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opposite party (putative husband) and became pregnant – On 10.03.1998, the minor daughter took birth – The putative father did not marry her and left the village – The birth of the daughter of the petitioner was registered and the date of registration was 21.03.1998 as per Certificate of Birth – On 10.04.2003, a petition was filed U/s. 125 of Cr.P.C. claiming maintenance for the child as the father had sufficient income – Allowed by the learned court below after considering the evidence – Opp. Party husband preferred revision disputing the paternity of the petitioner-minor girl and the order granting maintenance was set aside – Whether legally correct? – Held, No, as the provisions of Registration of Births and Deaths Act, 1969 provides that the extract given by the State Government i.e. Certificate shall be admissible evidence for the purpose of proving the birth or death to which the entry relates – The Revisional Court has exceeded its jurisdiction when he entered to re-assess the evidence on record and that too relied upon a decision which was prior to the commencement of the Registration of Births and Deaths Act, 1969 – The proceeding U/s.125 Cr.P.C. is summary in nature and its decision is subject to final order in any civil proceeding – The scope of revision against the order granting maintenance U/s. 125 of Cr.P.C. being limited, the impugned order not sustainable.

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ROHINTON FALI NARIMAN, J & VINEET SARAN, J.

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(Arising out of SLP (C) Nos. 33747-33748 of 2014)

BHARAT HEAVY ELECTRICALS LTD. .....Appellant(s)

.Vs.

MAHENDRA PRASAD JAKHMOLA & ORS. .....Respondent(s)

WITH

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SLP(C) Nos. 33766-33767 of 2014

CIVIL APPEAL NOS. 1823-1824 OF 2019
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LABOUR SERVICE – Reference – Claim of reinstatement and regularization of the Contract labourers working under a Contractor engaged by BHEL – Award allowing the claim and confirmed by High Court – Appeal – Workers provided by the Contractor, whether can claim regularization in the Organisation of the Principal Employer? – Tests to be applied – Two of the well-recognized tests to find out whether the contract labourers are the direct employees of the Principal employer and whether the Principal employer pays the salary instead of the contractor; and whether the principal employer controls

and supervises the work of the employee – Facts not satisfying the requirements – Award set aside.

"12. The expression "control and supervision" in the context of contract labour was explained by this Court in International Airport Authority of India v. International Air Cargo Workers' Union thus: (SCC p.388, paras 38-39)

"38…. if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by a contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor."From this judgment, it is clear that test No. 1 is not met on the facts of this case as the contractor pays the workmen their wages. Secondly, the principal employer cannot be said to control and supervise the work of the employee merely because he directs the workmen of the contractor 'what to do' after the contractor assigns/allots the employee to the principal employer. This is precisely what paragraph 12 explains as being supervision and control of the principal employer that is secondary in nature, as such control is exercised only after such workman has been assigned to the principal employer to do a particular work."

Case Laws Relied on and Referred to :-

1. (1964) (2) SCR 838) : Basti Sugar Mills Ltd. .Vs. Ram Ujagar & Ors.
2. (2001) 7 SCC 1 : Steel Authority of India Ltd. & Ors. .Vs. National Union Waterfront Workers & Ors.
3. (2002) 3 SCC 39 : Swami Krishnanand Govindananad .Vs. Managing Director, Oswal Hosiery (Regd.)
4. (1976) 1 SCC 863 : C.M. Arumugam .Vs. S. Rajgopal.
5. 2014(9) SCC 407 : Balwant Rai Saluja & Anr. .Vs. Air India Limited & Ors.
6. 1988 (Supp) SCC 768 : Calcutta Port Shramik Union.Vs. Calcutta River Transport Association & Ors.
7. 2016 4 SCC 493 : Pepsico India Holding Private Ltd. .Vs. Grocery Market.
8. (2010) 3 SCC 192 : Shops Board & Ors. Harjinder Singh .Vs. Punjab State Warehousing Corporation'

For Parties : Mr. Sudhir Chandra, Sr. Adv. Mr. Parijat Sinha, AOR
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Madan, AOR, Mr. Mukesh Jain, AOR, Ms. Madhu Talwar,
Mr.Rahul Verma, Mrs. D. Bharathi Reddy, AOR & Ms. Rachna Gandhi.

JUDGMENT Date of Judgment : 20 .02.2019

R. F. NARIMAN, J.

The present appeals arise out of a judgment dated 24.04.2014 and a review dismissal from the aforesaid judgment dated 11.09.2014, by which the High Court of Uttarakhand has dismissed a writ petition against a Labour Court's Award.

The brief facts necessary to decide these appeals are as follows:

By Reference Order dated 09.11.2004 under Section 4(k) of the Uttar Pradesh Industrial Disputes Act, 1947, the following dispute was referred to the Labour Court:

> "Whether termination of services of workman Shri Mahendra Prasad Jakhmola, s/o Late Shri Vachaspati Jakhmola, Helper by the employer, w.e.f. 13.11.2001, is justified and/or as per law? If not, what benefit/relief the concerned workman is entitled for and with what other details?"

Similar Reference Orders were made in 63 other cases.

Pleadings were filed before the Labour Court at Haridwar and evidence was led on behalf of the appellant as well as by the workmen. By an Award dated 01.11.2009, the Labour Court held, referring to a notification, which is, notification dated 24.04.1990 under the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter referred to as '1970 Act'), that the said notification, on application to the appellant, would show that the workmen were not deployed to do the work mentioned in the notification. It was further held that based on documentary evidence in the form of gate passes, the workmen, who were otherwise employed by a contractor, were directly employed by the appellant. It was also held to have been fairly conceded by the employer's representative that supervision, superintendence and administrative control of all these workmen were with the appellant. It was also held that under the extended definition of "employer" in the Uttar Pradesh Industrial Disputes Act, 1947, even if the workmen are regarded as workmen of a contractor, they would yet be workmen of the appellant as the appellant was within the extended definition of "employer" under the Act. This being the case, it was held that all such workers, being 64 in number, were entitled to be reinstated with immediate effect but without backwages. From this Labour Award, a review petition was filed by the appellant, in which it was clearly stated that no such concession, as recorded by the Labour Court, was made before it. Further, notification dated 24.04.1990 had

no application as Bharat Heavy Electricals Ltd. (BHEL) was exempted therefrom and, therefore, to apply this notification to the facts of this case was also wrong. On 18.05.2011, this review was dismissed by the Labour Court holding:

> "Considering the above noted discussion, as made in award dated 01.11.2009, I find force in the argument of opposite part-2 that as far as notification dated 24.04.1990 is concerned, this court has already considered and has given its verdict on this notification and now on review application no contrary inference can be drawn by this court as prayed by the applicant. As far as Notification dated 23.07.2010 (supra) is concerned, this notification was not issued by Government when award was passed. As such, this notification cannot be said applicable at that time and no benefit of later issued notification dated 23.07.2010 can be given to applicant. Moreover, if applicant was exempted vide notification on dated 24.04.1990, in such a case what was the necessity to issue the second notification dated 23.07.2010 (supra) for exemption of contract labour.
>
> On perusal of all the documents and legal preposition of law laid down by Apex Court in Uttar Pradesh State Roadway Transport Corporation versus Imtiaz Hussain (supra). I am in agreement with the Opposite Party-2 that except arithmetical or clerical errors, the order which was passed by the court on merit, cannot be changed, amended or altered. As far as case in hand is concerned no clerical or arithmetical mistake is involved. As such, application A-2 is liable to be rejected."

A writ petition was filed, being W.P. No. 1021/2011, against the aforesaid orders. This writ petition was dismissed by the first impugned order dated 24.04.2014 in which the High Court recorded that "undisputedly" all petitioners, i.e., workmen, were performing the duties which were identical with those of regular employees. Therefore, it can be said that they were under the command, control, management of the BHEL and, concomitantly, the contractor has absolutely no control over the workmen in performing such duties. It was, therefore, held that the alleged contract with the contractor was "sham" and, consequently, the Labour Court Award was correct in law and was upheld. Against this order, a special leave petition was filed which was disposed of as follows: -

> "……. In the impugned order the High Court records, *"Undisputedly, all the petitioners, herein, were performing the skilled/unskilled duties with the regularly appionted staff of BHEL in BHEL Factory Premises and were reporting on duties along with regular employees to perform identical duties and had been working for fixed hours along with regular employees of BHEL.*"
>
> Mr. Sudhir Chandra, learned senior counsel for the petitioner submits that the above position was seriously disputed and the High Court has wrongly recorded "*Undisputedly*".

> If that be so, the course open to the petitioner is to approach the High Court seeking review of the impugned order. The submission cannot be entertained for the first time by this Court having regard to the statement of fact recorded in the impugned order.
>
> We observe that if review applications are filed within two weeks, the same will not be dismissed on the ground of delay.
>
> Since special leave petitions are not being entertained on the above ground, liberty is granted to the petitioner to challenge the impugned order, in case, review applications are dismissed by the High Court.
>
> Special leave petitions are disposed of."

The appellant, then filed a review petition before the High Court, which disposed of the review stating:

> "BHEL has submitted written statement before the learned Labour Court. Paragraph 3 thereof reads as under:
>
> "3. The workman concerned in the dispute Sri Mahendra Prasad Jakhmola was never engaged by BHEL Haridwar and he was not their employee and they were not his employers. It appears that he might have been engaged and employed by the contractor Sri Madan Lal who also has been made party as employer in the Industrial Dispute under reference."
>
> Plain reading of paragraph 3 of the written statement would go to suggest that even BHEL is not sure as to whether workmen were supplied by the contractor or were engaged by the BHEL. That being so, even if there was any Contract Labour Agreement between the BHEL and Madan Lal, alleged contractor, same seems to be sham transaction and camouflage.
>
> Not only this, the BHEL/employer-I has not placed on record any material to demonstrate that under the alleged Labour Contract Agreement payment was ever made in favour of Madan Lal/alleged contractor for supplying labourers/workmen in question; no material is available on the record to say what was the period of supplying the labourers under the contract.
>
> In view of the above discussion, I do not find any good or valid reason to review the judgment under review. Consequently, all the review applications fail and are hereby dismissed."

Shri Sudhir Chandra, learned senior counsel appearing on behalf of the appellant, has argued before us that the Labour Court Award was perverse. Accordingly to him, it could not have applied the notification dated 24.04.1990 as his client was excluded from such notification, and being excluded from such notification, there was, consequently, no prohibition on employment of contract labour. Further, if the evidence is to be read as a

whole, it is clear that the representative of BHEL made it clear that, in point of fact, there were agreements with contractors and that it is workers of such contractors, who were paid by them, that are involved in the present dispute. He also added that no concession was made before the Labour Court, as was pointed out in the review petition, but, unfortunately, this plea was also turned down by the Labour Court, dismissing the review petition. Merely to state that because gate passes were given, does not lead to inference that there was any direct relationship between the appellant and the respondent-workmen. He also argued that the High Court, in the first round, not only missed the fact that the Labour Court Award was perverse, but committed the same error by stating that the admitted position before the High Court was also that the labour was directly employed by the appellant. This is why, according to him, the Supreme Court sent his client back in review, but the review order, after setting down a paragraph of the written statement filed by the so-called employer, then arrived at an opposite conclusion from what is stated therein. For all these reasons, therefore, according to him, the judgments of the High Court and the Labour Court Award ought to be set aside. He also cited certain judgments before us to buttress his argument that there was no manner of direct employment between his client and the workmen. Ms.Asha Jain, on the other hand, has pointed out to us that we should not exercise our discretionary jurisdiction under Article 136 of the Constitution, inasmuch as the Labour Court Award is a fair Award, as only reinstatement was ordered without back wages. She also argued that, at no stage, had BHEL, which is a Government Company, reinstated her clients despite the fact that there is no stay granted in their favour. She went on to add that the concession that was made was rightly made before the Labour Court, and that the review petition did not contain any statement by any authorised representative, who made such concession, that he had not done so. She countered the argument that gate passes were not the only basis of the Labour Court, concluding that a direct relationship exists between the appellant and her clients. She argued that despite the change of contractors four times over, the same workers continued showing, therefore, that there was a direct relationship between these workmen and the employer. She also pointed out from certain documents that the contractor got a 10 per cent profit and otherwise he had nothing to do with the labour that was provided by him. She then relied upon certain judgments which state that the power of judicial review of the High Court ought to be exercised with circumspection, and that mere errors of law or fact cannot be interfered with. She also strongly relied upon the judgment in '*Basti Sugar Mills Ltd.* v. *Ram Ujagar* and Ors.'

[(1964) (2) SCR 838) to state that, in any event, even if these employees were employees of the contractor, yet by the extended definition of 'employer' in the Uttar Pradesh Industrial Disputes Act, a relationship of employer and workmen would exist under the said Act. She went on to cite certain passages in the '*Steel Authority of India Ltd. And Ors.* v. *National Union Waterfront Workers and Ors.'* [(2001) 7 SCC 1] to buttress her contention that even if there were agreements with the contractor, they were only 'sham' or nominal on the facts of this case.

Having heard learned counsel for both the sides, it is important, first, to advert to the Award of the Labour Court. The said Award sets down the notification dated 24.04.1990 that was issued under the 1970 Act. A reading of the aforesaid notification makes it clear that the appellant, insofar as their UP operations are concerned, in Haridwar, in particular, are exempted from the aforesaid notification. Despite this, however, the Labour Court went on to apply the said notification, which would clearly be perverse. In addition, though Ms. Jain stated that documentary evidence was filed, yet the Labour Court based its finding on direct relationship between the parties only on the gate passes being issued by the appellant, and on a concession made by the appellant's representative.

What is clear from the evidence that was led by the parties is that the aforesaid gate passes were issued, as has been stated by the appellant's witness, only at the request of the contractor for the sake of safety and also from the administrative point of view. The idea was security, as otherwise any person could enter the precincts of the factory. This evidence was missed by the Labour Court when it arrived at a conclusion that a direct relationship ought to be inferred from this fact alone. Further, as has been correctly pointed out by Shri Sudhir Chandra, the appellant has, not only in the first review, but also in the writ petition filed, taken the plea that no such concession was ever made. Moreover, quite apart from this plea and the counter plea of Ms. Jain that the person who has made such concession should have stated that he did not do so, concessions on mixed questions of fact and law cannot decide cases as the evidence as a whole has to be weighed and inferences drawn therefrom.

Even a concession on facts disputed by a respondent in its written statement cannot bind the respondent. Thus, in *Swami Krishnanand Govindananad* v. *Managing Director, Oswal Hosiery (Regd.)* [(2002) 3 SCC 39, this Court held:

> "2. ……. It appears that when the case was posted for trial, the learned counsel appearing for the respondent conceded the facts disputed by the respondent in his written statement before the Court. That statement of the advocate was recorded by the Additional Rent Controller thus: "The respondent's learned counsel has admitted the ground of eviction and also the fact that the applicant is a public charitable institution and for that purpose it required the premises." …….
>
> 3. ……. Whether the appellant is an institution within the meaning of Section 22 of the Act and whether it required bona fide the premises for furtherance of its activities, are questions touching the jurisdiction of the Additional Rent Controller. He can record his satisfaction only when he holds on these questions in favour of the appellant. For so holding there must be material on record to support his satisfaction otherwise the satisfaction not based on any material or based on irrelevant material, would be vitiated and any order passed on such a satisfaction will be without jurisdiction. There can be no doubt that admission of a party is a relevant material. But can the statement made by the learned counsel of a party across the Bar be treated as admission of the party? Having regard to the requirements of Section 18 of the Evidence Act, on the facts of this case, in our view, the aforementioned statement of the counsel for the respondent cannot be accepted as an admission so as to bind the respondent. Excluding that statement from consideration, there was thus no material before the Additional Rent Controller to record his satisfaction within the meaning of clause (d) of Section 22 of the Act. It follows that the order of eviction was without jurisdiction."

Equally, where a question is a mixed question of fact and law, a concession made by a lawyer or his authorised representative at the stage of arguments cannot preclude the party for whom such person appears from re-agitating the point in appeal. In '*C.M. Arumugam* v. *S. Rajgopal'* [(1976) 1 SCC 863], this Court held:

> "8. ……. That question is a mixed question of law and fact and we do not think that a concession made by the first respondent on such a question at the stage of argument before the High Court, can preclude him from reagitating it in the appeal before this Court, when it formed the subject-matter of an issue before the High Court and full and complete evidence in regard to such issue was led by both parties……."

It would be perverse to decide based only on a concession, without more, that a direct relationship exists between the employer and the workmen. Equally perverse is finding that the extended definition of 'employer' contained in the Act would automatically apply. The extended definition contained in section 2(i)(iv) of the Uttar Pradesh Industrial Disputes Act reads as follows:

> "2. Definitions.
> ……..

> ……..
> (i)'*Employer'* includes-
> ……..
> ……..
> (iv) where the owner of any industry in the course of or for the purpose of conducting the industry contracts with any person for the execution by or under such person of the whole or any part of any work which is ordinarily part of the industry, the owner of such industry;"

A look at this provision together with the judgment in '*Basti Sugar Mills Ltd.* v. *Ram Ujagar* and Ors.' [(1964) (2) SCR 838) relied upon by Ms. Jain, ould show that in order that section 2(i)(iv) apply, evidence must be led to show that the work performed by contract labour is a work which is ordinarily part of the industry of BHEL. We find, on the facts of the present case, that no such evidence has, in fact, been led. Consequently, this finding is also a finding directly applying a provision of law without any factual foundation for the same.

This being the case, it is clear that the Labour Court has arrived at a conclusion which no reasonable person could possibly arrive at and ought, therefore, to have been set aside. Apart from the Labour Court dismissing a review from its own order, we find that the High Court, in the first impugned judgment dated 24.04.2014, has also arrived at findings which are contrary to the evidence taken on record. First and foremost, it could not have said that "undisputedly", the labour that was employed through contractors were performing identical duties as regular employees and that, therefore, without any evidence, it can be said that they were under the control, management and guidance of BHEL. Secondly, when it said that alleged contracts that were awarded in favour of contractors and how many labourers, in what type of work etc. were asked for, were not furnished, is also directly contrary to the evidence led on behalf of the BHEL, in which such documents were specifically provided. Thus, Shri Naveen Luniyal, in his evidence-in-chief, had pointed out:

> "……
> Thus, we entered into contract of workers with the contractors which are document No. 8 and 9 of the above list and the same are marked Exhibit E-6 and E- 7 respectively. The period of contract used to be extended for the completion of assignment in case the work was not completing in time or the same was being extended. The concerned workman filed writs before Hon'ble Delhi High Court seeking their regularization while impleading BHEL as a party and it was ordered by the court that you may prefer your suit for regularization before C.G.I.T.
>
> …… . .
> …… . .

> There is no master employer and servant relationship of the workers with BHEL and BHEL was also not making any payment of salary to them as the workers were in the service of the contractor. Thus, there does not arise any question of giving them employment.
>
> The workers were being issued gate passes at the request of the contractor, for the sake of safety and also from administrative point of view, it was specifically bearing the mention that they are the workers of the contractors. Any worker cannot enter in the workplace if such gate passes are not issued. CISF takes care of the safety in our organisation."

Equally, the review judgment apart from being cryptic, draws an unsustainable conclusion after setting out paragraph 3 of the written statement of BHEL in the Labour Court. What was stated by BHEL in paragraph 3 was that the workmen were only engaged by the contractor and were not their employees. The written statement then goes on to be speculative in stating that it appears that a workman might have been engaged as an employee by a particular contractor. A plain reading of this written statement would certainly not suggest that BHEL is not sure as to whether workmen were or were not supplied by a contractor, or engaged by BHEL. What is clear from the written statement is that BHEL has denied that the workmen were engaged by BHEL or that the workmen were BHEL's workmen. From this to conclude that the transaction seems to be 'sham', is again wholly incorrect. Apart from this, it is also incorrect to state that BHEL has not placed on record any material to demonstrate that under the alleged labour contract, payment was ever made in favour of Madan Lal, the alleged contractor. It has been correctly pointed out by learned counsel appearing on behalf of BHEL that in the very first sentence of the cross examination of the workmen, before the labour court, the workmen admitted that payments of their wages were made by four contractors including Shri Madan Lal. Also, the fact that Madan Lal was paid under the agreement with BHEL was never disputed. Indeed, Ms. Jain's argument that Madan Lal only derived a 10 per cent profit from the agreement with him presupposes payment to Madan Lal by BHEL under the agreement with him. This finding again is wholly incorrect.

We, now come to some of the judgments cited by Shri Sudhir Chandra and Ms. Asha Jain. In '*General Manager, (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon* v. *Bharat Lala and Another'* [2011 (1) SCC 635], it was held that the well recognised tests to find out whether contract labourers are direct employees are as follows:

> "10. It is now well settled that if the industrial adjudicator finds that the contract between the principal employer and the contractor to be a sham, nominal or merely a camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-recognized tests to find out whether the contract labourers are the direct employees of the principal employer are: (i) whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that the first respondent is a direct employee of the appellant"

The expression 'control and supervision' were further explained with reference to an earlier judgment of this Court as follows:

> "12. The expression "control and supervision" in the context of contract labour was explained by this Court in *International Airport Authority of India* v. *International Air Cargo Workers' Union* thus: (SCC p.388, paras 38-39)
>
> "38…. if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by a contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor.
>
> 39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor."

From this judgment, it is clear that test No. 1 is not met on the facts of this case as the contractor pays the workmen their wages. Secondly, the principal employer cannot be said to control and supervise the work of the employee merely because he directs the workmen of the contractor 'what to do' after the contractor assigns/ allots the employee to the principal employer. This is precisely what paragraph 12 explains as being supervision and control of the principal employer that is secondary in nature, as such control is exercised only after such workman has been assigned to the principal employer to do a particular work.

We may hasten to add that this view of the law has been reiterated in '*Balwant Rai Saluja and Another* v. *Air India Limited and Others'* [2014(9) SCC 407], as follows:

> "65. Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia:
>
> (i) who appoints the workers;
> (ii) who pays the salary/remuneration;
> (iii) who has the authority to dismiss;
> (iv) who can take disciplinary action;
> (v) whether there is continuity of service; and
> (vi) extent of control and supervision i.e.
> whether there exists complete control and supervision.
>
> As regards extent of control and supervision, we have already taken note of the observations in *Bengal Nagpur Cotton Mills case* [(2011) 1 SCC 635]*, International Airport Authority of India case* [2009 13 SCC 374] and *Nalco case* [(2014) 6 SCC 756]."

However, Ms. Jain has pointed out that contractors were frequently changed, as a result of which, it can be inferred that the workmen are direct employees of BHEL. There is no such finding of the Labour Court or any reference to the same by the High Court. Consequently, this argument made for the first time in this Court together with judgments that support the same, is of no consequence.

Ms. Jain also pointed out three judgments of this Court in '*Calcutta Port Shramik Union* v. *Calcutta River Transport Association and Others* [1988 (Supp) SCC 768], *Pepsico India Holding Private Limited* v. *Grocery Market and Shops Board and Others* [2016 4 SCC 493] and *'Harjinder Singh* v. *Punjab State Warehousing Corporation*' [(2010) 3 SCC 192] for the proposition that judicial review by the High Court under Article 226, particularly when it is asked to give relief of a writ of certiorari, is within well recognised limits, and that mere errors of law or fact are not sufficient to attract the jurisdicton of the High Court under Article 226. There is no doubt that the law laid down by these judgments is unexceptionable. We may only state that these judgments have no application to the facts of the present case. The Labour Court's Award being perverse ought to have been set aside in exercise of jurisdiction under Article 226.

Ms. Jain then argued that since no backwages were granted but only reinstatement was ordered, we should not exercise our jurisdiction under Article 136 to set aside the said Award. When it is found that the findings of

the Labour Court are perverse, it is difficult to accede to this argument. Equally, the argument that the so-called employer has not complied with the Labour Court's Award, despite there being no stay, is an argument that must be rejected. In that a contempt petition could always have been moved on behalf of the workmen for implementation. No such thing has been done in the present case.

The argument that the contractor, in the facts of the present case, gets only a 10 per cent profit and nothing more, is again an argument that needs to be rejected in view of the clear and unequivocal evidence that has been led in this case. The workmen have themselves admitted that there is no appointment letter, provident fund number or wage slip from BHEL insofar as they are concerned. Apart from this, it is also clear from the evidence led on behalf of BHEL, that no wages were ever been paid to them by BHEL as they were in the service of the contractor. Further, it was also specifically pointed out that the names of 29 workers were on the basis of a List provided by the contractor in a bid that was made consequent to a tender notice by BHEL.

Ms. Asha Jain's reliance upon the judgment in '*Steel Authority of India Ltd. And Others'* [(2001) 7 SCC 1] is also misplaced. There is nothing on facts to show that the contract labour that is engaged, even *de hors* a prohibition notification, is in the facts of this case 'sham'.

Given this, we set aside the impugned judgments of the High Court and the Labour Court's Award. The appeals are allowed in the aforesaid terms.

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2019 (II) ILR - CUT-239

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

W.P.(C) NOS.11126, 11127 & 11128 OF 2008

SMC POWER GENERATION LTD. .....Petitioner

.Vs.

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

ORISSA VALUE ADDED TAX ACT, 2004 – Section 41 and 42 – Identification of tax payers for tax audit and Audit assessment – Audit visit report – Extension of time – Plea that extension of time ought to have been sought for within six months from the date of receipt of the

Audit Visit Report – Not done – Whether the impugned order of assessment and the consequential notice is barred ? – Held, Yes – Reasons discussed.

"Taking into consideration the provision under sub-section (6) of Section 42 of the OVAT Act including the proviso, it can be safely said that the notice period had already expired when the extension for time to complete the assessment was sought for. The same was done much after six months of expiry of the period of limitation in January, 2008 but the extension is sought for in June, 2008. In that view of the matter and in view of the observations made by the Hon'ble Supreme Court in the case of ***Shreyans Indus Ltd. and Ors*** *(supra), we are of the considered opinion that the notice is without jurisdiction. These writ petitions deserve to be allowed and the same are allowed."* *(Paras 6 & 7)*

Case Laws Relied on and Referred to :-

1. (2016) 4 SCC 769 : State of Punjab and Ors. .V. Shreyans Indus Ltd. and Ors.

For Petitioner : Mr. N. Venkataraman, Sr. Adv.
M/s. Satyajit Mohanty, R.R. Swain, A. Mohaptra & S. Pattnaik

For Opp. Parties : Standing Counsel for Revenue.

JUDGMENT Date of Hearing & Judgment: 06.03.2019

K.S. JHAVERI, C.J.

Since in all these writ petitions, the questions of law involved are similar, learned counsel for the petitioner requested to take up W.P.(C) No.11126 of 2008 as leading case. Learned counsel for the opposite parties have no objection to the same. As such, W.P.(C) No.11126 of 2008 is taken up as leading case and the order to be passed herein, will govern the fate of other two writ petitions, i.e., 11127 and 11128 of 2008.

In W.P.(C) No.11126 of 2008, the petitioner has prayed for the following relief:

> "In the facts and circumstances stated above, it is humbly prayed that this Hon'ble Court may graciously be pleased to issue Rule NISI in the nature of Writ of Certiorari and/or any other appropriate Writ/Writs, call for the records and calling upon the Opp. Parties to show cause;
>
> As to why the order of Assessment dtd.2.7.2008 passed by the Asst Commissioner of Sales Tax, Sambalpur Range, Sambalpur (vide Annexure-6) under Section 42(4) of the Orissa Value Added Tax Act, 2004 for the period 1.4.2005 to 30.11.2006 imposing tax amounting to Rs.3,53,36,607.00 including penalty of Rs.2,35,57,738.00, shall not be quashed;
>
> And if the Opp. Parties fail to show cause or show insufficient cause, make the said Rule NISI absolute.

> And pass such other order/orders as this Hon'ble Court may deem fit and proper; And allow the Writ Petition.
>
> And for this act of kindness the Petitioner shall as in duty bound ever pray."

2. Learned counsel for the petitioner at the outset fairly submitted that he is not canvassing any other points raised, but he is restricting his argument only on the point of extension of time, which ought to have been sought for within six months from the date of receipt of the Audit Visit Report. That having not been done, the impugned order of assessment is barred by limitation. In order to appreciate the submission of learned counsel for the petitioner, some facts as well as relevant dates need be considered.

3. Pursuant to an audit under the provisions of the OVAT Act, the Audit Visit Report (AVR) was submitted on 01.06.2007 under Section 41(4) of the OVAT Act. The Assistant Commissioner of Sales Tax, Sambalpur Range, Sambalpur (Opposite Party No.3) received the Audit Visit Report on 05.07.2007. Accordingly, notice under Section 42 of the OVAT Act was issued by the Assessing Authority (Opposite Party No.3) on 04.10.2007 which was received by the petitioner on 10.10.2007 requiring him to appear on 13.11.2007. Thus, according to him, the period of limitation has expired on 04.01.2008 or 09.04.2008, i.e., six months from the date of issuance of notice to the petitioner, but extension of further six months time was sought for as it is reflected in the order dated 07.06.2008, which reads as under:

> "7.6.2008. Call for the record. The cross verification of statement and other documents are completed today. As such, the audit visit report is related to the period(s) 1.4.05 to 30.11.2006. Thus, issue letter to the Commissioner of Commercial Taxes, Orissa, Cuttack accordingly seeking extension of further six months time for completion of assessment U/s. 42(4) of the OVAT Act of the instant dealer-Company. Put up the record along with the permission order of the C.C.T.(O), Cuttack for completion of assessment and issue of assessment order and demand notice to the dealer-Company."

However, extension of time was granted on 26.06.2008 as is revealed from the order dated 30.06.2008 passed by the Asst. Commissioner of Sales Tax, which reads as under:

> "Record is put up to me today along with the order of extension of time for further six months for completion of assessment vide Head Office letter No. VII (REV) 06/08/10698/CT dated 26.6.2008. In this letter of the Head Office it is revealed that the C.C.T.(O), Cuttack has been pleased to extend a period of further six months time for completion of assessment U/s.42(6) of the OVAT Act and fixed the date of completion of assessment on dated 04.7.2008. Hence, put up the record on 2.7.2008 for issue of assessment order and demand notice to the dealer-Company."

4. Learned counsel for the petitioner took us to the provisions of Sections 41 and 42 of the OVAT Act, which read as under:

"**41. Identification of tax payers for tax audit.-**

(1) The Commissioner may select such individual dealers or class of dealers for tax audit on random basis or on the basis of risk analysis or on the basis of any other objective criteria, at such intervals or in such audit cycle, as may be prescribed.

(2) After identification of individual dealers or class of dealers for tax audit under sub-section (1), the Commissioner shall direct that tax audit in respect of such individual dealers or class of dealers be conducted in accordance with the audit programme approved by him:

Provided that the Commissioner may direct tax audit in respect of any individual dealer or class of dealers on out of turn basis or for more than once in an audit cycle to prevent evasion of tax and ensure proper tax compliance.

(3) Tax audit shall ordinarily be conducted in the prescribed manner in the business premises or office or godown or warehouse or any other place, where the business is normally carried on by the dealer or stock in trade or books of account of the business are kept or lodged temporarily or otherwise.

(4) After completion of tax audit of any dealer under sub-section (3), the officer authorized to conduct such audit shall, within seven days from the date of completion of the audit, submit the audit report, to be called **"Audit Visit Report**", to the assessing authority in the prescribed form along with the statements recorded and documents obtained evidencing suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit and evasion of tax, if any, relevant for the purpose of investigation, assessment or such other purposes.

42. Audit assessment

(1) Where the tax audit conducted under sub-section (3) of section 41 results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit, evasion of tax or contravention of any provision of this Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under section 39 or section 40, serve on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person or through his authorized representative on a date and place specified therein and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.

(2) Where a notice is issued to a dealer under sub-section (1), he shall be allowed time for a period of not less than thirty days for production of relevant books of account and documents.

(3) If the dealer fails to appear or cause appearance, or fails to produce or cause production of the books of account and documents as required under sub-section (1), the assessing authority may proceed to complete the assessment to the best of his judgment basing on the materials available in the Audit Visit Report and such other materials as may be available, and after causing such enquiry as he deems necessary.

(4) Where the dealer to whom a notice is issued under sub-section (1), produces the books of account and other documents, the assessing authority may, after examining all the materials as available with him in the record and those produced by the dealer and after causing such other enquiry as he deems necessary, assess the tax due from that dealer accordingly.

(5) Without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or sub-section (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections.

(6) Notwithstanding anything contained to the contrary in any provision under this Act, an assessment under this section shall be completed within a period of six months from the date of receipt of the Audit Visit Report :

Provided that if, for any reason, the assessment is not completed within the time specified in this sub-section, the Commissioner may, on the merit of each such case, allow such further time not exceeding six months for completion of the assessment proceeding.

(7) No order of assessment shall be made under sub-section (3) or sub-section (4) after the expiry of one year from the date of receipt of the Audit Visit Report."

5. Learned counsel for the petitioner further contended that the issue is squarely covered by the ratio in the case of ***State of Punjab and Ors.-v-Shreyans Indus Ltd. and Ors****;* reported in *(*2016) 4 SCC 769, wherein the Hon'ble Supreme Court at paragraphs-8, 9 and 24 has observed as follows:

"**8.** As the submissions of the parties on either side would be better understood once the relevant statutory provision is noted, it would be apposite to reproduce the provisions of Section 11 of the Act, which are as follows:

"**11.** ***Assessment of tax***.—(1) If the assessing authority is satisfied without requiring the presence of dealer or the production by him of any evidence that the returns furnished in respect of any period are correct and complete, he shall pass an order of assessment on the basis of such returns ***within a period of three years from the last date prescribed for furnishing the last return in respect of such period*.**

(2) If the assessing authority is not satisfied without requiring the presence of dealer who furnished the returns or production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him, on a date and at place

specified therein, either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of such returns.

(3) On the day specified in the notice or as soon afterwards as may be, the assessing authority shall, after hearing such evidence as the dealer may produce, and such other evidence as the assessing authority may require on specified points, [***pass an order of assessment within a period of three years from the last date prescribed for furnishing the last return in respect of any period.***]

(4) If a dealer having furnished returns in respect of a period, fails to comply with the terms of notice issued under sub-section (2), the assessing authority shall, within a period of three years from the 1st date prescribed for furnishing the last return in respect of such period, pass an order of assessment to the best of his judgment.

(5) If a dealer does not furnish returns in respect of any period by the last date prescribed the assessing authority shall within a period of five years from the last date prescribed for furnishing the return in respect of such period and after giving the dealer a reasonable opportunity of being heard, pass an order of assessment to the best of his judgment.

(6) If upon information which has come into his possession, the assessing authority is satisfied that any dealer has been liable to pay tax under this Act in respect of any period but has failed to apply for registration, the assessing authority shall, within five years after the expiry of such period, after giving the dealer a reasonable opportunity of being heard, proceed to assess, to the best of his judgment the amount of tax, if any, due from the dealer in respect of such period and all subsequent periods and in case where such dealer has wilfully failed to apply for registration, the assessing authority may direct that the dealer shall pay by way of penalty, in addition to the amount so assessed, a sum not exceeding one-and-a-half times that amount.

(7) The amount of any tax, penalty or interest payable under this Act shall be paid by the dealer in the manner prescribed, by such date as may be specified in the notice issued by the assessing authority for the purpose and the date so specified shall not be less than fifteen days and not more than thirty days from the date of service of such notice:

Provided that the assessing authority may, with the prior approval of the Assistant Excise and Taxation Commissioner, in charge of the district extend the date of such payment or allow payment by instalments against an adequate security or bank guarantee.

(8) If the tax assessed under this Act or any instalment thereof is not paid by any dealer within the time specified thereof in the notice of assessment or in the order permitting payment in instalments, the Commissioner or any other person appointed to assist him under sub-section (1) of Section 3 may, after giving such dealer an opportunity of being heard, impose on him a penalty not exceeding in amount the sum due from him.

(9) Any assessment made under this section shall be without prejudice to any penalty imposed under this Act.

(**10**) ***The Commissioner, may for reasons to be recorded in writing, extend the period of three years, for passing the order of assessment for such further period as he may deem fit.***

(11) Where the proceedings of the assessment are stayed by an order of any court, the period for which such stay remains in force, shall not count towards computing the period of three years specified under this section for passing the order of assessment.

(12) The assessing authority may, on his own motion, review any assessment order passed by him and such review shall be completed within a period of one year from the date of order under review." (emphasis supplied)

9. A mere reading of the aforesaid provision would reflect that wherever return is filed by the assessee, assessment is to be made within a period of three years from the last date prescribed for furnishing the return in respect of such period. On the other hand, in those cases where return is not filed or any dealer, who is liable to pay the tax under the Act, does not get himself registered therein, the period of assessment prescribed is five years. We are not concerned with the alternate situation as in the instant appeals not only the assessees are registered dealers, they had also filed their returns regularly within the prescribed period and, therefore, assessments were to be completed within a period of three years from the last date prescribed for furnishing the returns, which is the normal period prescribed. At the same time, sub-section (10) of Section 11 gives power to the Commissioner to extend a period of three years. Interestingly, there is no upper limit prescribed for which the period can be extended, meaning thereby such an extension can be given, theoretically, for any length of time. This discretion is, however, controlled by obligating the Commissioner to give his reasons for extension, and such reasons are to be recorded in writing. Obviously, the purpose of giving reasons in writing is to ensure that the power to extend the period of limitation is exercised for valid reasons based on material considerations and that power is not abused by exercising it without any application of mind, or mala fide or on irrelevant considerations or for extraneous purposes. Such an order of extension of time, naturally, is open to judicial review, albeit within the confines of law on the basis of which such judicial review is permissible.

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24. If one is to go by the aforesaid dicta, with which we entirely agree, the same shall apply in the instant cases as well. In the context of the Punjab Act, it can be said that extension of time for assessment has the effect of enlarging the period of limitation and, therefore, once the period of limitation expires, the immunity against being subject to assessment sets in and the right to make assessment gets extinguished. Therefore, there would be no question of extending the time for assessment when the assessment has already become time-barred. A valuable right has also accrued in favour of the assessee when the period of limitation expires. If the Commissioner is permitted to grant the extension even after the expiry of original period of limitation prescribed under the Act, it will give him right to exercise such a power at any time even much after the last date of assessment. In

> the instant appeals itself, when the last dates of assessment were 30-4-2004, 30-4-2005, 30-4-2006 and 30-4-2007, orders extending the time under Section 11(10) of the Act were passed on 17-8-2007, 17-8-2007, 17-8-2007 and 25-5-2007 respectively. Thus, for Assessment Year 2000-2001, order of extension is passed more than three years after the last date and for Assessment Year 2001-2002, it is more than two years after the last date. Such a situation cannot be countenanced as rightly held by the High Court. When the last date of assessment in respect of these assessment years expired, it vested a valuable right in the assessee which cannot be lightly taken away. As a consequence, sub-section (11) of Section 10 has to be interpreted in the manner which is equitable to both the parties. Therefore, the only way to interpret the same is that by holding that power to extend the time is to be exercised before the normal period of assessment expires. On the aforesaid interpretation, other arguments of Mr Ganguli lose all significance. Argument of the learned Senior Counsel for the appellants based on Section 148 CPC would be of no consequence. This section categorically states that power to enlarge the period can be exercised even when period originally fixed has expired. Likewise, reliance upon Section 139(2) of the Income Tax Act is misconceived. That provision is made for the benefit of the assessee which empowers the assessing officer to grant an extension of time for filing of the return of income and, therefore, obviously will have no bearing on the issue at hand. Moreover, this Court in *Ajanta Electricals case* [***CIT* v. *Ajanta Electricals***, (1995) 4 SCC 182] , which is relied upon by the learned counsel for the appellant, held that the time can be extended even after the time allowed originally has expired on the interpretation of the words "*it has not been possible*" occurring in Section 133(2) of the Act. The Court, thus, opined that the aforesaid expression would mean that the time can be extended even after original time prescribed in the said provision has expired. Same is our answer to the argument of Mr Ganguli predicated on Section 28 of the Arbitration Act, 1940 as that provision was in altogether different context."

6. Taking into consideration the provision under sub-section (6) of Section 42 of the OVAT Act including the proviso, it can be safely said that the notice period had already expired when the extension for time to complete the assessment was sought for. The same was done much after six months of expiry of the period of limitation in January, 2008 but the extension is sought for in June, 2008.

7. In that view of the matter and in view of the observations made by the Hon'ble Supreme Court in the case of ***Shreyans Indus Ltd. and Ors*** (supra), we are of the considered opinion that the notice is without jurisdiction. These writ petitions deserve to be allowed and the same are allowed. No other contention is canvassed in view of the fact that the petitioner has succeeded on the first point in the present case.

