation of the Hon'ble Apex Court in ***L.Narayan Swamy case (Supra)*** relying upon a large number of earlier decisions on similar line that no sanction order is necessary for prosecuting a public servant if he has ceased to hold the post which he held during the check period for either being on transfer or on promotion the impugned order of cognizance is unassailable. Learned counsel also placed some other decisions on similar line that no sanction is necessary under Section 19 of the P.C. Act, if the Officer concerned has already ceased to hold the same post which he was holding during the check period. It was submitted by Mr.Dhal, learned counsel for the petitioner, that the position of law as relied upon by the Vigilance Department, though not disputed, is absolutely distinguishable in the present case for the reason that in the instant case necessary sanction was sought for and it has been refused.

7. The sole question remains to be answered in this case is whether the learned trial court was correct in taking cognizance of the offences against the present petitioner in absence of valid sanction. The charge-sheet was submitted specifically mentioning that in view of the decision of the Hon'ble Apex Court in the case of ***L.Narayan Swami (Supra)*** there was no necessity of sanction since the present petitioner has already seized to hold the office which he was holding during the check period. As seen from the impugned order, the learned Special Judge, Vigilance, has not made any discussion or reference of the said position of law and has simply passed the order of cognizance. The learned counsel for the State, Vigilance, harped upon the said position of law relying upon certain other case laws in submitting that no sanction is necessary in the present case in view of the fact that the petitioner is holding a different post presently.

8. One aspect gains importance in the present case differentiating it from the cases as cited and decided by the Hon'ble Apex Court in relation to necessity of sanction that in the present case, sanction has been refused by the competent authority under whom the petitioner was working at the relevant time of check period. In the case of ***L.Naryan swami*** it has been categorically observed that if the public servant had abused entirely different office or offices than the one, which he was holding on the date when

cognizance was taken, there was no necessity of sanction under Section 19 of the P.C. Act. It was further observed that:

> "Therefore, the corrupt conduct is directly attributable and flows from the power conferred on the office. This interrelation and interdependence between individual and the office he holds is substantial and not severable. Each of the three clauses of sub-section(1) of Section 6 (pre-amended) uses the expression office and the power to grant sanction is conferred on the authority competent to remove the public servant from his office and Section 6 requires a sanction before taking cognizance of offences committed by public servant. The offence would be committed by the public servant by misusing or abusing the power of office and it is from that office, the authority must be competent to remove him so as to be entitled to grant sanction. The removal would bring about cessation of interrelation between the office and abuse by the holder of the office."
>
> xxx xxx xxx
>
> "Therefore, it unquestionably follows that the sanction to prosecute can be given by an authority competent to remove the public servant from the office which he has misused or abused because that authority alone would be able to know whether there has been a misuse or abuse of the office by the public servant and not some rank outsider. By a catena of decisions, it has been held that the authority entitled to grant sanction must apply its mind to the facts of the case, evidence collected and other incidental facts before according sanction. A grant of sanction is not an idle formality but a solemn and sacrosanct act which removes the umbrella of protection of Government servants against frivolous prosecutions and the aforesaid requirements must therefore, be strictly complied with before any prosecution could be launched against public servants."

9. In the case of ***L.Naryan Swami*** the accused persons were holding different office at the time of taking cognizance for the offence from the office they held during the check period. Thus, it was the observation of the Hon'ble Apex Court that since the competent authority to remove the accused persons from the office has been changed, there was no necessity for obtaining sanction. But, in the present case, the Vigilance Department after preparation of charge-sheet, sought for sanction from the competent authority namely, State Government in the G.A. Department in its letter dated 18.08.2018 and the Government of Odisha in G.A Department in its letter dated 22.08.2018 was pleased not to accord sanction of prosecution against the present petitioner, Ex-B.D.O, Rasulpur Block, District Jajpur at present Sub-collector, Puri, further mentioning that orders have been passed for initiation of Departmental Proceeding against the petitioner for his lack of supervision of the work on the ground of gross negligence in duty, violation of NREGS guidelines and loss of Government money. Thus, it was apparent from the letter that the appropriate authority on analysis of the material facts came to the conclusion that no criminal offence has been committed by the petitioner but he was liable for being proceeded against in a departmental

proceeding for negligence in his official duty. In the stated circumstances, I am of the humble view that the present case of the petitioner stands absolutely on a different footing than the cited case laws where neither any sanction was sought for nor it was required. In the instant case, the sanction having been specifically refused by the competent authority, the bar provided under Section 19 of the P.C. Act or Section 197 of the Cr.P.C. comes into play prohibiting any court to take cognizance of any offence against the present petitioner.