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2019 (II) ILR – CUT- 247

K. S. JHAVERI,C.J & BISWANATH RATH, J.

W.P.(C) NO. 12373 OF 2003
(with following batch of Writ Petitions)

Sl. No.	Case No.	Petitioner(s)	Advocate on behalf of the petitioner(s).
1.	W.P.(C) No.12373 of 2003	M/s. K.B. Saha and sons Industries pvt. Ltd. & Anr.	Mr. R.K. Rath, Sr. Adv.
2.	W.P.(C) No. 9446 of 2003	M/S. Subrata Patra	M/S.R.P.Kar
3.	W.P.(C) No. 9447 of 2003	M/S.Sital Enterprises	
4.	W.P.(C) No. 9448 of 2003	M/S. N.B.Patel & Co.	
5.	W.P.(C) No. 9588 of 2003	M/S. Darbar Biri Tobacco Co.	
6.	W.P.(C) No. 9589 of 2003	M/S. Patra Tobacco	
7.	W.P.(C) No. 9590 of 2003	M/s. Popular Bidi Tobacco Co.	
8.	W.P.(C) No. 9591 of 2003	M/S. Nirmal Tobacco Co.	
9.	W.P.(C) No. 9643 of 2003	M/s. Nur Biri Works P. Ltd.	Mr. Sambit S.Ray
10.	W.P.(C) No. 9644 of 2003	M/s. Saraf Trading Co.	
11.	W.P.(C) No. 9646 of 2003	M/S. V.Rajesh & Co.	M/S. R.P.Kar
12.	W.P.(C) No. 9939 of 2003	M/s. Kishore Kumar & Co.	Mr. S.J. Pradhan.
13.	W.P.(C) No. 8480 of 2003	M/s. Bhanjiatanshi Patel & Ors.	Mr. S.S.Ray
14.	W.P.(C) No. 9244 of 2003	M/s. J.P.Tabacco Products P.Ltd.	Mr. S.J.Pradhan
15.	W.P.(C) No. 9662 of 2003	M/s. Radhashyam Tirthabasi Paul & Anr.	Mr. S.J. Pradhan
16.	W.P.(C) No. 9663 of 2003	M/s. Patel Trading Co. & Anr.	
17.	W.P.(C) No. 9664 of 2003	M/s. Barun Ku.Mallick & Anr.	
18.	W.P.(C) No. 9665 of 2003	M/s. Mukta Biri Factory & Anr.	Mr. S.J. Pradhan
19.	W.P.(C) No. 9666 of 2003	M/s. Bhagwanji Bhawanbhai & Co. & Anr.	Mr. P.K.Patnaik
20.	W.P.(C) No. 9667 of 2003	M/s. Patel Tobacco Stores & Anr.	Mr. S.J. Pradhan
21.	W.P.(C) No. 9673 of 2003	M/s. V.Maganlal & Co. and Anr.	Mr. S.J.Pradhan
22.	W.P.(C) No. 9674 of 2003	M/s. Raojibhai Maganbhai & Co. and Anr.	Mr. C.R.Swain
23.	W.P.(C) No. 9675 of 2003	M/s. Shankerlal Dhanjibhai & Co. & Anr.	M/S. B.Sahu
24.	W.P.(C) No. 9676 of 2003	M/s. Ramesh R.Patel and Co. & Anr.	M/S S.J.Pradhan
25.	W.P.(C) No. 9677 of 2003	M/S. Vinodrai and Co. & Anr.	M/S. B.K.Sharma
26.	W.P.(C) No. 9678 of 2003	M/s. Chhotabhai Jethabhai Patel & Co. & Anr.	Mr. S.J.Pradhan
27.	W.P.(C) No. 9679 of 2003	M/s. Great India Tobacco Co. & Anr.	
28.	W.P.(C) No. 9680 of 2003	M/s. Pataka Industries P. Ltd. & Anr.	Mr. S.J. Pradhan
29.	W.P.(C) No. 9681 of 2003	M/s. Naresh Kumar & Co. and Anr.	Mr. S.J.Pradhan
30.	W.P.(C) No. 9717 of 2003	M/s. Mahabir Biri Leaves Supply.	Mr. Sambit S.Ray
31.	W.P.(C) No. 9753 of 2003	M/S.Kalinga Traders	
32.	W.P.(C) No. 9781 of 2003	M/s. Bhagabati Tobacco Stores.	M/S. R.P.Kar
33.	W.P.(C) No. 9782 of 2003	M/s. Veejay Trading Co.	
34.	W.P.(C) No. 9793 of 2003	M/S.U.Shahul Hameed & Brother.	
35.	W.P.(C) No. 9794 of 2003	M/S. Saha & Saha	
36.	W.P.(C) No. 9883 of 2003	M/s. Ganesh Ch. Shaha	M/S. S.J.Pradhan
37.	W.P.(C) No. 9901 of 2003	M/s. Mahabir Tobacco Co.	M/S. Sambit S.Ray
38.	W.P.(C) No. 9902 of 2003	M/s. Shiv Biri Mfg.Co.(P) Ltd.	

39.	W.P.(C) No. 9937 of 2003	M/s. Mantu Bini Factory Pvt. Ltd.	
40.	W.P.(C) No. 9938 of 2003	M/s. D.Mahendra Kumar & Co.	M/S. S.J.Padhan
41.	W.P.(C) No. 10101 of 2003	M/s. Lakshmi N.Tobacco Store	M/S.R.P.Kar
42.	W.P.(C) No. 10322 of 2003	M/s. Montu Tobacco Stores	Mr. S.J. Pradhan
43.	W.P.(C) No. 10324 of 2003	M/s. Sangita Trading Co.	M/S. S.J.Pradhan
44.	W.P.(C) No. 10533 of 2003	M/s. Seyadu Beedi Co.	
45.	W.P.(C) No. 10534 of 2003	M/s. Sarkar Tobacco & Co.	
46.	W.P.(C) No. 10589 of 2003	M/s. H.K.Narendra Thakkar	
47.	W.P.(C) No. 10654 of 2003	M/S.C.D.Raghavji and Co.	
48.	W.P.(C) No. 10655 of 2003	M/s. Vishal Enterprises.	
49.	W.P.(C) No. 10712 of 2003	M/S.Patel & Co.	
50.	W.P.(C) No. 10713 of 2003	M/S.Durga Trading Co	
51.	W.P.(C) No. 10757 of 2003	M/s. B.R.Patel & Co.	M/S.R.P.Kar
52.	W.P.(C) No. 10991 of 2003	M/s. India Trading Co.	
53.	W.P.(C) No. 10992 of 2003	M/s. L. G. N. & Co.	
54.	W.P.(C) No. 11103 of 2003	M/S. N.Amratlal & Co.	
55.	W.P.(C) No. 11296 of 2003	M/s. Gopal Biri Factory	M/S. S.J.Pradhan
56.	W.P.(C) No. 11298 of 2003	M/s. Gorabazar Tabacoo Stores	M/S. B.K.Sharma
57.	W.P.(C) No. 11299 of 2003	M/S. Abhisek Traders	
58.	W.P.(C) No. 11310 of 2003	M/s. Kamala Biri Mfg. (P) Ltd.	M/S. A.Tripathy
59.	W.P.(C) No. 11511 of 2003	M/s. P.L.Dutta	M/S. S.J.Pradhan
60.	W.P.(C) No. 11566 of 2003	M/s. Shree Veer Trading Co.	Mr. S.J. Pradhan
61.	W.P.(C) No. 11774 of 2003	M/s. Jayantilal Vishram	
62.	W.P.(C) No. 11775 of 2003	M/s. Ranjit Kumar Paul	M/S. R.P.Kar
63.	W.P.(C) No. 11776 of 2003	M/s. Bhikhabhai Khodabhai	
64.	W.P.(C) No. 11977 of 2003	M/s. Hindustan Biri Leaves	
65.	W.P.(C) No. 11978 of 2003	M/S. Patel Brothers	M/S.S.J.Pradhan
66.	W.P.(C) No. 11979 of 2003	M/S.C.K.Tobacco	
67.	W.P.(C) No. 11980 of 2003	M/S.King Impex	
68.	W.P.(C) No. 12107 of 2003	M/S.Chowdhury Enterprises.	
69.	W.P.(C) No. 12230 of 2003	M/S. D.Mondal	
70.	W.P.(C) No. 12316 of 2003	M/s. Ankita Sales Agency	
71.	W.P.(C) No. 12317 of 2003	M/S.K.B.Company	
72.	W.P.(C) No. 12318 of 2003	M/s. Ananda Tobacco Stores.	
73.	W.P.(C) No. 12902 of 2003	M/s. Chittaranjan Saha	M/S.R.P.Kar
74.	W.P.(C) No. 13051 of 2003	M/S.Overseas Traders	
75.	W.P.(C) No. 13052 of 2003	M/S. Roy Biri Factory	
76.	W.P.(C) No. 13630 of 2003	M/S. Vidarbha Tobacco Products P. Ltd.	
77.	W.P.(C) No. 13631 of 2003	M/S. Somanath Tobacco Co.	
78.	W.P.(C) No. 11 of 2004	M/s. Saraf Tobacco Co.	M/S.Sambit S.Ray
79.	W.P.(C) No. 125 of 2004	M/s. Dilip Ku.Chhaganlal & Co.	
80.	W.P.(C) No. 876 of 2004	M/S. Kunal Traders	
81.	W.P.(C) No. 973 of 2004	M/s. Dillip K.Mansukhalal & Co.	
82.	W.P.(C) No. 2072 of 2004	M/S.Ganesh Traders	
83.	W.P.(C) No. 2242 of 2004	M/S. Roy Traders	M/S.R.P.Kar
84.	W.P.(C) No. 4310 of 2004	M/s. Belal Biri Factory (P) Ltd.	
85.	W.P.(C) No. 4311 of 2004	M/s. Batakrishna Malakar & Brothers.	
86.	W.P.(C) No. 4312 of 2004	M/S. G.S. & Co.	
87.	W.P.(C) No. 5291 of 2004	Mr. Radhakishan Narayandas	
88.	W.P.(C) No. 12369 of 2004	M/s. P.K.Tobacco Product P. Ltd.& Anr.	M/S.S.J.Pradhan

89.	W.P.(C) No. 13763 of 2004	M/s. Bhanumata Tobacco Stores.	M/S.R.P.Kar
90.	W.P.(C) No. 13764 of 2004	M/S. A.Kotecha & Co.	
91.	W.P.(C) No. 13765 of 2004	M/s. Madan Mohan Gopal Enterprise.	
92.	W.P.(C) No. 13766 of 2004	M/s. Lokenath Tobacco & Co.	
93.	W.P.(C) No. 12661 of 2005	M/S. A.Abdul Latheef	
94.	W.P.(C) No. 12662 of 2005	M/s. Hindusthan Trading Co.	
95.	W.P.(C) No. 12663 of 2005	M/s. Gurukripa Trading Co.	
96.	W.P.(C) No. 12664 of 2005	M/s. B.Mandal & Co.	
97.	W.P.(C) No. 12665 of 2005	M/s. India Tobacco Co.	
98.	W.P.(C) No. 12695 of 2005	M/s. National Trading Co.	
99.	W.P.(C) No. 12696 of 2005	M/s. Joy Trading Co.	
100.	W.P.(C) No. 14790 of 2005	M/s. Kishore Kumar. Somaiya	
101.	W.P.(C) No. 14791 of 2005	Md. Khaleel-Ur-Rahman	
102.	W.P.(C) No. 14792 of 2005	M/s. Abhyuday Enterprise	
103.	W.P.(C) No. 5867 of 2006	M/s. Shree Balajee Tobaco Products.	
104.	W.P.(C) No. 5868 of 2006	M/S. B.K.Enterprises	
105.	W.P.(C) No. 10796 of 2006	M/s. Manilal Dayalji & Co.	
106.	W.P.(C) No. 11117 of 2006	M/s. Rabindra M. Roy	Mr. S.J.Pradhan
107.	W.P.(C) No. 11582 of 2006	M/s. Bharat Beedi Works P. Ltd. & Anr.	M/S. S.S.Ray
108.	W.P.(C) No. 12238 of 2006	M/s. Jaskaran Agrawal	Mr. S.R. Pati
109.	W.P.(C) No. 12309 of 2006	Dhuliyan Tobacco Stores & Anr.	M/S. P.K.Pattnaik
110.	W.P.(C) No. 12355 of 2006	M/s. Mrinalini Biri Mfg. Co. Ltd.	M/s. S.J. Pradhan
111.	W.P.(C) No. 12477 of 2006	M/s. S.K. Traders	M/S.Pitambar Acharya
112.	W.P.(C) No. 12714 of 2006	M/s. Namokar Tobacco Co.	M/S.R.P.Kar
113.	W.P.(C) No. 12715 of 2006	M/s. Zunaid Enterprises	
114.	W.P.(C) No. 12777 of 2006	M/s. Shiv Biri Mfg.Co.Ltd	
115.	W.P.(C) No. 12787 of 2006	Mohd.Khaleel-Ur-Rahm	Mr. S.J. Pradhan
116.	W.P.(C) No. 13136 of 2007	M/s. Star Enterprise	M/S.R.P.Kar
117.	W.P.(C) No. 13147 of 2007	M/S. Joy Lokanath Enterprise	
118.	W.P.(C) No. 13148 of 2007	M/s. Pioneer Enterprise	
119.	W.P.(C) No. 13149 of 2007	M/s. Pragati Traders	
120.	W.P.(C) No. 13150 of 2007	M/s. Patra Trading Co.	
121.	W.P.(C) No. 17380 of 2007	M/s. B.S. Sundarvadivel Muduliar & Sons.	
122.	W.P.(C) No. 17403 of 2007	M/s. N.B.Abdul Gafoor	

For Opp. Parties : Mr. S.P. Mishra, Advocate General
Mr. S.K. Patnaik, Sr. Adv.

M/S. K.B. SAHA AND SONS INDUSTRIES PVT. LTD. & ANR. ……..Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Seventh Schedule – Union and State List – Entry 54 and 92 A – State enacted the Orissa Forest Development (Tax on sale of forest produce by Government of Orissa Forest Development Corporation) Act, 2003 – Plea that the State legislation in question is not competent to levy tax on inter-state sale – Further plea that the Act, 2003 being one under Entry-54 of List-II, no tax can be collected on inter-state sale which falls under Entry-92A of List-I – After hearing the court held the following.

"Taking into consideration the Entry 54 of List-II, it is very clear that the State Government is competent to legislate an Act for the purpose of imposing tax of purchase of sale of goods. Tax on sale and purchase of goods other than the newspaper is subject to the provisions of Entry 92A. Therefore, it will be very difficult for us to hold that the State has no competence to enact the Act, but while interpreting the provisions of the Act and the charging Section i.e. Section 3 of the Act, we are of the view that the Act in question, which came into force, will operate only for intra-State sales i.e. sales within the State of Orissa. In so far as transactions which are clearly inter-state transactions in nature, as in the present cases, there can be no levy of the said tax in view of the clear provisions under Entry-92A of List-I of the Constitution of India. In that view of the matter, we are of the opinion that the transactions which are within the State of Orissa, this tax can be levied. But, the transaction which is inter-State, the provisions of the Act cannot be operated in view of Entry 92A. Considering the entire fact situation of the case, relevant provisions of the Act and the decisions referred to above, the writ petitions are disposed of with declaration that for transactions which are inter-State in nature, the provision of the Act, 2003 will not be enforced. Therefore, the Corporation will examine facts of each of the matter individually and recommend the State Government or the competent authority for refund of the Tax collected." *(Paras 15 to 18)*

Case Laws Relied on and Referred to :-

1. (2007) 9 SCC 97 : State of Orissa & Anr. .Vs. K.B.Saha and Sons Industries (P) Ltd. & Ors.
2. AIR 1963 SC 703 : Gujarat University & Anr. .Vs. Shri Krishana Ranganath Mudhokar & Ors.
3. AIR 1961 SC 459 : The Hingir-Rampur Coal Co., Ltd. & Ors. .Vs. The State of Orissa & Ors.
4. (1990) 4 SCC 557 : Bharat Coking Coal Ltd. .Vs. State of Bihar & Ors.
5. (2012) 11 SCC 1 : Monnet Ispat and Energy Limited .Vs. Union of India & Ors.
6. AIR 1990 SC 1927 : Synthetics & Chemicals Ltd. etc .Vs. State of U.P. & Ors.
7. (2009) 4 SCC 94 : Central Bank of India Vs. State of Kerala & Ors.
8. AIR 2003 SC 767 : Shree Digvijay Cement Co. Ltd. & Anr. .Vs. Union of India & Anr.
9. 2001 (I) OLR-586 : M/s. Ashok Biri and another & Ors. .Vs. State of Orissa & Ors.
10. (2008) 7 SCC 126 : T.N. Godavarman Thirumulpad .Vs. Union of India & Ors.

JUDGMENT Date of Hearing & Judgment : 10.04.2019

K.S. JHAVERI, C.J.

Since the issues involved in all these writ petitions are similar in nature, as agreed upon by learned counsel for the parties, all these writ petitions are taken up together for analogous hearing and to decide the same by a common judgment. For the sake of convenience of discussion, on the request of the parties involved in the cases, W.P.(C) No.12373 of 2003 is taken up as the leading case for hearing.

2. By way of these writ petitions, the petitioners have challenged the levy and collection of Orissa Forest Development Tax under Section 3 of The Orissa Forest Development (Tax on sale of forest produce by Government of Orissa Forest Development Corporation) Ordinance, 2003 vide Orissa Ordinance No. 3 of 2003, dated 18.07.2003, which has been subsequently enacted into an Act i.e. The Orissa Forest Development (Tax on sale of forest produce by Government or Orissa Forest Development Corporation) Act, 2003 on 8.12.2003 i.e. Orissa Act 18 of 2003 (for short "the Act, 2003") making it effective from 18.07.2003. Petitioners have further challenged the levy of the tax with effect from 18.07.2003 on the ground that the rate of tax has been notified only with effect from 30.07.2003.

3. The relevant provisions for our consideration are the definitions under Sections 2(d) and 2(g) and sub-sections (1),(2) and (3) of Section 3, and Section 6 of the Act, 2003.

The rate of tax prescribed vide Notification dated 30.07.2003, is as follows:

Sl.No.	Name of Forest Produce	Rate of Forest Development Tax
1.	Bamboo	1%
2.	Timber	4%
3.	Kendu Leaf	16%

4. Further a letter was issued on 24.09.2003 by the Chairman-cum-Managing Director of Orissa Forest Development Corporation to all the Divisional manager (KL) and others of Orissa Forest Development Corporation Ltd., where a clarification has been issued. Relevant portion in paragraph-2 of the said letter reads as under:

> *"(2) Now it has been clarified by the Laws Department and communicated vide F&E Department letter No. 14527/F&E dated 30.8.2003 that exemption granted under article 286(I)(b) of the Constitution of India and the provisions of Section 5 of the C.S.T. Act would be applicable in all appropriate cases. Hence, sales in course of export would be exempted of Forest Development Tax, if such sales satisfy the condition laid down under Section 5 (Sub-Section (3) of C.S.t. Act. For this purpose, the facts and circumstances of each individual case are to be verified and if the provisions of Section 5(3) of the C.S.T. Act are satisfied, exemption of E.D.T. can be allowed."*

5. Mr. R.K. Rath, learned Senior Counsel appearing for the petitioner along with Mr. R.P. Kar & Mr. A.N. Ray, taking lead on behalf of the other counsel for petitioners, in course of argument, has mainly contended that the State legislation in question itself is not competent to levy tax on inter-state sale which has been carried on by the petitioners.

5.1 The nature of sale by the Orissa Forest Development Corporation Ltd. (OFDC Ltd.) has been declared to be an inter-State sale in an earlier judgment which came to be delivered by this Court in OJC No.9724 of 2000 and batch of writ petitions reported in ***2001 (I) OLR-586***. The said judgment was confirmed by Hon'ble the Supreme Court in ***State of Orissa and another v. K.B.Saha and Sons Industries (P) Ltd. and others,*** *reported in* (2007) 9 SCC 97.

5.2 It is contended by the learned Sr. Counsel for the petitioners that with the aim to overcome the effect of the judgment of this Court and pending SLP before the Hon'ble Supreme Court during the relevant point of time, an Ordinance came to be issued in 2003 which is in contravention of Entry 54 List-II of the VIIth Schedule of Constitution of India.

5.3 It is submitted by the learned Sr. Counsel for the petitioners that the Act,2003 being one under Entry-54 of List-II, no tax can be collected on inter-state sale which falls under Entry-92A of List-I. Learned Sr. Counsel placed reliance on Entry-54, List –II and Entry-92A of List-I of the VIIth Schedule of the Constitution of India, which read as under:

> ***List-II-***
> ***Entry-54:-*** *"Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I."*
> ***List-I-***
> ***Entry-92A:*** *"Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce."*

6. In view of the above, learned Sr. Counsel for the petitioners contended that there is no power vested with the State Government to enact such law, under Entry-54 of List-II, which is covered under Entry 92A of List-I. In support of such submission, learned Sr. Counsel for the petitioners has strongly relied upon the following decisions of the Hon'ble Supreme Court as mentioned below.

6.1 Learned Sr. Counsel placed reliance on the decision of the Supreme Court in ***Gujarat University and another v. Shri Krishana Ranganath Mudhokar and others, reported*** AIR 1963 SC 703 at paragraph 23, which reads as under:

"23. Power of the Bombay Provincial Legislature to enact the Gujarat University Act was derived from Entry 17 of the Government of India Act, 1935, List II of the Seventh Schedule — "Education including Universities other than those specified in para 13 of List I". In List I Item 13 were included the Banaras Hindu University and the Aligarh Muslim University. Therefore, except to the extent expressly limited by Item 17 of List II read with Item 13 of List I, a Provincial Legislature was invested with plenary power to enact legislation in respect of all matters pertaining to education including education at University level. The expression "education" is of wide import and includes all matters relating to imparting and controlling education; it may therefore have been open to the Provincial Legislature to enact legislation prescribing either a federal or a regional language as an exclusive medium for subjects selected by the University. If by Section 4(27) the power to select the federal or regional language as an exclusive medium of instruction had been entrusted by the legislature to the University, the validity of the impugned statutes 207, 208 and 209 could not be open to question. But the legislature did not entrust any power to the University to select Gujarati or Hindi as an exclusive medium of instruction under Section 4(27). By the Constitution a vital change has been made in the pattern of distribution of legislative power relating to education between the Union Parliament and the State Legislatures. By Item 11 of List II of the Seventh Schedule to the Constitution, the State Legislature has power to legislate in respect of "education including Universities subject to the provisions of Items 63, 64, 65 and 66 of List I and 25 of List III". Item 63 of List I replaces with modification Item 13 of List I to the Seventh Schedule of the Government of India Act, 1935. Power to enact legislation with respect to the institutions known at the commencement of the Constitution as the Benaras Hindu University, the Aligarh Muslim University and the Delhi University, and other institutions declared by Parliament by laws to be an institution of national importance is thereby granted exclusively to Parliament. Item 64 invests the Parliament with power to legislate in respect of "institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament, by law, to be institutions of national importance". Item 65 vests in the Parliament power to legislate for "Union agencies and institutions for — (a) professional, vocational or technical training, including the training of police officers; or (b) the promotion of special studies or research; or (c) scientific or technical assistance in the investigation or detection of crime". By Item 66 power is entrusted to Parliament to legislate on "coordination and determination of standards in institutions for higher education or research and scientific and technical institutions. Item 25 of the Concurrent List confers power upon the Union Parliament and the State Legislatures to enact legislation with respect to "vocational and technical training of labour". It is manifest that the extensive power vested in the Provincial Legislatures to legislate with respect to higher, scientific and technical education and vocational and technical training of labour, under the Government of India Act is under the Constitution controlled by the five items in List I and List III mentioned in Item 11 of List II. Items 63 to 66 of List I are carved out of the subject of education and in respect of these items the power to legislate is vested exclusively in the Parliament. Use of the expression "subject to" in Item 11 of List 11 of the Seventh Schedule clearly indicates that legislation in respect of excluded matters

cannot be undertaken by the State Legislatures. In Hingir Rampur Coal Company v. State of Orissa [(1961) 2 SCR 537] this Court in considering the import of the expression "subject to" used in an entry in List II, in relation to an entry in List I observed that to the extent of the restriction imposed by the use of the expression "subject to" in an entry in List II, the power is taken away from the State Legislature. Power of the State to legislate in respect of education including Universities must to the extent to which it is entrusted to the Union Parliament, whether such power is exercised or not, be deemed to be restricted. If a subject of legislation is covered by Items 63 to 66 even if it otherwise falls within the larger field of "education including Universities" power to legislate on that subject must lie with the Parliament. The plea raised by counsel for the University and for the State of Gujarat that legislation prescribing the medium or media in which instruction should be imparted in institutions of higher education and in other institutions always falls within Item 11 of List II has no force. If it be assumed from the terms of Item 11 of List II that power to legislate in respect of medium of instruction falls only within the competence of the State Legislature and never in the excluded field, even in respect of institutions mentioned in Items 63 to 65, power to legislate on medium of instruction would rest with the State, whereas legislation in other respects for excluded subjects would fall within the competence of the Union Parliament. Such an interpretation would lead to the somewhat startling result that even in respect of national institutions or Universities of national importance, power to legislate on the medium of instruction would vest in the legislature of the States within which they are situate, even though the State Legislature would have no other power in respect of those institutions. Item 11 of List II and Item 66 of List I must be harmoniously construed. The two entries undoubtedly overlap: but to the extent of overlapping, the power conferred by Item 66 List I must prevail over the power of the State under Item 11 of List II. It is manifest that the excluded heads deal primarily with education in institutions of national or special importance and institutions of higher education including research, sciences, technology and vocational training of labour. The power to legislate in respect of primary or secondary education is exclusively vested in the States by Item 11 of List II, and power to legislate on medium of instruction in institutions of primary or secondary education must therefore rest with the State Legislatures. Power to legislate in respect of medium of instruction is, however, not a distinct legislative head; it resides with the State Legislatures in which the power to legislate on education is vested, unless it is taken away by necessary intendment to the contrary. Under Items 63 to 65 the power to legislate in respect of medium of instruction having regard to the width of those items, must be deemed to vest in the Union. Power to legislate in respect of medium of instruction, insofar it has a direct bearing and impact upon the legislative head of coordination and determination of standards in institutions of higher education or research and scientific and technical institutions, must also be deemed by Item 66 List I to be vested in the Union."

6.2 Reliance has also been placed on the decision of the Supreme Court in the case of ***The Hingir-Rampur Coal Co., Ltd. and others v. The State of Orissa and others,*** AIR 1961 SC 459 at paragraphs 23 and 24 of the report, which reads as under:

"23. *The next question which arises is, even if the cess is a fee and as such may be relatable to Entries 23 and 66 in List II its validity is still open to challenge because the legislative competence of the State Legislature under Entry 23 is subject to the provisions of List I with respect to regulation and development under the control of the Union; and that takes us to Entry 54 in List I. This Entry reads thus: "Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest". The effect of reading the two Entries together is clear. The jurisdiction of the State Legislature under Entry 23 is subject to the limitation imposed by the latter part of the said Entry. If Parliament by its law has declared that regulation and development of mines should in public interest be under the control of the Union, to the extent of such declaration the jurisdiction of the State Legislature is excluded. In other words, if a Central Act has been passed which contains a declaration by Parliament as required by Entry 54, and if the said declaration covers the field occupied by the impugned Act the impugned Act would be ultra vires, not because of any repugnance between the two statutes but because the State Legislature had no jurisdiction to pass the law. The limitation imposed by the latter part of Entry 23 is a limitation on the legislative competence of the State Legislature itself. This position is not in dispute.*

24. *It is urged by Mr Amin that the field covered by the impugned Act has already been covered by the Mines and Minerals (Regulation and Development) Act, 1948, (53 of 1948) and he contends that in view of the declaration made by Section 2 of this Act the impugned Act is ultra vires. This Central Act was passed to provide for the regulation of mines and oil fields and for the development of minerals. It may be stated at this stage that by Act 67 of 1957 which has been subsequently passed by Parliament, Act 53 of 1948 has now been limited only to oil fields. We are, however, concerned with the operation of the said Act in 1952, and at that time it applied to mines as well as oil fields. Section 2 of the Act contains a declaration as to the expediency and control by the Central Government. It reads thus: "It is hereby declared that it is expedient in the public interest that the Central Government should take under its control the regulation of mines and oil fields and the development of minerals to the extent hereinafter provided". It is common ground that at the relevant time this Act applied to coal mines. Section 4 of the Act provides that no mining lease shall be granted after the commencement of this Act otherwise than in accordance with the rules made under this Act. Section 5 empowers the Central Government to make rules by notification for regulating the grant of mining leases or for prohibiting the grant of such leases in respect of any mineral or in any area. Sections 4 and 5 thus purport to prescribe necessary conditions in accordance with which mining leases have to be executed. This part of the Act has no relevance to our present purpose. Section 6 of the Act, however, empowers the Central Government to make rules by notification in the Official Gazette for the conservation and development of minerals. Section 6(2) lays down several matters in respect of which rules can be framed by the Central Government. This power is, however, without prejudice to the generality of powers conferred on the Central Government by Section 6(1). Amongst the matters covered by Section*

6(2) is the levy and collection of royalties, fees or taxes in respect of minerals mined, quarried, excavated or collected. It is true that no rules have in fact been framed by the Central Government in regard to the levy and collection of any fees; but, in our opinion, that would not make any difference. If it is held that this Act contains the declaration referred to in Entry 23 there would be no difficulty in holding that the declaration covers the field of conservation and development of minerals, and the said field is indistinguishable from the field covered by the impugned Act. What Entry 23 provides is that the legislative competence of the State Legislature is subject to the provisions of List I with respect to regulation and development under the control of the Union, and Entry 54 in List I requires a declaration by Parliament by law that regulation and development of mines should be under the control of the Union in public interest. Therefore, if a Central Act has been passed for the purpose of providing for the conservation and development of minerals, and if it contains the requisite declaration, then it would not be competent to the State Legislature to pass an Act in respect of the subject-matter covered by the said declaration. In order that the declaration should be effective it is not necessary that rules should be made or enforced; all that this required is a declaration by Parliament that it is expedient in the public interest to take the regulation and development of mines under the control of the Union. In such a case the test must be whether the legislative declaration covers the field or not. Judged by this test there can be no doubt that the field covered by the impugned Act is covered by the Central Act 53 of 1948."

6.3. Reliance has also been placed at paragraphs-14,15,17,18 and 19 of the decision of the Supreme Court in ***Bharat Coking Coal Ltd. v. State of Bihar and others,*** (1990) 4 SCC 557, which reads thus:

"14. *Articles 245 and 246 of the Constitution read with Seventh Schedule and the legislative lists therein prescribe the extent of legislative competence of Parliament and State legislature. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule. Similarly, State legislature has exclusive power to make laws with respect to any of the matters enumerated in List II. Parliament and the State legislature both have legislative power to make laws with respect to any matter enumerated in List III, the Concurrent List. This is the legislative scheme under the Constitution, but certain matters of legislation are overlapping which present difficulty. The subject matter of legislation with respect to regulation of mines and mineral development is enumerated under Entry 23 of List II and Entry 54 of List I. These entries are as under:*

"23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union."

"54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of Union is declared by Parliament by law to be expedient in the public interest."

15. *The State legislature is competent to enact law for the regulation of mines and mineral development under Entry 23 of State List but this power is subject to the declaration which may be made by Parliament by law as envisaged by Entry 54 of Union List. Thus the legislative competence of the State legislature to make law on the topic of mines and mineral is subject to Parliamentary legislation. The Parliament has enacted the Mines and Minerals (Regulation and Development) Act, 1957. By Section 2 of the Act the Parliament has declared that it is expedient in public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent provided in the Act. In view of Parliamentary declaration as made in Section 2 of the Act, the State legislature is denuded of its legislative power to make any law with respect to the regulation of mines and mineral development to the extent as provided by the Act. In order to ascertain the extent of Parliamentary declaration, it is necessary to have a glance at the provision of the Act. Section 3 of the Act defines various expressions occurring in the Act. Sections 4 to 9 prescribe restrictions on undertaking, prospecting and mining operations under licence or lease. Sections 10 to 12 prescribe procedure for obtaining prospecting licences or mining leases in respect of the land in which minerals vest in government. Sections 13 to 16 provide for framing of rules for regulating the grant of prospecting licences or mining leases. In particular Section 13 empowers the Central Government to make rules for regulating the grant of prospecting licences and mining leases in respect of minerals and for the purposes connected therewith. Section 13(2) lays down that rules may provide for all or any of the matters as enumerated under various clauses therein. Clause (o) of Section 13(2) before its amendment by the Amending Act 37 of 1986 conferred power on the Central Government to frame rules for the disposal or discharge of any tailings, slime or other waste products arising from any mining or metallurgical operations carried out in a mine. This provision empowered the Central Government to frame rules for the disposal of waste products or effluent discharge from mines including a coal mine. Section 14 makes the provisions of Sections 4 to 13 inapplicable to minor minerals. Section 15 empowers the State Government to make rules for regulating the grant of quarry leases, mining leases and other mineral concessions in respect of minor minerals and purposes connected therewith. Since in the instant cases, we are not concerned with the minor minerals, it is not necessary to deal with the question in detail. Section 17 confers special powers on Central Government to undertake prospecting or mining operations in certain lands. Sections 18 and 18-A relate to the development of minerals. Sections 19 to 33 deal with miscellaneous matters.*

17. *The aforesaid analysis of the provisions of the Act makes the extent of Parliamentary declaration clear that the disposal and discharge of sludge or slurry emanating or coming from the washery of a coal mine is exclusively within the legislative power of Parliament. The Act further provides that the Central Government has exclusive power to frame any rule either under Section 13(2)(o) or under the amended Section 18(2)(k) of the Act regulating disposal of slurry. The effect of the Parliamentary declaration as contained in the Act is that the matters referred to in the declaration, stand abstracted from List II and those become matters of legislation in List I of the Seventh Schedule . As a result of the*

declaration made by Parliament, under Section 2 of the Act, the State legislature is denuded of its legislative power with respect to the regulation of mines and mineral development and the entire legislative field has been taken over by Parliament. In Baijnath Kedia v. State of Bihar [(1969) 3 SCC 838 : (1970) 2 SCR 100] this Court dealing with the extent of Parliament's declaration made under Section 2 of the Act, observed as follows: (SCC p. 847, para 13)

"To what extent such a declaration can go is for Parliament to determine and this must be commensurate with public interest. Once this declaration is made and the extent laid down, the subject of legislation to the extent laid down becomes an exclusive subject for legislation by Parliament. Any legislation by the State after such declaration and trenching upon the field disclosed in the declaration must necessarily be unconstitutional because that field is abstracted from the legislative competence of the State legislature."

This Court has consistently taken this view in Hingir-Rampur Coal Co. Ltd. v. State of Orissa [(1961) 2 SCR 537 : AIR 1961 SC 459] , State of Orissa v. M.A. Tulloch & Co. [(1964) 4 SCR 461 : AIR 1964 SC 1284] , State of Tamil Nadu v. Hind Stone[(1981) 2 SCC 205 : (1981) 2 SCR 742] .

18. *The Central Government has not framed any rule either under Section 13 or under Section 18 of the Act. Does it affect the legal position as discussed earlier? The answer must be in the negative. Prior to the Amending Act 37 of 1986 Section 13(2)(o) conferred power on the Central Government to frame rules for the purpose of granting prospecting licences and mining leases including the disposal or discharge of any tailings, slime or other waste products. Sub-clause (o) of Section 13(2) was transposed into Section 18(2) as sub-clause (k) by the Amending Act 37 of 1986. As noted earlier, Section 18(1) confers general power on the Central Government to frame rules and to take all such steps as may be necessary for the conservation and development of minerals in India. Section 18(2) does not affect or restrict the generality or width of legislative power under Section 18(1) as the matters specified in various sub-clauses of Section 18(2) are illustrative in nature. Even in the absence of sub-section (2) or its various sub-clauses, the Central Government was invested with the power of subordinate legislation in respect of any matter which could reasonably be connected with the purpose of "conservation and development of minerals" by Section 18(1) of the Act. Thus, power to frame rules, regulating the discharge or disposal of slime or slurry emanating from a coal mine including its collection from the river bed or from raiyati land after its escape from the washery of the coal mines, would clearly fall within the expression "conservation of mineral". Slurry admittedly contains coal particles, its collection from land or river is reasonably connected with the 'conservation of mineral'. Section 18(2)(k) which expressly confers power on the Central Government to regulate disposal or discharge of waste of a mine makes the Parliamentary declaration apparent that the State legislature is not competent to regulate waste discharge of a coal mine. Mere absence of any rule framed by the Central Government under Section 13 or 18 of the Act with regard to the disposal of slime or waste of a coal mine does not confer legislative competence on the State legislature to make any law or rule. Once a particular topic of legislation is*

covered by the Parliamentary declaration, the State legislature is denuded of its power to make any law or rule in respect of that topic or subject matter and the absence of rules would not confer legislative competence on the State. In Hingir-Rampur Coal Co. Ltd. v. State of Orissa [(1961) 2 SCR 537 : AIR 1961 SC 459] this Court held: (SCR p. 560)

"In order that the declaration should be effective it is not necessary that rules should be made or enforced; all that is required is a declaration by Parliament that it was expedient in the public interest to take the regulation of development of mines under the control of the Union. In such a case the test must be whether the legislative declaration covers the field or not."

Since Section 18 of the Act covers the field with respect to disposal of waste of a mine, there is no scope for the contention that until rules are framed the State legislature has power to make law or rules on the subject. Once the competent legislature with a superior efficacy expressly or impliedly evinces its legislative intent to cover the entire field on a topic, the enactments of the other legislature whether passed before or after would be overborne. Mere absence of rules framed by the Central Government, does not confer power on the State legislature to make law on the subject. Since the legislative field with regard to the framing of rules relating to the disposal of slime and waste of coal mine is fully covered by Section 18, the State legislature is denuded of its power of making any law with regard to those matters.

19. *It was then urged that in the absence of a law being made by the State legislature, the State Government's action in executing lease/settlement in respondent's favour for collection of slurry is relatable to exercise of its executive powers. Learned counsel for the appellants contended that since Entry 23 of List II of the Seventh Schedule confers legislative power on the State legislature for making laws regulating mines and minerals, the State Government in the absence of any rule made by the Central Government has power to regulate disposal and collection of slurry. The State Government was justified in exercising its executive power making arrangements for the collection or removal of slurry which has been polluting the river water and affecting the raiyati land's fertility. Article 162 prescribes the extent of executive power of the State, it lays down that the executive power of a State shall extend to the matters with respect to which the legislature of the State has power to make laws. Thus, the executive power of the State Government is co-extensive with the legislative power of the State legislature. If the State legislature has power to enact laws on a matter enumerated in the State List or in the Concurrent List the State has executive power to deal with those matters subject to other provisions of the Constitution. If a subject matter falls within the legislative competence of State legislature, the exercise of executive power by the State Government is not confined, as even in the absence of a law being made, the State Government is competent to deal with the subject matter in exercise of its executive power. See Rai Sahib Ram Jawaya Kapur v. State of Punjab [(1955) 2 SCR 225 : AIR 1955 SC 549] . In the absence of any law, the State Government or its officers in exercise of executive authority cannot infringe citizen's rights merely because the State legislature has power to make laws with regard to subject, in*

respect of which the executive power is exercised. See State of Madhya Pradesh v. Thakur Bharat Singh [(1967) 2 SCR 454 : AIR 1967 SC 1170] . No doubt under Entry 23 of List II, the State legislature has power to make law but that power is subject to Entry 54 of List I with respect to the regulation and development of mines and minerals. As discussed earlier the State legislature is denuded of power to make laws on the subject in view of Entry 54 of List I and the Parliamentary declaration made under Section 2 of the Act. Since State legislature's power to make law with respect to the matter enumerated in Entry 23 of List II has been taken away by the Parliamentary declaration, the State Government ceased to have any executive power in the matter relating to regulation of mines and mineral development. Moreover, the proviso to Article 162 itself contains limitation on the exercise of the executive power of the State. It lays down that in any matter with respect to which the legislature of a State and Parliament have power to make laws, the executive power of State shall be subject to limitation of the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authority thereof. The limitation as contained in the proviso to Article 162 was necessary to avoid conflict in the exercise of executive power of State and the Union Government in respect of matters enumerated in List III of the Seventh Schedule. If Parliament and the State legislature both have power to make law in a matter, the executive power of the State shall be subject to the law made by the Parliament or restricted by the executive power of the Union expressly conferred on it by the Constitution or any law made by Parliament. Parliament has made the law as contemplated by Entry 54 of List I and the law so made confers exclusive power on the Central Government to frame rules regulating the disposal of waste or industrial effluent of a mine, the State legislature has, therefore no power either to make law under Entry 23 of List II or to exercise executive power to regulate the disposal of slurry, a waste effluent discharge of a coal mine."

6.4 Learned Sr. Counsel also referred to paragraphs-93,94,95,97,113,114 and 125 of the decision of the Hon'ble Supreme Court in ***Monnet Ispat and Energy Limited v. Union of India and others,*** (2012) 11 SCC 1, wherein the Supreme Court, relying on its large number of earlier decisions referred to above, came to the similar conclusion.

7. With reference to the above judgments, learned Sr. Counsel for the petitioners contended that the legislative power is not there in view of the language used in Section 3 notwithstanding anything contained and the legislation involved is in gross violation of Entry 92A and therefore, in view of the decision of the Hon'ble Supreme Court more particularly in ***Monnet Ispat & Energy Ltd (supra),*** the Act is required to be struck down.

8. Learned Sr. Counsel for the petitioners has also contended that as the State cannot take advantage of general entry to impose a development tax, inasmuch as the entry must be specific therefore one cannot fall back on any

General Entry to impose tax. In support of his contention he has relied upon decisions of Hon'ble the Supreme Court in the case of ***Synthetics & Chemicals Ltd. etc v. State of U.P. and others,*** AIR 1990 SC 1927, wherein the Supreme Court at paragraph 67 of the judgment, relying on large number of earlier decisions, held as under:

> ***"67.*** *The Balsara case [1951 SCR 682 : AIR 1951 SC 318 : 52 Cri LJ 1361] was in the context of the business of potable alcohol. Problems arose with regard to auctions, vends, licences and the business of manufacturing, selling, etc. of potable alcohol. Until the case of Synthetics & Chemicals [(1980) 2 SCC 441 : (1980) 2 SCR 531 : AIR 1980 SC 614] , which is under challenge here, all other cases since then have dealt with potable alcohol. The only case which has dealt with alcohol used for industrial purposes was the case of Indian Mica and Micanite Industries Ltd. v. State of Bihar [(1971) 2 SCC 236 : 1971 Supp SCR 319 : AIR 1971 SC 1182] . The Constitution of India, it has to be borne in mind, like most other Constitutions, is an organic document. It should be interpreted in the light of the experience. It has to be flexible and dynamic so that it adapts itself to the changing conditions and accommodates itself in a pragmatic way to the goals of national development and the industrialisation of the country. This Court should, therefore, endeavour to interpret the entries and the powers in the Constitution in such a way that it helps to the attainment of undisputed national goals, as permitted by the Constitution. As mentioned hereinbefore, the relevant entries in the Seventh Schedule to the Constitution demarcate legislative fields and are closely linked and supplement one another. In this connection, reference may be made to Entry 84 of List I which deals with the duties of excise on tobacco and other goods manufactured or produced in India except, inter alia, alcoholic liquors for human consumption. Similarly, Entry 51 of List II is the counterpart of Entry 84 of List I so far as the State list is concerned. It authorises the State to impose duties of excise on alcoholic liquors for human consumption and opium, etc. manufactured or produced in the State and the countervailing duties at the same or lower rates on similar goods produced or manufactured elsewhere in India. It is clear that all duties of excise save and except the items specifically excepted in Entry 84 of List I are generally within the taxing power of the central legislature. The State legislature has power, though limited it is, in imposing duties of excise. That power is circumscribed under Entry 51 of List II of the Seventh Schedule to the Constitution. As we have noted hereinbefore, the correct principles of harmonious interpretation of legislative entries have been laid down in several cases. We have mentioned hereinbefore some of the decisions as noted in the decision of this Court in India Cement [(1990) 1 SCC 12] . In M.P.V. Sundararamier & Co. v. State of A.P. [AIR 1958 SC 468 : 1958 SCR 1422, 1480-82 : (1958) 9 STC 298] this Court has laid down that —*
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> *(i)* ***Legislative entries are to be liberally construed. But when a topic is governed by two entries, then they have to be reconciled. It cannot be that one entry is to be liberally construed and the other entry is not to be liberally construed.***

(ii) Under the constitutional scheme of division of powers under legislative lists, there are separate entries pertaining to taxation and other laws. A tax cannot be levied under a general entry.

(iii) A Constitution is an organic document and has to be so treated and construed.

(iv) If there is a conflict between the entries, the first principle is to reconcile them. But the Union power will prevail by virtue of Article 246(1) and (3). The words "notwithstanding" and "subject to" are important and give primacy to the central legislative power."

8.1 On the said proposition, learned Sr. Counsel also placed reliance on the view expressed by the Supreme Court in the case of ***Central Bank of India v. State of Kerala and others,*** (2009) 4 SCC 94, particularly at paragraph 30 of the report, which reads as under:

*"**30.** While negating challenge to the State legislation, a three-Judge Bench laid down the following principles [**Ed.**: As observed in State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201, pp. 281-82, para 31.] :*

"(1) The various entries in the three lists are not 'powers' of legislation but 'fields' of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States.

(2) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

(3) Taxation is considered to be a distinct matter for purposes of legislative competence. There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt within one group of entries and power of taxation in a separate group. The power to tax cannot be deduced from a general legislative entry as an ancillary power.

(4) The entries in the lists being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The words and expressions employed in drafting the entries must be given the widest possible interpretation. This is because, to quote V. Ramaswami, J., the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simplex numeration of broad categories. A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters.

(5) Where the legislative competence of the legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in List I or III. If it does, no further question need be asked and Parliament's legislative competence must be upheld. Where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence. The court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded.

(6) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There the doctrine of pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the legislature which enacted it, an incidental encroaching in the field assigned to another legislature is to be ignored. While reading the three lists, List I has priority over Lists III and II and List III has priority over List II. However, still, the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List I."

9. Learned Sr. Counsel on behalf of the petitioners has also contended that the impugned Act which has been brought into in 2003 is bad in law since the taxing statute itself has no sanction of law. In this regard, he has placed reliance upon the decision of the Hon'ble Supreme Court in ***Shree Digvijay Cement Co. Ltd. and another v. Union of India and another,*** AIR 2003 SC 767, particularly at paragraph 26, which reads as under:

*"**26.** It is no doubt true that in taxing legislation, the legislature deserves greater latitude and greater play in joints. This principle, however, cannot be extended so as to validate a levy which has no sanction of law, however laudable may have been the object to introduce it and howsoever laudable may have been the purpose for which the amount so collected may have been spent."*

9.1 Further, learned Sr. Counsel has also relied upon a decision of this Court in ***M/s. Ashok Biri and another and others v. State of Orissa and others,*** 2001 (I) OLR-586, more particularly paragraphs-2,5,6,9 and 10, which reads as under:

*"**2.** The case of the petitioners briefly stated is as following :*

Petitioner No. 2 is one of the shareholders of petitioner No.l which is a private limited company having its registered head office at Calcutta. It carries on

business in tobacco and kendu leaves. It prepares bidi with kendu leaves in the name and style of 'Ashok Bidi' at its factory situated in the State of West Bengal. The Orissa Forest Development Corporation Limited, opposite party No. 3 (hereinafter referred to as 'O.F.D.C.") is a Government of Orissa undertaking. Trade in kendu leaves in the State of Orissa being the State's monopoly, it is being transacted by the O.F.D.C. which sells processed and phal kendu/tendu leaves by way of tender and auction every year. The petitioner No.l is a registered dealer in West Bengal both under the West Bengal Sales Tax, Act, 1994 and Central Sales Tax Act, 1956. As usual O.F.D.C. issued tender call notice for sale of processed and phal kendu (tendu) leaves for the year 2000-2001 inviting sealed tenders from purchasers duly registered with it. The petitioner No.l being a registered purchaser with O.F.D.C. submitted its tender which was duly accepted. As required, it has entered into an agreement with O.F.D.C. After the sale of kendu leaves and payment of the sale value, lifting orders were issued by the O.F.D.C. to its respective Divisional Managers permitting the petitioner No.l to lift the goods. Thereafter, the concerned Divisional Forest Officer issued transport permit in the prescribed form on the basis of which the petitioners transported kendu leaves to its place of business in West Bengal. According to the petitioners. the sale/purchase of kendu leaves shall be deemed to have taken place in course of inter-State trade because the sale/purchase had occasioned the movement of kendu leaves from the State of Orissa to the State of West Bengal and as such, it is exigible to Central Sales Tax under the Central Sales Tax Act, 1956 and not to local sales tax. They have accordingly prayed for a declaration that levy and collection of sales tax under the Orissa Sales Tax, 1947 are unauthorised and without jurisdiction and the excess amount collected from them under the guise of Orissa Sales Tax should be refunded.

5. *Before proceeding to consider the rival submissions, a short preface is necessary to be made here. Kendu tree is a wild growth. Its leaf is used mainly for manufacture of bidi. To regulate the trade in kendu leaves, the State of Orissa had been adopting different executive and legislative mensures. The State legislature enacted the Orissa Kendu Leaves (Control of Trade) Act, 1961 under which the State has assumed monopoly of trade in kendu leaves. In some of the provisions of the said Act and the Rules framed thereunder i.e. the Orissa Kendu Leaves (Control of Trade) Rules, 1962 were referred to by the counsel for the parties in course of hearing, we may also indicate the same at this stage. Under Sub-section (1) of Section 3 of the said Act, no person other than (a) the government; (b) an officer of the government authorised in that behalf: or (c) an agent in respect of the unit in which the leaves have grown; shall purchase or transport kendu leaves. Sub-section (2) of Section 3 contains two Clause (a) and (b). Since we are not concerned with Clause (a), we need not refer to it. Clause (b) [i.e. Section 3(2)(b)] lays down that notwithstanding anything contained in Sub-section (1), leaves purchased from government or any officer or agent specified in the said sub-section by any person for manufacture of bidis within the State or by any person for sale outside the State may be transported by such person outside the unit under a permit to be issued in that behalf by such authority and in such manner as may be prescribed and the permit so issued shall be subject to such conditions as may be prescribed.*

Now coming to the rules, it may be seen that rule 5-B deals with disposal of kendu leaves. It provides that kendu leaves shall ordinarily be sold by entering into a contract in advance for which tender shall be invited. Under Sub-rule (10) of Rule 5-B, a person or party who is selected as purchaser for the particular unit shall purchase the entire quantity of kendu leaves procured or likely to be procured from such unit or such lesser quantity out of it as may be offered to him. Under Sub-rule (11), the purchaser is required to execute an agreement in the prescribed Form 'H' within 15 days from the dale of receipt of an order relating to his selection as purchaser, failing which, the said order of selection shall be liable to be cancelled. Sub-rule (13) provides that purchaser shall take delivery of kendu leaves from such depots or stores as intimated by the Divisional Forest Officer during the currency of the purchaser's agreement. Under Sub- rule (14) if the purchaser during the currency of the agreement establishes a bidi factory in order to provide employment to the residents of the State, he shall be entitled to rebate of two per cent of the annual purchase price paid by him. Rule 6 deals with grant of transport permit. Sub-rule (1) of Rule 6 lays down that an application for issue of permit under Section 3(2)(b) in the prescribed Form 'C has to be made to the Divisional Forest Officer. Sub-rule (2) states that the permit shall be in the prescribed Form 'D' Rule 9 deals with grant of certificate of sale. It laid down that the government or their officer or agent while selling kendu leaves to any such person shall grant to such person a certificate of sale in Form 'F'.

6. *Central issue :*

Sec. 3 (a) of the Central Sales Tax Act, 1956 so far relevant. reads as follows :

" A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase –

(a) occasions the movement of goods from one State to another; or"

It is now fairly settled by series of decisions of the Supreme Court that conditions essential for a sale in the course of inter-State trade or commerce within the meaning of Section 3 (a) are :

(i) there must be a sale of goods ;or

(ii) such sale must occasion the movement of goods from one State to another.

The word 'occasions' in Section 3 (a) is used as a verb and means to cause or to be the immediate cause. In other words, the movement of goods from one State to another must be the necessary incidence - necessary consequences - of sale or purchase. The case of cause or effect, the cause being the sale/purchase and the effect being the movement of goods to another State. What is decisive is whether the sale is one which occasions the movement of goods from one State to another. The inter- state movement must be the result of a covenant expressed or implied in the contract of sale or the incident of the contract. It is not necessary that the contract of sale must itself provides for and cause the movement of goods. It is enough if the movement was in pursuance of or incidental to the contract of sale. The question whether it is an inter-State sale or intra-State sale does not depend

upon the circumstances as to in which State the property in goods passes. It may pass in either State and yet the sale can be an inter-State sale. Where the transaction between the parties constitute ,a sale or purchase in course of inter-State trade or commerce, the Court should have regard to the entire course of dealing between the parties (See Kelvinator of India Ltd. v. State of Haryana, (1973) 32 S.T.C. 629, Oil India Ltd. v. Superintendent of Taxes, (1975) 35 S.T.C. 445, Union of India v. K. C. Khosla, (1979) 43 S.T.C. 457 and Commissioner of Sales Tax, U.P. v. Bakhtawar Lal Kailash Chand Arhti, (1992) 87 S.T.C. 196).

9. *From the facts discussed above and the averments made in the writ petition; which have not been controverted by the opposite parties, it is evident that kendu leaves can only be delivered after submission of necessary transport permit and the sale can only be completed after delivery of the goods, that is to say, after the goods have been directed to move to definite places, as mentioned in the transport permit. The transport permit clearly indicates the destination and also checking and examination at Check Gates in between the point of despatch and destination so as to avoid diversion of the goods, i.e. kendu leaves. In this case, the petitioner had to move the goods to West Bengal and. as such, transport permit had been issued for removal of the goods to Aurangabad in West Bengal which was a condition precedent for delivery of the goods to it. Having regard to the facts and circumstances mentioned above and the entire gamut of dealings between the parties, we are inclined to hold that (i) the O.F.D.C. sold kendu leaves to the petitioners and (ii) the sale occasioned the movement of goods from the State of Orissa to the State of West Bengal as a necessary incident or necessary consequence. As the pre-conditions essential for a sale in course of inter-State trade have been satisfied, the transaction has to be held an inter-State sale within the meaning of Section 3(a) of the Act.*

10. *For the reasons aforesaid, the petitioners are entitled to get refund of the excess amount collected from them under the Orissa Sales Tax Act, 1947. The opposite parties are hereby directed to refund it to the petitioners within two months of receipt of writ from this Court. If the excess amount is not paid within the time granted, the petitioners would be entitled to receive interest at the rate of 16 per cent per annum on the differential amount from the date of default."*

9.2 In this regard, he has also placed reliance on the decision of the Hon'ble Supreme Court in ***State of Orissa and another v. K.B. Saha and sons Industries (P) Ltd. and others,*** (2007) 9 SCC 97, more particularly at paragraphs-1, 2, 3, 5, 6, 7, 12, 20 and 25. For ready reference, the same are reproduced hereunder:

"1. …..Appellants State of Orissa and Orissa Forest Corporation Ltd. (in short the "Corporation") in these appeals call in question legality of the judgment rendered by a Division Bench of the Orissa High Court allowing the writ petitions filed under Article 226 of the Constitution of India.

2. *Writ petitions were filed by the respondents on the plea that the transactions between them and the Corporation were in course of inter-State trade and, therefore, only sales tax under the Central Sales Tax Act, 1956 (in short "the Central Act") and not the Orissa Sales Tax Act, 1947 (in short "the State Act") was*

leviable. Accordingly, prayer was made for a declaration that levy and collection of tax under the State Act was unauthorised, without jurisdiction and the excess amount collected from them under the guise of the State sales tax should be refunded.

3. *Background facts as presented by the appellants are as follows:*

The respondents have their registered office outside the State of Orissa. They carry on business in tobacco and kendu leaves. They prepare bidi at factories situated in the State of West Bengal. The Corporation is a Government of Orissa Undertaking. Trade in kendu leaves in the State of Orissa is a State monopoly and, therefore, is being transacted by the Corporation which sells processed and phal tendu leaves by way of tender and auction every year. The writ petitioners were registered both under the West Bengal Sales Tax Act, 1994 (in short "the West Bengal Act") and the Central Act.

5. *The High Court referred to various provisions of the Orissa Kendu Leaves (Control of Trade) Act, 1961 (in short "the Kendu Leaves Act") under which the State of Orissa has assumed monopoly of trading in kendu leaves. Rules framed thereunder are known as the Orissa Kendu Leaves (Control of Trade) Rules, 1962 (in short "the Control Rules"). It was noted by the High Court that Section 3(2)(b) of the Kendu Leaves Act lays down that notwithstanding anything contained in sub-section (1), leaves purchased from the Government or any officer or agent specified in the said sub-section by any person for manufacture of bidis within the State or by any person for sale outside the State may be transported by such person outside the unit under a permit to be issued in that behalf by such authority as may be prescribed and the permits so issued shall be subject to such conditions as may be prescribed. The High Court also referred to Rule 5-B which deals with disposal of kendu leaves. Particular reference was made to sub-rule (10) and sub-rule (11) of the said rule. Under sub-rule (11) the purchaser is required to execute an agreement in the prescribed Form 'H' within 15 days from the date of receipt of an order relating to his selection as purchaser failing which the said order of selection shall be liable to be cancelled. Sub-rule (13) provides that purchaser shall take delivery of kendu leaves from such depots or stores as indicated by the Divisional Forest Officer during the agreement. Rule 6 deals with grant of transport permit. The High Court relied upon the said rule for its conclusion that the transactions were in the nature of inter-State trade. Reference was made to sub-rule (1) of Rule 6 which lays down that an application for issue of permit under Section 3(2)(b) of the State Act in the prescribed Form 'C' has to be made to the Divisional Forest Officer. The High Court found that the writ petitioners were purchasers duly registered with the Corporation. They have submitted their tenders pursuant to the notice of tender. Their bids were accepted pursuant to which in each case agreement was executed. As an instance regarding the nature of the transaction, reference was made to the factual position in OJC No. 9724 of 2000 filed by Ashok Bidi. In that case it was noted that the Divisional Manager of the Corporation, Balangir Division in his letter dated 13-11-2000 wrote to the Sub-Divisional Manager, Padampur Sub-Division, requesting him to give delivery of the stock to Writ Petitioner 1 on receipt of the transport permit from the Divisional Forest*

Officer, Kendu Leaf, Padampur. In the copy which was forwarded to the Divisional Forest Officer, Kendu Leaf, Padampur Division, the Divisional Manager requested him to issue necessary transport permit in favour of the writ petitioner. The challan indicates that the goods were to travel from Mithapali in Orissa to Aurangabad in West Bengal. The transport permit also noted the destination. It was, therefore, concluded by the High Court that kendu leaves can only be delivered after submission of necessary transport permit and the sale can only be completed after delivery of the goods, that is to say, after the goods have been directed to move to the definite place as mentioned in the transport permit. Such permits clearly indicate the destination and also checking and examination at check gates in between the point of dispatch and destination so as to avoid diversion of the goods. It was, therefore, concluded that the preconditions essential for a sale in course of inter-State trade were satisfied and the transactions have to be held as inter-State sale within the meaning of Section 3(a) of the Central Act. The writ petitions were accordingly allowed.

6. *In support of the appeals, learned counsel for the appellants submitted that unnecessary stress has been laid by the High Court on the transport permit. They submitted that even in case of intra-State trade, the transport permits were required. There was in each case an agreement with the Corporation and nowhere it stipulates that the goods could only be taken outside the State. After the sale was completed in the State of Orissa, the purchaser was free to take it to any destination.*

7. *The nature of the transaction has to be concluded on the basis of the common intention of the parties. The seller had no knowledge as to what is the ultimate destination. Mere knowledge to the seller is not sufficient. Something more is necessary. There was no material to show that the seller's intention was of inter-State trade. The permit issued for outside units is only for the convenience of the purchasers; where the goods pass is immaterial.*

12. *The nature of a transaction i.e. whether it is an inter-State or intra-State would depend upon the factual scenario of the case under examination. The Corporation only accepts tenders from purchasers who are duly registered with it. The registration is renewed from time to time. One of the clauses on which the High Court has placed great reliance is Clause 3.7. The same reads as follows:*

"The tenderer shall be bound by all Forest Department rules and regulations in connection with the purchase and transit of the forest produce."

It has been pointed out by learned counsel for the respondents that in the tender document there was clear indication that the principal place of business and additional place of business of the respondents were all outside the State of Orissa. The details of the registrations under the West Bengal Act and the Central Act were indicated. The way bill of transport and consignment of goods dispatched from outside the State of West Bengal to any place in West Bengal was also brought on record.

20. *In order to decide whether sale is inter-State it is sufficient that movement of goods should have been occasioned by sale or should be incidental thereto. What is*

important is that the movement of goods and the sale must be inseparably connected. It is not necessary that there should be an existence of contract of sale incorporating the express or implied provision regarding inter-State movement of goods. Even if hypothetically it is accepted that such a requirement is necessary in the facts of the present case such implied stipulation does exist. This is referable to Clause 3.7 of the agreement.

***25.** Above being the position, the inevitable conclusion is that the High Court was justified in its view. On the fact situation established no interference is, therefore, called for. The appeals are dismissed with no order as to costs."*

10. A contention has also been raised by learned Sr. Counsel for the petitioners that in some of the writ petitions though the Notification came to be issued on 30.07.2003, the tax is collected from 18.07.2003, which is in violation of the basic taxing statute. In that view of the matter, the collection of tax prior to 30.07.2003 is required to be held bad in law.

11. The petitioners, those who are before us are the persons who are dealing with Kendu leaves within the State of Odisha & also outside the State of Odisha.

12. Mr. S.P. Mishra, learned Advocate General has taken us to the definition of "forest produce" under Section 2(d) and also taken us to Section 2(g), section 3 (1), (2),(3), and Section 6 of the Orissa Act 18 of 2003. He has also taken us to Article 366 of the Constitution of India, more particularly sub-Article 12 where goods are defined and has contended that in view of the definition of 'goods' under Article 366 the State Government is all competent to impose the tax within the State on any goods defined under Article 366 and the legislative competence is there under Entry 54 of list-II of Seventh schedule.

12.1 He has also relied upon the same judgment which is sought to be relied upon by learned counsel for the petitioners, more particularly paragraph-67 (i) of the decision of Supreme Court in ***Synthetics & Chemicals Ltd. etc*** (supra) and also paragraph-30 of the decision of the Supreme Court in ***Central Bank of India*** **(supra),** but he has relied upon sub-para 1,2,4 and **5** of para-30 of the judgment and contended that the State with a view to develop the forest has imposed this development tax from the purchaser and any transaction within the State is for the purpose of development of the forest.

13. It has come on record that a letter dated 09.08.2006 issued by the Special Secretary to Government, Department of Forest & Environment, Govt. of Orissa to the Managing Director, Orissa Forest Development

Corporation Ltd., Orissa, instructing the OFDC Ltd. to delete last sentence of Clause 9 and the word "Forest Development Tax" from Clause-22 of the terms and conditions of sale of Kendu Leaf in general tender and auction communicated vide Memo No.163/5 dated 19.7.2006 of O.F.D.C. Ltd. Hereafter, OFDC Ltd. will deposit the Forest Development Tax on account of sale of Kendu Leaf with the Government. For ready reference, the relevant portion of the said letter is quoted here under:

> ***"Sub: Deposit of Forest Developmental Tax on sale of Kendu Leaf.***
>
> *Sir,*
>
> *I am directed to inform you that after careful consideration, Government has decided to instruct OFDC Ltd. to delete last sentence of Clause 9 and the word "Forest Development Tax" from Clause-22 of the terms and conditions of sale of KL in general tender and auction communicated vide Memo No. 163/5 dated 19.7.2006 of OFDC Ltd. Hereafter, OFDC Ltd. will deposit the Forest Development Tax on account of sale of Kendu Leaf with the Government.*
>
> *Therefore, you are requested to implement the aforesaid decision of the Government with immediate effect."*

13.1 Referring to the said letter, it is contended that no tax is collected from 09.08.2006 from the dealer and, therefore, the period of dispute involved here is from 18.07.2003 to 09.08.2006.

14. Mr. S.K. Patnaik, learned Sr. Counsel for the Corporation has taken us to the definition of Section 3 and contended that the tax is to be collected from the purchaser. Meaning thereby, it is not a sale and therefore, it is not to be borne by the seller but to be borne by the purchaser. Therefore in a way it was a transaction (within the State of Orissa) tax. In support of such submission, he has relied upon a decision of Hon'ble the Supreme Court in ***T.N. Godavarman Thirumulpad v. Union of India & Ors.,*** (2008) 7 SCC 126, more particularly paragraphs-7 and 9, which are quoted hereunder:

> ***"7.*** *Based on the ecological importance of forest falling in different eco-value and canopy density classes, relative weightage factors have also been taken into consideration. By using these relative weightage factors, the equalised forest area in eco-value Class I and very dense forest corresponding to forest falling in different eco-value and density classes have been compiled. For example, 17,997 sq km of open forest of Eco-Class IV has been calculated to be equivalent to 7558 sq km of very dense forest of eco-value Class I. Accordingly, the entire forest area of the country has been calculated and found to be equivalent to 5.2 lakhs sq km forest area having highest ecological significance as that of forest falling in eco-value Class I with density above 70%.*
>
> ***9.*** *Based on this, NPV was fixed and the following recommendations have been made:*

(i) for non-forestry use/diversion of forest land, NPV may be directed to be deposited in the Compensatory Afforestation Fund as per the rates given below:

Eco-value class	*Very dense forest*	*Dense forest*	*Open forest*
Class I	*10,43,000*	*9,39,000*	*7,30,000*
Class II	*10,43,000*	*9,39,000*	*7,30,000*
Class III	*8,87,000*	*8,03,000*	*6,26,000*
Class IV	*6,26,000*	*5,63,000*	*4,38,000*
Class V	*9,39,000*	*8,45,000*	*6,57,000*
Class VI	*9,91,000*	*8,97,000*	*6,99,000*

(in Rs per hectare)

(ii) the use of forest land falling in national parks/wildlife sanctuaries will be permissible only in totally unavoidable circumstances for public interest projects and after obtaining permission from the Hon'ble Court. Such permissions may be considered on payment of an amount equal to ten times in the case of national parks and five times in the case of sanctuaries respectively of NPV payable for such areas. The use of non-forest land falling within the national parks and wildlife sanctuaries may be permitted on payment of an amount equal to NPV payable for the adjoining forest area. In respect of non-forest land falling within marine national parks/wildlife sanctuaries, the amount may be fixed at five times the NPV payable for the adjoining forest area;

(iii) these NPV rates may be made applicable with prospective effect except in specific cases such as Lower Subhanshri Project, mining leases of SECL, field firing ranges, wherein pursuant to the orders passed by this Hon'ble Court, the approvals have been accorded on lump sum payment/no payment towards NPV; and

(iv) for preparation and supply of district-level maps and GPS equipments to the State/UT Forest Departments concerned and the regional offices of the MoEF, the Ad-hoc CAMPA may be asked to provide an amount of Rs 1 crore to the Forest Survey of India out of the interest received by it."

15. We have heard learned counsel for the parties and gone through the provisions of the Orissa Act 18 of 2003 and the relevant Entries of the Constitution of India upon which reliance has been placed by the learned counsels for the parties. Taking into consideration the Entry 54 of List-II, it is very clear that the State Government is competent to legislate an Act for the purpose of imposing tax of purchase of sale of goods.

16. Tax on sale and purchase of goods other than the newspaper is subject to the provisions of Entry 92A. Therefore, it will be very difficult for us to hold that the State has no competence to enact the Act, but while interpreting the provisions of the Act and the charging Section i.e. Section 3 of the Act, we are of the view that the Act in question, which came into force, will operate only for intra-State sales i.e. sales within the State of Orissa. In so far as transactions which are clearly inter-state transactions in nature, as in the present cases, there can be no levy of the said tax in view of the clear provisions under Entry-92A of List-I of the Constitution of India.

17. In that view of the matter, we are of the opinion that the transactions which are within the State of Orissa, this tax can be levied. But, the transaction which is inter-State, the provisions of the Act cannot be operated in view of Entry 92A.

18. Considering the entire fact situation of the case, relevant provisions of the Act and the decisions referred to above, the writ petitions are disposed of with declaration that for transactions which are inter-State in nature**,** the provision of the Act, 2003 will not be enforced. Therefore, the Corporation will examine facts of each of the matter individually and recommend the State Government or the competent authority for refund of the Tax collected.

19. So far as the argument of Mr. R.P. Kar, learned counsel, with regard to collection of tax from 18.07.2003 to 30.07.2003, in view of the Notification which came to be published for the first time on 30.07.2003, tax collected prior thereto is declared to be bad in law, hence the same is also required to be refunded.

20. It is made clear that the amount of tax collected, which is lying with the Corporation, will be refunded by the Corporation and if it is lying with the State Government, the same will be refunded by the State Government.

21. The refund shall be made within a period of four months from the date of receipt of a copy of this judgment along with application for refund from the petitioners individually. If the amount is not refunded, as directed, within four months, then claimant will be entitled to interest at the rate of 8% from the date of depositing the amount. The writ petitions are allowed to the extent indicated above. No order as to cost.

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

W.P.(C) NO. 14733 OF 2006
(with following batch of Writ Petitions)

Sl. No.	Case No.	Petitioner(s)	Advocate for the petitioner(s).
1.	W.P.(C) No.14733 of 2006	Jami Ramesh	M/S. C. Ananda Rao
2.	W.P.(C) No.5120 of 2003	Prasanna Ku.Naik	M/S. B.K. Sharma
3.	W.P.(C) No.4958 of 2004	Gahanu Oram	Mr. D.K. Sharma

4.	W.P.(C) No.14734 of 2006	Jami Ramesh	M/S. C. Ananda Rao
5.	W.P.(C) No.14735 of 2006		
6.	W.P.(C) No.14736 of 2006		
7.	W.P.(C) No.14737 of 2006		
8.	W.P.(C) No.14738 of 2006		
9.	W.P.(C) No.14739 of 2006		
10.	W.P.(C) No.14740 of 2006		
11.	W.P.(C) No.14741 of 2006		
12.	W.P.(C) No.14742 of 2006		
13.	W.P.(C) No.14743 of 2006		
14.	W.P.(C) No.17242 of 2007	M.Kameswar Rao	M/S. M.K.Mohapatra
15.	W.P.(C) No.7067 of 2008	Gouri Sankar Simahad	M/S. C. Ananda Rao
16.	W.P.(C) No.2478 of 2009	Anand Ch.Mishra	Mr. Jagjit Panda
17.	W.P.(C) No.2479 of 2009		
18.	W.P.(C) No.10442 of 2009	Hari Naik@Harihar	M/S. P.K. Rath
19.	W.P.(C) No.14128 of 2009	G.Chiranjibalu	M/S. C. Ananda Rao
20	W.P.(C) No.15714 of 2009	Gokul Bagh	M/S. S.K. Dash
21.	W.P.(C) No.15919 of 2009	Martin Khosla	M/S. D.R. Bhokta
22.	W.P.(C) No.15935 of 2009	Bijaya Ch.Khosla	
23.	W.P.(C) No.16638 of 2009	Sushila Sahoo	M/S. B. Muduli
24.	W.P.(C) No.17074 of 2009	Rama Ch.Khemundu	M/S. P.K. Nanda
25.	W.P.(C) No.17075 of 2009	Gangadhar Khemundu	
26.	W.P.(C) No.17207 of 2009	Sira Nayak	M/S. D.R. Bhokta
27.	W.P.(C) No.17208 of 2009		
28.	W.P.(C) No.18275 of 2009	Rama Pr.Chaudhury	M/S. S. Mohanty
29.	W.P.(C) No.18277 of 2009	Litty Rary	
30.	W.P.(C) No.18278 of 2009	Manika Subudhi	
31.	W.P.(C) No.18339 of 2009	Achul Mandi@Achyut	M/S. P.K. Nanda
32.	W.P.(C) No.18340 of 2009		
33.	W.P.(C) No.18341 of 2009		
34.	W.P.(C) No.18373 of 2009	Anka Subudhi	M/S. S. Mohanty
35.	W.P.(C) No.18664 of 2009	Purna Ch.Bhoi	M/S. S.K. Mishra
36.	W.P.(C) No.18866 of 2009	Sachindra Hantal	M/S. D.K. Bhokta
37.	W.P.(C) No.18906 of 2009	Padlam Golari	
38.	W.P.(C) No.18907 of 2009	Bhagaban Khemundu	
39.	W.P.(C) No.19062 of 2009	Hantal Daimati	

40.	W.P.(C) No.19075 of 2009	Dagara Bisoyi	MD. G. Madani
41.	W.P.(C) No.19076 of 2009	Bhalu Domba	
42.	W.P.(C) No.19077 of 2009	Ramnath Gauda	
43.	W.P.(C) No.20191 of 2009	B.Harikrushna Reddy	M/S. B. Pujari
44.	W.P.(C) No.20287 of 2009	Jahan Garada	MD. G. Madani
45.	W.P.(C) No.20472 of 2009	Jyotsnamayee Nayak	M/S. D.R. Bhokta
46.	W.P.(C) No.252 of 2010	Manaba Seva Samiti	M/S. A.K. Nanda
47.	W.P.(C) No.511 of 2010	Sadrak Bagh	M/S. D.R. Bhokta
48.	W.P.(C) No.512 of 2010	Lajar Bagh	
49.	W.P.(C) No.513 of 2010	Pabitra Ku.Khosla	
50.	W.P.(C) No.963 of 2010	Kamala Khara	M/S. P.K. Parhi
51.	W.P.(C) No.1583 of 2010	Sanyasi Parida	M/S. D.R. Bhokta
52.	W.P.(C) No.1941 of 2010	Bansidhar Dash	
53.	W.P.(C) No.1942 of 2010	Namita Patra	
54.	W.P.(C) No.2061 of 2010	Krushna Ch.Khora	
55.	W.P.(C) No.2062 of 2010	Lachaman Hontal	
56.	W.P.(C) No.2063 of 2010	Krushna Ch.Khora	
57.	W.P.(C) No.2231 of 2010	Bhagirathi Hiyal	M/S. S.K. Dash
58.	W.P.(C) No.2232 of 2010	Babulal Takri	
59.	W.P.(C) No.2361 of 2010	Kesari Krishna Kumar	M/S. S. Mohanty
60	W.P.(C) No.2388 of 2010	Sankarlal Agrawal	M/S. D.R. Bhokta
61	W.P.(C) No.2389 of 2010	Darshan Devi Agrawal	
62.	W.P.(C) No.2401 of 2010	Bajendra Hantal	
63.	W.P.(C) No.2402 of 2010	Deba Ranjan Rath	
64.	W.P.(C) No.2403 of 2010	Dalimba Burudi	
65.	W.P.(C) No.2404 of 2010	Basanta Kumari Rath	
66.	W.P.(C) No.2405 of 2010	Bhabani Pr.Rath	
67.	W.P.(C) No.2771 of 2010	Abhimanyu Digal	M/S. D.P. Dhal
68.	W.P.(C) No.2926 of 2010	Dullabha Khemundu	M/S. D.R. Bhokta
69.	W.P.(C) No.2927 of 2010	Sasi Bhusana Patro	
70.	W.P.(C) No.2928 of 2010	Jaya Khemundu	
71.	W.P.(C) No.2929 of 2010	Jaya Khemundu	
72.	W.P.(C) No.2931 of 2010	Subarao Mallick	
73.	W.P.(C) No.2932 of 2010	Balaram Khemundu	
74.	W.P.(C) No.2933 of 2010	Muralidhar Patro	
75.	W.P.(C) No.2934 of 2010	Bhaskar Mallick	

76.	W.P.(C) No.3407 of 2010	Jagannath Khilla	
77	W.P.(C) No.3408 of 2010	Keshab Mallik	
78.	W.P.(C) No.3409 of 2010	Jagannath Khilla	
79	W.P.(C) No.3411 of 2010	Keshab Malliki	
80.	W.P.(C) No.3412 of 2010	Jagannath Khilla	
81.	W.P.(C) No.4084 of 2010	Haribandhu Khora	
82.	W.P.(C) No.4085 of 2010	Sania Khora	
83.	W.P.(C) No.4086 of 2010	Dinu Gouda	
84.	W.P.(C) No.4099 of 2010	Haribandhu Khora	
85.	W.P.(C) No.4304 of 2010	Mohan Kuldip	
86.	W.P.(C) No.4441 of 2010	Bijayalaxmi Mishra	Mr. Jagjeet Panda
87.	W.P.(C) No.4442 of 2010	Nigamananda Mishra	Mr. Jagjit Panda
88.	W.P.(C) No.4465 of 2010	Ishwarlal Patwania	M/S. D.R. Bhokta
89.	W.P.(C) No.4807 of 2010	Basanta Ku.Pradhan	M/S. G.N. Mishra
90.	W.P.(C) No.4828 of 2010	Panchanan Behera	M/S. G. Mohanty
91.	W.P.(C) No.4987 of 2010	Bijayalaxmi Mishra	M/S. A.K. Nanda
92.	W.P.(C) No.5077 of 2010	Alfred Khura	Mr. S. Mishra-1
93.	W.P.(C) No.5094 of 2010	Gagan Behari Samal	Mr. S. Mishra
94.	W.P.(C) No.5156 of 2010	Manoj Ku.Agarwal	M/S. D.R. Bhokta
95.	W.P.(C) No.5258 of 2010	Abhi Khora	
96.	W.P.(C) No.5288 of 2010	Niranjan Mali	
97.	W.P.(C) No.5289 of 2010	Bijay Ch.Brahma	M/S. S.B. Sahoo
98.	W.P.(C) No.5291 of 2010		
99.	W.P.(C) No.5292 of 2010	Bijay Ku.Sahu	
100.	W.P.(C) No.5333 of 2010	Kamala Nayak	M/S. P.K. Rath
101	W.P.(C) No.5334 of 2010		
102.	W.P.(C) No.5535 of 2010	Jaydev Sahoo	M/S. T.K. Mishra
103.	W.P.(C) No.5549 of 2010	Bulu Khosla	M/S. D.R. Bhokta
104.	W.P.(C) No.5816 of 2010	Fr.Bendict Kujuru	M/S. S. Mohanty
105.	W.P.(C) No.7792 of 2010	Ramesh Ch.Panigrahi	M/S. P.K. Nanda

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

JAMI RAMESH & ORS. .....Petitioners

.Vs.

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

THE ORISSA SCHEDULED AREAS TRANSFER OF IMMOVABLE PROPERTY (BY SCHEDULED TRIBES) REGULATION 1956 READ WITH ORISSA SCHEDULED AREAS TRANSFER OF IMMOVABLE PROPERTY (BY SCHEDULED TRIBES) AMENDMENT REGULATION, 2000 – Section 3(1) and 3(B) – Amendment – Prayer to declare the same as ultra vires to the Constitution of India as the same has been made applicable retrospectively – The question arose whether the amendment in a statute can be made applicable retrospectively – Held, No. – Reasons indicated.

"In view of the decision of the Hon'ble Supreme Court referred hereinabove and the well settled principle of law that any amendment made to the Act, will have a prospective effect, unless it is expressly provided or by necessary implications, make it retrospective. On perusal of the amended Regulation, 2000, it appears that there is no express provision making it applicable retrospectively. On the other hand, the amending Regulation makes it clear that it will come into effect from the date of publication. Further, the language of the amending provision which empowers the authority to re-open all transactions right from 1956, even in absence of allegation of fraud, does not make it clear the object to be achieved by such amendment. If the amended provision is allowed to operate retrospectively, it would make the persons belonging to non-ST community to face unnecessary litigations putting their vested right over the property at stake and making it vulnerable. The same is never the intention of the impugned amendment and can't be. In that view of the matter, we are of the considered opinion that the amendment which is brought into as Section 3(B) of the Amendment Regulation, 2000, cannot have a retrospective effect and as such, the same will have a prospective effect. It will be applied to the transactions made on or after the date of publication i.e. 04.09.2002 and the transaction which took place prior thereto, will not be affected, in any manner by the provisions of Amendment Regulation, 2000. In view of the above, we think it proper to direct the authority concerned to reconsider cases of the respective petitioners in the writ petitions and pass appropriate order keeping in mind the observations made above, after giving due opportunity of being heard to each of the petitioner and allow them to file reply. Accordingly, we pass the following order:

ORDER

1. *We clarified that the Amendment Regulation, 2000 will have a prospective effect.*
2. *The impugned order passed on the basis of the Amendment Regulation, 2000 is required to be set aside and the same is accordingly set aside.*
3. *The matter is remitted back to the authority concerned and the petitioners are directed to appear before the concerned authority in the first week of June, 2019 and file their replies. The authority will consider and decide the matter within six months from the date of receipt of such replies.*
4. *The possession of the petitioners will not be disturbed till the matter is heard by the authority.*

However, we don't express any opinion on Section 3(1) of the Amendment Regulation, 2000." *(Paras 11 to 13)*

Case Laws Relied on and Referred to :-

1. 2004 (II) OLR SC 117 : Amrendra Pratap Singh Vs. Tej Bahadur Prajapati & Ors.

JUDGMENT Heard and Decided on 12.04.2019

K.S. JHAVERI, C.J.

Since the issues involved in all the writ petitions are similar, as agreed upon by learned counsel for the parties, those are taken up together for analogous hearing and are disposed of by a common judgment. For the sake of convenience of discussion, W.P.(C) No.14733 of 2006 is taken up as the leading case.

2. By way of the writ petition, the petitioner has challenged the entire proceedings initiated in OSATIP Case Nos.1116 of 2005 to 1126 of 2005 and the final order dated 07.10.2006 (Annexure-11) passed therein by the Sub-Collector, Jeypore-opposite party no.3, holding the transaction of land is fraudulent and reverting the same to the original tribal owners. The petitioner has also challenged the provisions under Section 3(1) and 3(B) of the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Amendment Regulation, 2000 (hereinafter referred to as "the Amendment Regulation, 2000") and has prayed to declare the same as *ultravires* to the Constitution of India.

3. The facts of the case as stated in the writ petition in a nutshell are that on 02.01.2003, the petitioner and his family members had purchased the case land from the vendors (general caste) and the case land was mutated in their names and the R.O.Rs were corrected accordingly vide Annexure-1 and 2 series. The vendors of the petitioner had originally purchased the case land from the tribal owners after obtaining due permission and following due procedure of laws as required under regulation 2/1956, from the then competent authority in the year 1984 to 1989. After purchasing the case land, the vendors mutated the same in their names and paid rent regularly. After mutation of case land, RORs were corrected vide Annexures-3 and 4, 5 & 6 series). Subsequently, on 25.3.2005, the case lands were sold by the petitioner and his family members to M/s. Sri Sai Rameswar Solvents Pvt. Ltd., represented by the petitioner as Managing Director and the lands were mutated in the name of the Company and R.O.Rs were corrected accordingly vide Annexures-7 & 8 series. However, on filing of information regarding details of purchase of land by the petitioner and his family members and occupation of land in the prescribed form (Form-2) supported by affidavit as

required under Section 3-B of Amended Regulation 2000 under Annexure-9 series, the Sub-Collector, Jeypore initiated eleven cases against the petitioners i.e. OSATIP No.1116/05 to 1126/2005 and issued notice to appear on 06.06.2006, which was served on 07.06.2006 (Annexure-10 series). It is stated that on different dates the cases were taken up in the absence of the petitioners or without issuing notice to the petitioners. And finally, the Sub-Collector passed the impugned order dated 07.10.2006 at Annexure-11, reverting the case land to the original tribal owners. For ready reference, the said order dated 07.10.2006 is quoted hereunder:

> *"The case is taken up today. I have examined Mangaru Kandha, Sukuru Kandha, Ramanidhi Samarath villagers of Murtahandi & Tima Kutuka, Rukuna Mahuka, Jami Mahuka, Indra Mahuka, Lima Nachika and Ketu Mahuka of Kachiakanadi village. All are related to the transactions of suit land. The statements of them are attached to the case record. From statements of all one thing revealed that Judhistir Samantray was a Contractor who motivated the tribals and tried to fetch a sizeable chunk of land in a single patch. For the same purpose he first purchased tribal lands in the name of Sadhaba Samaratha and later on could be able to regularize the same by obtaining permission. Sri Ramanidhi Samarath revealed that some land was also purchased in his name. Since the informant could not produce Sri Judhisir Samantray and the connected records. This could not be examined. But the fact is corroborated that the vendors and their legal heirs are aware of the fact that they knew only Judhistir Samantray and not Sadhab or Ramanidhi Samarath. This Sadhab Samarath belong to village Mrutahandi which is far away from village Majurmunda and he never posses, saw the land at any point o time. Besides, all the legal heirs of the deceased vendors including one living vendor Ketu Mahuka expressed that all they had no intension or necessity to sell away the land but were motivated by one VAW Sri Rao and other one medical staff who took them to different offices for execution of sale paper and permission order. It is also stated that they have not received the money in a single installment. Under the above circumstances, I hold that the entire transaction through which Sri Judhistir Samantray and his son took over tribal lands in village Majurmunda are all fraudulently taken. The Competent Authority has not shown due sincerity in examining the matter while sanctioning permission. Giving blanket order to tribal tenant to sell land to anybody is not as per the spirit of law. From no.1 provides that the Competent Authority should consult the prospective purchaser whether he is willing to pay the market value and whether it was actually paid. In many cases where enquiry is made the tribal tenants are honestly admitting the sale, but their statement reveals that there is difference between the price fixed by the Competent Authority and the price actually paid. The present informant defend in all the cases that since the deed has been executed and the DSR examines the payment, it would be deemed to have been paid. But this is not at all a fact. One common mistake has been committed that neither competent authority nor the DSR has actually ensured payment of the land cost. All the payment has happened behind the bank of C.A. and DSR. The tenants have been left to the bargain of the purchaser. In many cases the land was previously occupied by the purchaser and subsequently obtained permission. In almost all cases it is observed that the purchaser himself has motivated persuaded the tenant.*

It is a general tendency of the tribal tenants that they hardly purchase and sell land among themselves. The grounds of application for permission in most of the cases are also common. It is either to repay hand loan, to purchase bullock or to repair the land. In some cases land has been sold to observe funeral and give their daughters in marriage. All of the above grounds are very weak grounds for the reason that repayment of hand loans encourages illegal money lending, in the availability of sufficient subsidized bank loans for purchase of bullocks and repair of land for which there is special ITDA to look after the matter. It is unfortunate to allow sell of the land for the purpose. There is no proof anywhere that bullocks were purchased and land was repaired. Lastly tribals receives wealth from the son-in-law but allowing land for daughters marriage is contradictory to this and against the spirit of law.

On the above observation, I hold the land particulars notified in case No.1116 to 1126/05 are all fraudulent transaction and hence stand reverted."