10. It was further contended by the learned counsel for the State, Vigilance, that even if necessary sanction was refused for prosecuting the petitioner under Section 13 of the P.C. Act in view of the bar under Section 19 of the P.C.Act, still the petitioner can be prosecuted for the offences under Sections 409/465/468/471/420/120-B, I.P.C. since the alleged acts did not relate to his performance of official duties but for his personal gain. It was submitted that the grant or sanction is a mandatory requirement for launching prosecution if the alleged act is done in discharge of his official duties. But, the Section does not extend its protective cover to wrong act or every act of omission or commission done by a public servant. Relying on the decision in the case of (***Prakash Singh Badal and another vrs State of Punjab and others) (2007) 36 OCR (SC) Page 233,*** it was submitted that the offence of cheating under Section 420 I.P.C. or for that matter the offences relatable to Sections 467/468/471/120-B, I.P.C. can by no stretch of imagination by their very nature being regarded as having been committed by any public servant while acting or purporting to act in discharge of his official duty. Further referring to another decision in the case of ***(Rajiv Ranjan and others vrs R.Bijay Kumar)*** reported in ***AIR 2014 SCW 5924,*** it was submitted that it is not every offence committed by a public servant that requires sanction for prosecution under Section 197(1) of the Cr.P.C nor even every act done by him while he was actually engaged in the performance of his official duty, but if the act complained of is directly concerned with his official decision so that, if questioned it could be claimed to have been done by virtue of office, then sanction would be necessary.

11. The position of law as submitted and mentioned above are not at all in dispute. But again to reiterate, it can be mentioned that the alleged acts committed by the petitioner have been considered by the competent authority and having found not to have made out any criminal offence, necessary sanction has been refused, deciding to proceed against the petitioner

departmentally for his negligence in duty while functioning as the B.D.O of the concerned Block during the relevant period. In such circumstances, when it has been considered and sanction has been refused by the competent authority, it does not lie in the mouth of the investigating agency to say that no sanction is necessary.

12. In this regard learned counsel for the petitioner relied upon a decision reported in ***(2015) 60 OCR (SC) 390 State of Punjab Vrs. Labh Singh*** wherein it was observed by the Hon'ble Apex Court that if the matter was considered by the authority and the sanction to prosecute was rejected, the court could not have taken cognizance in so far as the offences punishable under the Indian Penal Code are concerned. It was further observed that as laid down by the Hon'ble Apex Court in the case of (***State of Himachal Pradesh Vrs Nishant Sarin) (2010) 14 SCC 527***, the recourse in such cases is either to challenge the order of sanctioning authority or to approach it again if there is fresh material.

13. In view of the said position of law, when the sanction has been refused by the appropriate authority, the prosecuting agency could not have filed charge-sheet mentioning that no sanction is necessary, which is again a matter to be considered by a competent court of law, and further the learned trial court could not have taken cognizance of the offences even without whispering a single word about the refusal of sanction.

14. Accordingly, I am of the considered view that the impugned order dated 25.11.2016 in T.R.Case No.47 of 2016 passed by the learned Special judge, Vigilance, Cuttack in taking cognizance of the offences punishable under Section 13 of the P.C.Act and other offences under the Indian Penal Code against the present petitioner on the face of refusal of sanction by appropriate authority is not sustainable in law and is accordingly set-aside. The CRLMC is disposed of accordingly.

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2019 (II) ILR - CUT- 218

DR. A.K. MISHRA, J.

CRLMC NO. 850 OF 2005

DILIP KUMAR PATTNAIK .....Petitioner.

.Vs.

HIMANSU PATTNAIK .....Opp. Party.