4. Mr. C.A. Rao, learned Senior Counsel for the petitioners with reference to Section 3(1) of the Amendment Regulation, 2000, which was substituted in place of Section 3(1) of Regulation 2 of 1956, submits that it is completely restricting the transfer of immovable property by member of Schedule Tribe (for short 'ST') to a non-ST member except by way of mortgaging property by way of collateral security or otherwise, in favour of any public financial Institution for securing a financial assistance for any agricultural purpose, and further limiting the transfer of land, if any, within the ST community only and omitted the transfer by member of ST in favour of non-ST even with previous consent in writing of the competent authority and further restricted that the member of ST not to transfer any land if the total extent of the land remaining after the transfer will be reduced to less than "two acres" in case of irrigated land or "five acres" in case of the un-irrigated land. He has also taken us to the provisions under Section 3(B) of the Amendment Regulation, 2000. For ready reference, the said Section 3(1) and 3(B) of the Amendment Regulation, 2000 are reproduced hereunder:

"3 (1) Notwithstanding anything contained in any law for the time being in force any transfer of immovable property by a member of a Scheduled Tribe, except by way of mortgage executed in favour of any public financial institution for securing a loan granted by such institution for any Agricultural purpose, shall be absolutely null and void and of no force or effect whatsoever, unless such transfer is made in favour of another member of a Scheduled Tribe:
Provided that:-

(i) nothing in this sub-section shall be construed as to permit any member of a Scheduled Tribe or his successor-in-interest to transfer any immovable property which was settled with such member of Scheduled Tribe by or under any authority of the State or the Central Government or under nay law for the time bring in force;

(ii) in execution of any decree for realisation of the mortgage money, no property mortgaged as shall be sold in favour of any person not being a member of a Scheduled Tribe; and

(iii) a member of a Scheduled Tribe shall not transfer any land if the total extent of his land remaining after the transfer will be reduced to less than two acres in case of irrigated land or five acres in case of un-irrigated land.

Explanation-I:- *For the purposes of this sub-section, a transfer of immovable property:-*

(a) in favour of a female member of a Scheduled Tribe, who is married to a person not belonging to any Scheduled Tribe, shall be deemed to be a transfer made in favour of a person not belonging to a Scheduled Tribe; and

(b) shall include a transfer of immovable property to a person belonging to a Scheduled Tribe for consideration paid or provided by another person not belonging to any such Tribe.

Explanation II:- *For the purposes of Clause (iii) of the proviso, the expression "irrigated land" shall mean such land which is irrigated atleast for one crop in a year and the expression "un-irrigated land" shall be construed accordingly.*

xxx xxx xxx xxx

3-B. Reversion of land of members of Scheduled Tribes, which was transferred by fraud*.-(1) Every person who, on the date of commencement of the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Amendment Regulation, 2000 (hereinafter referred to in this section as the Amendment Regulation of 2000), is in possession of agricultural land which belonged to a member of a Scheduled Tribe at any time during the period commencing on the 4th October, 1956 and ending on the date of commencement of the Amendment Regulation of 2000 shall, within two years of such commencement, notify to the Sub-Collector in such form and in such manner as may be prescribed; all the information as to how he has come in possession of such land.*

(2) If any person fails to notify the information as required by sub-section (1) within the period specified therein it shall be presumed that such person has been in possession of the agricultural land without any lawful authority and the agricultural land shall on the expiration of the period aforesaid, revert to the person to whom it originally belonged and if that person be dead, to his heirs.

(3) On receipt of the information under sub-section (1), the Sub-Collector shall make such enquiry as may be necessary about all such transactions of transfer and if he finds that the member of Scheduled Tribe has been defrauded of his legitimate right shall declare the transaction null and void and:-

(a) Where no building or structure has been erected on the agricultural land prior to such finding, pass an order revesting the agricultural land in the transferor and if he be dead, in his heirs;

(b) where any building or structure has been erected on the agricultural land prior to such finding, he shall fix the price of such land in accordance with the principles laid down for fixation of price of land in the Land Acquisition Act 1894 and order the person referred to in subsection (1) to pay to the transferor the difference, if any, between the price so fixed and the price actually paid to the transferor:

Provided that where the building or structure has been erected after the commencement of the Amendment Regulation of 2000, the provisions of clause (b) shall not apply;

Provided further that fixation of price under clause (b) shall be with reference to price on the date of registration of the case before the Sub-Collector."

4.1 It is submitted that the aforesaid provisions was newly added which came into effect w.e.f. 04.9.2002, calling upon the person in possession of Agricultural land, which belonged to a member of ST at any time during the period commencing 04.10.1956 and ending on the date of commencement of the Amendment Regulation, 2000 i.e. on 04.09.2002, shall within 2 years of such commencement, notify to the Sub-Collector in Form No.2, along with affidavit, all information as to how he has come in possession of such land.

4.2. The provision under amended Regulation 3(B)(2), contemplates that if any person fails to notify the information as required shall be presumed that he has been in possession of the land without any lawful authority and the lands shall be reverted to the person to whom it was belonged to originally.

4.3. It is further submitted that under sub-clause (3) of Section 3(B), after getting information under sub-clause (1) of Section 3(B), the Sub-Collector was empowered to make enquiry about all such transaction of transfer i.e. the period from 04.10.1956 to 04.09.2002 and if he finds that the ST member has been defrauded, shall declare the transaction null and void.

5. Learned counsel for the petitioners further contended that all the amendments are prospective and where it was never intended to give retrospective operation of law unlike Regulation 7(D), a separate Miscellaneous provision of Regulation, which was promulgated by the Governor under sub-Clause (2) of Clause-5 of 5th Schedule of the Constitution, as in "OSATIP (By Schedule Tribes) Miscellaneous Provisions Regulations,1976".

6. In support of his contention that all amendments/regulations are prospective in nature, unless it is specifically stated in said Regulation/Acts or by necessary implication to make it retrospective, he has relied upon relevant parts of some decisions of Hon'ble the Apex Court and other Courts, which are quoted hereunder:

i. Relevant part of Paragraph-7 of ***Keshavan Madhava Menon v. The State of Bombay,*** AIR 1951 SC 128:

"7. xxx Every statute is prima facie prospective unless it is expressly or by necessary implications made to have retrospective operation. xxx"

ii. Paragraphs-21 to 24 and 31 of ***Defedar Niranjan Singh and another v. Custodian, Evacuee Property (Pb) and another,*** AIR 1961 SC 1425:

"21. The third contention is based upon the assumption that the order of the Custodian dated June 6, 1949, by the process of fiction shall be deemed to be an order made by the Custodian in exercise of the powers conferred on him by Ordinance No. XXVII of 1949. As we have already indicated at an earlier stage of our judgment, the order of a Custodian under that Ordinance was subject to an appeal under s. 25 thereof to the District Judge designated in that behalf by the Provincial Government. The order of the District Judge on appeal was subject to revision by the Custodian-General under s. 27. Subject to the said provision, the order of the Custodian was final under s. 28. In the present case, no appeal was filed against the order of the Custodian to the District Judge and, therefore, the said order had become final under s. 28. To put it in other words, by operation of the provisions of the said Ordinance the order of the Custodian made under Ordinance No. IX of 2004 but deemed to have been made under Ordinance No. XXVII of 1949 had become final. What then was the effect of the repeal of that Ordinance by the Act of 1950? We have already noticed the provisions of s. 58 which repealed the said Ordinance and which also made certain savings in respect of acts done tinder the Ordinance. Sub-s. (3) of s. 58 dealing with the said savings, as we have stated when considering the history of the legislation, is in two parts. The first part says that the repeal by the Act of the said Ordinance shall not affect the previous operation of the said Ordinance; and the second part says that anything done or any action taken in the exercise of any power conferred by or under that Ordinance shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act were in force on the day on which such thing was done or action taken. The second part is expressly made subject to the first part. If a case falls under the first part, the, second part does not apply to it. In the present case under the previous operation of the Ordinance the order of the Custodian had become final. If so, the fiction introduced in the second part could only operate on that order subject to the finality it had acquired under that Ordinance.

(22) xxx. The section does not expressly affect a vested right of a person in whose favour there was a final determination under the Ordinance. Nor does the section imply such retroactivity by necessary intendment. An order which had become final under the Ordinance could be deemed to be an order under the Act without disgorging itself of the attribute of finality acquired by it under the repealed Ordinance. xxx.

(23) After stating the principle, the Judicial Committee made the following remarks in respect of the question that arose in that case:

"Their Lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality Orders which, when the statute came into force, were final, are provisions which touch existing rights. Accordingly, if the section now in question is to apply to orders final at the date when it came into force, it must be clearly so provided. Their Lordships cannot find in the section even an indication to that effect."

(24) We respectfully accept the said principle as laying down the correct law on the subject. If so, by the same parity of reasoning, we must hold in the present case that the order of the custodian which had become final under Ordinance No. XXVII of 1949, could not be affected retrospectively under s. 58(3) of the Act so as to deprive the order of the Custodian of the finality it had acquired under the said Ordinance. Not only the said provision does not contain any positive indication giving it such. retroactivity but also in express terms it saves the previous operation of that Ordinance.

31. Nor do we find any force in the argument of learned counsel for the State that under s. 27 of the Act, the Custodian- General may at any time revise the order of any Custodian and, therefore, the Custodian-General can revise without any limit of time any order made by any Custodian under any previous law. Section 27 of the Act can be given retrospective operation only to the extent permitted bys. 58(3) of the Act. We have held that s. 58(3) does not affect the previous operation of the law and therefore cannot affect the finality of the orders made under the Ordinance. So the words in the section "any time" or "any Custodian" must necessarily be confined only to orders of any one of the Custodians defined in the Act and to orders of Custodians deemed to have been made under the Act but had not become final before the Act came into force.

iii. Paragraphs-20, 23 and 24 of ***Deputy Collector & Another v. S. Venkata Ramanaiah and another***, AIR 1996 SC 224:

"20. Even though the aforesaid provisions of the Regulations represent a species of welfare legislation for protecting the illiterate tribals from exploitation at the hands of non-tribals the short question which arises for our consideration is as to whether these beneficial provisions have any retrospective effect.

23. xxx. Therefore, we agree with the submission of Mr Bobde, learned counsel for respondents, that the provisions of Section 3(1) of the Regulation are purely prospective in nature and do not affect past transactions of transfers effected between tribals and non-tribals or between non-tribals and non- tribals themselves in the Agency Tracts at a time when neither Regulation I of 1959 nor Regulation II of 1963 or Regulation I of 1970 was in force. Such past transactions remained untouched by the sweep of the aforesaid subsequently enacted Regulations.

24. xxx. Section 3(1) of the Regulation cannot be supported on the ratio of that judgment to nullify vested rights under past completed transactions. As we have already discussed earlier. Section 3(1)(a) read with Section 3(2)(a) of the Regulation seeks to hit only those transfers of lands in Agency tracts which take place after the advent of Section 3(1)(a) of the Regulation. Possessions under transfers which are beyond the sweep of Section 3(1)(a) cannot be said to have continued under any invalid transfers as envisaged by Section 3(1)(a). Such possessions obtained under the then existing old and valid transfers would be outside the ken of the Regulation itself. The alternative submission canvassed by learned senior counsel for the authorities, therefore, also has no substance and has got to be rejected."

iv. Paragraphs-5 and 6 of ***Bhubaneswar Prasad Singh Deo v. State of Orissa and Others,*** AIR 1983 Orissa 159:

"5. xxx. Ordinarily, every Act is prospective in operation. There can be no dispute that the paramount Legislature has plenary power to make retroactive and retrospective legislation and even affect vested rights. Where, however, the Legislature does not clearly intend or the provisions by necessary implication do not give retrospective operation to the legislation, the Courts are unanimous in giving prospective operation to the law. (See, Keshavan Madhava Menon v. State of Bombay, AIR 1951 SC 128: Mahadeolal Kanodia v. Administrator General of West Bengal, AIR 1960 SC 936 and Arjan Singh v. State of Punjab, AIR 1970 SC 703).

6. Though the present definition of 'Family' was inserted into the Act with effect from Sept. 29, 1973, 26th of Sept. 1970 has been provided as the relevant date with a view to

not permitting manipulations or arrangements by which the purpose of the Act would be defeated. This is a well-known device. We may refer to the Orissa Estates Abolition Act of 1951. Though the law came into existence in 1951, the relevant date for several purposes has been taken as January, 1946. Obviously the legislative intention seems to be that partition beyond 26th of Sept., 1970, would not be acted upon. We are of the opinion that in the absence of any express provision or indication of intention by necessary intendment that the definition would be so construed as to take away existing rights, it should be so interpreted that it would not operate prior to the Act came into force and partitions which had taken effect earlier than the Act have to be accepted and given effect to; otherwise, the consequences would be serious and far-reaching; for instance, a man of the age of sixty who had chosen to remain a bachelor, and had separated from the family four scores of years back, would be brought into the fold of 'family' and land held by him would be put into the hotchpot for determining the ceiling in the hands of his father or mother who may be living. Such a position could not have been contemplated by the legislature. We find support for our view from an unreported judgment of this Court in the case of Jayakrishna Singh Rai v. State of Orissa (O.J.Cs. No. 1050 and No. 1087 of 1976, disposed of on 20-9-1978). We also agree with the contention of the petitioner that the Revenue Officer is not entitled to initiate a proceeding against the mother and take into account the properties of the separated son when both are independent landholders prior to the Act."

v. Paragraph-4 of the decision rendered in ***Arjan Singh and another v. The State of Punjab and others,*** AIR 1970 SC 703:

"4. It is, a well settled rule of construction that no provision in a statute should be given retrospective effect unless the legislature by express terms or by necessary implication has made it retrospective and that where a provision is made retrospective, care should be taken not to extend its retrospective effect beyond what was intended."

vi. Paragraph-15 of ***The Godavari Sugar Mills Ltd., v. S.B. Kamble and Others,*** AIR 1975 SC 1193:

"15. The protection and immunity afforded by Article 31b is, however, restricted to the provisions of the Act or Regulation as they exist on the date the Act or Regulation is included in the Ninth Schedule. The inclusion of the Act and Regulation would protect not only the principal Act or Regulation which is included in the Ninth Schedule but also the amendments which have been made therein till the date of its inclusion in the Ninth Schedule, even though the constitutional amendment by which the Act or Regulation is included in the Ninth Schedule refers only to the principal Act and Regulation and not to the amendments thereof. The protection or immunity enjoyed by the Act or Regulation, including the amendments thereof till the date of its inclusion in the Ninth Schedule would not, however, extend to the amendments made in the Act or Regulation after the date of its inclusion in the Ninth Schedule. The reason for that is that the inclusion of an Act or Regulation in the Ninth Schedule can be brought about only by means of an amendment of the Constitution. The amendment of the Constitution can be carried out in accordance with Article 368 of the Constitution. Such a power is exercised not by the legislature enacting the impugned law but by the authority which makes the constitutional amendment under article 368, viz., the prescribed majority in each House of Parliament. Such a power can be exercised in respect of an existing Act or Regulation of which the provisions can be scrutinized before it is inserted in the

Ninth Schedule. It is for the prescribed majority in each House to decide whether a particular Act or Regulation should be inserted in the Ninth Schedule, and if so, whether it should be so inserted in its entirety or partly, In case the protection afforded by Article 31b is extended to amendments made in an Act or Regulation subsequent to its inclusion in the Ninth Schedule, the result would be that even those provisions would enjoy the protection which were never scrutinized and could not in the very nature of things have been scrutinized by the prescribed majority vested with the power of amending the Constitution. It would, indeed, be tantamount to giving a power to the State legislature to amend the Constitution in such a way as would enlarge the contents of Ninth Schedule to the Constitution."

vii. Paragraph-2 of the decision of ***The State of Orissa v. Chandrasekhar Singh Bhoi***, AIR 1970 SC 398:

"2. xxx. The amending Act passed after the enactment of the Constitution (Seventeenth Amendment) Act, 1964 does not therefore qualify for the protection of Article 31-B. xxx."

viii. Paragraph-8 of ***I.R. Coelho (dead) by L.Rs. v. State of Tamil Nadu,*** AIR 2007 SC 861:

"8. The High Court of Patna in Kameshwar v. State of Bihar [AIR 1951 Patna 91] held that a Bihar legislation relating to land reforms was unconstitutional while the High Court of Allahabad and Nagpur upheld the validity of the corresponding legislative measures passed in those States. The parties aggrieved had filed appeals before the Supreme Court. At the same time, certain Zamindars had also approached the Supreme Court under Article 32 of the Constitution. It was, at this stage, that Parliament amended the Constitution by adding Articles 31-A and 31-B to assist the process of legislation to bring about agrarian reforms and confer on such legislative measures immunity from possible attack on the ground that they contravene the fundamental rights of the citizen. Article 31-B was not part of the original Constitution. It was inserted in the Constitution by the Constitution (First Amendment) Act, 1951. The same amendment added after Eighth Schedule a new Ninth Schedule containing thirteen items, all relating to land reform laws, immunizing these laws from challenge on the ground of contravention of Article 13 of the Constitution. Article 13, inter alia, provides that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention thereof shall, to the extent of the contravention, be void."

6.1 He, therefore, contended that by introduction of provisions of Section 3(B) of the Amendment Regulation, 2000, the transaction taken place right from the year 1956, information of which directed to be furnished within two years of commencement of the Amendment Regulation, 2000, is sought to be disturbed. There is no nexus between the amendment and object to be achieved by such amendment.

7. He further contended that in view of the decisions referred hereinabove, the provisions under Section 3(B) of the Amendment Regulations, 2000 is required to be clarified by this Court that the same will

have prospective effect from the date of publication of the notification and will be applicable to the transactions made on or after the date of publication and as such, the authority concerned may be directed to consider the case of the petitioners afresh taking into consideration that the amendments made in the Amendment Regulation, 2000, will have prospective effects.

8. Mr. B.P. Pradhan, learned A.G.A. for the State-opposite parties, on the other hand, while justifying the amendment made under the provisions under Section 3(B) of the Amendment Regulation, 2000 has stated that the same is applicable only in a case where fraud is committed in transferring a land from a tribal owner, who has no knowledge about the law of transfer and they are being exploited looking at their conditions.

9. In support of such submission, he has strongly relied upon the decision of the Apex Court in ***Amrendra Pratap Singh vs. Tej Bahadur Prajapati and others,*** 2004 (II) OLR SC 117. Relevant paragraph-24 of the said judgment which he has relied upon is as under:

> *"24. Reverting back to the facts of the case at hand, we find that in the land, the ultimate ownership vests in the State on the principle of eminent domain. Tribals are conferred with a right to hold land, which right is inalienable in favour of non-tribals. It is clear that the law does not permit a right in immovable property vesting in a tribal to be transferred in favour of or acquired by a non-tribal, unless permitted by the previous sanction of a competent authority. The definition of 'transfer of immovable property' has been coined in the widest possible terms. The definition makes a reference to all known modes of transferring right, title and interest in immovable property and to make the definition exhaustive, conspicuously employs the expression - "any other dealing with such property", which would embrace within its sweep any other mode having an impact on right, title or interest of the holder, causing it to cease in one and vest or accrue in another. The use of the word 'dealing' is suggestive of the legislative intent that not only a transfer as such but any dealing with such property (though such dealing may not, in law, amount to transfer), is sought to be included within the meaning of the expression. Such 'dealing' may be a voluntary act on the part of the tribal or may amount to a 'dealing' because of the default or inaction of the tribal as a result of his ignorance, poverty or backwardness, which shall be presumed to have existed when the property of the tribal is taken possession of or otherwise appropriated or sought to be appropriated by a non-tribal. In other words, a default or inaction on the part of a tribal which results in deprivation or deterioration of his rights over immovable property would amount to 'dealing' by him with such property, and hence a transfer of immovable property. It is so because a tribal is considered by the legislature not to be capable of protecting his own immovable property. A provision has been made by para 3A of the 1956 Regulations for evicting any unauthorized occupant, by way of trespass or otherwise, of any immovable property of the member of the Scheduled Tribe, the steps in regard to which may be taken by the tribal or by any person interested therein or even suo motu by the competent authority. The concept of locus standi loses its significance. The State is the custodian and trustee of the immovable property of tribals*

and is enjoined to see that the tribal remains in possession of such property. No period of limitation is prescribed by para 3A. The prescription of the period of 12 years in Article 65 of the Limitation Act becomes irrelevant so far as the immovable property of a tribal is concerned. The tribal need not file a civil suit which will be governed by law of limitation; it is enough if he or anyone on his behalf moves the State or the State itself moves into action to protect him and restores his property to him. To such an action neither Article 65 of Limitation Act nor Section 27 thereof would be attracted."

He, therefore, contended that the very purpose of the amendment is to protect the interest of the people of ST community. As such, there is no illegality in making the amendment retrospective.

10. We have heard learned counsel for the parties.

11. In view of the decision of the Hon'ble Supreme Court referred hereinabove and the well settled principle of law that any amendment made to the Act, will have a prospective effect, unless it is expressly provided or by necessary implications, make it retrospective. On perusal of the amended Regulation, 2000, it appears that there is no express provision making it applicable retrospectively. On the other hand, the amending Regulation makes it clear that it will come into effect from the date of publication. Further, the language of the amending provision which empowers the authority to re-open all transactions right from 1956, even in absence of allegation of fraud, does not make it clear the object to be achieved by such amendment. If the amended provision is allowed to operate retrospectively, it would make the persons belonging to non-ST community to face unnecessary litigations putting their vested right over the property at stake and making it vulnerable. The same is never the intention of the impugned amendment and can't be.

12. In that view of the matter, we are of the considered opinion that the amendment which is brought into as Section 3(B) of the Amendment Regulation, 2000, cannot have a retrospective effect and as such, the same will have a prospective effect. It will be applied to the transactions made on or after the date of publication i.e. 04.09.2002 and the transaction which took place prior thereto, will not be affected, in any manner by the provisions of Amendment Regulation, 2000.

13. In view of the above, we think it proper to direct the authority concerned to reconsider cases of the respective petitioners in the writ petitions and pass appropriate order keeping in mind the observations made above, after giving due opportunity of being heard to each of the petitioner and allow them to file reply. Accordingly, we pass the following order:

ORDER

1. We clarified that the Amendment Regulation, 2000 will have a prospective effect.
2. The impugned order passed on the basis of the Amendment Regulation, 2000 is required to be set aside and the same is accordingly set aside.
3. The matter is remitted back to the authority concerned and the petitioners are directed to appear before the concerned authority in the first week of June, 2019 and file their replies. The authority will consider and decide the matter within six months from the date of receipt of such replies.
4. The possession of the petitioners will not be disturbed till the matter is heard by the authority.

However, we don't express any opinion on Section 3(1) of the Amendment Regulation, 2000. Accordingly, all the writ petitions are disposed of.

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2019 (II) ILR – CUT-288

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

W.P. (C) Nos. 12128, 13433, 13434, 13435, 13436, 13437, 13438, 13439, 13440, 13441, 13442, 13443, 13444, 13445, 13446, 13447, 13448, 13449, 13450, 13451, 13452, 13453, 13454, 13455, 13456, 13457, 13458, 13459, 13460, 13461, 13462, 13482, 13490, 13494, 13497, 13502, 13503, 13505, 13508, 13531, 13532, 13534, 13536, 13538, 13540, 13542, 13543, 13544, 13546, 13548, 13551, 13554, 13555, 13557, 13558, 13560, 13561, 13562, 13565, 13586, 14586, 14588, 14589, 14590, 14591, 14592, 14593, 14594, 14595, 14596, 14597, 14598, 14599, 14600, 14601, 14602, 14603, 14604, 14605, 14606, 14607, 14608, 14609, 14610, 14611, 14612,14613, 14614, 14615, 14616, 14617, 14618, 14619, 14620, 14621 of 2018

MANAGEMENT COMMITTEE, PARADIP PORT .....Petitioner

.Vs.

C.G.I.T. -CUM-LABOUR COURT & ORS. .....Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Article 227 – Writ petition – Challenge is made to the award passed by the Industrial Tribunal – Scope of interference in exercise of power under Articles 226 and 227

of the Constitution of India – Held, this Court, in exercise of its power under Articles 226 and 227 of the Constitution of India should not interfere with the findings of fact recorded by the Tribunal unless there is an apparent error on the face of the award and the findings given in the award are perverse or unreasonable either based on no evidence or based on illegal/unacceptable evidence or against the weight of evidence or outrageously defies logic so as to suffer from irrationality or the award has been passed in violation of the principles of natural justice – If the Tribunal erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding, the same can be interfered by a writ of certiorari – Adequacy of evidence cannot be looked into in the writ jurisdiction but consideration of extraneous materials and non-consideration of relevant materials can certainly be taken into account – Findings of fact of the Tribunal should not be disturbed on the ground that a different view might possibly be taken on the said facts – Inadequacy of evidence or the possibility of reading the evidence in a different manner, would not amount to perversity. (Para 7)

(B) INDUSTRIAL DISPUTES ACT, 1947 – Section 33-C (2) – Provision under – Application filed by the Union seeking certain financial benefits – Plea of Management that there has been delay and latches in making the application – The question arose as to whether the Tribunal is required to consider the aspect of delay and latches while adjudicating the claim – Held, Yes.

"In view of the foregoing discussions, we are of the humble view that even though the provisions of the Limitation Act, 1963 is not applicable to the applications under section 33-C(2) of the I.D. Act but the learned Court below should have kept in view whether the applications suffer on account of gross laches and delay. The applicants perhaps being aware of the justness of the decisions taken by the Management Committee from time to time in not making provisions for payment of guaranteed minimum wages and attendance allowance from the inception of the Scheme on account of financial constraints, remained silent and did not raise any objection or claim or challenge such decision taken by the committee. In such a factual scenario, it was not proper on the part of the learned Court below not to deal with the delay aspect in view of the ratio laid down in the case of Mohan Lal."

(Para 8)

Case Laws Relied on and Referred to :-

1. (1993) II Labour Law Journal 193 (Ker.) : Kerala State Coop. Coir Marketing .Vs. Labour Court
2. A.I.R. 1964 S.C. 752 : The Bombay Gas Co. Ltd. .Vs. Gopal Bhiva.
3. A.I.R. 1968 S.C. 218 : Chief Mining Engineer .Vs. Rameshwar.
4. A.I.R. 1964 S.C. 743 : The Central Bank of India .Vs. P. S. Rajagopalan.

5. A.I.R. 1964 S.C. 477 : Syed Yakoob .Vs. K.S. Radhakrishnan
6. A.I.R. 1984 S.C. 1467 : Sadhu Ram .Vs. Delhi Transport Corporation
7. (1986) 4 SCC 447 : Chandavarkar Sita Ratna Rao .Vs. Ashalata S. Guram
8. (2015) 4 SCC 270 : M/s. Pepsico India Holding Pvt. Ltd. .Vs. Krishna Kant
9. A.I.R. 2014 S.C. 1188 : B.S.N.L. Vs. Bhurumal.
10. A.I.R. 1969 S.C. 1335 : Town Municipal .Vs. The Presiding Officer.
11. A.I.R. 1970 S.C. 209 : Nityananda .Vs. Life Insurance Corporation of India.
12. A.I.R. 1999 S.C. 1351 : Ajaib Singh .Vs. The Sirhind.
13. (2013) 14 SCC 543 : Assistant Engineer .Vs. Mohan Lal.
14. (2005) 8 SCC 58 : State of Uttar Pradesh & Anr. .Vs. Brijpal Singh.

For Petitioner : Mr. Saurjya Kanta Padhi (in all the cases) (Sr. Adv.).
For Opp. Parties (workers) : Mr. Sanjat Das.

JUDGMENT Date of Judgment: 04.06.2019

S. K. SAHOO, J.

The petitioner Management Committee, Paradip Port represented through its Secretary has filed these writ petitions under Article 227 of the Constitution of India to quash the impugned order dated 15.05.2018 (Annexure-7) passed by the learned Presiding Officer, Central Government Industrial Tribunal (hereafter 'C.G.I.T.') -cum- Labour Court, Bhubaneswar in Industrial Dispute Misc. Case No.19 of 2008 filed under section 33-C(2) of the Industrial Disputes Act, 1947 (hereafter 'I.D. Act').

2. 252 applicants who are the opposite parties in these writ petitions filed separate Misc. Cases under section 33-C(2) of the I.D. Act before the learned Presiding Officer, C.G.I.T. -cum- Labour Court, Bhubaneswar asserting that they were the workers of Clearing, Forwarding and Handling (hereafter 'C.F. & H') Pool enlisted as mazdoors under Paradip Port Clearing, Forwarding and Handling Workers (Regulation of Employment) Scheme, 1994 (hereafter '1994 Scheme') and their services were under the supervision and control of the petitioner-Management Committee during the relevant period from June 1995 to August 2001. Initially there were a large number of casual workers in the Paradip Port from its inception and all the workers could not be accommodated in jobs of carrying, forwarding and handling in the Port for which discontentment arose between the casual workers engaged by different Stevedores and workers of C.F. & H Pool which led to labour unrest in the Port. Such unrest ultimately culminated into several litigations in this Court as well as in the Hon'ble Supreme Court. The Hon'ble Supreme Court resolved the disputes by appointing a High Power Committee (H.P.C.) under the Chairmanship of Retd. Supreme Court Judge, Justice H.R. Khanna. While appointing the committee, direction was given

by the Hon'ble Court that H.P.C. was to assess and determine the actual requirement of the work force vis-à-vis the manning scale and the datum of Pradip Port. Pursuant to such direction, the H.P.C. submitted its report in the month of July 1993 suggesting to frame a scheme in the line of Cargo Handling Workers (Regulation of Employment) Scheme, 1979 for the purpose of accommodating sufficient work to the workers in C.F. & H operation. The recommendation was accepted by the Hon'ble Supreme Court in toto and direction was given for taking necessary action as per the recommendation. The object of introducing the scheme was to ensure greater regularity in the employment for C.F. & H workers and for bringing efficiency in such C.F. & H works. In compliance to the recommendations of the H.P.C. and direction of the Hon'ble Supreme Court, Paradip Port Trust framed the 1994 Scheme, which came into force w.e.f. 27th May 1994. It was the claim of the applicants that by virtue of direction of the Hon'ble Court, the recommendation of H.P.C. and the Scheme framed thereunder have become the mandate of the Hon'ble Court and the Scheme has got a legal sanctity being the final order of the Hon'ble Court and hence, the provisions of the Scheme are enforceable under the provisions of the I.D. Act having an award or settlement approved by the Hon'ble Court. According to the applicants, clauses 32 and 33 of the 1994 Scheme provided for guaranteed minimum wages in a month and attendance allowance to a workman of C.F. & H respectively. The aforesaid wages and allowance are payable to such workers when no work is accommodated to him by the petitioner-Management Committee who is in overall responsible for implementation of the Scheme on behalf of the employers. There are various groups of workers like 816 Group, 545 Group and other groups on the basis of different categories of cargoes handled by the workers of such groups. The applicants being the members of the 545 Group asserted that the petitioner-Management Committee could not provide them any work in between 01.01.1995 to 30.08.2001 though all of them were enlisted as C.F. & H Workers under the Scheme. They were neither provided with any work nor guaranteed minimum wages in a month and attendance allowance as per provisions of the Scheme for the aforesaid period. They ventilated their grievances individually as well through the Union before the petitioner-Management Committee. Since no fruitful result came out, the applicants filed individual applications in Form-K-3 before the learned Court below for investigation and settlement under the provisions of section 33-C(2) of the I.D. Act for individual payment of Rs.1,35,880.10 paisa towards guaranteed wages for the period from June

1995 to August 2001 and Rs.43,906.20 paisa towards attendance allowance for the period from January 1995 to August 2001.

The petitioner-Management Committee on being noticed filed its objection and contested the claim of the applicants taking the stand that the petitioner-Management Committee was constituted in September 1993 to administer the Scheme formulated for regulating the service condition of the C.F. & H workers and the Scheme came into existence on 27th May 1994. It was the further stand that the provisions of guaranteed minimum wages and attendance allowance are not recognized as an absolute right/benefit to be extended to a worker under the Scheme and payment of such benefit is a conditional one subject to the financial position of the Management Committee and regular availability of work. The provision of guaranteed minimum wages and attendance allowance is neither absolute in nature nor binding on the Management Committee. During the period from June 1995 to August 2001, the Committee was in a formative stage and its financial position was quite uncertain due to certain conditions prevailing in those periods. As per the terms and conditions of the scheme and decision of the committee, priority was required to be given to ensure payment of past liabilities of unpaid wages, unpaid C.F. & H contribution and discharge of full and final settlement of the past service of workers and also to meet the liability towards terminal benefits likely to be incurred due to surplus of workers by introduction of mechanization of thermal coal handling. It was decided by the petitioner-Management Committee that provisions of guaranteed minimum wages and attendance allowance should not be extended at that stage due to magnitude of its financial liability. As per the decision of the committee by its resolution dated 18.01.2001, provisions incorporated with regard to guaranteed minimum wages and attendance allowance in clauses 32 and 33 of 1994 Scheme were deleted. The above facilities cannot be extended suo motu to all workers of the Management Committee unless the same is accepted by the Management committee. A stand was also taken on behalf of the petitioner-Management committee that the provisions of attendance allowance as per clause 33 does not allow the computation of such allowance on the basis of wages and dearness allowance rather the same is to be calculated on the basis of 1/60th of monthly wage only exclusive of dearness allowance and other allowance. According to the petitioner-Management committee, the applicants were paid attendance allowance on the higher side and the differential amount as claimed by them is not correct and maintainable. As the financial position of the Management

Committee is the condition precedent in the Scheme for extending the guaranteed minimum wages to the applicants, their claim is not maintainable under the provisions of section 33-C(2) of the I.D. Act.

The Utkal Port and Dock Workers Union in a separate claim statement conceded that the applicants are eligible for the benefits under the clauses 32 and 33 of the Scheme. It was their stand that such benefits should also be made available to other workers in similar situations and the deletion of the provisions by the petitioner-Management Committee is beyond its jurisdiction and such action of the committee is not tenable in the eye of law. However, the Union asserted that the Management Committee be directed to raise a separate fund to meet the expenses towards payment of guaranteed minimum wages and attendance allowance.

In their rejoinders to the stand taken by the petitioner-Management Committee as well as the Utkal Port and Dock Workers Union, the applicants asserted that the benefits extended under the Scheme formulated on the strength of the order of the Hon'ble Supreme Court cannot be taken away by the Management Committee in a resolution of its proceeding without approval of the Hon'ble Court. The financial constraints cannot be an excuse for implementation of the Scheme when workers of other group were extended benefits of the Scheme. It was further asserted that in an application under section 33-C(2) of the I.D. Act, the Labour Court/Tribunal is not concerned with the financial constraints or sources of income from which the entitlement of a workman is to be paid and as such the objection raised by the petitioner-Management Committee should be dismissed in limine.

3. The learned Presiding Officer, C.G.I.T. -cum- Labour Court on the basis of the pleadings of the parties formulated the following points for consideration:-

> **(i)** Whether the application under the provisions of section 33-C(2) of the I.D. Act is maintainable?
>
> **(ii)** Whether the applicants workmen are entitled to receive the benefit from the Management Committee, which is capable of being computed in terms of money and the quantum of amount to which each applicant is entitled to receive?

4. In order to substantiate their claims, the applicants examined four witnesses and filed documents like calculation sheet claiming guaranteed minimum wages and attendance allowance which were marked as Ext.1 to Ext.1/A.

The petitioner-Management Committee examined its Secretary as O.P.W.1 and exhibited documents like photocopy of the High Power Committee report, copy of the proceedings of the extra-ordinary meeting dated 11.01.1999, copy of the proceeding of the meeting dated 18.04.2001, copy of the award of the Arbitrator dated 14.08.1992, copy of the proceedings of the extraordinary meeting dated 20.11.1995, copy of the proceedings of the meeting dated 15.01.1996, copy of the proceedings of the meeting dated 29.07.1996 and copy of the proceedings of the meeting dated 07.06.2016 marked as Ext. A to Ext. H.

No evidence was adduced by the opposite party no.2 Utkal Port and Dock Workers Union.

5. The learned Court while adjudicating the first point, held that from the plain reading of the provisions of section 33-C(2) of the I.D. Act, it can be safely said that to invoke the jurisdiction of the Labour Court under the section 33-C(2), two ingredients are necessary. The first is that a workman must be entitled to receive from his employer any money or benefit under a pre-existing right i.e. settlement or award which is capable of being computed in terms of money and the second one is that a question must have arisen as to the amount of money due or as to the amount at which such benefit should be computed. When both these ingredients are satisfied, the Labour Court will have jurisdiction to determine the question. Therefore, the benefit sought to be recovered must be necessarily be a pre-existing benefit or the benefit flowing from an award or settlement. If the entitlement depends upon the adjudication of a right for the first time, then that adjudication will not come under the purview of the section 33-C(2).

While adjudicating the second point, the learned Court held that the entitlement in regard to the guaranteed minimum wages and attendance allowance which arose out of the Scheme formulated at the instance of the Hon'ble Supreme Court can be safely held to be a pre-existing right and such entitlement arose out of a settlement between the parties in the shape of the Scheme and therefore, the contention of the Management Committee that the entitlement put forth by the applicants is not recognized by any pre-existing right or settlement or an award of a Tribunal/Court has no force in the eye of law. It was further held that the recommendation as well as the scheme provides only $1/60^{th}$ of monthly wage as attendance allowance. When other workers of different groups were extended benefits as per the Scheme, the applicants cannot be denied of such benefit or entitlement as provided in the

Scheme. The plea of financial constrain cannot deprive the applicants from such entitlement and accordingly, the Court directed the quantum of attendance allowance to be computed and determined on the basis of 1/60th of the monthly wage only prevailing during the period. It was further held that as per the Scheme, each applicant is entitled to 1/60th of monthly wage as attendance allowance for seven days in a month and directed the Management Committee to calculate the attendance allowance to which each of the applicants is entitled to receive which would be subject to the adjustment of amount already received by the applicant in that regard as per the award of the Arbitrator. The Court further directed that the amount put forth by each applicant towards guaranteed minimum wages and attendance allowance @ 1/60th of the monthly wages subject to adjustment to the allowance already received under that heading by each applicant is to be recovered from the Management Committee. However, the Court on the assertion made by the Utkal Port and Dock Workers Union regarding raising of a separate fund to meet the expenses towards payment of guaranteed minimum wages and attendance allowance, held that in a claim/entitlement under section 33-C(2), the Labour Court is not required to be concerned as to the source of the employer from which the entitlement is to be recovered. Hence, any specific direction on the source from which the Management Committee is to meet the expenses would be an order without jurisdiction. The Labour Court is only concerned about the entitlement to which the applicants are entitled to recover from the Management Committee and it is the look out of the Management Committee as to how it can raise a source to pay such entitlement.

The learned Court, accordingly, ordered the petitioner-Management Committee to take necessary steps to make payment of minimum guaranteed wages and attendance allowance at the rate of 1/60th of the monthly wage subject to adjustment towards earlier payment, if any and further directed that the calculated/computed amount is to be paid within three months of the communication of the order, failing which each applicant would be entitled to receive his entitlement with an additional simple interest at the rate of 8% per annum on such amount after the expiry of such period.

6. Mr. Saurjya Kanta Padhi, learned Senior Advocate appearing for the petitioner-Management Committee challenging the impugned order placed para 15.23 of the High Power Committee report which relates to the constitution of the Management Committee for the smooth and effective working of the 1994 Scheme. He also placed clauses 32 and 33 of the 1994

Scheme which deal with payment of guaranteed minimum wages in a month and attendance allowance respectively. He further placed para 15.26 of the High Power Committee report relating to creation of fund for suitable compensation to the 816 Group of workers who were likely to be retrenched on account of mechanization of coal handling operation. It is contended that the Management Committee is a tripartite body constituted as per the direction of the Hon'ble Supreme Court and since as per the 1994 Scheme, payment of guaranteed minimum wages and attendance allowance are subject to financial position of the Management Committee and regular availability of work and such payment is neither absolute nor binding in nature, there cannot be any pre-existing right attributed in favour of the applicants. It is further contended that when with consent of the parties, clauses 32 and 33 of the 1994 Scheme were deleted by way of an amendment on the decision taken by the petitioner-Management Committee on 18.04.2001 and even after lapse of seventeen years, none of the parties and even the Unions have challenged such deletion, the applicants cannot claim benefits of such provisions at a belated stage. He argued that even if no specific period of limitation has been prescribed under the I.D. Act but an application under section 33-C(2) of the I.D. Act which is in the nature of execution proceeding similar to that of a money claim, should not have been entertained by the learned Court below after the statutory period of limitation i.e. 3 years. He further argued that the claim of the applicants is barred by gross laches and delay inasmuch as the applicants approached the learned Court in the year 2008 i.e. after a lapse of thirteen years of the initial cause of action and after seven years of the deletion of clauses 32 and 33 of 1994 Scheme. According to Mr. Padhi, when the applicants were fully aware about the conditions of service and rules governing the field as stipulated in the 1994 Scheme, they should have been more vigilant in approaching the Court earlier and the learned Court should have rejected their claims on the ground of delay. He placed reliance in case of **Kerala State Coop. Coir Marketing -Vrs.- Labour Court reported in (1993) II Labour Law Journal 193 (Ker**.). Concluding his argument, the learned Senior Advocate submitted that the applicants are very much bound by the decision taken by their representatives taking into consideration the financial position of the petitioner-Management Committee and therefore, the impugned order is not sustainable in the eye of law and should be set aside.

Mr. Sanjat Das, learned counsel appearing for the applicants workers on the other hand contended that the ground of delay in approaching the Court as contended by the learned counsel for the petitioner is not sustainable

in view of the ratio laid down by the Hon'ble Supreme Court in case of **The Bombay Gas Co. Ltd. -Vrs.- Gopal Bhiva reported in A.I.R. 1964 S.C. 752** and **Chief Mining Engineer -Vrs.- Rameshwar reported in A.I.R. 1968 S.C. 218** and such plea of delay was never raised before the learned Court below. He placed reliance in the case of **The Central Bank of India -Vrs.- P. S. Rajagopalan reported in A.I.R. 1964 S.C. 743** and submitted that the Labour Court while determining the computation of benefits in terms of money can deal with the question as to whether the workman has a right to the said benefit or not. He further argued that the learned Court has rightly turned down the argument advanced by the Management Committee regarding its financial constraints in absence of any specific pleadings and evidence adduced in that respect. He emphasized that the deletion of the provisions under clauses 32 and 33 of the Scheme as per the resolution made by the Management Committee in its meeting dated 18.04.2001 is to be acted upon prospectively and the listed C.F. & H workers, who were not provided employment, are entitled to receive guaranteed minimum wages and attendance allowance for the period in which the provisions under clauses 32 and 33 were in force. According to him, there is no apparent error on the face of the impugned order and the findings arrived by the learned Court is neither perverse nor unreasonable and therefore, the writ petitions should be dismissed.

7. Before adverting to the contentions raised by the learned counsel for the parties, it is necessary to discuss the scope of interference with the order passed by the Industrial Tribunal/ Labour Court by this Court in exercise of its power under Articles 226 and 227 of the Constitution of India.

In the case of **Syed Yakoob -Vrs.- K.S. Radhakrishnan reported in A.I.R. 1964 S.C. 477**, a Constitution Bench of the Hon'ble Supreme Court held as follows:-

> "7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or Tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory

jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding is within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised (Ref: **Hari Vishnu Kamath -Vrs.- Ahmad Ishaque : A.I.R. 1955 S.C. 233**; **Nagendra Nath -Vrs.- Commr. of Hills Division : A.I.R. 1958 S.C. 398** and **Kaushalya Devi -Vrs.- Bachittar Singh : A.I.R. 1960 S.C. 1168**)."

The Hon'ble Supreme Court in the case of **Sadhu Ram -Vrs.- Delhi Transport Corporation reported in A.I.R. 1984 S.C. 1467** has held as follows:-

"3. We are afraid the High Court misdirected itself. The jurisdiction under Article 226 of the Constitution is truly wide but, for that very reason, it has to be exercised with great circumspection. It is not for the High Court to constitute itself into an appellate Court over Tribunals constituted under special legislations to resolve disputes of a kind qualitatively different from ordinary civil disputes and to re-adjudicate upon questions of fact decided by those Tribunals. That the questions decided pertain to jurisdictional facts does not entitle the High Court to interfere with the findings on jurisdictional facts which the Tribunal is well competent to decide. Where the circumstances indicate that the Tribunal has snatched at jurisdiction, the High Court may be justified in interfering. But where the Tribunal gets jurisdiction only if a reference is made and it is therefore impossible ever to say that the Tribunal has clutched at jurisdiction, we do not think that it was proper for the High Court to substitute its judgment for that of the Labour Court and hold that the workman had raised no demand with the management...."

In the case of **Chandavarkar Sita Ratna Rao -Vrs.- Ashalata S. Guram reported in (1986) 4 Supreme Court Cases 447**, it is held as follows:-

"21. It is true that in exercise of jurisdiction under Article 227 of the Constitution, the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a view of fact taken in the teeth of preponderance of evidence. But the High Court should decline to exercise its jurisdiction under Articles 226 and 227 of the Constitution to look into the fact in the

absence of clear cut down reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a finding within the jurisdiction of the inferior tribunal except where the findings were perverse and not based on any material evidence or it resulted in manifest of injustice."

In the case of **M/s. Pepsico India Holding Pvt. Ltd. -Vrs.- Krishna Kant reported in (2015) 4 Supreme Court Cases 270**, it is held that the High Court in the guise of exercising its jurisdiction normally should not interfere under Article 227 of the Constitution and convert itself into a Court of appeal.

In the case of **B.S.N.L. -Vrs.- Bhurumal reported in A.I.R. 2014 S.C. 1188**, it is held that the findings of fact by the Central Government Industrial Disputes -cum- Labour Court (CGIT) are not be interfered with by the High Court under Article 226 of the Constitution. Interference is permissible only in cases where the findings are totally perverse or based on no evidence. Insufficiency of evidence cannot be a ground to interdict the findings as it is not the function of the High Court to reappreciate the evidence.

Therefore, this Court, in exercise of its power under Articles 226 and 227 of the Constitution of India should not interfere with the findings of fact recorded by the Tribunal unless there is an apparent error on the face of the award and the findings given in the award are perverse or unreasonable either based on no evidence or based on illegal/unacceptable evidence or against the weight of evidence or outrageously defies logic so as to suffer from irrationality or the award has been passed in violation of the principles of natural justice. If the Tribunal erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding, the same can be interfered by a writ of certiorari. Adequacy of evidence cannot be looked into in the writ jurisdiction but consideration of extraneous materials and non-consideration of relevant materials can certainly be taken into account. Findings of fact of the Tribunal should not be disturbed on the ground that a different view might possibly be taken on the said facts. Inadequacy of evidence or the possibility of reading the evidence in a different manner, would not amount to perversity.

Whether the C.G.I.T. -cum- Labour Court should not have entertained the claim benefits of the applicants on account of gross laches and delay:

8. According to Mr. Padhi, learned Senior Advocate, clauses 32 and 33 of the 1994 Scheme were deleted on 18.04.2001 but the applicants were

enlisted as C.F. & H Workers, approached the learned Court below in the year 2008 claiming guaranteed minimum wages in a month and attendance allowance for the period from 01.01.1995 to 30.08.2001 as per the aforesaid clauses of the Scheme which was after a lapse of thirteen years of the initial cause of action and after seven years of the deletion of the clauses. He argued that the applicants were fully aware about the conditions of service and rules governing the field as stipulated in the 1994 Scheme and therefore, they should have been more vigilant in approaching the Court earlier. According to him, the maxim "*Vigilantibus non dormientibus jura subveniunt*" which means that the law assists the vigilant and not those who sleep over their rights is very well applicable to the case in hand. He argued that even if no specific period of limitation has been prescribed under the I.D. Act but an application under section 33-C(2) of the I.D. Act which is in the nature of execution proceeding similar to that of a money claim, should not have been entertained after the statutory period of limitation i.e. 3 years. He emphasized that the learned Court below should have rejected the claims of the applicants on the ground of delay. Reliance was placed by him in the case of **Kerala State Coop. Coir Marketing** (supra) in which a single Judge of Kerala High Court while dealing with a dispute relating to the award of subsistence allowance by the Labour Court under section 33-C(2) of the I.D. Act held as follows:-

> "13. The Legislature did not provide a period of limitation for filing an application under section 33-C(2) of the Industrial Disputes Act. However, it cannot be said to be a guarantee that the said provision can be used in any manner as one likes. Every provision of law has to be applied properly, reasonably and bona fide. It is repeatedly said by the Supreme Court that industrial adjudication should not encourage unduly belated claims. The employees who prefer to invoke the provisions under section 33-C(2) shall make the application within a reasonable period. What is reasonable period will depend on the circumstances of each case."

Countering such argument, Mr. Das, learned counsel for the opposite parties placed reliance in the case of **The Bombay Gas Co. Ltd.** (supra) wherein the Hon'ble Supreme Court held as follows:-

> "13. In dealing with this question, it is necessary to bear in mind that though the legislature knew how the problem of recovery of wages had been tackled by the Payment of Wages Act and how limitation had been prescribed in that behalf, it has omitted to make any provision for limitation in enacting section 33-C(2). The failure of the legislature to make any provision for limitation cannot, in our opinion, be deemed to be an accidental omission. In the circumstances, it would be legitimate to infer that legislature deliberately did not provide for any limitation under section 33-C(2). It may have been thought that the employees who are entitled to take the benefit of section 33-C(2) may not always be conscious of their rights and it would not be right to put the

> restriction of limitation in respect of claim which they may have to make under the said provision. Besides, even if the analogy of execution proceedings is treated as relevant, it is well known that a decree passed under the Code of Civil Procedure is capable of execution within 12 years, provided of course, it is kept alive by taking steps in aid of execution from time to time as required by Art. 182 of the Limitation Act, so that the test of one year or six months' limitation prescribed by the Payment of Wages Act cannot be treated as a uniform and universal test in respect of all kinds of execution claims. It seems to us that where the legislature has made no provision for limitation, it would not be open to the courts to introduce any such limitation on grounds of fairness or justice. The words of section 33-C(2) are plain and unambiguous and it would be the duty of the Labour Court to give effect to the said provision without any considerations of limitation. Mr. Kolah no doubt emphasised the fact that such belated claims made on a large scale may cause considerable inconvenience to the employer, but that is a consideration which the legislature may take into account, and if the legislature feels that fair play and justice require that some limitation should be prescribed, it may proceed to do so. In the absence of any provision, however, the Labour Court cannot import any such consideration in dealing with the applications made under section 33-C(2).
>
> 14. Mr. Kolah then attempted to suggest that Art. 181 in the First Schedule of the Limitation Act may apply to the present applications, and a period of 3 years' limitation should, therefore, be held to govern them. Article 181 provides 3 years' limitation for applications for which no period of limitation is provided elsewhere in Schedule I, or by section 48 of the Code of Civil Procedure, and the said period starts when the right to apply accrues. In our opinion, this argument is one of desperation. It is well-settled that Art. 181 applies only to applications which are made under the Code of Civil Procedure, and so, its extension to applications made under section 33-C(2) of the Act would not be justified. .....Therefore, it is not possible to accede to the argument that the limitation prescribed by Art. 181 can be invoked in dealing with applications under section 33-C(2) of the Act."

In the case of **Chief Mining Engineer** (supra) which was placed by Mr. Das, the principle laid down by the Hon'ble Supreme Court in the case of **The Bombay Gas Co. Ltd.** (supra) was followed.

In the case cited by Mr. Padhi i.e. **Kerala State Coop. Coir Marketing** (supra), the benefit under Kerala Payment of Subsistence Allowance Act, 1972 was under consideration and the first proviso to section 4 of the Act provided that the applications shall be made within one year from the date on which the money became due to the employee from the employer. However in the case in hand, there is no such period of limitation provided anywhere for availing the unpaid amount towards guaranteed minimum wages and attendance allowance by a worker as provided under clauses 32 and 33 of 1994 Scheme.

In the case of **Town Municipal -Vrs.- The Presiding Officer reported in A.I.R. 1969 S.C. 1335**, the question came up for consideration

was whether article 137 of the schedule to the Limitation Act, 1963 which prescribes period of limitation of three years to any other application for which no period of limitation is provided elsewhere, is applicable to the applications under section 33-C(2) of the I.D. Act. The Hon'ble Supreme Court held that article 137 of the schedule to the Limitation Act, 1963 does not apply to the applications under section 33-C(2) of the I.D. Act.

In the case of **Nityananda -Vrs.- Life Insurance Corporation of India reported in A.I.R. 1970 S.C. 209**, it is held that article 137 of the schedule to the Limitation Act only contemplates applications to Courts. The scheme of the Limitation Act is that it only deals with applications to Courts, and that the Labour Court is not a Court within the Limitation Act.

In the case of **Ajaib Singh -Vrs.- The Sirhind reported in A.I.R. 1999 S.C. 1351**, it is held that the provisions of article 137 of the schedule to the Limitation Act, 1963 are not applicable to the proceeding under the Industrial Disputes Act, 1947 and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence.

The object of the statutes of limitations is to compel a person to exercise his right of action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims. There are two aspects of the statutes of limitation, the one concerns the extinguishment of the right if a claim or action is not commenced within a particular time and the other merely bars the claim without affecting the right which either remain merely as a moral obligation or can be availed of to furnish the consideration for a fresh enforceable obligation. Where a statute prescribing the limitation extinguishes the right, it affects substantive rights, while that which purely pertains to the commencement of action without touching the right is said to be procedural.

In the case of **Assistant Engineer -Vrs.- Mohan Lal reported in (2013) 14 Supreme Court Cases 543**, the Hon'ble Supreme Court held that though Limitation Act, 1963 is not applicable to the reference made under the I.D. Act but delay in raising industrial dispute is definitely an important circumstance which the Labour Court must keep in view at the time of exercise of discretion irrespective of whether or not such objection has been raised by the other side.

It is not in dispute that since the plea of delay was never raised by the petitioner-Management Committee before the learned Court below, the learned Court below has not dealt with the same. It is rightly contended by the learned counsel for the petitioner that the applicants were very much aware and conscious of their rights as they were represented through their respective Unions. The applicants have taken a stand in their applications that they ventilated their grievances individually as well through the Union before the petitioner-Management Committee but no fruitful result came out. It is no doubt true that even if there is delay in approaching the Court to get the reliefs, under peculiar circumstances, however, excusing or justifying the delay, the Courts of equity would not refuse its aid in furtherance of the rights of the party; since in such cases there was no pretence to insist upon laches or negligence, as a ground for dismissal of the application.

In view of the foregoing discussions, we are of the humble view that even though the provisions of the Limitation Act, 1963 is not applicable to the applications under section 33-C(2) of the I.D. Act but the learned Court below should have kept in view whether the applications suffer on account of gross laches and delay. The applicants perhaps being aware of the justness of the decisions taken by the Management Committee from time to time in not making provisions for payment of guaranteed minimum wages and attendance allowance from the inception of the Scheme on account of financial constraints, remained silent and did not raise any objection or claim or challenge such decision taken by the committee. In such a factual scenario, it was not proper on the part of the learned Court below not to deal with the delay aspect in view of the ratio laid down in the case of **Mohan Lal** (supra).

Whether deletion of the provisions of clauses 32 and 33 of 1994 Scheme has got any effect on the claims of the applicants:

9. According to Mr. Padhi, learned Senior Advocate, clauses 32 and 33 of the 1994 Scheme were deleted as per the resolution made by the Management Committee in its meeting dated 18.04.2001 and such a decision was taken transparently taking into consideration the financial position of the Committee after due deliberations and discussions with all the constituent members of the Committee which includes the representatives of the applicants and therefore, the claims of the applicants towards guaranteed minimum wages and attendance allowance are not sustainable in the eye of law.

Mr. Das on the other hand contended that the deletion clauses 32 and 33 is to be acted upon prospectively and the listed C.F. & H workers, who were not provided employment, are entitled to receive guaranteed minimum wages and attendance allowance for the period in which the provisions under clauses 32 and 33 were in force.

Adverting to such contentions, it is not in dispute that the 1994 Scheme came into existence on 27.05.1994 in view of the report of the High Power Committee constituted as per the direction of the Hon'ble Supreme Court. In clause 15.25 of the recommendation of the High Power Committee, it is mentioned that the listed C.F. & H workers should be allowed twelve days minimum guaranteed wages at the initial stage and they may be allowed attendance allowance at the rate of $1/60^{th}$ of monthly wages. Taking into account such recommendation, clauses 32 and 33 were incorporated in the Scheme which deal with guaranteed minimum wages in a month and attendance allowance respectively to be provided to the listed C.F. & H workers. The 1994 Scheme, therefore, has a legal sanctity and the provisions under clauses 32 and 33 are enforceable in the eye of law.

At this stage, it would be profitable to indicate para 15.26 of the report of the High Power Committee wherein it is mentioned as follows:-

> "15.26. As the proposed scheme will have prospective effect, the Management Committee should ensure that all past liabilities on account of workers, unpaid wages, unpaid CPF contribution, if any, and any other dues should be discharged in full and final settlement of the past service of these workers. The proposed mechanisation of thermal coal handling is not far off. This is likely to be commissioned in 1996. Even if its commissioning is delayed by a year or two, the stark reality remains that all the workers in thermal coal section would be rendered surplus and their services will not be required after the mechanisation. Hence, their present employment would have to end and in order to meet the expenditure on thermal benefits and any other dues, required by law, payable at that stage, the Management Committee should commence building up a separate fund for C.F. & H agents by means of a separate levy. This seems to be necessary as otherwise it would not be possible for the C.F. & H agents to meet the entire expenditure at one stroke. It is easy to build up the funds in an equitable manner for all employers in installments and as such the requisite amount should be suitably assessed and collection started from the employers in right earnest from the day the proposed scheme comes into force."

Mr. Padhi placed reliance relating to the proceedings of the meeting no.4/96-97 of the members of Management Committee (C.F.H. Scheme), Paradip Port which was held on 26.07.1996 in presence of the workers'

representatives which was annexed as Annexure-A Series to the written statement filed by the Secretary, Management Committee in the Court below and annexed as Annexure-3 to these writ petitions, in which it was resolved as follows:-

> "A.I. No. 4(4)/96-97/ RESOL. No. 34/96-97
>
> Budget Estimate For The Year 1996-97 Of The Management Committee
>
> xx xx xx xx xx xx
>
> (iii) The question of making a provision for guaranteed wages in the budget was discussed and it was decided that provision for guaranteed wages cannot be made at this stage as the existing cost of handling, as pointed out by the employer's representatives, is very high. All the Members of Committee were of the view that matter could be discussed in a time when the Committee would be in a position to meet the liability from its own funds."

The issue of payment of minimum guaranteed wages was again discussed in the meeting no.6/97-98 of the members of Management Committee (C.F.H. Scheme), Paradip Port which was held on 01.10.1997 and it was clarified that all the issues had since been discussed in the past and a fresh discussion on the issue without a change in any of the situation was considered to be inappropriate. The said proceedings of the meeting was annexed as Annexure-B Series to the written statement filed by the Secretary, Management Committee in the Court below which is annexed as Annexure-3 to these writ petitions.

The Management Committee in its meeting no.8/98-99 dated 17.02.1999 while discussing the introduction of guaranteed wages, as per the recommendations of the High Power Committee, copy of which was annexed as Annexure-D Series to the written statement filed by the Secretary, Management Committee in the Court below and annexed as Annexure-3 to these writ petitions, observed as follows:-

> "Referring to introduction of guaranteed wages, attendance allowance etc., as per the recommendations of the High Power Committee, on implementation of the Scheme was also discussed. The fact that movement of bag and bale cargoes to the Port has stopped and the 545 group of workers do not get more than one or two engagements in a month and further that demands have been made to reduce the handling cost of Bag & Bale cargoes to attract movement of such cargoes to the Port, extension of any benefit like guaranteed wage or attendance allowance will not be advisable without appropriate cargo support. The Committee has also discussed the financial capability of the Committee and it was decided that extension of such benefit should be deferred till the financial condition improves. In the existing situation, extension of additional benefits will push up the handing cost of the existing cargoes and the same shall be detrimental for movement of existing cargoes."

Thereafter, finally the Management Committee in its meeting dated 18.04.2001 while making an amendment of the 1994 Scheme, resolved to delete clauses 32 and 33 from the Scheme pertaining to payment of guaranteed wages and attendance allowance to the workers. The Chairman of the Management Committee explained to the members that extension of facilities such as guaranteed wages and attendance allowance etc. are administrative decisions and they need not be reflected in the Scheme. There is nothing to doubt about the transparency in the decision taken which seems to have been done after due deliberations/discussions with all the constituent members of the Management Committee to delete the provisions of guaranteed minimum wages and attendance allowance as provided in clauses 32 and 33 of the Scheme.

It appears that during the period from June 1995 to August 2001, the Management Committee was in a formative stage and its financial position was quite uncertain due to certain conditions prevailing in those periods. As per the terms and conditions of the scheme and decision of the committee, priority was required to be given to ensure payment of past liabilities of unpaid wages, unpaid C.F. & H contribution and discharge of full and final settlement of the past service of workers and also to meet the liability towards terminal benefits likely to be incurred due to surplus of workers by introduction of mechanization of thermal coal handling, for which a decision was taken by the petitioner-Management Committee that provisions of guaranteed minimum wages and attendance allowance should not be extended at that stage due to magnitude of its financial liability. As per the recommendations of the High Power Committee, the 1994 Scheme and above all the decisions taken from time to time by the Management Committee, payment of guaranteed minimum wages and attendance allowance are subject to financial position of the Committee and regular availability of work. Even though the applicants in ordinary course would have been entitled to receive guaranteed minimum wages and attendance allowance at the prescribed rate in the scheme from the Management Committee for the period in which the provisions under clauses 32 and 33 were in force but in view of the exigencies of the situation and decisions taken by the Management Committee from time to time, the listed C.F. & H workers, who were not provided employment, are not entitled to receive the benefits of such provisions. We are of the view that the learned Court below was not justified in holding that the applicants are entitled to the reliefs under clauses 32 and 33 from June 1995 till April 2001.

Whether financial constraints of the Management Committee debars the claim of benefits under clauses 32 and 33 of 1994 Scheme:

10. According to Mr. Padhi, learned Senior Advocate, benefits under clauses 32 and 33 of the 1994 Scheme are not absolute, it does not flow from any pre-existing right but it is conditional one subject to the financial position of the Management Committee and regular availability of work in the Port.

Mr. Das on the other hand placed reliance in the case of **The Central Bank of India** (supra) in which the Hon'ble Supreme Court has held that the claim under section 33-C(2) of the I.D. Act clearly postulates that the determination of the question about computing the benefit in terms of money may, in some cases, have to be preceded by an enquiry into the existence of the right and such an enquiry must be held to be incidental to the main determination which has been assigned to the Labour Court by sub-section (2). It was further held that section 33-C(2) takes within its purview cases of workmen who claimed that the benefit to which they are entitled to should be computed in terms of money, even though the right to the benefit on which their claim is based is disputed by their employers. It was further held that for the purpose of making the necessary determination under section 33-C(2), it would, in appropriate cases, be open to the Labour Court to interpret the award or settlement on which the workman's right rests.

In the case of **State of Uttar Pradesh & Anr. -Vrs.- Brijpal Singh reported in (2005) 8 Supreme Court Cases 58**, the Hon'ble Supreme Court held that whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit can approach Labour Court under section 33-C(2) of the I.D. Act. The benefit sought to be enforced under section 33-C(2) of the Act is necessarily a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right or benefit on one hand and the right or benefit which is considered just and fair on the other hand is vital. The former falls within jurisdiction of Labour Court exercising powers under section 33-C(2) of the Act while the latter does not.

The learned Court below has observed that the entitlement in regard to the guaranteed minimum wages and attendance allowance which arose out of the Scheme formulated at the instance of the Hon'ble Apex Court can be safely held to be a pre-existing right and such entitlement arose out of a settlement between the parties in the shape of the Scheme. The learned Court

has committed error of record in holding that there is no specific pleadings in the written statement filed by the Management Committee relating to the financial constraints for not providing guaranteed minimum wages and attendance allowance to the applicants. It is not a case of mere bald denial or plea of financial constraints rather all the decisions taken from time to time by the Management Committee were annexed to the written statement and the learned Court below seems to have not given any attention to such vital documents which has resulted in arriving at a faulty conclusion.

Therefore, we are of the view that when on the ground of financial constraints, the Management Committee took the decision that making a provision for guaranteed wages in the budget cannot be made and that extension of the benefits of guaranteed wages and attendance allowance should be deferred till the financial condition improves and such decisions have remained unchallenged for years together since the inception of the Scheme in 1994, the claims of the applicants in that respect in the year 2008 are totally misconceived.

11. In the case in hand, it is not disputed at the Bar that the opp. parties to these writ petitions were the applicants in the Court below being the C.F. & H workers of 545 Group. They have not received the guaranteed minimum wages under clause 32 of the 1994 Scheme for the period from June 1995 till deletion of such clause in the year 2001. They only received the attendance allowance on the basis of the award dated 14.08.1992 pronounced by the Arbitrator Sri G.R. Majhee, Deputy Chief Labour Commissioner (Central), New Delhi in a matter referred under section 10A of the I.D. Act.

Even though the learned Court below directed for computation and determination of the quantum of attendance allowance at a particular rate on the basis of clause 33 of the 1994 Scheme and its recovery from the Management Committee subject to adjustment of the amount already received by the applicants in that regard by the arbitral award, we are of the view that no further amount except as was fixed by the Arbitrator, if not already paid, is to be recovered from the Management Committee. If any of the applicants have not yet received such amount in spite of the award passed by the Arbitrator, they are entitled to get it from the Committee and the Committee shall make immediate arrangement for disbursement of the same in favour of the applicants within a period of three months from today, failing which such unpaid amount shall carry an additional simple interest @ 8% per annum after the expiry of such period. If any of such applicants have been

paid attendance allowance on the higher side than the award amount passed by the Arbitrator as contended by the Management committee, in view of the financial condition of the applicants and particularly when they were having no work in between the period from June 1995 till deletion of clause 33 in the year 2001, the amount so paid is not liable to be refunded.

In view of the foregoing discussions, we are of the humble view that the findings of the learned Court below in directing recovery of the guaranteed minimum wages and the attendance allowance at a particular rate from the Management Committee, is neither proper nor justified. The applicants are very much bound by the decision taken by the Management Committee which includes their nominated representatives, which seems to have been taken with all fairness and looking into the financial position of the Committee and other liabilities. Even though provisions were made under clauses 32 and 33 of the 1994 Scheme for such benefits, in the overwhelming factual scenario in the instant case, refusal to grant the reliefs towards guaranteed minimum wages and the attendance allowance at a particular rate would not amount to perpetuation of gross illegality, unjustness and unfairness meted out to the applicants. The findings arrived at by the learned Court below suffer from non-consideration of relevant materials on record and are perverse and therefore, the impugned order is not sustainable in the eye of law and liable to be set aside. With the aforesaid observations and directions, all the writ applications are disposed of.

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S.K. MISHRA, J.

W.P.(C) NO. 2511 OF 2018

VISA STEEL LTD. .....Petitioner

.Vs.

RESERVE BANK OF INDIA & ANR. .....Opp.Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Prayer for issuance of mandamus to the Reserve Bank of India to issue details of resolution frame work in terms of Clause-6 of the Press Release dated 13th June, 2017 and a mandamus to the State Bank of India to finalize and implement the resolution plan within six months from the date of release of resolution frame work in terms of

Clause-4 of the Press Release dated 13th June, 2017 with a further prayer for issuance of writ of certiorari quashing the initiation of proceeding before the National Company Law Tribunal under the Insolvency and Bankruptcy Code – Financial policy matter – Whether court can exercise writ jurisdiction? – Held, No, – Court exercises restraint in matters of financial and economic affairs, refuse to exercise its jurisdiction under Articles 226 and 227 of the Constitution of India and hold that there is no merit in the Writ Petition and the same is dismissed being devoid of any merit. (Paras 7 to 10)

Case Laws Relied on and Referred to :-

1. (1992) 2 SCC 343 : Peerless General Finance and Investment Co. Ltd. & Anr Vs. RBI.

For Petitioner : M/s. R.K.Rath, Sr.Adv., S.K. Kapoor, Sr. Adv., Goutam Mishra, D.K.Patra, A.Dash and J.R.Deo.
For O.P. No.1 : M/s. B.A.Mohanti, Sr.Adv., D.N.Mishra, S.K.Panda, S.Swain, U.K.Mishra and Mamata Tripathy.
For O.P.No.2 : M/s. P. Acharya, Sr.Adv., S.Rath, A.Satpathy, G.Patra and U.C.MIshra.

JUDGMENT Date of Judgment: 25.03.2019

S.K. MISHRA, J.

In this writ petition the petitioner, being a Company, has prayed to issue direction to the opposite parties to release the details of the resolution framework in terms of Clause-6 of the Press Release dated 13th June, 2017 under Anexure-2 and to allow the petitioner to have a resolution plan in terms of Clause-4 of the aforesaid Press Release. It is further prayed for issuance of mandamus to the Reserve Bank of India, opposite party no.1, to issue details of resolution frame work in terms of Clause-6 of the Press Release dated 13th June, 2017 and a mandamus to the State Bank of India, opposite party no.2, to finalize and implement the resolution plan within six months from the date of release of resolution frame work in terms of Clause-4 of the Press Release dated 13th June, 2017. It is also prayed for issuance of writ of certiorari quashing the initiation of proceeding before the National Company Law Tribunal under the Insolvency and Bankruptcy Code.

2. The case of the petitioner, which is undisputedly a loanee, having a default of more than Rs.4000 crores to the consortium Banks of which the State Bank of India is the lead Bank. The petitioner pleads that the Reserve Bank of India (hereinafter referred to as the "RBI" for brevity) in usual course of discharging its duties and obligations from time to time have

issued diverse directions and/or guidelines in relation to the cases that may be considered for reference for resolution under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "IBC" for brevity). The RBI on 13th June, 2017 issued a Press Release under the heading "Reserve Bank of India Identifies Accounts for Reference by Banks under the Insolvency and Bankruptcy Code (IBC)" inter alia, recording the decision of the Internal Advisory Committee (IAC) in formulating an objective, non-discretionary criteria for referring account for resolution under the said IBC. The said Press Release is annexed herewith as Annexure-2 to the writ petition. The case of the petitioner is that the RBI recommended for reference under the said IBC of all accounts with fund and non-fund based outstanding amount greater than Rs.5000 crores with 60% or more classified as non-performing by banks as on 31st March, 2016. Under the said recommended criteria while 12 accounts were identified. As regards the other non-performing accounts which did not qualify under the aforesaid criteria, it was recommended that the banks should finalize a resolution plan within six months and in cases where a viable resolution plan was not agreed upon within the stipulated period the banks would be required to file for insolvency proceedings under the said IBC. The details of the resolution framework in regard to the other non-performing accounts were directed to be released in the following days. A corrigendum was issued on 8th July, 2017. While a portion of Press Release was amended by deletion of a portion of Clause-5. The case of the petitioner is that it falls in the other categories of non-performing account which did not qualify under the criteria mentioned in Clause-3 of the said Press Release. As such in terms of Clause-4 of the said Press Release a resolution plan was to be finalized in terms of the resolution frame work which was to be released in terms of clause 6 thereof. It is the further case of the petitioner is that no resolution framework was or has been released by the RBI till date, as a result whereof no resolution plan could be finalized and implemented. The stipulated period of six months also did not commence to run as no resolution frame work was released. The petitioner has from time to time sought finalization of a resolution plan in terms of the aforesaid Press Release and has also given various proposals to opposite party no.2 being the lead Banker. As neither any resolution framework was released by opposite party no.1 in terms of Clause-6 of the said Press Release dated 13th June, 2017, it was neither possible nor feasible to finalize the resolution plan within six months in terms of clause-4 thereof or otherwise. As opposite party no.2 did not and/or could not comply with the provision of Clause-4 of the Press Release dated 13th June, 2017. Non-compliance of the

aforesaid Clause-4 of the Press Release deprives the petitioner from availing a resolution plan, notwithstanding exercise of due diligence and bonafide. The SBI on 21st December, 2017 filed proceeding under Section 7 of the IBC against the petitioner company before the National Company Law Tribunal, which has been registered as CP (IB) 24/KB/2018.

3. Learned Senior Counsel appearing for the petitioner submitted that filing of the aforesaid proceeding is not only contrary to and/or inconsistent with the Press Release dated 13.6.2017 and in the absence of a resolution framework in terms of Clause-6 thereof, the petitioner is deprived of the opportunity to finalize a resolution in terms of such frame work. The petitioner has a legitimate expectation that the Press Release dated 13.6.2017 and all its directions would be complied, including that of releasing of resolution framework in terms of Clause-6 thereof. It is submitted that the action of the SBI is illegal, arbitrary and denying/depriving the petitioner from availing finalization of a resolution plan in terms of Clause-4 of the said Press Release, other banks mentioned in the schedule appearing in Annexure-1, would be inspired. As it is necessary to pass appropriate orders/writs by this Court, this writ petition has been filed.

4. Counter affidavit has been filed by opposite party no.1. Firstly, they submitted that the writ petition ought to be dismissed on the ground that comprehensive restructuring directives issued by RBI and there is no right in favour of the petitioner to have its debt restructured. It is borne out from the pleading that the RBI has issued various directive from time to time for restructuring of debt under the Joint Lenders' Forum (hereinafter referred to as "JLF" for brevity) mechanism. By its circular dated February 26, 2014 on frame work for Revitalizing Distressed Assets in the Economy – Guidelines on JLF and Corrective Action Plan (hereinafter referred to as "CAP" for brevity) (Restructuring Guidelines), RBI introduced a mechanism by which the JLF may arrive at a CAP for resolution of stressed debt which included, inter alia, rectification, restructuring and recovery. Furthermore, the RBI pleads that it is directive do not prohibit/restrain initiation of insolvency proceedings under the Code prior to implementation of the resolution plan/or an attempt thereto. Therefore, it is stated by the RBI that the petitioner company do not have any right to have its debt restructured.

5. Opposite party no.2 has also filed its counter affidavit. It is pleaded by the SBI that the loan account of the petitioner company comes within top 500 N.P.A. account and is in the category of "other non-performing accounts" under Clause-4 of the Press Release dated 13.6.2017. In the instant

case, opposite party no.2 along with other 17 lender Banks have sanctioned loans for Rs.3640 crores wherein opposite party no.2 is the consortium leader. After the said account has become NPA, opposite party no.2 as lender Bank along with other lender Banks have examined and taken all efforts to find out an acceptable and viable resolution plan in compliance with RBI guidelines. The SBI pleads that several Joint Lenders Meeting (hereinafter referred to as "JLM" for brevity) were held and the petitioner was present. The Banks have granted reasonable opportunities to the petitioner company for submission of resolution plan acceptable to the lenders and the resolution plan submitted by the company were carefully considered by the lenders in various JLMs. Since the resolution plan submitted by the petitioner company was found not viable, the lenders had no other alternative but to adhere to the instructions of the regulator and file application before NCLT, Kolkata seeking corporate insolvency resolution plan. It is most humbly submitted that the IBC provides for Corporate Insolvency Resolution Process of Corporate Person/Company for maximization of value of assets of such borrowing company, promote entrepreneurship, make availability of credit and balance the interest of all the stakeholders. The SBI further pleads that the account of the petitioner company became NPA on 11.7.2012. Opposite party no.2 acted as per instructions and guidelines issued by the RBI. There is absolutely no violation or contraventions on the part of opposite party no.2 in initiating the proceedings before the National Company Law Tribunal, Kolkata. The loan accounts of the petitioner company comes within top 500 NPA. Accounts and Bank have provided reasonable opportunities to the petitioner company for submission of a viable resolution plan acceptable to the lenders. Moreover, whatever resolution plan submitted by the company were carefully considered by the lenders and since the same was not submitted by the petitioner company, the lenders had no other alternative but to honour the instructions of the regulator and file application before NCLT, Kolkata seeking corporate insolvency resolution plan. Opposite party no.2 being a public sector Bank is obliged under law to adhere to the provisions and guidelines/policies framed by opposite party no.1 from time to time. In reply to the averments made by the petitioner in paragraph-5 of the writ petition, the SBI has stated in its counter affidavit that the RBI has issued direction as per Annexure-2 of the writ petition and instructions of the said direction of the RBI is complied with by the lenders as is evident from minutes of the various JLMS/correspondence of the petitioner. Copies of the minutes of the proceedings dated 4.8.2017, 25.9.2017, 26.10.2017, 18.11.2017 and 28.11.2017 are annexed to the counter affidavit and has been

marked as Annexures-A/2, B/2, C/2, D/2 and E/2. Therefore, the learned Senior Counsel appearing for the SBI submits that there is no truth in the assertions made by the petitioner company and there has been enough efforts in various JLMs to settle its debts and restructured it. As there is no viable alternative, the SBI has no other option but to initiate a proceeding against the petitioner company before the National Company Law Tribunal.

6. Mr. Kapoor, learned Senior Counsel appearing for the petitioner company, argued that the Press Release issued by the RBI identifies certain accounts for resolution under the IBC. Such Press Release categorized the following two categories. The 1st category relates to the defaulting loanee having more than Rs.5000.00 crores and other non-performing accounts having less amount as the other category. The Internal Advisory Committee recommended that the Bank should finalize a resolution plan within six months. In cases, where a viable resolution plan is not agreed upon within six months, Bank should file insolvency proceeding under the IBC. Placing much reliance on paragraph-6 of the Press release, which contains that the details of the resolution frame work in regard to other non-performing accounts should be released in coming days. It is argued by the learned Senior Counsel for the petitioner that no resolution frame work has been issued by the RBI with regard to non-performing asset having less than Rs.5000.00 crores. According to RBI the matter cannot be referred to the National Company Law Board. Annexure-2 which is issued in purported exercise of power of RBI under Sections 35-AA and 35-AB of the Banking Regulation Act is a delegated legislation and if it is taken to be delegated legislation, the same having not been published and the petitioner has not been informed about such direction, the prayer made by the petitioner should be allowed and appropriate direction is sought for, described above, should be issued in favour of the petitioner.

7. Learned Senior Counsel for the RBI submits that in the matter of financial management, the Court should refrain from interfering especially the cases involving complicated fiscal evaluation inasmuch as it is argued that the doctrine of restrain should be applied. He relies upon several judgments. It is appropriate to take up one judgment, i.e. ***Peerless General Finance and Investment Co. Ltd. and another Vs. RBI;*** (1992) 2 SCC 343. In the reported case, the Hon'ble Supreme Court considered the question whether the endowment scheme piloted by the Peerless General Finance and Investment Company Ltd. fell within the definition of 'Prize Chits' within the meaning of Section 2(e) of the Banning Act and also in course of

disposing of the same, the Hon'ble Supreme Court has dealt with many other matters related to the Central Issue and at Paragraph-69 a word of caution has been imparted by the Hon'ble Supreme Court. The said paragraph is quoted herein below:-

> "69. It is well settled that the court is not a tribunal from the crudities and inequities of complicated experimental economic legislation. The discretion in evolving economic measures, rests with the policy makers and not with the judiciary. Indian social order is beset with social and economic inequalities and of status, and in our socialist secular democratic Republic, inequality is an anthema to social and economic justice. The Constitution of India charges the State to reduce inequalities and ensure decent standard of life and economic equality. The Act assigns the power to the RBI to regulate monetary system and the experimentation of the economic legislation, can best be left to the executive unless it is found to be unrealistic or manifestly arbitrary. Even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibilities from those on whom a democratic society ultimately rests. The Court has to see whether the scheme, measure or regulation adopted is relevant or appropriate to the power exercised by the authority. Prejudice to the interest of depositors is a relevant factor. Mismanagement or inability to pay the accrued liabilities are evils sought to be remedied. The directions are designed to preserve the right of the depositors and the ability of RNBC to pay back the contracted liability. It is also intended to prevent mismanagement of the deposits collected from vulnerable social segments who have no knowledge of banking operations or credit system and repose unfounded blind faith on the company with fond hope of its ability to pay back the contracted amount. Thus the directions maintain the thrift for saving and streamline and strengthen the monetary operations of RNBCs."

8. Thus, it is submitted by the learned Senior Counsel for the R.B.I. that the complex and technical matters, like financial regulation, should not be interfered with by the Court in exercise of its writ jurisdiction.

9. Moreover, in this case it is seen that the SBI has made enough efforts and this Court has examined the records and it is apparent from Annexures-A/2, B/2, C/2, D/2, E/2 and F/2 that attempts were made by the SBI to settle the matter and find out a resolution plan, but the efforts failed as the petitioner failed to put forth a viable accepted plan. Hence, opposite party no.2 has no way out but to initiate an insolvency proceeding before the appropriate Tribunal.

10. In that view of the matter, this Court exercises restraint in matters of financial and economic affairs, refuse to exercise its jurisdiction under Articles 226 and 227 of the Constitution of India and hold that there is no merit in the Writ Petition and the same is dismissed being devoid of any merit. However, there shall be no order as to costs.

2019 (II) ILR – CUT- 316

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

MATA NO. 75 OF 2011

ASHOK KUMAR RATH ……..Appellant

.Vs.

SMT. ANNAPURNA RATH ……Respondent

(A) HINDU MARRIAGE ACT, 1955 – Section 13 read with section 9 – Application filed under section 9 was rejected with the finding that the wife has not deserted the company of the husband – Subsequent application under section 13 seeking divorce filed on the ground of desertion was held to be not maintainable and barred by the principles of res judicata – Whether correct? – Held, No.

"As discussed herein before, while narrating the observations of the learned trial court, the findings of the learned Judge, Family court as to the positions of law are not correct. To reiterate, it may be mentioned that a proceeding for divorce under Section 13 of the Hindu Marriage Act, 1955 cannot be said to be not maintainable, if filed within a period of one year after rejection of an application for restitution of conjugal rights. Further, the said rejection cannot also be said to operate as res judicata for a subsequent proceeding for divorce on the self-same ground of desertion." *(Para 9)*

(B) HINDU MARRIAGE ACT, 1955 – Section 13 – Grounds of divorce – 'Cruelty and Desertion' – Whether desertion amounts to cruelty? – Held, though the term 'cruelty' & 'desertion' are separate grounds for claiming the relief of divorce but both are inter-linked to each other because desertion without sufficient reasons also amount to cruelty for violating the right of other spouse to have the conjugal life.

(Para 10)

For Appellant : M/s. Tusar Kumar Mishra and B.K. Swain.

For Respondent : Mr. Bikash Jena, C.R. Dash and S.K. Biswal.

JUDGMENT Date of Hearing : 26.02.2019 : Date of Judgment : 15.04.2019

J.P. DAS, J.

This matrimonial appeal is directed against the judgment dated 26.08.2011 passed by the learned Judge, Family court, Rourkela in Civil Proceeding No.42 of 2007 rejecting the application of the present appellant, who sought for a decree of divorce against the opposite party-respondent-wife. The petitioner-appellant initiated a proceeding under Section 13 of the Hindu Marriage Act, 1955 with the contentions that he married the respondent-wife on 10.06.1995 at Rourkela according to Hindu Rites and Customs and stayed jointly along with his parents. A son was born out of

their wedlock on 11.08.1996. He alleged that after the birth of the son, the respondent-wife started behaving differently and suggested the appellant-husband to stay separately from his parents. He further alleged that with further visit of the brother and parents of the respondent-wife frequently to their house on the pretext of seeing the new born baby and on their instigation, the suggestion of the wife-respondent for separate house turned to be a demand resulting in matrimonial disturbance between the parties. The respondent-wife started behaving differently towards the parents-in-law and the appellant-husband submitted a report at Mahila Police Station, Rourkela with regard to the same. On the intervention of the police, both the parties agreed to stay separately from their parents with the new born baby and accordingly, shifted to a quarters at a different place in Rourkela leaving the parents at their old house. They led a happy life for some time and one daughter was born to them on 20.10.2001. The husband-appellant further alleged that the wife-respondent asked the petitioner-appellant to help her brothers with financial aid of Rs.50,000/- to each of them to carry on their business. The husband-appellant expressed his incapability while the respondent-wife insisted to get the money from his parents as they had received a substantial amount as retiral benefits. Since the appellant-husband did not concede to her demand, the respondent-wife created further disturbances and even adopted methods to assault the appellant-husband with the help of club members and her brother. The mother of the appellant-husband came to their quarters on 19.04.2003 to pacify the matter but on the next day morning, i.e., 20.04.2003, the respondent-wife left the matrimonial house along with the children withdrawing herself from the society of the appellant-husband without any rhyme or reason. Repeated efforts made by the appellant-husband yielded no result to bring her back and when the appellant-husband went to the school where his son was reading, he learnt that the respondent-wife had already taken transfer certificate of their son on 10.07.2003. The appellant-husband again lodged a report at Mahila Police Station on 24.07.2003 and informed about the incidents, pursuant to which a Station Diary was made and the respondent-wife was called to the Police Station but she refused. Thereafter, the respondent-wife filed a proceeding claiming maintenance for herself and her children in the year 2005 and the appellant-husband also filed a proceeding under Section 9 of the Hindu Marriage Act in the same year praying for restitution of conjugal rights. The proceeding filed by the appellant-husband was dismissed since the respondent-wife did not agree to join the company of the husband. Thereafter, the appellant-husband filed the present proceeding praying for

divorce with the submission that the respondent-wife deserted him voluntarily and was residing separately for a long period.

2. The respondent-wife entering appearance assailed the maintainability of the application for divorce with the pleadings that the application for restitution of conjugal rights filed by the appellant-husband on the ground of desertion having been rejected, the subsequent application for divorce on the self-same ground within a period of one year was not maintainable. She counter alleged that she was mentally and physically tortured on further demand of dowry by her husband and in-laws and she was also assaulted by the appellant-husband under influence of liquor. She also alleged that her husband had also assaulted their son for which he sustained some injuries and was taken to hospital for treatment. She submitted that since the appellant-husband was not taking care of the family and the children, she had to pass sleepless nights and subsequently, she along with her children was driven out of the house by the appellant-husband on 20.04.2003 since when she had no other alternative than to stay with her parents.