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Quashing of the order of cognizance for the alleged offence

under Section 441 of Indian Penal Code, 1860 – Petitioner took a long term lease of land – Lease terminated by giving notice to quit – In spite of quit notice the lessee remained in possession – Civil suits pending between parties – On a complaint being filed by the Lessor cognizance was taken under section 441 – Whether possession of such property amount to criminal trespass? – Held, No.

Presently, for the facts unfolded by the parties, the legal embargo for the tenancy which was entered into by virtue of a lease is found not overcome. The case does not come under the four corners of the Section 441 of I.P.C. as amended by Orissa Act 22 of 1986. In view of the legal position clarified in the aforesaid Division Bench judgment, the cognizance order, on being tested suffers from illegality.

(Para 10-a)

Counsel for Petitioner : M/s.Banshidhar Baug, B. R. Das, S. S. Ghosh, B.Das & S. Rath.

Counsel for Respondent : M/s. G. Mukherji, P. Mukherji, S. Patnaik, A.C. Panda, J. K. Mohapatra and S. Mohanty.

JUDGMENT Date of Hearing : 29.01.2019 : Date of Judgment : 08.02.2019

DR. A.K. MISHRA, J.

In this Lis U/s.482 Cr.P.C. prayer has been made to quash the proceeding as well as cognizance order dtd.07.01.2005 passed by the learned S.D.J.M., (Sadar) Cuttack in I.C.C. Case No.335 of 2001.

2. The petitioner was accused in the aforesaid complaint case while opposite party was the complainant.

3. The case of petitioner, in brief, is that on 14.02.1994 the complainant had entered in to a lease / tenancy agreement with the present petitioner – accused to let out a piece of land in Mouza – Ramgarh appertaining to Plot No.58 under Khata No.1005 measuring an area Ac.0.055 decimals and Plot No.1313/1458, area Ac.0.010 decimals, (total Ac.0.065 decimals) for a period of fifteen years at a monthly rent of Rs.1000/- with an understanding that the rent would get incremental increase by Rs.100/- annually. The accused – petitioner had installed a petrol filling station under the name and style "FILL & FLY" with the permission of the dealer IBP Company Ltd. The complainant had taken advance of Rs.10,000/-.

3-(a). The complainant issued Lawyer's notice on 05.02.2001 U/s.106 of the Transfer of Property Act for termination of tenancy. The complainant filed Title Suit No.149 of 2001 in the court of Civil judge, (Sr. Division) 1st Court, Cuttack for permanent injunction. In that case prayer for interim injunction was dismissed on 08.08.2003. The opposite party – complainant filed

Miscellaneous Appeal No.98 of 2003 before the learned District Judge, Cuttack and the same was dismissed on 08.10.2004. Complainant also filed Title Suit No.306 of 2001 in the court of Civil Judge (Sr. Division) 1st Court, Cuttack for eviction and damages which was subjudice. In December 2001 the present complaint I.C.C. No.335 of 2001 was filed but the accused petitioner received notice from the court to appear on 31.3.2005.

The further case of the petitioner is that in the complaint petition, the induction of tenancy, termination thereof by notice dtd.5.2.2001 U/s.106 of the Transfer of Property Act and filing of Title Suit No.149 of 2001 and Title Suit No.306 of 2001 have been averred.

Learned S.D.J.M., Cuttack had taken cognizance, after making enquiry U/s.202 Cr.P.C. U/s.447 IPC read with section 34 of the Indian penal Code. The accused petitioner has specifically asserted that he had not received any notice U/s441 of the I.P.C. (Orissa Amendment) dtd.14.11.2001.

4. Learned counsel for the petitioner Mr. Banshidhar Baug buttressed his submission that in view of the admitted position that a lease deed vide Annexure-1 was executed between the parties on 14.2.1994 for a period of fifteen years, the land lord – complainant should not have resorted to the criminal proceeding U/s.441 of the Indian Penal Code (Odisha Amendment) after filing of two civil suits. In support of his contention, he has relied upon the Division bench decision of this court in the case of **Akapati Bhaskar Patro Vrs. Trinath Sahu and Another** reported in **2001 (I) OLR 502**. He also relied upon two other decisions reported in **2008 Crl. L.J. 2397** in the case of **Sri Kumar Debasish Vrs. State of Orissa and Another** and **2002 (I) OLR 498** in the case of **Akapati Bhaskar Patro Vrs. Trinath Sahu and Another** (Single Bench).