3. On the aforesaid pleadings, learned Judge, Family court, Rourkela framed three issues, as follows:-

I. Whether the petitioner wife without any reasonable excuse has withdrawn herself from the society of petitioner-husband for more than two years;

II. Whether the petitioner-husband is entitled to the relief for a decree of divorce; and

III. To what other relief the parties are entitled.

4. Both the parties adduced their evidence in support of their respective contentions. The learned Judge, Family court observed that admittedly, the petitioner-husband had filed the proceeding under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights where the issue was whether the opposite party-wife without any reasonable excuse has withdrawn herself from the society of the petitioner-husband. The said proceeding was dismissed with the observation that the opposite party-wife had got reasonable excuse to withdraw from the society of the petitioner-husband and the said findings were not challenged by the husband-petitioner in any higher forum. Thus, the learned Judge, Family court, Rourkela held that the findings that the wife had reasonable excuse to withdraw herself from the society of the petitioner-husband having reached finality, the proceeding initiated by the petitioner-husband on the self-same ground within a period of six months from the disposal of the earlier proceeding was not maintainable

in law since because the ground taken by the appellant-husband in the present proceeding was also desertion.

5. Relying on certain judicial pronouncements, learned trial court held that once it is found by a court in a suit for restitution of conjugal rights that the wife left the house of her husband for reasonable cause, her living away from her husband does not become desertion for the purpose of divorce under Section 13 of the Hindu Marriage Act unless it is shown that the wife went to live with the husband thereafter and then again left him without reasonable cause. Thus, the learned trial court held that the prayer of the petitioner-husband for restitution of conjugal rights on the ground of desertion having been rejected in an earlier proceeding, he cannot maintain a proceeding for divorce on the self-same ground of desertion within a period of six months thereafter. Learned trial court further observed that it was admitted case of the parties that the wife left the house of the petitioner-husband on 20.04.2003 whereafer the earlier proceeding was filed by the husband and at no point of time after 20.04.2003 the wife and husband had lived jointly. The learned trial court went on to observe that the earlier application having been rejected on the self-same plea of desertion, it would have effect of *res judicata* and the petitioner-husband was debarred to re-agitate the same question of fact again in the subsequent proceeding. Thus, the learned trial court held that the appellant-husband was not entitled for a decree of divorce on the ground of desertion.

6. Learned trial court further observed that as per Section 13(1-A) (II) of the Hindu Marriage Act, a judgment debtor spouse in decree of restitution of conjugal rights is entitled to seek divorce on ground of failure of resumption of cohabitation for one year or more from the date of said decree but in this case, the appellant-husband initiated proceeding only within a period of six months after disposal of the proceeding under Section 9 of the Hindu Marriage Act. Suffice it to say that such an observation was a misconception of law, since the quoted provision of the Hindu Marriage Act refers to failure in carrying out the decree for restitution of conjugal rights, whereas in the present case, the application for restitution of conjugal rights filed by the appellant-husband was rejected.

7. It has been submitted on behalf of the appellant in the present appeal that the learned trial court erred in law by observing that there was no desertion and was mostly guided by the thought that the earlier application for restitution of conjugal rights on the ground of desertion was rejected and

hence, a prayer of divorce on self-same ground was hit by the principle of *res judicata* which was a misconception of law. However, it was submitted on behalf of the appellant that it was the specific case of the petitioner-appellant that after respondent-wife left the matrimonial house on 20.04.2003, the appellant-husband made several efforts to bring her back but, she did not agree. Learned counsel on behalf of the appellant submitted that the learned trial court has wrongly held that the petitioner-husband had not adduced any evidence to the effect and failed to appreciate that the refusal by respondent-wife at subsequent stages for re-union being unreasonable amounted to desertion. It was further submitted that the proceeding for divorce was filed admittedly, after two years of the respondent-wife leaving her matrimonial house and the learned trial court failed to take note of the fact that the allegations made by the husband-appellant as regards behavior of the wife-respondent towards him and his parents apart from the allegations of assault made to the husband-appellant and reports at the Police Station amounted to cruelty, thereby making it impossible and impracticable for the parties to again live jointly and lead a conjugal life. It was submitted that on those grounds, the appellant-husband was entitled to a decree of divorce.

8. Per contra, it was submitted by learned counsel on behalf of the respondent-wife that the findings and observations of the learned trial court based on settled position of law and cannot be interfered with. It was further submitted that since the appellant-husband prayed for a decree of divorce only on the ground of desertion, he cannot raise a further plea before this Court as to the cruelty, apart from the fact that the plea of desertion was rejected by the competent court shortly prior to filing of the proceeding for divorce and such findings remained unchallenged.

9. As discussed herein before, while narrating the observations of the learned trial court, the findings of the learned Judge, Family court as to the positions of law are not correct. To reiterate, it may be mentioned that a proceeding for divorce under Section 13 of the Hindu Marriage Act, 1955 cannot be said to be not maintainable, if filed within a period of one year after rejection of an application for restitution of conjugal rights. Further, the said rejection cannot also be said to operate as *res judicata* for a subsequent proceeding for divorce on the self-same ground of desertion.

10. The sequence of the events between the parties remained undisputed that the marriage between the parties was in the year 1995, son was born out of their wedlock in the year 1996, the parties started living separately from the parents of the appellant-husband in another quarters, there a daughter was

born to the parties in the year 2001 and on 20.04.2003, both the parties got separated from conjugal life. It has been the pleading of the appellant-husband that after birth of their son, the attitude and the behavior of the respondent-wife changed towards the family members and she insisted for a separate house and mess, which was ultimately accepted by the appellant-husband. It also remained undisputed that the appellant-husband had made two reports at Mahila Police Station, Rourkela. These factors having not been disputed create a presumption in favour of the husband, since because no son would leave his elderly parents to stay in a separate house in the same township taking his wife and children to another quarters. It was also the case of the husband-appellant that the wife-respondent with the help of her brother and others had tried to assault him and subsequent efforts of the husband-appellant to bring back the wife to the matrimonial house failed. In this regard, it may be mentioned that a party comes to the court seeking dissolution of marriage when living jointly with the other spouse becomes impossible or impracticable for certain reasons or when one of spouse leaves the company of the other without any reasonable excuse. The first is termed 'cruelty' and the second is 'desertion'. Though both are separate grounds for claiming a relief of divorce still both are inter-linked for the reason that desertion without sufficient reason also amounts to cruelty for violating the rights of the other spouse to have the conjugal life. In the instant case as mentioned hereinbefore, the appellant has narrated the incidents and given the instances, which in our opinion also amounted to cruelty of course subject to establishment thereof on evidence, apart from the specific plea of desertion. But the learned trial court has not taken note of such facts and, as stated earlier, has been swayed away with the only conception that a proceeding for divorce was not maintainable on the sole ground of desertion, such a plea having been negatived in an earlier proceeding within a preceding period of six months.

11. In view of the discussion of facts and circumstances of the case, we feel it appropriate to remand the matter back to the learned trial court to frame a specific issue as to cruelty and give a specific finding thereon after giving reasonable opportunity of hearing to both the parties, that being more so for the reason that both the parties are staying separately since the year 2003.

12. Accordingly, the judgment dated 26.08.2011 passed by the learned Judge, Family court, Rourkela in Civil Proceeding No.42 of 2007 is set aside and the matter is remanded back to the learned trial court who would do the needful as per our observations made in the preceding paragraph. Both the

parties are directed to appear before the learned trial court on 2nd of May, 2019 to take further instruction in the matter and the learned trial court would do well to dispose of the proceeding as expeditiously as possible. The MATA is disposed of accordingly.

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2019 (II) ILR – CUT- 322

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

GOVERNMENT APPEAL NO. 28 OF 1989

STATE OF ORISSA ……...Appellant

.Vs.

BALARAM PRADHAN & ORS. ……Respondents

CODE OF CRIMINAL PROCEDURE, 1973 – Section 378 – Appeal against acquittal – When can be interfered by the Appellate Court? – Principles – Discussed.(Ghurey lal -Vs.- State of U.P, (2008) 10 SCC 450, Followed).

"In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal.

The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice;

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached – one that leads to acquittal, the other to conviction – the High Courts/appellate courts must rule in favour of the accused.

Thus unless a very substantial and compelling reasons are there the appellate court should not overrule or otherwise disturb the trial court's acquittal. Very substantial and compelling reasons are, the trial court's conclusion with regard to the facts is palpably wrong or the trial court's decision was based on an erroneous view of law. It is not the case of the State that the facts have not been properly appreciated by the learned IInd Addl. Sessions Judge nor it is that the trial court's decision was based on erroneous view of law. The State also do not submit that the trial court's judgment is likely to result in grave miscarriage of justice or the entire approach of the trial court in dealing with the evidence was patently illegal or the trial court judgment was manifestly unjust and unreasonable or that the trial court has ignored the evidence or misleading the material facts and has ignored the material document like dying declaration report of the ballistic report etc. Moreover, two views can be reached, one that leads to acquittal and other to conviction, then the view in favour of the accused is to be accepted."

Case Laws Relied on and Referred to :-

1. (2008) 10 SCC 450 : Ghurey Lal Vs. State of Uttar Pradesh.

For Appellant : Addl. Govt. Adv.

For Respondents : M/s. Ramanikanta Pattnaik, A.K.Mohapatra, R.Ch.Pattnaik, K.N.Parida, M.K.Mohanty & D.K.Patra.

JUDGMENT Date of Judgment: 01.5.2019

S.K. MISHRA, J.

In this Government Appeal the State of Orissa challenges the judgment of acquittal recorded with respect to the respondents, who are accused persons in Sessions Trial Case No.16/99 of 1987. The IInd Addl. Sessions Judge, Puri vide judgment dated 20th February, 1989 has acquitted the accused persons of the offences for which they have been charged. It is borne out from the record that killing of two persons and hurting quite a few other witnesses for which offences under Sections 302/323/325/34 of the I.P.C. have been variously framed against different accused persons.

2. The case of the prosecution in short is that P.W.1, Chailla Pradhan, on 11.12.1985 at about 9.30 P.M. submitted an oral report before the Satyabadi P.S. at Sakhigopal Government Hospital alleging that at about 4 P.M. he along with deceased Jugal Pradhan and Abhaya Pradhan and the injured Maheswar Pradhan were going to their lands located at Mankudidhipa Danda to collect the paddy sheaves. When both the deceased and Maheswar proceeded ahead, the informant was walking at the back. At that time they

saw the accused persons were cutting paddy in the disputed Anabadi Plot No.1484 and the other accused persons were standing there being armed with lathis and bahungis. When the accused persons saw them they rushed and encircled Jugal Pradhan, Abhaya Pradhan and Maheswar Pradhan. The accused Naba Kishore Pradhan dealt a blow by means of lathis on the head of Jugal Pradhan and on account of such assault he fell down. While he was lying accused Bansidhar Pradhan also assaulted him by means of a lathi. Accused Giridhari Pradhan and Bhagaban Pradhan assaulted the deceased Abhaya Pradhan on his head by means of lathis. The accused persons were assaulted P.W.2-Maheswar Pradhan for which he fell down on the ground. When his father Bairagi came to rescue of his son Maheswar, he was also assaulted on his head. When he and Naran Pradhan (P.W.3) raised protest, he was assaulted by accused Bansidhar Pradhan with lathi and he sustained injuries on his right hand. Accused Biswanath Pradhan also assaulted him and on account of assault he fell down on the ground and became senseless. After regaining his sense he saw that Gangadhar Pradhan (P.W.8), Dinabandhu Pradhan (P.W.11), Nabaghana Pradhan (P.W.5) and Sarbeswar Pradhan (P.W.7) had sustained injuries on their persons. It is stated that after the assault they were shifted to Sakhigopal Hospital in carts. On the way Jugal Pradhan died and Abhaya Pradhan succumbed to the injuries at the hospital. After lodging of the F.I.R., the Investigating Officer took up the investigation of the case and took all necessary steps for investigation of the case and finally submitted charge sheet for offences alleged above.

3. The plea of the accused persons is a denial one. The defence without disputing regarding the death of the deceased Jugal Pradhan and Abhaya Pradhan, the injuries sustained by all the accused persons denied to have assaulted them. They have further taken their plea in Section 313 Cr.P.C. statement that the disputed land belonged to the accused Bansidhar Pradhan, who was in possession of the land and had raised crop in the disputed year in question. On the alleged date of occurrence, the prosecution party including the so-called deceased persons and the injured persons forcibly cut the paddy from that land. When accused Balaram Pradhan raised protest, he was assaulted there. Hearing the incident, when they went to the spot and raised protest they were also assaulted. It is further revealed that they have taken the plea that they were snatched away the lathis from the hands of the witness and other persons and whirled the same. In other words they have taken the plea of right to private defence both of persons as well as of property.

4. The prosecution in order to prove its case examined twenty witnesses on its behalf. The defence, on the other hand, examined one D.W. namely, Iswar Pradhan, who simply proved certain documents like rent receipts, encroachment notice in Encroachment Case No.911/1982 and certified copy of the R.O.R.

Out of the witnesses examined by the prosecution P.Ws. 1 to 8 and 11 are the witness, who have suffered injuries in the incident. P.W.1 is the informant, who had lodged the First Information Report. P.Ws. 1 and 2 are the eye witnesses to the assault. Rest of the witnesses speak that they had seen that the deceased Abhaya and Jugal were lying at the spot with bleeding injuries on their persons. They also speak regarding the assault on them. P.Ws. 9 and 10 did not support the case of the prosecution and were cross-examined by the prosecution after taking permission of the Court under Section 154 of the Evidence Act. Rest of the witnesses are formal witnesses.

5. At the outset Mr. Pattnaik, learned counsel for the respondents has admitted that they are not raising any question regarding the homicidal nature of death of the two deceased or the injuries sustained by the injured. The respondents only confined their argument to show that they have exercised their right of private defence with their landed property invaded by informant and others.

6. After careful examination of the judgment, it reveals that the learned Addl. Sessions Judge has come to the conclusion that the prosecution has been able to prove that both the deceased were done to death by the respondents and also injured suffered hurt in the hands of the respondents. But after careful assessment of the evidence, learned Addl. Sessions Judge has come to the conclusion that the accused persons are not guilty because they acted in exercising the right of private defence.

7. It has been reflected in the F.I.R. that the disputed plot is Plot No.1484. However the report of the I.O.(P.W.20), who has visited the spot, prepared the spot map and investigated into the case, shows that the disputed plot is 361/1484 which is a fraction plot. It is evident from Ext.L, a certified copy of the R.O.R. of 1977 settlement, Plot No.361/1484, Anabadi, has note of possession in favour of Bansidhar Pradhan and Balaram Pradhan, sons of Bauribandhu Pradhan since 1964. Moreover, it is further seen that in the year 1982 for such unauthorized possession an Encroachment Case being E.C. No.991/1982 was initiated against the accused Bansidhar Pradhan. Admittedly, the rent receipts showing the penalty of encroachment case has been

deposited on 4.9.1987 by Bansidhar Pradhan. From this learned IInd Addl. District Judge has come to the conclusion that even though the disputed plot is Anabadi Plot, it was in the possession of the accused Bansidhar Pradhan and Balaram Pradhan since 1964 and the same is within the knowledge of the Government and it has recognized their possession since the penalty of Rs.260/- has been accepted from them.

8. The second salient feature which influenced the learned IInd Addl. Sessions Judge is the evidence of P.W.9. This witness has stated that from his village if one goes to village Banpur he has to pass by the side of the land of the accused Bansidhar Pradhan at Mankudidhipa Chaka and he has occasion to see that Bansidhar Pradhan and his people used to cultivate their land.

It is also stated by P.W.10 that he has seen the land of the accused Banasidhar Pradhan at Mankudidhipa Chaka, which is one "Mana" in area. In the year of occurrence, the accused Bansidhar Pradhan had raised Godari Champa variety of paddy in that land. These witnesses were declared as hostile witnesses. The learned IInd Addl. Sessions Judge has rightly placed reliance on the same. P.W.1-Chaila Pradhan had admitted that there were disputes between them and the accused persons prior to the occurrence. Accused Bansidhar Pradhan has filed a criminal case against him. It is seen that Satyabadi P.S. Case No.124/85 for the offence under Section 379 of the I.P.C. has been initiated against Chaila Pradhan, Mahendra Mohanty, Jugal Pradhan, Bairagi Pradhan and Bishnu Pradhan. They were arrested and forwarded to the Court. The aforesaid case had taken place a few days prior to the occurrence involved in this case. Moreover, it is also seen from the record that the learned IInd Addl. Sessions Judge has taken note of the fact that a counter case has been filed against the informant and others, in which some of the accused persons have sustained injuries and no explanation is forthcoming from the side of the prosecution to explain the injuries on the accused persons.

9. After having a detailed discussions of the aforesaid materials and discussing the law applicable, the learned IInd Addl. Sessions Judge held that the accused persons have successfully established the right of private defence and therefore the accused persons were held not guilty.

10. In the case of ***Ghurey Lal Vs. State of Uttar Pradesh***; (2008) 10 Supreme Court Cases 450, the Hon'ble Supreme Court has the occasion to examine almost all the judgments of the Hon'ble Supreme Court regarding

the principles to be followed in a case of appeal against acquittal. The summary of the judgment is reflected at Paragraph-70. We find it appropriate to quote the same:-

> "In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal.
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> The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.
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> A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:
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> (i) The trial court's conclusion with regard to the facts is palpably wrong;
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> (ii) The trial court's decision was based on an erroneous view of law;
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> (iii) The trial court's judgment is likely to result in "grave miscarriage of justice;
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> (iv) The entire approach of the trial court in dealing with the evidence was patently illegal;
>
> (v) The trial court's judgment was manifestly unjust and unreasonable;
>
> (vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.
>
> (vii) This list is intended to be illustrative, not exhaustive.
>
> 2. The appellate court must always give proper weight and consideration to the findings of the trial court.
>
> 3. If two reasonable views can be reached – one that leads to acquittal, the other to conviction – the High Courts/appellate courts must rule in favour of the accused.

11. Thus unless a very substantial and compelling reasons are there the appellate court should not overrule or otherwise disturb the trial court's acquittal. Very substantial and compelling reasons are, the trial court's conclusion with regard to the facts is palpably wrong or the trial court's decision was based on an erroneous view of law. It is not the case of the State that the facts have not been properly appreciated by the learned IInd Addl. Sessions Judge nor it is that the trial court's decision was based on erroneous view of law. The State also do not submit that the trial court's judgment is likely to result in grave miscarriage of justice or the entire approach of the trial court in dealing with the evidence was patently illegal or the trial court judgment was manifestly unjust and unreasonable or that the trial court has ignored the evidence or misleading the material facts and has ignored the material document like dying declaration report of the ballistic report etc.

Moreover, two views can be reached, one that leads to acquittal and other to conviction, then the view in favour of the accused is to be accepted.

12. Keeping in view the aforesaid facts succinctly stated by us and the principles guiding the appeal against acquittal, we find no merit in the Government Appeal and, therefore, come to the conclusion that the appeal is devoid of any merit and there is no substantial and compelling reasons to disturb the findings recorded by the leaned IInd Addl. Sessions Judge, Puri.

13. With such observation, the Government Appeal is dismissed.

14. L.C.R. be sent back forthwith.

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2019 (II) ILR – CUT- 328

DR. A.K. RATH, J.

MACA NO. 314 OF 2013

ACHYUTA CHARAN MOHANTY .....Appellant

.Vs.

GOVT. OF ORISSA & ORS. .....Respondents

MOTOR VEHICLES ACT, 1988 – Section 173 – Appeal by claimant challenging the mode of the payment of award amount – Accident between Govt. jeep and private Bus injuring the Medical officer who was in the jeep – Owner of both vehicles set ex-parte – Award passed with the finding that due to composite negligence of both the vehicles, the accident took place and apportioned the compensation @ 50% between the owners of both the vehicles on the ground that the bus was not insured – Plea of the claimant that instead of saddling 50% liability on the owner of the bus, the Tribunal ought to have directed the Govt.(owner of the Jeep) to pay the entire amount and recover the same from the owner of the bus – Question arose for consideration as to whether it is open to a claimant to recover entire compensation from one of the joint tortfeasors, particularly when in the accident caused by composite negligence of drivers of jeep and bus – Held, Yes – Reasons Indicated.

Case Laws Relied on and Referred to :-

1. (2015) 9 SCC 273 : Khenyei .Vs. New India Assurance Company Limited & Ors.

For Appellant : Dr. T.C. Mohanty, Sr. Adv.

For Respondent : Mr. Swayambhu Mishra, ASC, & Mr. G.P. Dutta.

JUDGMENT Date of Hearing : 01.02.2019 : Date of Judgment : 06.02.2019

DR. A.K.RATH, J.

The instant appeal has been filed under Sec.173 of the Motor Vehicles Act, 1988 (in short, "the M.V Act") by the claimant assailing the award of the Claims Tribunal.

2. The claimant-appellant filed an application under Sec.166 of the M.V Act for compensation. His case was that he was the Medical Officer of Gop P.H.C. On 11.10.1995, he was returning to Gop in the Government jeep bearing registration number OSP-667 after finishing his work at Tarakore Sterilization Camp. At about 7 P.M at Balinuamuhan near village Junei on Gop-Konark road, there was a collision between the jeep and the bus bearing registration number ORX-9582 coming from opposite direction, as a result of which he sustained injuries. Immediately he was shifted to Gop P.H.C and thereafter to SCB Medical College & Hospital for treatment.

3. Though notice had been issued to opposite parties 1 and 2, but they had chosen not to contest the case and as such, were set ex parte. Opposite party no.3 filed a written statement denying the liability.

4. Stemming on the pleadings of the parties, learned Tribunal framed five issues. Parties led evidence, oral and documentary. On an anatomy of pleadings and evidence on record, learned Tribunal came to hold that the accident took place due to composite negligence of the drivers of both the vehicles. Held so, it awarded an amount of Rs.1,20,000/- along with interest @ 6% per annum and apportioned the compensation @ 50% between the opposite party no.1 and owner of the bus, opposite party no.2. Liability was saddled with the opposite parties on the ground that the bus was not insured with opposite party no.3.

5. Heard Dr. T.C. Mohanty, Senior Advocate along with Mr.P.K. Singh, learned counsel for the appellant, Mr. Swayambhu Mishra, learned ASC and Mr. G.P. Dutta, learned counsel for respondent no.3.

6. Dr. Mohanty, learned Senior Advocate for the appellant confined his argument with regard to composite negligence on both the vehicles. He submitted that in the case of composite negligence, it is open to the claimant to proceed against any owner of the vehicles. Learned Tribunal came to a finding that due to composite negligence of both the vehicles, the accident took place. Instead of saddling 50% liability on the owner of the bus, the

Tribunal ought to have directed the opposite party no1- respondent no.1 herein, to pay the entire amount and recover the same from respondent no.2-oposite party no.2. To buttress the submission, he placed reliance on the decision of the apex Court in the case of Khenyei v. New India Assurance Company Limited and others, (2015) 9 SCC 273.

7. Per contra, Mr. Swayambhu Mishra, learned ASC submitted that the learned Tribunal came to hold that the claimant sustained injuries due to composite negligence of both the vehicles. 50% liability has been saddled with the Government of Orissa opposite party no.1. It is open to the claimant to proceed against the owner of the bus and recover rest 50%.

8. Mr. Dutta, learned counsel for the respondent no.3 submitted that the offending bus was not insured with opposite party no.3. Learned Tribunal has rightly saddled with the compensation on the owner of the vehicle.

9. The seminal question that hinges for consideration is whether it is open to a claimant to recover entire compensation from one of the joint tortfeasors, particularly when in the accident caused by composite negligence of drivers of jeep and bus.

10. An identical matter came up for consideration before the apex Court in the case of Khenyei v. New India Assurance Company Limited and others, (2015) 9 SCC 273. On a survey of earlier decisions, the apex Court held :

> "15. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the accident cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but due to the outcome of combination of negligence of two or more other persons. The apex Court in T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748] has held that in case of contributory negligence, the injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder:
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> "6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to

> determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.
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> 7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence."

11. The apex Court further held that when the other joint tortfeasor has not been impleaded, obviously question of negligence of non-impleaded driver could not be decided apportionment of composite negligence cannot be made in the absence of impleadment of joint tortfeasor. Thus, it would be open to the impleaded joint tortfeasors after making payment of compensation, so as to sue the other joint tortfeasor and to recover from him the contribution to the extent of his negligence. However, in case when both the tortfeasors are before the court/tribunal, if evidence is sufficient, it may determine the extent of their negligence so that one joint tortfeasor can recover the amount so determined from the other joint tortfeasor in the execution proceedings, whereas the claimant has right to recover the compensation from both or any one of them.

12. As to the remedies available to one of the joint tortfeasors from whom compensation has been recovered, the apex Court held :

> "22. What emerges from the aforesaid discussion is as follows:
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> 22.1. In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.
>
> 22.2. In the case of composite negligence, apportionment of compensation between two tortfeasors vis-a-vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.
>
> 22.3. In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors

> is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tortfeasor can recover the amount from the other in the execution proceedings.
>
> 22.4. It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award."

13. In the said case there was determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Since the trailor-truck which was not insured with the insurer was negligent to the extent of 2/3rd, it was held that it would be open to the insurer of the bus after making payment to the claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tortfeasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

14. The ratio in Khenyei (supra) proprio vigore applies to the facts of the case.

15. In the instant case, learned Tribunal came to hold that due to composite negligence of both the vehicles, the accident took place and saddled with the liability 50% each on the owner of the jeep, Government of Orissa and the owner of the bus, opposite party no.2. In view of the decision of the apex Court in the case of Khenyei (supra), the Government of Orissa opposite party no.1- respondent no.1 herein shall pay the entire award amount and recover 50% of the same from the owner of the bus, namely opposite party no.2 in the execution proceeding. The appeal is allowed to the extent indicated above.

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2019 (II) ILR – CUT-333

DR. A.K. RATH, J.

MACA NOS.1358 & 1425 OF 2015

IFFCO TOKIO GENERAL INSURANCE CO. LTD. ……..Appellant

.Vs.

SUMITRA SAMAL & ORS. ……..Respondents

MOTOR ACCIDENT CLAIM – An auto rickshaw dashed against the backside of another auto which was parked on the left side of the road resulting in death of the owner of the Auto rickshaw who was in the offending auto – Claim application allowed directing to pay compensation – Appeal by Insurance Company – Plea that the owner of the auto rickshaw having not paid the premium for his personal accident cover, no compensation is payable to the legal representatives – The question arose as to whether the owner of the offending vehicle, who was travelling in the vehicle, died in the accident without involving any other vehicle can be construed as a passenger qua the offending vehicle and the insurer is liable to pay compensation to his legal representatives ? – Held, No.

"The commercial vehicle package policy has been filed by the insurer as well as the claimants. On a cursory perusal of the same, it is evident that premium of Rs.100/- was paid under the head legal liability to the driver. Rs.50/- was paid towards legal liability to employees. No premium was paid to the personal accident of the owner. Admittedly the deceased was the owner of the offending vehicle. He was travelling in the said vehicle. He cannot be construed as a third party qua the offending vehicle. No extra premium was paid by him to cover the accident under the personal accident. In view of the same, the claim application filed by the legal representatives of the deceased is not maintainable." *(Para 16)*

Case Laws Relied on and Referred to :-

1. (1998) 1 SCC 365: Oriental Insurance Co. Ltd. .Vs. Sunitra Rathi & Ors.
2. (2004) 8 SCC 553: Dhanraj .Vs. New India Assurance Co. Ltd. & Anr.
3. (2006) 9 SCC 174: New India Assurance Co. Ltd. .Vs. Meera Bai & Ors.
4. (2009) 13 SCC 710: Ningamma & Anr..Vs. United India Insurance Co. Ltd.
5. AIR 2009 SC 1788 : New India Assurance Company Ltd. .Vs. Sadanand Mukhi & Ors.
6. AIR 2013 SC 473 : National Insurance Company Ltd. .Vs. Balakrishnan & Anr.
7. (2007) 9 SCC 263 : Oriental Insurance Co. Ltd. .Vs. Jhuma Saha (Smt) & Ors.
8. [2002] 7 SCC 456 : National Insurance Co. Ltd., Chandigarh .Vs. Nicolletta Rohtagi & Ors.
9. (2018) 9 SCC 801 : National Insurance Company Limited .Vs. Ashalata Bhowmik & Ors.

For Insurance Company : Mr. G.P. Dutta.
For Claimants : Mr. D. Mund.

JUDGMENT Date of Hearing : 8.2.2019 : Date of Judgment : 18.02.2019

DR. A.K. RATH, J.

Both the appeals involve common question of facts and law were heard together and are disposed of by this common judgment.

2. Shorn of unnecessary details, the brief facts of the case are that on 3.6.2013 at about 11.30 A.M while Rahas Bihari Samal was returning to his house from Thermal market by the auto riskshaw bearing registration number OR-19-A-4823 with his driver Alekha Bhutia, the auto riskshaw dashed against the backside of another auto bearing registration number OR-19-P-7906 which was parked on the left side of the road. Due to accident, he succumbed to the injuries on the spot. With this factual scenario, the dependants of the deceased filed MAC Case No.13 of 2014 under Sec.166 of the Motor Vehicles Act ('M.V.Act') before the learned 3rd M.A.C.T., Talcher claiming compensation of Rs.14,60,000/-. The claimants assert that the accident took place due to rash and negligent driving by the driver of the auto bearing registration number OR-19-A-4823. The deceased was earning Rs.14000/- per month. He was aged about 45 years at the time of accident. The offending auto was validly insured with the insurance company. The driver of the offending auto had valid driving licence on the date of accident.

3. The opposite party-insurance company entered contest and filed a written statement denying the liability. It was stated that the deceased was the owner of the offending auto riskshaw. He was not a third party and as such, the claim case is not maintainable.

4. Stemming on the pleadings of the parties, learned Tribunal struck five issues. To substantiate the case, the claimants had examined three witnesses and on their behalf, fourteen documents had been exhibited. No evidence was adduced by the opposite party-insurance company. On an anatomy of pleadings and evidence on record, learned Tribunal came to hold that the accident took place due to rash and negligent driving of the driver of the auto riskshaw. The policy of the offending vehicle is a comprehensive policy. The opposite party-insurance company is liable to pay the compensation. Held so, it awarded an amount of Rs.10,58,000/- on 16.9.2015 and directed the insurance company to pay the same with interest @ 7.5% per annum from the date of filing of the claim application. Assailing the award, the insurer has

filed MACA No.1358 of 2015. The claimants have filed MACA No.1425 of 2015 for enhancement of compensation.

5. Heard Mr.G.P. Dutta, learned counsel for the insurance company and Mr. Dhananjaya Mund on behalf of Mr. Sunil Kumar Panda, learned counsel for the claimants.

6. Mr. Dutta, learned counsel for the insurance company argued with vehemence that as per Sec.149(1) of the M.V Act, the liability against the appellant can be enforced only when the award is obtained against the owner/insured. The owner had not paid any premium of personal accident cover for himself. He had paid premium of Rs.50/- for personal accident to the passengers under which the maximum liability of the insurer towards passengers is one lakh. The deceased being the owner of the auto riskshaw and not a passenger, the insurer is not liable to pay any compensation. To buttress the submission, he placed reliance on the decisions in the case of Oriental Insurance Co. Ltd. v. Sunitra Rathi and others, (1998) 1 SCC 365, Dhanraj v. New India Assurance Co. Ltd. and another, (2004) 8 SCC 553, New India Assurance Co. Ltd. V. Meera Bai and others, (2006) 9 SCC 174, Ningamma and another v. United India Insurance Co. Ltd., (2009) 13 SCC 710, New India Assurance Company Ltd. v. Sadanand Mukhi & others, AIR 2009 SC 1788 and National Insurance Company Ltd. v. Balakrishnan and another, AIR 2013 SC 473.

7. Per contra, Mr. Mund, learned counsel for the claimants submitted that the vehicle was registered as passenger carrying commercial vehicle and was duly insured with the appellant. The policy in question is a comprehensive package policy. Due to rash and negligent driving of the offending vehicle, the owner of the vehicle who was travelling as a passenger, died. Since the deceased was a passenger, learned Tribunal is justified in saddling the liability on the insurer. He placed reliance on the decisions of the apex Court in the case of National Insurance Company Ltd. v. Balakrishnan and another, AIR 2013 SC 473 and Rajesh v. Rajbir Singh, 2013 (9) SCC 54 and the decision of the Madras High Court in the case of the National Insurance Co. Ltd. v. Krishnan, (CMA No.3006 of 2012 disposed of on 15.3.2013).

8. The seminal point that hinges for consideration is whether the owner of the offending vehicle, who was travelling in the vehicle, died in the accident without involving any other vehicle can be construed as a passenger

qua the offending vehicle and the insurer is liable to pay compensation to his legal representatives ?

9. In Sunitra Rathi, the apex Court held that the liability of the insurer arises only when the liability of the insured has been upheld for the purpose of indemnifying the insured under the contract of insurance.

10. In Ningamma, the deceased was travelling in Hero Honda motor cycle, which he borrowed from the real owner. When the said motor cycle was proceeding on Ilkal-Kustagl, National Highway, a bullock cart proceeding ahead of the said motor cycle carrying iron sheet suddenly stopped and consequently deceased Ramappa who was proceeding on the said motor cycle dashed against it. Consequent to the aforesaid incident, he sustained fatal injuries over his vital part of body and on the way to Government hospital he died. The widow and son of the deceased filed an application under Sec.163A of the M.V Act before the Tribunal claiming compensation. Learned Tribunal awarded compensation. The insurance company preferred first appeal before the High Court on the ground that the accident occurred due to the fault of the deceased and the claim application was not maintainable as Sec.163A of the M.V Act is not applicable unless there was another vehicle involved in the accident. The High Court allowed the appeal holding that the claim application was not maintainable as there was no tort-feasor involved. Review application filed by the claimants was dismissed. The matter travelled to the apex Court. The question arose before the apex Court is whether the legal representatives of a person, who was driving a motor vehicle, after borrowing it from the real owner meets with an accident without involving any other vehicle, would be entitled to compensation under Sec.163A of the M.V Act or under any other provisions of law and also whether the insurer who issued the insurance policy would be bound to indemnify the deceased or his legal representatives? The apex Court held that the legal representatives of the deceased who have stepped into the shoes of the owner of the motor vehicle could not have claimed compensation under Section 163-A of the M.V Act. It was held that undoubtedly, Section 166 of the M.V Act deals with "Just Compensation" and even if in the pleadings no specific claim was made under Section 166 of the M.V Act, a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. The M.V Act is beneficial and welfare legislation. In fact, the court is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the

claimant or not. However, whether or not the claimants would be governed by the terms and conditions of the insurance policy and whether or not the provisions of Section 147 of the M.V Act would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court. The matter was remitted back to the High Court.

11. In Dhanraj, the appellant along with certain other persons was travelling in his own jeep. The jeep met with an accident. In the accident, the appellant as well as other passengers received injuries. A number of claim petitions came to be filed. The appellant also filed a claim petition. The Tribunal held that the driver of the jeep responsible for the accident. In all the claim petitions filed by other passengers, the Tribunal directed that the appellant (as the owner) as well as the driver and insurance company were liable to pay compensation. In the claim application filed by the appellant, the Tribunal directed the driver and the insurance company to pay compensation to the appellant. The insurance company filed appeal before the High Court. The same was allowed. It was held that the appellant was the owner of the vehicle, the insurance company is not liable to pay him any compensation. The apex Court held that that the policy had not covered any risk for injury to the owner himself. The premium was paid towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In that case, there was no such insurance. The appeal was allowed.

12. In Sadanand Mukhi, the first respondent was owner of a motor cycle. The vehicle was insured with the appellant company for the period 9.9.1999 and 8.9.2000. On 8th September, 2000, Tasu Mukhi, son of the insured, while driving the motor cycle met with an accident and died. The accident allegedly took place as a stray dog came in front of the vehicle. A First Information Report was also lodged. Respondents filed a claim petition. Amongst them, first respondent, who is the owner of the insured vehicle, was the applicant. The insurer appellant raised a specific contention that keeping in view the relationship between the deceased and the owner of the motor vehicle i.e. father and son, he was not a third party. The apex Court held:

> "15. Contract of insurance of a motor vehicle is governed by the provisions of the Insurance Act. The terms of the policy as also the quantum of the premium payable for insuring the vehicle in question depends not only upon the carrying capacity of the vehicle but also on the purpose for which the same was being used and the extent of the

risk covered thereby. By taking an `act policy', the owner of a vehicle fulfils his statutory obligation as contained in Section 147 of the Act. The liability of the insurer is either statutory or contractual. If it is contractual its liability extends to the risk covered by the policy of insurance. If additional risks are sought to be covered, additional premium has to be paid. If the contention of the learned counsel is to be accepted, then to a large extent, the provisions of the Insurance Act become otiose. By reason of such an interpretation the insurer would be liable to cover risk of not only a third party but also others who would not otherwise come within the purview thereof. It is one thing to say that the life is uncertain and the same is required to be covered, but it is another thing to say that we must read a statute so as to grant relief to a person not contemplated by the Act. It is not for the court, unless a statute is found to be unconstitutional, to consider the rationality thereof. Even otherwise the provisions of the Act read with the provisions of the Insurance Act appear to be wholly rational.

16. Only because driving of a motor vehicle may cause accident involving loss of life and property not only of a third party but also the owner of the vehicle and the insured vehicle itself, different provisions have been made in the Insurance Act as also the Act laying down different types of insurance policies. The amount of premium required to be paid for each of the policy is governed by the Insurance Act. A statutory regulatory authority fixes the norms and the guidelines.

17. Keeping in view the aforementioned Parliamentary object, let us consider the fact of the present case so as to consider as to whether the insurer is liable to pay the amount of compensation in relation to the accident occurred by use of the vehicle which was being driven by the son of the insured.

18. We may, for the said purpose, notice certain decisions covering different categories of the claims.

In United India Insurance Co. Ltd. v. Tilak Singh, [(2006) 4 SCC 404] this Court considered the provisions of the Motor Vehicles Act, 1939 as also 1988 Act and inter alia opined that the insurance company would have no liability towards the injuries suffered by the deceased who was a pillion rider, as the insurance policy was a statutory policy which did not cover the gratuitous passenger.

In Oriental Insurance Co. Ltd. v. Jhuma Saha, [(2007) 9 SCC 263], it was held :-

"10. The deceased was the owner of the vehicle.
For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident. The accident did not involve motor vehicle other than the one which he was driving. The question which arises for consideration is that the deceased himself being negligent, the claim petition under Section 166 of the Motor Vehicles Act, 1988 would be maintainable.

11. Liability of the insurer Company is to the extent of indemnification of the insured against the respondent or an injured person, a third person or in respect of damages of property. Thus, if the insured cannot be fastened with any liability under the provisions of the Motor Vehicles Act, the question of the insurer being liable to indemnify the insured, therefore, does not arise."

It was furthermore held :-

"13. The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, Section 147(b) of the Motor Vehicles Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case."

The matter came up for consideration yet again in Oriental Insurance Co. Ltd. [(2007) 5 SCC 428] wherein it was observed :-

"13. As we understand Section 147(1) of the Act, an insurance policy thereunder need not cover the liability in respect of death or injury arising out of and in the course of the employment of an employee of the person insured by the policy, unless it be a liability arising under the Workmen's Compensation Act, 1923 in respect of a driver, also the conductor, in the case of a public service vehicle, and the one carried in the vehicle as owner of the goods or his representative, if it is a goods vehicle. It is provided that the policy also shall not be required to cover any contractual liability. Uninfluenced by authorities, we find no difficulty in understanding this provision as one providing that the policy must insure an owner against any liability to a third party caused by or arising out of the use of the vehicle in a public place, and against death or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of vehicle in a public place.

The proviso clarifies that the policy shall not be required to cover an employee of the insured in respect of bodily injury or death arising out of and in the course of his employment. Then, an exception is provided to the last foregoing to the effect that the policy must cover a liability arising under the Workmen's Compensation Act, 1923 in respect of the death or bodily injury to an employee who is engaged in driving the vehicle or who serves as a conductor in a public service vehicle or an employee who travels in the vehicle of the employer carrying goods if it is a goods carriage. Section 149(1), which casts an obligation on an insurer to satisfy an award, also speaks only of award in respect of such liability as is required to be covered by a policy under clause (b) of sub- section (1) of Section 147 (being a liability covered by the terms of the policy). This provision cannot therefore be used to enlarge the liability if it does not exist in terms of Section 147 of the Act.

14. The object of the insistence on insurance under Chapter XI of the Act thus seems to be to compulsorily cover the liability relating to their person or properties of third parties and in respect of employees of the insured employer, the liability that may arise under the Workmen's Compensation Act, 1923 in respect of the driver, the conductor and the one carried in a goods vehicle carrying goods. On this plain understanding of Section 147, we find it difficult to hold that the Insurance Company, in the case on hand, was liable to indemnify the owner, the employer Company, the insured, in respect of the death of one of its employees, who according to the claim, was not the driver. Be it noted that the liability is not one arising under the Workmen's Compensation Act, 1923 and it is doubtful, on the case put forward by the claimant, whether the deceased could be understood as a workman coming within the Workmen's Compensation Act, 1923. Therefore, on a plain reading of Section 147 of the Act, it appears to be clear that the Insurance Company is not liable to indemnify the insured in the case on hand."

The said principle was reiterated in United India Insurance Co. Ltd. v. Davinder Singh, [(2007) 8 SCC 698] holding :-

> "10. It is, thus, axiomatic that whereas an insurance company may be held to be liable to indemnify the owner for the purpose of meeting the object and purport of the provisions of the Motor Vehicles Act, the same may not be necessary in a case where an insurance company may refuse to compensate the owner of the vehicle towards his own loss. A distinction must be borne in mind as regards the statutory liability of the insurer vis-a-vis the purport and object sought to be achieved by a beneficent legislation before a forum constituted under the Motor Vehicles Act and enforcement of a contract qua contract before a Consumer Forum."

13. In Balakrishnan, the question arose for consideration was whether the policy was an "Act Policy" or "Comprehensive/Package Policy". Since there was no discussion either by the Tribunal or the High Court in this regard, the finding of the High Court and the Tribunal as regards the liability of the insurer was set aside and the matter was remitted back to the Tribunal to scrutinize the policy in a proper perspective.