5. Per Contra, learned counsel for opposite party - complainant Mr. G. Mukherji contended that the lease agreement under Annexure-1 was an unregistered document for which it is not admissible. Relying upon same Division Bench judgment in the case of **Akapati Bhaskar Patro** (supra) submitted that Section 441 of I.P.C. (Odisha Amendment) is applicable to the person who was permitted to possess the property for a particular period and after lapse of the said period, he was called upon to handover possession by issuance of quit notice.

6. Both parties having relied upon the Division Bench decision of this court in the case of **Akapati Bhaskar Patro** (supra), it is apt to refer the ratio laid down therein which is as follows:-

> *"12. On the basis of the discussions made in the preceding paragraphs, we are of the opinion that the rigors of section 441 of I.P.C. as amended by the Orissa Act 22 of 1986 shall not be applicable to the following cases:-*
>
> *(i) Statutory tenants whose tenancy is governed by any statute.*
>
> *[They are protected by tenancy laws like. Public Premises Eviction Act, etc.]*
>
> ***(ii) Tenant who has entered into possession by virtue of a lease.***
>
> *[Rights of such tenant is governed under the provisions of the Transfer of Property Act and the Specific Relief Act and he acquires a right of possession. After determination of tenancy by notice, he would become "Tenant holding over", "Tenant on sufferance" or "Tenant at will" as the case may be. His possession being juridical, is protected He can be evicted only in due process of law. The possession of such tenant cannot be equated with that of trespassers.]*
>
> *(iii) Person who has entered into possession by virtue of some covenant like, agreement to sell, will etc. and/ or put forth a genuine right over the property possessed.*
>
> *[If a person claims a right of title coupled with possession, till the dispute is adjudicated, his possession cannot be conclusively said to be that of a trespasser and his right to possess would be subject to the result of the suit or legal proceeding.]*
>
> *However, the said section shall be applicable to the following category of persons ;*
>
> ***(i) Person who was permitted to possess a property for a particular period and after lapse of the said period, he was called upon to handover possession by issuance of quit notice,***
>
> *(ii) Person who was put in possession by means of a 'licence' and who fails to handover possession after expiry of the term of licence and/or after receiving quit notice from the landlord,*
>
> *(iii) Persons who was in "permissive possession" and who fails to handover possession even after receiving a notice to quit] The reference made by the learned Single Judge is answered accordingly.*
>
> *Before parting, we feel constrained to observe that there cannot be an iron tight jacket to fit in all cases or tenants. It should be borne in mind that judicial process should not be permitted to be used as an instrument of oppression or needless harassment. The court should be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of private complainant as vendetta to harass the persons needlessly. In a given case, the court adjudicating the dispute has to take a pragmatic view keeping in mind the discussions made in this judgment and other provisions of law and arrive at a subjective satisfaction as to whether the mischief as stipulated under section 441, I. P. C. (Amended) has been intentionally committed or not and pass necessary orders."*

6-(a). It is noteworthy that the aforesaid Division Bench decision was the outcome of a reference by a Single Bench on the point as to the applicability of Section 441 of I.P.C. (Odisha Amendment) to a tenant whose tenancy has been terminated.

7. Facts admitted obviate debate, Annexure-1Agreement to let out premises was executed on 14.2.1994 between the parties and clause-1 of the said agreement shows that the lease was for a period of fifteen years from the date of taking possession of the premises. Clause 12 provides that the agreement may be terminated by either party by giving six months notice of his intention to do so and / or on due approval of I.B.P. Company Ltd. for re-phasing. It is not registered. The relationship between the parties on the basis of this agreement is stated to be land lord and tenant.

7-(a). The copy of complaint petition (Annexure-4) had referred to such agreement. It mentions about termination of tenancy by issuance of notice on 14.11.2001 U/s.106 of the Transfer of Property Act. Thus, the parties have acted by the agreement treating the same to be a lease and accused – petitioner was given possession for the purpose mentioned in the said document.