14. In Oriental Insurance Co. Ltd. v. Jhuma Saha (Smt) and others, (2007) 9 SCC 263, the deceased was the owner of an insured vehicle bearing registration number TR-03-2304, a maruti van. While he was driving the said vehicle, allegedly, in order to save a goat which was running across the road, the steering of the vehicle failed and it dashed with a tree on the road side. He suffered injuries. He later on succumbed thereto. On the aforementioned premise, a claim petition under Section 166 of the M.V Act was filed. The insurer resisted the claim petition, inter alia, contending as under that as per M.V Act and Rules the owner is not entitled to get any compensation if he drives the vehicle and falls in an accident as the insurance policy is a third party in nature. The contract between the insured and insurer is that if any accident occurred out of the use of motor vehicle then only third party is entitled to get compensation. The insurer and insured is the first and second party and other than the all are third party. But in this case as per the version of the petition the deceased was the owner of the vehicle and was driving the vehicle and he met with an accident. Though the deceased had valid driving licence still he is not the third party as per Rules and Acts. Hence the petitioners are not entitled to get any compensation. The contention of the appellant, however did not find favour with the Tribunal which, inter alia, held that the vehicle being insured and an additional premium for the death of the driver or conductor having been paid, the liability was covered by the Insurance Policy. The appellant preferred appeal before the High Court. The contention of the respondents that in view of the decision of this Court in National Insurance Co. Ltd., Chandigarh v. Nicolletta Rohtagi and others, [2002] 7 SCC 456, the appeal was not maintainable, was accepted. The matter went to the apex Court. On an interpretation of Section 147(1)(b) of the M.V Act, the apex Court held :

> "10. The deceased was the owner of the vehicle. For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident. The accident did not involve motor vehicle other than the one which he was driving, the question which arises for consideration is that the deceased himself being negligent, the claim petition under Section 166 of the Motor Vehicles Act, 1988 would be maintainable.
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> 11. Liability of the insurer-Company is to the extent of indemnification of the insured against the respondent or a injured person, a third person or in respect of damages of property. Thus, if the insured cannot be fastened with any liability under the provisions of Motor Vehicles Act, the question of the insurer being liable to indemnify insured, therefore, does not arise.
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> 12. In Dhanraj v. New India Assurance Co. Ltd. and another, [2004] 8 SCC 553, it is stated as follows :
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> "8. Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorised representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.
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> xxx xxx xxx
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> 10. In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs. 4989 paid under the heading "Own damage" is for covering liability towards personal injury. "Under the heading "Own damage", the words "premium on vehicle and non-electrical accessories" appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In this case there is not such insurance."
>
> 13. The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, Section 147(b) of the Motor Vehicles Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case."

15. The same view was reiterated in National Insurance Company Limited v. Ashalata Bhowmik and others, (2018) 9 SCC 801.

16. The commercial vehicle package policy has been filed by the insurer as well as the claimants. On a cursory perusal of the same, it is evident that premium of Rs.100/- was paid under the head legal liability to the driver. Rs.50/- was paid towards legal liability to employees. No premium was paid to the personal accident of the owner. Admittedly the deceased was the owner of the offending vehicle. He was travelling in the said vehicle. He cannot be construed as a third party qua the offending vehicle. No extra premium was paid by him to cover the accident under the personal accident. In view of the same, the claim application filed by the legal representatives of the deceased is not maintainable.

17. The decision of the Madras High Court in the case of Krishnan is distinguishable on facts. In the said case, the owner was insured with the insurance company for his personal accident cover and paid compulsory personal accident cover premium of Rs.100/-, besides additional personal accident cover premium of Rs.250/-.

18. In the instant case, no premium was paid towards personal accident.

19. The logical sequitur of the analysis made in the preceding paragraphs is that no liability can be fastened on the insurer. The impugned award is set aside. The appeal filed by the insurance company is allowed and the appeal filed by the claimants is dismissed. There shall be no order as to costs.

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2019 (II) ILR – CUT- 342

DR. A.K. RATH, J.

C.M.P. NO. 207 OF 2019

BASANTILATA SWAIN & ANR. .....Petitioners

.Vs.

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

CODE OF CIVIL PROCEDURE, 1908 – Section 80 (2) – Application under – Plaintiffs instituted suit for perpetual injunction and also filed an application seeking injunction from demolishing a portion of house which is an urgent relief against the Government – Trial court rejected the application without assigning any reason – Effect of – Held, it is trite that failure to give reasons amounts to denial of justice – Reasons are live links between the minds of the decision-taker to the controversy in question and the decision or conclusion arrived at – In Bajaj Hindustan Sugar and Industries Ltd. vs. Balrampur Chini Mills Ltd. and others, (2007) 9 SCC 43, the apex Court held that in view of Sec.80(2) CPC it must be held that if leave is refused by the original court, it is open to the superior courts to grant such leave as otherwise in an emergent situation a litigant may be left without remedy once such leave is refused and he is required to wait out the statutory period of two months after giving notice – The order has been passed in flagrant violation of the statutory provision – If the same is allowed to stand, it will cause miscarriage of justice. (Paras 8 & 9)

Case Laws Relied on and Referred to :-

1. (2007) 9 SCC 43 : Bajaj Hindustan Sugar and Industries Ltd. .Vs. Balrampur Chini Mills Ltd. & Ors.

For Petitioners : Mr. N.K. Sahu, Mr. B. Swain.
For Opp. Party : Mr. R.P. Mohapatra, A.G.A.

JUDGMENT Date of Hearing & Judgment: 18.03. 2019

DR. A.K. RATH, J.

This petition challenges the order dated 24.01.2019 passed by the learned Civil Judge (Sr. Divn.), Jajpur in C.S. No.66(I) of 2019, whereby and whereunder learned trial court rejected the application of the plaintiffs filed under Sec.80(2) CPC to waive notice.

02. Plaintiffs-petitioners instituted the suit for perpetual injunction against the defendants. They filed an application under sub-sec.(2) of Sec.80 CPC to waive notice on the ground of urgency. They have also filed an application under Order 39 Rule 1 and 2 CPC for temporary injunction restraining the defendants from entering upon the suit land. Learned trial court assigned the following reasons and rejected the application.

> "The object of the provision u/s.80(2) of CPC is manifestly to give the government or any public officer sufficient notice of the case which is proposed to be brought against it or him so that, it or he may consider the position and decide for itself or himself which the claim of the plaint should be accepted or registered.
>
> On the basis of this along with the facts and circumstances of the suit the petition is hereby rejected."

03. Heard Mr. N.K. Sahu, learned Advocate, along with Mr. B. Swain, learned Advocate for the petitioners and Mr. R.P. Mohapatra, learned A.G.A. for the State-opposite party nos.1 and 2.

04. Mr. Sahu, learned Advocate for the petitioners submits that the plaintiffs-petitioners instituted the suit for perpetual injunction. They filed an application for injuncting the defendants from demolishing a portion of house standing over the suit land. The suit has been instituted to obtain an urgent relief against the Government. In view of the same, they filed an application under Sec.80(2) CPC to waive notice. Learned trial court without assigning any reason rejected the petition.

05. Per contra, Mr. Mohapatra, learned A.G.A. for the State-opposite party nos.1 and 2, submits that learned trial court rejected the petition filed by the plaintiffs under Sec.80(2) CPC and returned the plaint. It is open to the plaintiffs to take out the plaint, serve notice under Sec.80 CPC on the defendants and thereafter institute the suit. There is no infirmity in the said order.

06. Sub-sec.(2) of Sec.80 CPC, which is the hub of the issue, is quoted hereunder.

> "(2) A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by Sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit.
>
> Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of Sub-section (1)."

07. On a bare reading of the said provision, it is manifest that a suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by Sub-section (1). Proviso to sub-sec.(2) of Sec.80 CPC postulates that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of Sub-section (1).

08. Paragraph no.2 of the petition filed under Sec.80(2) CPC vide Annexure-2 shows that the defendant nos.1 to 5 in collusion with the defendant nos.6 to 8 are making hectic preparation to demolish the residential house of the plaintiffs and raise new construction thereon. Plaintiffs filed an application seeking urgent relief. By a laconic order dated 24.01.2019, learned trial court rejected the said petition. It is trite that failure to give reasons amounts to denial of justice. Reasons are live links between the minds of the decision-taker to the controversy in question and the decision or conclusion arrived at.

09. In *Bajaj Hindustan Sugar and Industries Ltd. vs. Balrampur Chini Mills Ltd. and others,* (2007) 9 SCC 43, the apex Court held that in view of Sec.80(2) CPC it must be held that if leave is refused by the original court, it is open to the superior courts to grant such leave as otherwise in an emergent situation a litigant may be left without remedy once such leave is refused and he is required to wait out the statutory period of two months after giving notice.

10. The order has been passed in flagrant violation of the statutory provision. If the same is allowed to stand, it will cause miscarriage of justice.

11. Resultantly, the impugned order is quashed. The petition filed by the petitioners under sub-sec.(2) of Sec.80 CPC is allowed. Learned trial court shall proceed with the matter. The petition is allowed. No costs.

2019 (II) ILR – CUT- 345

DR. A.K. RATH, J.

C.M.P. NO.1124 OF 2018

MAMATA TRIPATHY …….Petitioner

.Vs.

ARCON RETREAT OWNERS WELFARE ASSOCIATION …….Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Order 8 Rule 1 read with Order 7 Rule 11 – Written Statement and Rejection of plaint – Defendant appeared and filed application under Order 7 Rule 11 – Application Rejected – Plaintiff's application to debar the defendant from filing the Written statement allowed – Long thereafter the defendant filed the written statement with an application to accept the same – Trial court accepted – Whether correct? – Held, No – Principles discussed.

"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 on 5.8.2015, the defendant entered appearance through its counsel and filed an application under Order 7 Rule 11 C.P.C. for rejection of plaint. By order dated 8.9.2015, learned trial court rejected the petition. Thereafter the matter has suffered several adjournments. On 28.7.2016, the plaintiff filed an application to debar the defendant from filing the written statement and proceed with the suit. On 20.10.2016, learned trial court precluded the defendant from filing the written statement and granted liberty to participate in the hearing of the suit. While the matter stood thus, the defendant has filed written statement along with an application to accept the same on 29.6.2017. Though learned trial court came to hold that the defendant could not properly explained the reasons for non-filing of written statement in time, but accepted the written statement holding that it will cause prejudice to the defendant. The order suffers from internal inconsistencies Proviso to Order 8 Rule 1 C.P.C. cannot be bypassed by an ingenious method in filing the application for rejection of plaint and protract the litigation for years. As held by the apex Court in M/s. SCG Contracts India Pvt. Ltd, the application under Order 7 Rule 11 C.P.C. cannot be made as a ruse for retrieving the lost opportunity to file the written statement. The approach of the learned trial court is erroneous in law. The same cannot be countenanced. If the order is allowed to stand, the same would cause miscarriage of justice."

(Paras 11 & 12)

Case Laws Relied on and Referred to :-

1. AIR 2003 SC 3044 : Surya Dev Rai .Vs. Ram Chander Rai & Ors.
2. (2005) 4 SCC 480 : Kailash .Vs. Nanhku & Ors.
3. AIR 2007 SC 2571 : M/s. R.N. Jadi and Brothers & Ors.Vs. Subhashchandra.
4. (2009) 3 SCC 513 : Mohammed Yusuf .Vs. Faij Mohammad & Ors.
5. AIR 2016 SC 3559 : Gayathri .Vs. M. Girish.
6 2012 SCC Del 1256 : Nunhems India Pvt. Ltd. .Vs. Prabhakar Hybrid Seeds.
7. ILR (2012) 6 Delhi 76 : M/s. Omaxe Ltd. & Ors.Vs. M/s. Roma International Pvt. Ltd.

8. AIR 1981 SC 1400 : Rafiq & Anr. .Vs. Munshilal & Anr.
9. (2018) 6 SCC 639 : Atcom Technologies Limited .Vs. Y.A. Chunawala and Company & Ors.
10. 2019 SCC OnLine SC 226 : M/s. SCG Contracts India Pvt. Ltd .Vs. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors.

For Petitioner : Mr. Bijoy Anand Mohanty, Sr. Adv. & Miss Sikata Sitiratna.
For Opp. Party : Mr. Brajaraj Prusty.

JUDGMENT Date of Hearing: 12.03.2019 : Date of Judgment: 20.03.2019

DR. A.K. RATH, J.

This petition challenges the order dated 12.7.2018 passed by learned 1st Additional Civil Judge (Sr. Divn.), Bhubaneswar in C.S. No.7846 of 2015, whereby and whereunder learned trial court has accepted the written statement filed by the defendant.

02. Since the dispute lies in a narrow compass, it is not necessary to recount in detail the cases of the parties. Suffice it to say that the plaintiff-petitioner instituted the suit for declaration and permanent injunction. Summons issued to the defendant fixing 11.9.2015 for appearance and file written statement. On 5.8.2015, the defendant entered appearance through its counsel. He filed an application under Order 7 Rule 11 C.P.C. for rejection of plaint. By order dated 8.9.2015, learned trial court rejected the petition. Thereafter the matter has suffered several adjournments. On 28.7.2016, the plaintiff filed an application to debar the defendant from filing the written statement and proceed with the suit. On 20.10.2016, learned trial court came to hold that the defendant has appeared in the suit. No written statement is filed within the stipulated period. Thus the defendant is precluded from filing the written statement. It granted liberty to the defendant to participate in the hearing of the suit. While the matter stood thus, the defendant filed written statement along with an application to accept the same on 29.6.2017. In the application, the defendant has assigned the following reasons in not filing the written statement in time.

> "Due to technical defect, the written statement has not been filed and as such, the present Advocate filed this written statement for the interest of justice, the same statement be accept. Hence this petition."

By order dated 12.7.2018, learned trial court came to hold that the defendant could not properly explained the reasons for non-filing of written statement in time. If the written statement is not accepted, it will cause prejudice to the defendant. Held so, it accepted the written statement subject to payment of cost of Rs.1,000/-.

03. Heard Mr. Bijoy Anand Mohanty, learned Senior Advocate, along with Miss Sikata Sitiratna, learned Advocate, for the petitioner and Mr. Brajaraj Prusty, learned Advocate, for the opposite party.

04. Mr. Mohanty, learned Senior Advocate for the petitioner, argued with vehemence that proviso to Order 8 Rule 1 C.P.C. is mandatory in nature. It stipulates that where the defendant fails to file the written statement within the stipulated period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons. He further submitted that the defendant appeared on 5.8.2015. Defendant has not filed written statement. Defendant took a calculated chance and filed an application under Order 7 Rule 11 C.P.C. to reject the plaint. The petition was rejected on 8.9.2015. Thereafter the matter has suffered several adjournments. No petition for time was filed. Thereafter, the defendant has filed an application to allow it to file written statement. Learned trial court rejected the same. The order has attained finality. No reason has been assigned in the petition to accept the written statement. Learned trial court committed a manifest illegality in accepting the written statement on 12.7.2018. The written statement was filed after lapse of two years of appearance of the defendant. To buttress the submission, he placed reliance on the decision of the apex Court in the cases of *Surya Dev Rai vs. Ram Chander Rai and others,* AIR 2003 SC 3044, *Kailash vs. Nanhku and others,* (2005) 4 SCC 480, *M/s. R.N. Jadi and Brothers and others vs. Subhashchandra,* AIR 2007 SC 2571, *Mohammed Yusuf vs. Faij Mohammad and others,* (2009) 3 SCC 513, *Gayathri vs. M. Girish,* AIR 2016 SC 3559 and the decision of the Deli High Court in the cases of *Nunhems India Pvt. Ltd. vs. Prabhakar Hybrid Seeds,* 2012 SCC OnLine Del 1256 and *M/s. Omaxe Ltd. and others vs. M/s. Roma International Pvt. Ltd.,* ILR (2012) 6 Delhi 76.

05. Per contra, Mr. Prusty, learned Advocate for the opposite party, submitted that the previous lawyer had not taken steps. The defendant had changed the counsel. The written statement was filed along with an application to accept the same. For the latches of the counsel, the party should not suffer. He placed reliance on the decision of the apex Court in the case of *Rafiq and another vs. Munshilal and another,* AIR 1981 SC 1400.

06. Order 8 Rule 1 C.P.C., which is the hub of the issue, is quoted hereunder.

"1. Written Statement – The defendant shall, within thirty days from the date of service of summons on him, present a written statement on his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons."

07. Order 8 Rule 1 C.P.C. was the subject matter of interpretation in *Kailash*. The apex Court held:

"42. Ordinarily, the time schedule prescribed by Order 8 Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order 8 Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended.

43. A prayer seeking time beyond 90 days for filing the written statement ought to be made in writing. In its judicial discretion exercised on well-settled parameters, the court may indeed put the defendants on terms including imposition of compensatory costs and may also insist on an affidavit, medical certificate or other documentary evidence (depending on the facts and circumstances of a given case) being annexed with the application seeking extension of time so as to convince the court that the prayer was founded on grounds which do exist.

44. The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the court. In no case, shall the defendant be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The court may impose costs for dual purpose: *(i)* to deter the defendant from seeking any extension of time just for the asking, and *(ii)* to compensate the plaintiff for the delay and inconvenience caused to him."

08. The same view was reiterated in *M/s. R.N. Jadi and Brothers and others, Mohammed Yusuf, Nunhems India Pvt. Ltd.* and *M/s. Omaxe Ltd. and others.*

09. In *Atcom Technologies Limited vs. Y.A. Chunawala and Company and others,* (2018) 6 SCC 639, the apex Court held:

"20. This provision has come up for interpretation before this Court in number of cases. No doubt, the words '*shall not be later than ninety days*' do not take away the power of the Court to accept written statement beyond that time and it is also held that the nature of the provision is procedural and it is not a part of substantive law. At the same time, this Court has also mandated that time can be extended only in exceptionally hard cases. We would like to reproduce the following discussion from the case of *Salem Advocate Bar Association, Tamil Nadu vs. Union of India,* (2005) 6 SCC 344:

"21…… There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to "make such order in relation to the suit as it thinks fit". Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time-limit of 90 days. The discretion of the court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1."

21. In such a situation, onus upon the defendant is of a higher degree to plead and satisfactorily demonstrate a valid reason for not filing the written statement within thirty days. When that is a requirement, could it be a ground to condone delay of more than 5 years even when it is calculated from the year 2009, only because of the reason that writ of summons was not served till 2009 ?

22. ……No doubt, the provisions of Order VIII rule 1 of the Code of Civil Procedure, 1908 are procedural in nature and, therefore, hand maid of justice. However, that would not mean that the defendant has right to take as much time as he wants in filing the written statement, without giving convincing and cogent reasons for delay and the High Court has to condone it mechanically.

xxx xxx xxx"

10. An identical matter camp up for consideration in the case of *M/s. SCG Contracts India Pvt. Ltd vs. K.S. Chamankar Infrastructure Pvt. Ltd. and others,* 2019 SCC OnLine SC 226, the apex Court held that the provisions of Order VIII Rules 1 and 10 can no longer be said to be directory, but can only be said to be mandatory. It was held that as an Order VII Rule 11 application had been filed and that had to be answered before trial of the suit could commence, it was clear that a written statement could not be filed. Further Sec.151 of the Code of Civil Procedure which preserves the inherent power of the court, more particularly, that of a court of record, the High Court, and can be invoked in cases like the present where grossly unjust consequences would otherwise ensue. It was further held that a perusal of these provisions would show that ordinarily a written statement is to be filed within a period of 30 days. However, grace period of a further 90 days is granted which the court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the fact that beyond 120 days from the date of

service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record. This is further buttressed by the proviso in order VIII Rule 10 also adding that the court has no further power to extend the time beyond this period of 120 days. The apex Court held:

> "13. Several High Court judgments on the amended Order VIII Rule 1 have now held that given the consequence of non-filing of written statement, the amended provisions of the CPC will have to be held to be mandatory. [See *Oku Tech Private Limited vs. Sangeet Agarwal & Ors.* by a learned Single Judge of the Delhi High Court dated 11.08.2016 in CS (OS) No.3390/2015 as followed by several other judgments including a judgment of the Delhi High Court in *Maja Cosmetics vs. Oasis Commercial Pvt. Ltd.* 2018 SCC Online Del 6698.
>
> 14. We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement; non-extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order VIII Rule 1 on the filing of written statement under Order VIII Rule 1 has now been set at naught.
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> xxx xxx xxx
>
> 17. ……We are of the view that this judgment cannot be read in the manner sought for by the learned counsel appearing on behalf of the respondents. Order VII Rule 11 proceedings are independent of the filing of a written statement once a suit has been filed. In fact, para 6 of that judgment records *"However, we may hasten to add that the liberty to file an application for rejection under Order 7 Rule 11 CPC cannot be made as a ruse for retrieving the lost opportunity to file the written statement."*
>
> (emphasis laid)

11. 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 on 5.8.2015, the defendant entered appearance through its counsel and filed an application under Order 7 Rule 11 C.P.C. for rejection of plaint. By order dated 8.9.2015, learned trial court rejected the petition. Thereafter the matter has suffered several adjournments. On 28.7.2016, the plaintiff filed an application to debar the defendant from filing the written statement and proceed with the suit. On 20.10.2016, learned trial court precluded the defendant from filing the written statement and granted liberty to participate in the hearing of the suit. While the matter stood thus, the defendant has filed written statement along with an application to accept the same on 29.6.2017. Though learned trial court came to hold that the defendant could not properly explained the reasons for non-filing of written statement in time, but accepted the written statement holding that it will cause prejudice to the defendant. The order suffers from internal inconsistencies.

12. In the application for acceptance of written statement, it is stated that due to technical defect, the written statement could not be filed. This Court fails to understand what is the "technical defect" in not filing the written statement within the stipulated time. No reason has been assigned. Further, learned trial court has rejected the application of the defendant in accepting the written statement. The order has attained finality. Proviso to Order 8 Rule 1 C.P.C. cannot be bypassed by an ingenious method in filing the application for rejection of plaint and protract the litigation for years. As held by the apex Court in *M/s. SCG Contracts India Pvt. Ltd,* the application under Order 7 Rule 11 C.P.C. cannot be made as a ruse for retrieving the lost opportunity to file the written statement. The approach of the learned trial court is erroneous in law. The same cannot be countenanced. If the order is allowed to stand, the same would cause miscarriage of justice.

13. The decision in the case of *Rafiq and another* cited by learned Advocate for the opposite party is distinguishable on facts. In the said case, the apex Court held that party should not suffer for the latches of the counsel. The same principle cannot apply in Order 8 Rule 1 C.P.C.

14. In *Surya Dev Rai,* the apex Court held that supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate Courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step into exercise its supervisory jurisdiction. There is no quarrel over the proposition of law.

15. In the wake of aforesaid, the impugned order is quashed. The defendant shall only participate in the hearing of the suit. The petition is allowed. No costs.

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2019 (II) ILR – CUT- 351

DR. A.K. RATH, J.

C.M.P. NO. 1550 OF 2017

SUBAS CHANDRA NAYAK ……..Petitioner

Vs

MEENA KUMARI SAHOO & ORS. …….Opp. Parties

HINDU MARRIAGE ACT, 1955 – Section 13 read with Section 151 of the Code of Civil Procedure – Application for divorce by husband on the ground of cruelty and adultery – Application filed seeking a direction for DNA test to the third and fourth children – Allegations and counter allegations – The question arose as to under what circumstances the scientific test should be conducted – Principles – Discussed.

"The apex Court in no uncertain terms held that when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test. There must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test. Any order for DNA can be given by the court only if a strong prima facie case is made out for such a course. Depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegations, which constitute one of the grounds, on which the concerned party would either succeed or lose. If the direction to hold such a test can be avoided, it should be so avoided." *(Para 8)*

Case Laws Relied on and Referred to :-

1. 2017 (I) ILR - CUT-342 : Ranjan Kumar Behera @ Naik Vs. Domburudhar Behera & Ors.
2. AIR 2010 SC 2851 : Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission for Women & Anr.
3. AIR 2015 SC 418 : Dipanwita Roy Vs. Ronobroto Roy.

For Petitioner : Mr. Kabir Kumar Jena.
For Opp. Parties : Dinesh Kumar Patra.

JUDGMENT Date of Hearing & Judgment : 27.03.2019

DR. A.K. RATH, J.

This petition challenges the order dated 25.11.2017, passed by the learned Judge, Family Court, Jajpur in C.P. No.476 of 2011, whereby and whereunder, learned trial court has rejected the application of the plaintiff-petitioner to conduct the DNA test of the third and fourth children of the opposite party no.1-wife.

2. Plaintiff-petitioner filed a petition u/s.13 of the Hindu Marriage Act, 1955, for divorce against the defendant no.1-opposite party no.1-wife on the ground of cruelty and adultery. The opposite party no.1 entered contest and

filed a written statement denying the assertions made in the petition. While matter stood thus, petitioner filed an application u/s.151 CPC to conduct the DNA test of the third and fourth children of opposite party no.1. It is stated that opposite party no.1 left the matrimonial home after the second child was born. She did not return to the matrimonial house. She developed illicit relationship with opposite party no.2. The third and fourth children are born out of the said illicit relationship. Opposite party no.1 filed objection denying the assertions made in the petition. It is stated that the petitioner used to visit her house. Out of their wed-lock, the third and fourth children are born. The petition was rejected on 20.08.2003. The order has attained finality. After lapse of 14 years, the petitioner filed another petition seeking the same relief. Learned trial court rejected the same.

3. Heard Mr. Kabir Kumar Jena, learned counsel for the petitioner and Mr. Dinesh Kumar Patra, learned counsel for the opposite party no.1

4. Mr. Jena, learned counsel for the petitioner submits that opposite party no.1 left the matrimonial home long since. She had developed illicit relationship with opposite party no.2. Thereafter, third and fourth children are born. The petitioner filed an application to conduct DNA test of the third and fourth children. The same is essential for just decision of the case. Learned trial court is not justified in rejecting the application.

5. Conversely, Mr. Patra, learned counsel for the opposite party no.1-wife submits that the allegations made in the petition are blatant lies. The petitioner used to visit the house of opposite party no.1.Out of their wedlock, the third and fourth children are born. He further submits that earlier order of rejection has attained finality. DNA test cannot be conducted as a matter of right. To buttress the submission, he places reliance on the decision of this Court in the case of *Ranjan Kumar Behera @ Naik Vrs. Domburudhar Behera & Ors.,* 2017 (I) ILR –CUT-342.

6. In *Bhabani Prasad Jena Vrs. Convenor Secretary, Orissa State Commission for Women & anr.,* AIR 2010 SC 2851, the apex Court held :

> "13. In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her

> spouse were living together during the time of conception. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test.
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> 14. There is no conflict in the two decisions of this Court, namely, *Goutam Kundu* (AIR 1993 SC 2295 : AIR SCW 2325) *and Sharda* (AIR 2003 SC 3450 : 2003 AIR SCW 1950). In *Goutam Kundu*, it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test. In the case of Sharda while concluding that a matrimonial court has power to order a person too undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA can be given by the court only if a strong prima facie case is made out for such a course. In so far as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court over looked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that Court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court."

7. In *Dipanwita Roy Vrs. Ronobroto Roy*, AIR 2015 SC 418, the apex Court held that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegations, which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The legitimacy of a child should not be put to peril.

8. The apex Court in no uncertain terms held that when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA test in a matter relating to paternity of a

child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test. There must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test. Any order for DNA can be given by the court only if a strong prima facie case is made out for such a course. Depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegations, which constitute one of the grounds, on which the concerned party would either succeed or lose. If the direction to hold such a test can be avoided, it should be so avoided.

9. In *Ranjan Kumar Roy*, this court referred to the decisions cited supra.

10. Admittedly, the marriage between the petitioner and opposite party no.1 was solemnized as per Hindu rites and customs. After marriage, they led a peaceful marital life for some time. Since dissensions cropped up between the parties, petitioner filed an application u/s.13 of the Hindu Marriage Act for divorce. The petitioner filed an application u/s.13 of the Hindu Marriage Act to conduct DNA test of the third and fourth children on the ground that she left the matrimonial home since long. She had developed illicit relationship with opposite party no.2. Thereafter, the third and fourth children were born. The same has been stoutly denied by opposite party no.1. She asserted that petitioner used to visit her house. Out of their wedlock, third and fourth children are born. Petitioner has not made a strong prima facie case. In a matter of paternity of a child, DNA test should not be directed to be conducted as a matter of course or in a routine manner, whenever such a request is made. There is no plea or evidence on record that before birth of third and fourth children, the petitioner at any point of time had any access to the opposite party no.1. Further the earlier order has attained finality. The second petition seeking the same relief is an abuse of process of Court. Thus DNA test is not eminently needed.

11. The dispute pertains to husband and wife. Why a person would feel of being bastardized by a Court verdict, disentitling him from inheriting the properties of his father? Why the children shall suffer the ignominy?

12. "A million million spermatozoa
All of them alive :
Out of their cataclysm but one poor

Noah
Dare hope to survive.
And among that billion minus one
Might have chanced to be
Shakespeare, another Newton, a new
Donne
But the one was me"

Thus, said Aldous Huxley in a state of desperation.

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

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2019 (II) ILR – CUT- 356

BISWAJIT MOHANTY, J.

W.P.(C) NO. 6602 OF 2019

ARABINDA MISHRA …….Petitioner

.Vs.

STATE TRANSPORT AUTHORITY & ORS. ….....Opp. Parties

MOTOR VEHICLES ACT, 1988 – Section 69, Sub-Section (1) of Section 79 and Sub-Section (12) of Section 88 read with Sub-Rule (5) of Rule 43 and Sub-Rules (9) & (10) of Rule 47 of the Orissa Motor Vehicles Rules, 1993 – National permit – Application thereof – Who is the competent authority to grant? – Discussed and determined.

"In such background, it is reiterated that from a conjoint reading of Clauses (a) and (c) of Explanation to Section 88 read with Sub-section (1) of Section 79 of "the Act", it is clear that at present RTA is the appropriate authority for issuing National Permit. In such view of the matter, this Court is of the opinion that vide the impugned policy decision at clause 3.1 under the heading Item No.3 nothing new has been introduced. Probably it has stopped an old practice which was in not tune with the requirements of provisions of "the Act" as indicated and discussed above relating to issuance of National Permit. Further as rightly contended by Mr. Sharma by asking the operators to approach the RTAs, no prejudice can be said to have been caused to the petitioner. Rather it would be beneficial to the petitioner as now he can get National Permit for his goods carriages nearer home from the district headquarter." *(Paras 5 & 6)*

For Petitioner : M/S. Pravakar Behera, H.P. Mohanty & P.K. Behera.
For Opp. Parties : Mr. Bigyan Kumar Sharma, Standing Counsel,Transport.

JUDGMENT Date of Judgment: 19.06.2019

BISWAJIT MOHANTY, J.

In this writ application, the petitioner calls in question the Policy decision at Item No.3 taken by the State Transport Authority, Odisha in its 287th Meeting on 22.01.2019 under Annexure-3 whereby the Secretary, Regional Transport Authorities have been authorised to issue and renew National Permit and issue authorisation in respect of goods carriages.

2. The petitioner is a transport operator engaged in goods transport on the strength of goods carriage permit as well as National Permit granted by the State Transport Authority, for short "STA". The last authorisation of National Permit granted in respect of his vehicle bearing Registration No.OD-16A-8353 was valid till 10.4.2019 as per Annexure-1. On 13.3.2019, i.e., much prior to expiry of the above noted validity period, the petitioner applied for authorisation and National Permit before the Chairman, STA (opposite party no.2) in Form-46. However, the said application was not received by the Secretary, STA (opposite party no.3) on the ground that as per the Policy decision under Anexure-3 as indicated earlier the application for National Permit has to be made before the Secretary, Regional Transport Authorities of the concerned region. Questioning such action, the petitioner has filed this present writ application.

3. Mr. Behera, learned counsel for the petitioner contended that such action of the opposite party no.3 directly violates the mandate of Sub-Rule (5) of Rule 43 and Sub-Rules (9) & (10) of Rule 47 of the Orissa Motor Vehicles Rules, 1993, for short "OMV Rules". According to Mr. Behera as per the above noted Rules, application for grant of National Permit is to be made to the STA and STA is the appropriate authority to dispose of such application. In such background, he attacked the impugned Policy decision under Annexure-3 which divests such power of STA and invests such power only in the Regional Transport Authorities, for short, "R.T.As". Accordingly, he prayed that the Policy decision of Clause-3.1 under Item No.3 of Annexure-3 be quashed.

4. Mr. Sharma, leaned Standing Counsel, Transport submitted that vide Clause-3.1 of the policy decision under Item No.3 of Annexure-3 nothing new has been done. It only states the obvious which is in tune with the statutory provisions of the Motor Vehicles Act, 1988, for short "the Act". According to him the subject matter of grant of National Permit in respect of

goods carriages has been dealt with at Sub-Section (12) of Section 88 of 'the Act" which makes it clear that the appropriate authority may for the purpose of encouraging long distance inter-state road transport grant National Permit in respect of goods carriages subject to Rules that may made by the Central Government under Sub-Section (14) of Section 88 of "the Act". Further relying on the Explanation to Section 88 of "the Act", he submitted that Explanation (c) defines "National Permit" to be a permit granted by the appropriate authority to goods carriages to operate through out the country or in such contiguous States not less than four in number including the State in which the permit is issued as maybe specified in such permit in accordance with the choice indicated in the application. Now with regard to phrase "appropriate authority" as used in Explanation (c), he drew attention of this Court to definition of appropriate authority as indicated at Explanation (a) to Section 88 of "the Act" according to which the appropriate authority in relation to a National Permit means the authority which is authorised under "the Act" to grant a goods carriage permit. According to him as per Sub-Section (1) of Section 79 of "the Act" only Regional Transport Authority (RTA) has been authorised to grant a goods carriages permit. In such background, he contended that a conjoint reading of Sub Section (1) of Section 79 and the earlier noted provisions of Section 88 of "the Act" would make it clear that R.T.As. are the appropriate authorities under "the Act" for granting National Permit and none else. Therefore, he submitted that Clause-3.1 of Annexure-3 of Item No.3 containing the Policy decision which indicates that henceforth R.T.A. would be dealing with the matter of issuance of renewal of National Permit cannot be said to be legally vulnerable as this is in tune with the above noted provisions of "the Act". With regard to the provisions of Sub-Rule (5) of Rule 43 and Sub-Rules (9) & (10) of Rule 47 of "OMV Rules" he submitted that these provisions should be ignored in the matter relating to grant of National Permit to goods carriages on the face of relevant provisions of "the Act" under Section 79 and Section 88, as provisions of the "OMV Rules" cannot override the provisions of "the Act". He further submitted that the above noted rules cannot be operational in absence of Gazettee notification under Sub Section (2) of Section 69 of "the Act" read with Rule 86 of the Central Motor Vehicles Rules, 1989, for short, "CMV Rules". Secondly, he submitted that now in tune with the above noted statutory provisions of "the Act", the grant of National Permit has been decentralised so that operator from all over Odisha need not approach STA at Cuttack and they can get the National Permit from R.T.As. at district levels. Thirdly, he submitted that the petitioner has not been able to show any

prejudice which would be caused to him in case he applies for a National Permit with R.T.A. at Sundargarh which is much nearer to his living place. If he is really interested in getting National Permit he should have applied before the R.T.A., Sundargarh without unnecessarily wasting time by challenging an action which is beneficial to him. In such background, he submitted that the writ application is without any merit and should be dismissed.

5. In order to appreciate the rival contentions, this Court thinks it appropriate to refer to the following relevant provisions of "the Act", "OMV Rules" and "CMV Rules":

Provisions of "the Act"

"69. General Provision as to applications for permits – (1) Every application for a permit shall be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle or vehicles:

> Provided that if it is proposed to use the vehicle or vehicles in two or more regions lying within the same State, the application shall be made to the Regional Transport Authority of the region in which the major portion of the proposed route or area lies, and in case the portion of the proposed route or area in each of the regions is approximately equal to the Regional Transport Authority of the region in which it is proposed to keep the vehicle or vehicles:
>
> Provided further that if it is proposed to use the vehicle or vehicles in two or more regions lying in different States, the application shall be made to the Regional Transport Authority of the region in which the applicant resides or has his principal place of business.
>
> (2) Notwithstanding anything contained in Sub-section (1), the State Government may, by notification in the Official Gazette, direct that in the case of any vehicles or vehicle proposed to be used I two or more regions lying in different States, the application under that Sub-section shall be made to the State Transport Authority of the region in which the applicant resides or has his principal place of business.
>
> **Section 88 – Validation of permits for use outside region in which granted –**
>
> (1) to (11) xxx xxx xxx
>
> (12) Notwithstanding anything contained in sub-section (1), but, subject to the rules that may be made by the Central Government under sub - section (14), the appropriate authority may, for the purpose of encouraging long distance inter-State road transport, grant in a State, national permits in respect of goods carriages and the provisions of section 69, 77, 79, 80, 81, 82, 83, 84, 85, 86 [clause (d) of Sub-section (1) of Section 87 and Section 89] shall, as far as may be apply to or in relation to the grant of national permits.
>
> (13) xxx xxx xxx
>
> (14) (a) The Central Government may make rules for carrying out the provisions of this Section.

(b) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :

(i) the authorisation fee payable for the issue of a permit referred to in sub-section (9) and (12) ;

(ii) the fixation of the laden weight of the motor vehicle;

(iii) the distinguishing particulars or marks to be carried or exhibited in or on the motor vehicle ;

(iii) the colour or colours in which the motor vehicle is to be painted ;

(iv) such other matters as the appropriate authority shall consider in granting a national permit.

Explanation :- In this Section, -

(a) "appropriate authority", in relation to a national permit, means the authority which is authorised under this Act to grant a goods carriage permit ;

(b) xxx xxx xxx

(c) "national permit" means a permit granted by the appropriate authority to goods carriages to operate throughout the territory of India or in such contiguous States not being less than four in number, including the State in which the permit is issued as may be specified in such permit in accordance with the choice indicated in the application.

Section 79 – Grant of goods carriage permit :

(1) A Regional Transport Authority may, on an application made to it under section 77, grant a goods carriage permit to be valid throughout the State or in accordance with the application or with such modifications as it deems fit or refuse to grant such a permit: 109 Provided that no such permit shall be granted in respect of any area or route not specified in the application.

(2) & (3) xxx xxx xxx."

The relevant provisions of **"OMV Rules"** read as follows:

"Rule 43. Disposal of application for permits :-

(1) to (4) xxx xxx xxx

(5) The disposal of an application in relation to a national permit shall be made by the State Transport Authority.

Rule 47 Area of validity of the permit and extension thereof: -

(1) to (8) xxx xxx xxx

(9) Every application for the grant of a national permit in respect of a goods carriage shall be made to the State Transport Authority in form accompanied by the fee as prescribed in rule 86 and 87 of Central Motor Vehicle Rules, 1989.

(10) On receipt of an application under sub-rule (9), the State Transport Authority shall follow the same procedure in considering the application as for the grant of a goods carriage permit under the Act and these rules and may grant the permit in the prescribed form."

The relevant provision of **"CMV Rules"** reads as follows:

"Rule 86. **Application for national permit**.- An application for the grant of a national permit shall be made in Form 48 to the authority referred to in section 69."

A perusal of Explanation (c) to Section 88 of "the Act" shows that it defines National Permit as a permit which is granted by the appropriate authority to goods carriages so as to enable those to operate through out the country or in such contiguous States including the State in which the permit is issued. Appropriate Authority in relation to National Permit has been defined at Explanation (a) to indicate the same to be an authority which is authorised under "the Act" to grant of goods carriage permit. Sub-Section (1) of Section 79 of "OMV Rules" clearly shows that goods carriage permit can only be granted by the Regional Transport Authority (RTA). A conjoint reading of above provisions of "the Act" makes it clear that for the purpose of issuance of National Permit, RTA is the appropriate authority under the provisions of "the Act".

6. Now, let us focus our attention on Sub-section (12) of Section 88 of "the Act". The said Sub-section indicates that appropriate authority can grant National Permit subject to rules made by Central Government and while granting such permit, various provisions of "the Act" as indicated therein shall as far as may apply. Rule 86 of "CMV Rules" as quoted earlier is the relevant rule for our purpose. It says that application for grant of National Permit shall be made to the authority referred to at Section 69 of "the Act". Section 69 of "the Act", which deals with general provision for application for permits in its Sub-Section (1) also speaks about RTA as the appropriate authority to which application for permit is to be made. Though sub-Section (2) of Section 69 of "the Act" permits making of an application for permit before STA, however, the same is made dependent upon issuance of a Notification to that effect by the State Government in Official Gazette. According to Mr. Sharma so far as State of Odisha is concerned, no such Gazette Notification exists under Sub-Section (2) of Section 69 of "the Act". Therefore, for the State of Odisha an application for grant of National Permit has to be made only to RTA. Had there been a Gazette Notification under Sub-section (2) of Section 69 of "the Act", then things would have been different. In such background in the humble opinion of this Court, till Gazette Notification under Sub-section (2) of Section 69 of "the Act", authorising STA in the matter is published; RTA would continue to be the sole authority for granting National Permit. Sub Rule (5) of Rule 43 (5) and Sub Rules (9) and (10) of Rule 47 of "OMV Rules" cannot override the provisions of "the

Act" as indicated earlier, which authorise only RTA to grant National Permit. These Sub Rules can only operate after Gazette under Sub-section (2) of Section 69 of "the Act" is published authorising STA to grant permit and not otherwise. So, for all purposes it is clear that at present, RTA is the appropriate authority to grant National Permit. With regard to various provision of "the Act" referred to in Sub-section (12) of Section 88; keeping in mind the use of phrase "as far as may be apply" in the said Sub-section in connection with such provisions, it can safely be concluded that RTA can take help of the said provisions/any of the said provisions while granting National Permit as and when required. In such background, it is reiterated that from a conjoint reading of Clauses (a) and (c) of Explanation to Section 88 read with Sub-section (1) of Section 79 of "the Act", it is clear that at present RTA is the appropriate authority for issuing National Permit. In such view of the matter, this Court is of the opinion that vide the impugned policy decision at clause 3.1 under the heading Item No.3 at Annexure-3, nothing new has been introduced. Probably it has stopped an old practice which was in not tune with the requirements of provisions of "the Act" as indicated and discussed above relating to issuance of National Permit. Further as rightly contended by Mr. Sharma by asking the operators to approach the RTAs, no prejudice can be said to have been caused to the petitioner. Rather it would be beneficial to the petitioner as now he can get National Permit for his goods carriages nearer home from the district headquarter.

7. For all these reasons, this Court finds no merit in this writ application, which is accordingly dismissed.

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2019 (II) ILR – CUT- 362

DR. B.R. SARANGI, J.

W.P.(C) NO. 13607 OF 2018

ASUTOSH SAHU (REP: - FATHER GUARDIAN) ……Petitioner

.Vs.

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

ADMISSION IN KENDRIYA VIDYALAYA – Petitioner, a minor, represented by his father who is working as Gramin Dak Sevak Branch Postmaster challenges the rejection of application for admission in Kendriya Vidyalaya – Rejection on the ground that the father of the petitioner being a Gramin Dak Sevak Branch Postmaster is not a

Central Govt. Employee – The question arose as to whether the Gramin Dak Sevak Branch Postmaster is a Central Govt. Employee? – Held, Yes.

"In view of the judgment of the apex Court, as mentioned above, there is no iota of doubt that Gramin Dak Sevak is a civil post, but not part of regular service of the postal department and, therefore, the appointment of Gramin Dak Sevak will be by way of direct recruitment and not by way of promotion. Once the petitioner's father is the holder of civil post under the Central Government, he is a Central Government employee and satisfies the requirement of the guidelines issued for admission in Kendriya Vidyalaya, as mentioned above. The question that whether Gramin Dak Sevak is a regular employee or not, is not required to be considered at this stage, in view of the admitted fact that Gramin Dak Sevaks are Central Government employees receiving salary from the consolidated fund of the India and for the purpose of admission in Kendriya Vidyala, as per the guidelines, requirements are satisfied. Therefore, the rejection of the candidature of the petitioner on the ground of "wrong selection of category" cannot have any justification and thereby the same is liable to be quashed and is accordingly quashed." *(Paras 10 & 11)*

Case Laws Relied on and Referred to :-

1. AIR 1967 SC 884 : The State of Assam .Vs. Kanak Chandra Dutta.
2. (1977) 3 SCC 94: AIR 1977 SC 1677 : Superintendent of Post Offices .Vs. P.K. Rajamma,
3. AIR 2016 SC 3789 : Y.Najithamol .Vs. Soumya S.D.
4. (2012) 7 SCC 389 : Asha .Vs. PT. B.D.Sharma University of Health Sciences.
5. (2014) 10 SCC 521 : Chandigarh Administration .Vs. Jasmine Kaur.
6. 2016 (II) ILR-CUT 1242 : Satish Mohan Padhi .Vs. NISER.
7. 2015 (II) ILR-CUT 785 : Ajitesh Singh .Vs. Kendriya Vidyalaya.
8. (2017) 4 SCC 516 : S.Krishna Sradha .Vs. State of Andhra Pradesh.