8. Learned counsel for the petitioner relied upon clause 2 of paragraph 12 of the Division bench judgment, i.e. "Tenant who had entered into possession by virtue of a lease" to submit that rigor of section 441 of I.P.C. as amended by Orissa Act 22 of 1986 is not applicable.

Learned counsel for opposite party relied upon the later part clause 1 which says that a person who was permitted to possess a property for a particular period and after lapse of the said period, he was called upon to handover possession by issuance of quit notice.

8-(a) In the aforesaid judgment the Court clarified the position of possession between "tenant-holding over" and "tenant-on sufferance" and has held that where continuance of occupation is in assertion of a right, the tenant could not be held guilty under this provision. To constitute the essence of the offence of criminal trespass under Section 441 (Orissa amendment) the basic ingredient is the intention and not simple occupation after service of notice to vacate. In all these cases, the bona fide claim advanced by the tenant has to be carefully considered before taking cognizance.

9. The judgment is not required to be read like a statute. Precedential authority cannot be construed like legislative enactments. For reading a judgment "the very words" found therein are to be referred to, i.e. *ipsossima verba* – "the very words". Reference in this regard may be made to the decision of Hon'ble Apex Court reported in **2008 (2) SCC 533** in the case of **State of Rajasthan Vrs. Ganeshi Lal,** wherein their Lordships stated as follows:-

"12. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. V. Horton (1951 AC 737 at p.761), Lord Mac Dermot observed:

"The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."

13. In Home Office v. Dorset Yacht Co. (1970 (2) All ER 294) Lord Reid said, "Lord Atkin's speech.....is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said:

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

14. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

15. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

**** *** *** "Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."*

9-(a) In another decision reported in **(2010) 5 SCC 388**, **Goan Real Estate & Constrn. Ltd. Vrs. Union of India** their Lordships have held that "A judgment, it is well settled, cannot be read as a statute. Construction of a judgment should be made in the light of the factual matrix involved therein. What is more important is to see the issues involved therein and the context wherein the observations were made. Observation made in a judgment, it is trite, should be read in isolation and out of context."

10. In the light of above principle, on reading of the Division Bench decision in **Akapati Bhaskar Patro** (supra), it is found that the later is applicable to the following category of persons while the earlier part refers that it shall not be applicable to the following cases. The dividing line between following category of persons and following cases is distinct and clear. Both are neither inconsistent nor intersecting. The very words *ipsissima vertra* dispels the doubt raised here.

10-(a) Presently, for the facts unfolded by the parties, the legal embargo for the tenancy which was entered into by virtue of a lease is found not overcome. The case does not come under the four corners of the Section 441 of I.P.C. as amended by Orissa Act 22 of 1986. In view of the legal position clarified in the aforesaid Division Bench judgment, the cognizance order, on being tested suffers from illegality.

In the decision reported in **2019 (I) OLR (SC) – 234** in the case of **Anand Kumar Mohatta and Another Vrs. State (Government of NCT of Delhi)** their Lordships of Hon'ble Apex Court have stated about the scope of the inherent power U/s. 482 Cr.P.C. to quash the proceeding in the following words:-

> *"27. We are of the opinion that the present case falls under the 1st, 3rd and 5th category set out in the para 102 of the judgment in the case of Bhajan Lal (supra). In such a situation, the High Court erred in dismissing the petition of the Appellants filed under Section 482 of Cr.P.C. This was a fit case for the High Court to exercise its inherent power under Section 482 of Cr.P.C. to quash the FIR.*
>
> *28. It is necessary here to remember the words of this Court in State of Karnataka v. L. Muniswamyand others6 which read as follows: -*
>
> *"7. …..In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice…..*"

12. For the reasons stated about, continuance of proceeding in I.C.C. Case No.335 of 2001 would be an abuse of the process of Court and to secure the ends of justice the same is required to be quashed.

Accordingly the proceeding as well as cognizance order dtd.07.01.2005 passed by the learned S.D.J.M., (Sadar) Cuttack in I.C.C. Case No.335 of 2001 is hereby quashed. The CRLMC is accordingly disposed of.

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