For Petitioner : Mr. B.P.B. Bahali.
For Opp. Parties : Mr. A.K. Bose. Asst. Solicitor General
Mr. H.K. Tripathy.

JUDGMENT Date of Hearing: 07.01.2019 : Date of Judgment: 10.01.2019

DR. B.R. SARANGI, J.

The petitioner-Asutosh Sahu, who is a minor, represented by his father guardian, has filed this application to quash Annexure-3 dated 24.05.2018, the list of rejected candidate showing rejection of application of the petitioner for admission into class-I in Kendriya Vidyalaya, Berhampur on the ground of "wrong selection of category"; and further seeks for direction to opposite party no.4 to admit him in Class-I in Kendriya Vidyalaya, Berhampur for the academic session 2018-19.

2. The factual matrix of the case, in hand, is that petitioner's the father is working as Gramin Dak Sevak Branch Postmaster at Jhadankuli, Berhampur under the Ministry of Communications and I.T., Department of Posts of the Government of India. Pursuant to notification issued by the Principal, Kendriya Vidyalaya, Berhampur, the father of the petitioner applied for admission of his son in Class-I in the priority service category-I. On consideration of his application, the selection committee prepared a list of selected candidates in which the name of the petitioner was found place at Sl. No.89. Consequentially, the petitioner's father was called upon by the School authority along with all original documents accompanied by the petitioner and his mother. On the date fixed, the petitioner's father appeared, but opposite party no.4 informed that the petitioner cannot be admitted into the School, as he (father of the petitioner) is not coming under the priority service category-I, being not a central government employee, and accordingly issued the list of rejected candidates in Annexure-3 dated 24.05.2018 indicating "wrong selection of category". Hence this application.

3. Mr. Biplaba P.B. Bahali, learned counsel for the petitioner contended that the father of the petitioner, who is working as Gramin Dak Sevak, is a Central Government employee working under the Department of Posts of the Government of India as Branch Postmaster and has been drawing salary from the consolidated fund of India. As such, the Ministry of Communications and I.T., Department of Posts, Government of India issued a letter on 01.08.2008 under Annexure-6 series recognizing the contribution of Gramin Dak Sevaks in providing postal services in rural parts of the country and as a gesture of goodwill the Minister of State (Communications and I.T) wrote to the Minister of Human Resources Development for extending the eligibility for admission to Kendriya Vidyalayas in favour of children of Gramin Dak Sevaks. In such view of the matter, the petitioner's father is a Central Government employee and as such his son, the petitioner herein, is entitled to get admission into Class-1 in Kendriya Vidyalaya, Berhampur. It is further contended that in the previous year similarly situated candidates, who were the children of Gramin Dak Sevaks, were granted the benefit of employees of Central Government and admitted to Kendriya Vidyalaya. Therefore, non-admission of the petitioner's son in the year in question amounts to discrimination and hence, arbitrary and unreasonable and contrary to provisions of law. It is further contended that if the application of the petitioner was considered and his name found place in the select list at serial no.89, and his father being a Central Government employee coming under the priority service category-I, non-giving of admission to the petitioner and

rejection of his application subsequently, is not justified. Therefore, the petitioner seeks for quashing of the list of rejected candidates under Annexure-3 dated 24.05.2018 indicating "wrong selection category", as the same cannot sustain in the eye of law.

To substantiate his contentions, he has relied upon ***The State of Assam v. Kanak Chandra Dutta***, AIR 1967 SC 884; ***Superintendent of Post Offices v. P.K. Rajamma***, (1977) 3 SCC 94:AIR 1977 SC 1677; ***Y.Najithamol v. Soumya S.D.***, AIR 2016 SC 3789; ***Asha v. PT. B.D.Sharma University of Health Sciences***, (2012) 7 SCC 389; ***Chandigarh Administration v. Jasmine Kaur***, (2014) 10 SCC 521; ***Satish Mohan Padhi v. NISER***, 2016 (II) ILR-CUT 1242; ***Ajitesh Singh v. Kendriya Vidyalaya***, 2015 (II) ILR-CUT 785; and ***S.Krishna Sradha v. State of Andhra Pradesh***, (2017) 4 SCC 516.

4. Mr. H.K. Tripathy, learned counsel appearing for opposite parties no.2 to 4 has contended that the action taken by the authority is fully justified which does not warrant interference at this stage. By the time the interim order was passed by this Court and communicated to the opposite parties, no seats were available, as the same had already been filled up. As the Gramin Dak Sevak is not a regular employee, due to false declaration made by the father of the petitioner, admission has been denied to him. It is further contended that admission of previous year given to the children of Gramin Dak Sevaks is an inadvertent mistake, which has been rectified in the subsequent year. He has also tried to distinguish the decisions cited by the learned counsel for the petitioner, as mentioned supra.

Though several judgments have been referred to in the written notes submitted by opposite party no.4, the same have not been placed at the time of hearing.

5. Heard Mr. Biplaba P.B. Bahali, learned counsel for the petitioner and Mr. H.K. Tripathy, learned counsel for opposite parties no.2 to 4. None appears for opposite party no.1-Union of India. Pleadings between the parties having been exchanged and with the consent of learned counsel for the parties this petition is being disposed of finally at the stage of admission.

6. The admitted fact is that opposite party no.4 issued an advertisement inviting applications for admission into Kendriya Vidyalaya, pursuant to which, the petitioner through his father guardian submitted his application, vide Annexure-1, indicating therein that the petitioner's father is a Central Government employee coming under service category-I. It is mentioned in

the application form that children of the transferable and non-transferable Central Government employees and children of ex-servicemen were to be taken as priority category-I. Along with the said application, a series of documents, including service certificate, have been uploaded, as the petitioner's father was serving as Gramin Dak Sevak. On consideration of such application, the petitioner's name was placed in the select list prepared by the authority at serial no. 89 under priority category. Therefore, on being called upon, the petitioner and his parents appeared before the selection committee on 24.05.2018, along with the documents. But on consideration of his documents, the application of the petitioner was rejected with the remark "wrong selection of category" as per list of rejected candidates in Annexure-3.

7. The Kendriya Vidyalaya Sangathan issued Guidelines for Admissions in Kendriya Vidyalayas, 2018-19. In Note (v) appended to Part-C of the above guidelines, it has been provided as follows:-

> *"(v) In respect of Category I, II, III and IV admissions, the veracity of the Certificates submitted by the parents in proof of their service must be invariably verified by the Principal."*

At the time of submission of application, the petitioner's father furnished his service certificate issued by the Senior Superintendent of Posts, Berhampur (GM) Division, Berhampur (GM), which reads thus:-

> *"This is to certify that Mr. Bidyadhar Sahu is a regular employee of Govt. of India working in the department of Posts, India as Branch Postmaster w.e.f. 08.05.2013. He has been drawing the salary from the Consolidated Fund of Govt. of India and his pay has been fixed as per the recommendation of 7th CPC. His present basic Pay is Rs.4745/- in the level NIL of the 7th CPC. He/She is a GPF/CPF/PRAN optee having Number NIL. He is having NIL number of transfer during the proceeding seven years."*

Under the General Guidelines contained in Part-A of the above guidelines for admissions in Kendriya Vidyalayas (2018-19), "Central Government Employee" has been defined under sub-Clause (i) of Clause-2 as follows:-

> *"2(i)* ***CENTRAL GOVERNMENT EMPLOYEES:***
>
> *An employee who draws his emoluments from the consolidated fund of India."*

Clause-3 thereof deals with priority in admission and clause-3(A) reads as follows:-

> *" (A)* ***KENDRIYA VIDYALAYAS UNDER CIVIL/ DEFENCE SECTOR:***
>
> *1. Children of transferable and non-transferable Central government employees and children of ex-servicemen. This will also include children of Foreign National officials, who come on deputation or transfer to India on invitation by govt. of India."*

On perusal of the aforesaid guidelines it is crystal clear that an employee, who draws his emoluments from the consolidated fund of India, is termed as Central Government employee for the purpose of admission into Kendriya Vidyalaya. In the service certificate issued by the competent authority, it has been clearly indicated that the petitioner's father is an employee of the Government of India working in the Department of Posts, India as Branch Postmaster and receiving his salary from the Government of India, Therefore, the conditions stipulated in the definition clause (2(i) read with clause-3A are fully satisfied by the petitioner's father.

8. Mr. H.K. Tripathy, learned counsel for the opposite parties no.2 to 4 vehemently urged before this Court that the service certificate issued by the Senior superintendent of Posts that the petitioner is a regular employee of Government of India, is not correct and thereby, the petitioner's father has tried to mislead the opposite parties in giving such an erroneous certificate, for which rejection of the admission of the petitioner is justified. But it is admitted in the counter affidavit that admission has to be made as per the procedure for admission prescribed in Kendriya Vidyalayas Sanghatan Admission Guidelines, 2018-19. It is also admitted that the petitioner father was working as a Gramin Dak Sevak in the department of Posts but it is contended that the service conditions of the Gramin Dak Sevaks are different from Central Government servants. This contention cannot have any justification, once it is admitted that the petitioner's father is a Central Government employee working under department of Posts as a Gramin Dak Sevak. Merely because a certificate has been issued by the competent authority that the petitioner's father is a regular employee of Central Government, the same cannot preclude the petitioner from getting the benefits admissible to him in terms of the guidelines issued by the Kendriya Vidyalaya.

9. The Department of Posts of Gramin Dak Sevaks (Conduct and Engagement) Rules, 2011 under clause 3(c) defines "Government" means Central Government and under clause 3(d) "Gramin Dak Sevak" to mean (i) a Gramin Dak Sevak Branch Postmaster. Note attached to the said provision reads thus:-

> *"NOTE 1- The persons holding the posts of Extra-Departmental Agents under the Posts and Telegraphs Extra-Departmental Agents (Conduct and Service) Rules, 1964 or Gramin Dak Sevaks (Conduct and Employment) Rules, 2001 on regular basis on the date of commencement of these rules shall be deemed to have been engaged to and hold the posts of Gramin Dak Sevaks in accordance with the provisions of these rules."*

Rule 3-A deals with terms and conditions of engagement and clause (iv) thereof reads as follows:-

> *"(iv). A Sevak can be transferred from one post/unit of another post/unit in public interest;"*

Therefore, the nature of work which is undertaken by the Gramin Dak Sevak clearly indicates that father of the petitioner is a Central Government employee, which is in clear adherence to the guidelines issued by the Kendriya Vidyalaya. As such, clause 2(i) of the guidelines, which deals with definitions, clearly defines "Central Government Employee" that an employee who draws emoluments from the consolidated fund of India. It does not state the regular employee or casual employee or contractual employee whatsoever. But fact remains, as per the guidelines of the Kendriya Vidyalaya, the Central Government employees who draw their emoluments from the consolidated fund of India, their applications will be taken into consideration on priority basis. Therefore, the contention raised by learned counsel appearing for opposite parties no.2 to 4 that the petitioner's father was not a regular employee of the Central Government, being working as a Gramin Dak Sevak, has no justification and such an argument cannot sustain in the eye of law. Furthermore, the Department of Posts of Gramin Dak Sevaks (Conduct and Engagement) Rules,2011 clearly indicates that "Gramin Dak Sevak" means a Gramin Dak Sevak Branch Postmaster. Admittedly, father of the petitioner is discharging the duty of Branch Postmaster, being a Gramin Dak Sevak, and as such is a Central Government employee holding a transferable post.Consequentially, the minimum requirements to be considered for admission to Kendriya Vidyalaya are satisfied. The ground of rejection of the application of the petitioner is "wrong selection of category". If the petitioner's father is holding a transferable post and is a Central Government employee, as defined under the guidelines, in that case the rejection of his application on the aforesaid ground cannot have any justification and as such the same is liable to be set aside.

10. In the case of ***Y. Najithamal*** (supra) the apex Court, while considering the case of promotion to Gramin Dak Sevak, held as follows:-

> *"9. At this stage, it is also useful to refer to the decision of this Court in the case of C.C. Padmanabhan and Ors. v. Director of Public Instructions and Ors. 1980 (Supp) SCC 668: AIR 1981 SC 64, wherein it was held as under.:*
>
> *"This definition fully conforms to the meaning of 'promotion' as understood in ordinary parlance and also as a term frequently used in cases involving service laws. According to it a person already holding a post would have a promotion if he is appointed to another post which satisfies either of the following two conditions, namely-*

(i) that the new post is in a higher category of the same service or class of service;

(ii) the new post carries a higher grade in the same service or class."

Promotion to a post, thus, can only happen when the promotional post and the post being promoted from are a part of the same class of service. Gramin Dak Sevak is a civil post, but is not a part of the regular service of the postal department. In the case of Union of India v. Kameshwar Prasad (1971) 11 SCC 650, this Court held as under :

"2. The Extra Departmental Agents system in the Department of Posts and Telegraphs is in vogue since 1854. The object underlying it is to cater to postal needs of the rural communities dispersed in remote areas. The system avails of the services of schoolmasters, shopkeepers, landlords and such other persons in a village who have the faculty of reasonable standard of literacy and adequate means of livelihood and who, therefore, in their leisure can assist the Department by way of gainful avocation and social service in ministering to the rural communities in their postal needs, through maintenance of simple accounts and adherence to minimum procedural formalities, as prescribed by the Department for the purpose. [See: Swamy's Compilation of Service Rules for Extra Departmental Staff in Postal Department p. 1.]"

Further, a three-judge Bench of this Court in the case of The Superintendent of Post Offices and Ors. v. P.K. Rajamma (1977) 3 SCC 94 : AIR 1977 SC 1677 held as under:

"It is thus clear that an extra departmental agent is not a casual worker but he holds a post under the administrative control of the State. It is apparent from the rules that the employment of an extra departmental agent is in a post which exists "apart from" the person who happens to fill it at any particular time. Though such a post is outside the regular civil services, there is no doubt it is a post under the State. The tests of a civil post laid down by Court in Kanak Chandra Dutta's case (supra) are clearly satisfied in the case of the extra departmental agents." (Emphasis laid by this Court)

A perusal of the above judgments of this Court make it clear that Extra Departmental Agents are not in the regular service of the postal department, though they hold a civil post. Thus, by no stretch of imagination can the post of GDS be envisaged to be a feeder post to Group 'C' posts for promotion."

In view of the judgment of the apex Court, as mentioned above, there is no iota of doubt that Gramin Dak Sevak is a civil post, but not part of regular service of the postal department and, therefore, the appointment of Gramin Dak Sevak will be by way of direct recruitment and not by way of promotion.

11. In the case of ***The Superintendent of Posts*** (supra), the apex Court also reiterated that Gramin Dak Sevak is a civil post and in paragraph-4 of the judgment it has been observed as follows:-

"4. It is thus clear that an extra departmental agent is not a casual worker but he holds a post under the administrative control of the State. It is apparent from the rules that the employment of an extra departmental agent is in a post which exists "apart from" the person who happens to fill it at any particular time. Though such a post is outside the regular civil services, there is no doubt it is a post under the State. The tests of a civil post laid down by this Court in Kanak Chandra Dutta's case (supra) are clearly satisfied in the case of the extra departmental agents."

Once the petitioner's father is the holder of civil post under the Central Government, he is a Central Government employee and satisfies the requirement of the guidelines issued for admission in Kendriya Vidyalaya, as mentioned above. The question that whether Gramin Dak Sevak is a regular employee or not, is not required to be considered at this stage, in view of the admitted fact that Gramin Dak Sevaks are Central Government employees receiving salary from the consolidated fund of the India and for the purpose of admission in Kendriya Vidyala, as per the guidelines, requirements are satisfied. Therefore, the rejection of the candidature of the petitioner on the ground of "wrong selection of category" in Annexure-3 cannot have any justification and thereby the same is liable to be quashed and is accordingly quashed.

12. In course of hearing, a question was posed by the Court that since the academic session 2018-2019 is going to lapse, in the event the writ application is allowed then what will be its effect. Reference has been made to a Division Bench judgment of this Court (of which Dr.B.R.Sarangi,J. is a member) rendered in the case of ***Satish Mohan Padhi*** (supra), in paragraphs 9 and 10 whereof, relying upon the judgment of the apex Court, the Division Bench held as follows:-

> *"9. Similar question had come up for consideration before the apex Court in* ***Asha v. PT. B.D. Sharma University Of Health Sciences And Others*** *(supra) and in paragraph-31 thereof, the apex Court came to hold as follows:-*
>
> *"31. Having recorded that the appellant is not at fault and she pursued her rights and remedies as expeditiously as possible, we are of the considered view that the cut-off date cannot be used as a technical instrument or tool to deny admission to meritorious students. The rule of merit stands completely defeated in the facts of the present case. The appellant was a candidate placed higher in the merit list. It cannot be disputed that candidates having merit much lower to her have already been given admission in the MBBS course. The appellant had attained 832 marks while the students who had attained 821, 792, 752, 740 and 731 marks have already been given admission in the ESM category in the MBBS course. It is not only unfortunate but apparently unfair that the appellant be denied admission."*
>
> *It is well recognized principle of law that strict adherence to the time schedule has to be followed, but the Court may have to mould relief and make an exception to the cut off date in exceptional circumstances in order to ensure that no fault can be attributed to the candidate that candidate persuade his rights and legal remedies expeditiously without any delay.*
>
> *10. In the judgment rendered in* ***Chandigarh Administration and another*** *(supra), the apex Court in paragraphs-33.2 and 33.4 whereof held as follows:*
>
> *33.2. Under exceptional circumstances, if the court finds that there is no fault attributable to the candidate i.e. the candidate has pursued his or her legal right*

expeditiously without any delay and that there is fault only on the part of the authorities or there is an apparent breach of rules and regulations as well as related principles in the process of grant of admission which would violate the right to equality and equal treatment to the competing candidates and the relief of admission can be directed within the time schedule prescribed, it would be completely just and fair to provide exceptional reliefs to the candidate under such circumstances alone.

xxx xxx xxx

33.4. When a candidate does not exercise or pursue his/her rights or legal remedies against his/her non-selection expeditiously and promptly, then the courts cannot grant any relief to the candidate in the form of securing an admission.

13. Since no fault is attributable to the petitioner, in the event seats are filled up and the academic session for which admission was sought is going to lapse, then opportunity is to be given to the petitioner to prosecute his studies keeping one seat reserved for him in the ensuing session 2019-2020 and accordingly this Court so directs.

14. The writ petition is thus allowed. No order as to costs.

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2019 (II) ILR – CUT- 371

DR. B.R. SARANGI, J.

W.P.(C) NO. 15472 OF 2007

DR. SANKAR PRASAD BHUYNA ……Petitioner

.Vs.

UTKAL UNIVERSITY & ORS. …..…Opp. Parties

SERVICE LAW – Reversion – Order of reversion after two and half years of retirement by effecting the same retrospectively without any opportunity of hearing – Whether permissible under law? – Held, No.

Petitioner was appointed temporarily as Professor of Zoology which was subsequently confirmed by following the regular selection process – While continuing, the petitioner was directed to hold the 14office as whole-time Director of Academic Staff College, Utkal University temporarily pursuant to order of the Vice-Chancellor in addition to the post of Professor of Zoology in the P.G. Department – Thereafter the petitioner was repatriated from the post of Director of Academic Staff College to his former post of Professor, P.G. Department of Zoology against the existing vacancy vide order dated 30.05.2000 and resumed his duty in the P.G. Department of Zoology as Professor and he was also retired from the post of Professor of Zoology on the very same day dated 31.05.2000 (A.N) on attaining the age of superannuation – He was also allowed to draw his salary as Professor P.G. Department of Zoology – Reversion Order was passed after two and half years of

his retirement – The question arose as to whether the retrospective change of service condition permissible? – Held, in view of the fact that a right had already been accrued in favour of the petitioner and that vested right should not have been taken away by an administrative order without affording opportunity of hearing to the petitioner - Since the petitioner, by the time the impugned order dated 16.12.2002 was passed, had already retired from service as Professor of Zoology, he was entitled to get all benefits as due and admissible in accordance with law, as a right had already been accrued in his favour by retiring him from service as Professor, Zoology – In the event the authority decided to revert the petitioner back to the post of Reader, then opportunity of hearing to the petitioner, which is the minimum requirement of law, was to be given – But nothing has been placed on record to indicate that there was compliance of principles of natural justice so far as reversion of the petitioner to the post of Reader is concerned – Order of reversion set aside.

(Paras 7 & 14)

Case Laws Relied on and Referred to :-

1. 1971(2) SCC 330 : Deokinandan Prasad .Vs. The State of Bihar.
2. (1997) 6 SCC 623 : Chairman, Railway Board .Vs. C.R. Rangadhamaiah.
3. (2011) 6 SCC 570 : J.S. Yadav .Vs. State of Uttar Pradesh.
4. AIR 2013 SC 3383: State of Jharkhand & Ors. .Vs. Jitendra Kumar Srivastava.
5. 1993 Supp (3) SCC 35 : Ramadhar Pandey .Vs. State of U.P.

For petitioner : Mr. R.K. Rath, Sr. Adv., M/s. R.P. Kar, A.N. Ray, N. Paikray, B.P. Mohanty, P. Rath, N.R. Rout, P.K. Mishra & D. Panda.

For Opp. Parties : M/s. D.Mohapatra & Mr. M. Mohapatra,

JUDGMENT Date of Hearing: 07.01.2019 : Date of Judgment: 10.01.2019

DR. B.R. SARANGI, J.

The petitioner, who was working as Faculty in the Department of Zoology of Utkal University and retired as Professor, has filed this application to quash the order dated 16.12.2002 reverting him to the post of Reader with retrospective effect, and consequential rejection of the appeal as well as representation of the petitioner by the Chancellor vide orders dated 15.02.2003 and 26.02.2007 in Annexure-11 Annexure-12(B) respectively.

2. The factual matrix of the case, in hand, is that the petitioner was appointed temporarily as Professor of Zoology against the Lien vacancy of Dr. (Mrs) P. Mohanty-Hejmadi up to 15.07.1998 in the P.G. Department of Zoology, Utkal University in the scale of pay of Rs.4500-7300/- pursuant to the decision of the Syndicate and subsequent order of the Vice-Chancellor, after following regular process of selection, in response to which he joined on 29.11.1997. The petitioner was directed to hold the office as whole-time Director of Academic Staff College, Utkal University temporarily, pursuant

to order of the Vice-Chancellor dated 29.06.1998 (which was communicated by the Registrar vide office order dated 17.07.1998), as a consequence of which he held such post with effect from 30.06.1998 in addition to the post of Professor of Zoology in the P.G. Department. Consequent upon joining of Dr.(Mrs)P. Mohanty-Hejmadi, the petitioner was reverted to his parent post, as Reader of Zoology, with effect from 01.07.1998 while working as whole-time Director of Academic Staff College. But the said order of reversion dated 10.08.1998 of the petitioner to the post of Reader was withdrawn, vide order dated 26.04.2000, and consequentially, he was holding the post of Professor of Zoology.

2.1 On 18.05.2000, the Registrar addressed a letter to the Principal Secretary to Chancellor regarding regularization of the petitioner against the existing vacancy of Professor in the P.G. Department of Zoology, in order to enable him to receive pensionary benefits. In the said letter, it was suggested that since the post held by the petitioner, i.e., Director of Academic Staff College is a scheme post sponsored by the University Grants Commission, the same was not eligible for pensionary benefit and since the said post was at par with that of Professor, the petitioner may be allowed to be transferred to the P.G. Department of Zoology against the post of Professor lying vacant on the retirement of Dr. D.R. Naik w.e.f. 30.06.1998 in order to enable him to avail pensionary benefits. Consequentially, the petitioner was repatriated from the post of Director of Academic Staff College to his former post of Professor, P.G. Department of Zoology against the existing vacancy caused on the retirement of Dr.(Mrs) P. Mohanty-Hejmadi, pursuant to the order of the Vice-Chancellor dated 30.05.2000 on the basis of the telephonic discussion with the Principal Secretary to the Chancellor. Accordingly, the petitioner was directed to resume his duty in the P.G. Department of Zoology as Professor on or before 31.05.2000. The petitioner joined in the said post on 31.05.2000 and he was also retired from the post of Professor of Zoology on the very same day dated 31.05.2000 (A.N) on attaining the age of superannuation. He was also allowed to draw his salary as Professor P.G. Department of Zoology pursuant to order dated 08.11.2000.

2.2 When the matter stood thus, the petitioner was reverted to the post of Reader vide letter dated 16.12.2002 and all office orders designating him as Professor stood modified as Reader and he was allowed to draw salary, pensionary dues accordingly as per the order of the Chancellor and subsequent order of the Vice-Chancellor after more than two and half years of his retirement as Professor. As against the said order of reversion, the

petitioner preferred appeal on 24.12.2002 before the Chancellor for review of his order and to restore status quo as on 01.07.1998 giving him personal hearing. But the Chancellor, vide order dated 15.02.2003, rejected the appeal. The petitioner again filed a representation on 27.05.2006 for personal hearing, but the same was also rejected vide order dated 26.02.2007. Hence this application.

3. Mr. R.K. Rath, learned Senior Counsel appearing along with Mr. R.P. Kar, learned counsel for the petitioner contended that the petitioner, having retired from the post of Professor, could not have been reverted to the post of Reader after two and half years with retrospective effect. The retrospective change of service condition is not permissible in view of the fact that a right had already been accrued in favour of the petitioner and that vested right should not have been taken away by an administrative order without affording opportunity of hearing to the petitioner.It is further contended that once the petitioner was repatriated from the post of Director, Academic Staff College and allowed to hold his former post of Professor, P.G. Department of Zoology against an existing vacancy created due to retirement of Dr.P.Mohanty-Hejmadi, pursuant to order dated 30.05.2000, and the same having been acted upon by the petitioner by joining in the said post on 31.05.2000, and he having been superannuated from service on 31.05.2000 on attaining the age of superannuation, he could not have been reverted to the post of Reader and extended with the benefits available to the said post, after two and half years on 16.12.2002, though on the last date of his retirement he was holding the post of Professor and was entitled to get the benefits of the said post. To substantiate his contentions, he has relied upon ***Deokinandan Prasad v. The State of Bihar***, 1971(2) SCC 330; ***Chairman, Railway Board v. C.R. Rangadhamaiah***, (1997) 6 SCC 623; ***J.S. Yadav v. State of Uttar Pradesh***, (2011) 6 SCC 570; ***State of Jharkhand and others v. Jitendra Kumar Srivastava***, AIR 2013 SC 3383; and ***Ramadhar Pandey v. State of U.P.***, 1993 Supp(3) SCC 35.

4. This Court vide order dated 04.01.2008 issued notice to the opposite parties, pursuant to which Mr. D. Mohapatra and associates entered appearance for opposite parties no.1 and 2 by filing vakalatnama on 27.03.2008, but till date no counter affidavit has been filed on their behalf. None has entered appearance for opposite party no.3. Mr. Mohapatra, learned counsel appearing for opposite parties no. 1 & 2 seeks time to file counter affidavit. This being an old case of the year 2007, this Court is not inclined to grant further time, accordingly proceeded to decide the same finally.

5. Mr. D. Mohapatra, learned counsel appearing for opposite parties no.1 and 2 argued with vehemence justifying the order passed by the authority concerned and contended that no illegality or irregularity has been committed by the authority in passing the order impugned.

6. Having heard Mr. R.K. Rath, learned Senior Counsel appearing along with Mr. R.P. Kar, learned counsel for the petitioner and Mr. D. Mohapatra, learned counsel for opposite parties no.1 and 2, since it is an old case of the year 2007, the matter is being disposed of at the stage of admission with the consent of learned counsel for the parties on the basis of the pleadings available on record.

7. The facts narrated above are undisputed. But the fact remains, when the petitioner was discharging his duty as Director of Academic Staff College was repatriated to the post of Professor of Zoology by office order dated 30.05.2000 and in terms of the same he resumed his duty on 31.05.2000 and he retired from service on that date as Professor of Zoology on attaining the age of superannuation. But on 16.12.2002, after a lapse of two and half years of his retirement, he was communicated with a letter stating, inter alia, that the office order issued under memo dated 30.05.2000 wherein he was allowed to be repatriated to his former post of Professor of Zoology against the then vacancy caused due to retirement of Dr.(Mrs) P. Mohanty-Hejmadi stood cancelled and all office orders issued earlier designating the petitioner as Professor stood modified as Reader and as a result thereof, the petitioner was reverted to his former post of Reader with retrospective effect, i.e., from 31.05.2000. Since the petitioner, by the time the impugned order dated 16.12.2002 was passed, had already retired from service as Professor of Zoology, he was entitled to get all benefits as due and admissible in accordance with law, as a right had already been accrued in his favour by retiring him from service as Professor, Zoology. In the event the authority decided to revert the petitioner back to the post of Reader, then opportunity of hearing to the petitioner, which is the minimum requirement of law, was to be given. But nothing has been placed on record to indicate that there was compliance of principles of natural justice so far as reversion of the petitioner to the post of Reader is concerned.

8. In addition to the above finding, it is also revealed that reversion of the petitioner to the post of Reader from Professor and that too retrospectively, which is not permissible under law, seriously affects the service conditions.

9. In ***C.R. Rangadhamaiah*** (supra) the apex Court held that even amending the rules the retrospective rejection of pensionary benefits is not permissible and such action is violative of Articles 31(1) and 19(1)(f) and is also violative of rights guaranteed under Articles 14 and 16 of the Constitution of India. The paragraph-11 of the judgment, wherein the relevant questions have been framed by the Constitutional Bench of the apex Court, reads as under:-

> **"**11. On the basis of the said decision of the Full Bench of the Tribunal, other Benches of the Tribunal at Bangalore, Hyderabad, Allahabad, Jabalpur, Jaipur, Madras and Ernakulam have passed orders giving relief on the same grounds. These appeals and special leave petitions have been filed against the decision of the Full Bench and those other Benches of the Tribunal. Some of these matters were placed before a Bench of three learned Judges of this Court on 28-3-1995 on which date the following order was passed:
>
> "Two questions arise in the present case, viz., (*i*) what is the concept of vested or accrued rights so far as the government servant is concerned, and (*ii*) whether vested or accrued rights can be taken away with retrospective effect by rules made under the proviso to Article 309 or by an Act made under that article, and which of them and to what extent."

Answering to the above questions, the apex Court in paragraphs-20, 22 and 24 of the judgment held as follows:-

> "**20.** It can, therefore, be said that a rule which operates in futuro so as to govern future rights of those already in service cannot be assailed on the ground of retroactivity as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed of, e.g., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively.
>
> **22.** In *State of Gujarat* v. *Raman Lal Keshav Lal Soni* [(1983) 2 SCC 33 : 1983 SCC (L&S) 231 : (1983) 2 SCR 287] decided by a Constitution Bench of the Court, the question was whether the status of ex-ministerial employees who had been allocated to the Panchayat service as Secretaries, Officers and Servants of Gram and Nagar Panchayats under the Gujarat Panchayat Act, 1961 as government servants could be extinguished by making retrospective amendment of the said Act in 1978. Striking down the said amendment on the ground that it offended Articles 311 and 14 of the Constitution, this Court said: (SCC p. 62, para 52)
>
> "52. … The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with

> reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history."
>
> **24.** In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in *Roshan Lal Tandon* , *B.S. Yadav* and *Raman Lal Keshav Lal Soni* ."

10. In ***Deokinandan Prasad*** (supra), the Constitutional Bench of the apex Court held that pension is not to be treated as a bounty payable on the sweet will and pleasure of the Government and the right to pension is a valuable right vesting in a Government servant and as such the same has been considered as property under pre-amended Constitution of Article-31(1) and after amendment in Article 300-A which provides persons not to be deprived of property save by authority of law. In paragraph-30 of the said judgment the apex Court held as follows:-

> "**30.** The question whether the pension granted to a public servant is property attracting Article 31(1) came up for consideration before the Punjab High Court in *Bhagwant Singh* v. *Union of India* [AIR 1962 Punj 503] . It was held that such a right constitutes "property" and any interference will be a breach of Article 31(1) of the Constitution. It was further held that the State cannot by an executive order curtail or abolish altogether the right of the public servant to receive pension. This decision was given by a learned Single Judge. This decision was taken up in letters patent appeal by the Union of India. Letters Patent Bench in its decision in *Union of India* v. *Bhagwant Singh* [ILR 1965 Punj 1] approved the decision of the learned Single Judge. The Letters Patent Bench held that the pension granted to a public servant on his retirement is "property" within the meaning of Article 31(1) of the Constitution and he could be deprived of the same only by an authority of law and that pension does not cease to be property on the mere denial or cancellation of it. It was further held that the character of pension as "property" cannot possibly undergo such mutation at the whim of a particular person or authority."

Similar view has also been taken in ***Jitndra Kumar Srivastava*** (supra), in paragraphs-8, 12 and 14 whereof the apex Court held as follows:-

> **"8**. It is thus hard earned benefit which accrues to an employee and is in the nature of "property". This right to property cannot be taken away without the due process of law as per the provisions of Article 300A of the Constitution of India.

> **12**. Right to receive pension was recognized as right to property by the Constitution Bench Judgment of this Court in Deokinandan Prasad v. State of Bihar (1971) 2 SCC 330 : (AIR 1971 SC 1409), as is apparent from the following discussion: (Paras 28 to 34 of AIR)
>
> "29. The last question to be considered, is, whether the right to receive pension by a Government servant is property, so as to attract Articles 19(1)(f) and 31(1) of the Constitution. This question falls to be decided in order to consider whether the writ petition is maintainable under Article 32. To this aspect, we have already adverted to earlier and we now proceed to consider the same.
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> **14**. Article 300A of the Constitution of India reads as under:
>
> "300A. Persons not to be deprived of property save by authority of law. - No person shall be deprived of his property save by authority of law."
>
> Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the Constitutional mandate enshrined in Article 300A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced."

11. Considering the factual matrix of the case in ***C.R. Rangadhamaiah*** (supra), the apex Court in paragraph-30 of the said judgment observed as follows:-

> "**30.** The respondents in these cases are employees who had retired after 1-1-1973 and before 5-12-1988. As per Rule 2301 of the Indian Railway Establishment Code they are entitled to have their pension computed in accordance with Rule 2544 as it stood at the time of their retirement. At that time the said rule prescribed that running allowance limited to a maximum of 75% of the other emoluments should be taken into account for the purpose of calculation of average emoluments for computation of pension and other retiral benefits. The said right of the respondent-employees to have their pension computed on the basis of their average emoluments being thus calculated is being taken away by the amendments introduced in Rule 2544 by the impugned notifications dated 5-12-1988 inasmuch as the maximum limit has been reduced from 75% to 45% for the period from 1-1-1973 to 31-3-1979 and to 55% from 1-4-1979 onwards. As a result the amount of pension payable to the respondents in accordance with the rules which were in force at the time of their retirement has been reduced."

Thereby, the apex Court came to the conclusion in paragraph-33 of the judgment which reads thus:-

> "**33.** Apart from being violative of the rights then available under Articles 31(1) and 19(1)(*f*), the impugned amendments, insofar as they have been given retrospective operation, are also violative of the rights guaranteed under Articles 14 and 16 of the Constitution on the ground that they are unreasonable and arbitrary since the said amendments in Rule 2544 have the effect of reducing the amount of pension that had become payable to employees who had already retired from service on the date of issuance of the impugned notifications, as per the provisions contained in Rule 2544 that were in force at the time of their retirement."

12. While considering the power of the Court, the apex Court in the case of ***J.S. Yadav*** (supra) held in paragraph-25 as follows:-

> "**25.** In *Union of India* v. *Tushar Ranjan Mohanty* [(1994) 5 SCC 450 : 1994 SCC (L&S) 1118 : (1994) 27 ATC 892] this Court declared the amendment with retrospective operation as ultra vires as it takes away the vested rights of the petitioners therein and thus, was unreasonable, arbitrary and violative of Articles 14 and 16 of the Constitution. While deciding the said case, this Court placed very heavy reliance on the judgment in *P.D. Aggarwal* v. *State of U.P.* [(1987) 3 SCC 622 : 1987 SCC (L&S) 310 : (1987) 4 ATC 272 : AIR 1987 SC 1676] wherein this Court has held as under: (SCC p. 639, para 18)
>
> "*18.* … the Government has the power to make retrospective amendments to the Rules but if the Rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution."

13. As the opposite parties, despite adequate opportunity having been given, have not filed their counter affidavit even after long lapse of 10 years, applying the doctrine of non-traverse, this Court proceeded with the matter. Therefore, taking into consideration the observation made by the apex Court in ***Ramadhar Pandey*** (supra), this Court proceeded with the matter.

14. In view of the facts and law discussed above, there is no iota of doubt that the petitioner, after repatriated from the post of Director of Academic Staff College, Utkal University, was retired from service on 31.05.2000 as Professor of Zoology. As such, on the last date of his retirement, he was holding the post of Professor and accordingly the financial benefits admissible to the post of Professor were to be calculated and disbursed to him. As the impugned order in Annexure-9 dated 16.12.2002 reverting the petitioner has been passed retrospectively, in view of the law discussed above, this Court is of the considered view that the said order under Annexure-9 dated 16.12.2002 cannot sustain in the eye of law and is liable to be quashed. Consequentially, the rejection of appeal by the Chancellor under Annexure-11 dated 15.02.2003 and rejection of representation under Annexure-12(B) dated 26.02.2007 also cannot sustain in the eye of law. Accordingly, the order of reversion dated 16.12.2002 in Annexure-9, which was passed after two and half years of retirement of the petitioner from service as Professor of Zoology, and the order dated 15.02.2003 in Annexure11 rejecting the appeal, as well as the order dated 26.02.2007 in Annexure-12(B) rejecting the representation of the petitioner passed by the Chancellor are liable to be quashed and are hereby quashed. Accordingly, the petitioner is entitled to get all the benefits admissible to him as Professor of Zoology and the same should be calculated and disbursed to him, after

adjusting the amounts received by him in the meantime, within a period of three months from the date of receipt of this judgment.

15. The writ petition is thus allowed. However, there shall be no order as to costs.

2019 (II) ILR – CUT- 380

DR. B.R. SARANGI, J.

W.P.(C) NO. 9119 OF 2013

PURUSOTTAM BEHERA .....Petitioner

.Vs.

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

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Petitioner an applicant for the posts of Management Trainee (Technical) – Selection process consisting of written test and Interview & group discussion – Petitioner not selected and alleged award of less mark in interview – Prayer to direct production of interview records – Whether permissible while exercising the judicial review – Held, No.

"*In view of the arguments advanced and pleadings made by the respective parties, it is to be seen whether this Court, while exercising the power of judicial review, can interfere with the marks awarded in the process of interview, as alleged by the petitioner, and further if a select list has already been prepared and candidates have been given appointment, without impleading those selected candidates as parties to this writ application, whether the same can be interfered with invoking the writ jurisdiction under Article 226 of the Constitution of India. Admittedly, the petitioner filed application for consideration of his candidature for the post of Management Trainee (Technical). He appeared in the written test and on being qualified was called upon to appear in the group discussion test and also interview, in which he participated. The petitioner, having secured less percentage of marks than the persons selected, was not given appointment. While admitting the evaluation made in the written test and also group discussion test, he only assails the award of marks in the interview. As a matter of fact, such relative assessment and awarding of marks cannot be adjudged in exercise of power under Article 226 of the Constitution of India."* *(Paras 5 & 6)*

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Petitioner, an applicant for the posts of Management Trainee (Technical) – Selection process consisting of written test and Interview & group discussion – Petitioner not selected and alleged award of less mark in interview and further alleged that candidates having secured

less marks than him have been appointed – Such candidates are not parties – Writ petition suffers from non-joinder of parties. (Paras7 to 9)

For Petitioner : Mr. J.K. Rath, Sr. Adv.
M/s. D.N. Rath, S.N. Rath & P.K. Rout.
For Opp.Parties : Mr. B. Senapati, Addl. Govt. Adv.
M/s. Prasanta Pradhan & S.K. Pradhan.

JUDGMENT Date of Hearing: 21.01.2019 : Date of Judgment: 29.01.2019

DR. B.R. SARANGI, J.

The petitioner, who was one of the applicants for the posts of Management Trainee (Technical), pursuant to the advertisement in Annexure-1 floated in the website of opposite party no.2, has filed this writ application seeking direction to the opposite parties to produce the relevant records pertaining to the selection, and further to issue appointment order in his favour since six posts of Management Trainee (Technical) are still available to be filled up.

2. The factual matrix of the case, in hand, is that the petitioner is a Graduate in Electrical Engineering. While he was continuing as Lecturer in the Electrical Engineering Department of Balasore School of Engineering, Balasore, an advertisement was floated vide Annexure-1 in the website of opposite party no.2 inviting applications for recruitment of 40 Management Trainees (Technical), 5 Management Trainees (HR) and 2 Management Trainees (Finance) for its 1.1 MT integrated steel plant located at Kalinga Nagar Industrial Complex, Duburi in the district of Jajpur. The required qualification for Management Trainees (Technical) was Engineering Degree in Metallurgy/Chemical/ Electrical/Mechanical/Refractory/Instrumentation from a recognized university/institute with minimum 65% marks in aggregate of all years/semesters. The petitioner having requisite qualification applied for the post of Management Trainee (Technical). On consideration of his application, he was called upon, by issuing admit card, to appear at the written test. On being qualified in the written test, he was called upon, vide letter dated 12.08.2009, to appear at the group discussion test and interview to be held on 01.09.2009, in which he participated. When the petitioner was waiting for his result, the same was neither published in the website of opposite party no.2 nor communicated to the petitioner in general process. When the petitioner made a query from opposite party no.3, at first he came to learn that successful candidates would be issued with appointment order in a phased manner, but subsequently he learnt that 34 persons have been appointed as Management Trainees.

2.1 Since the petitioner did not receive any communication, he made an application under the Right to Information Act, 2005 to supply necessary information, i.e. final selection list, after the written test, psycho test, group discussion test and interview with the marks secured by him. Pursuant thereto, the petitioner was communicated on 18.10.2011, that his name did not visible in the final list of candidates approved for appointment under the opposite parties. He was also advised to prefer appeal, if he is aggrieved, within 30 days of receipt of the decision, before the first appellate authority. Since the query made by the petitioner was not met in the reply given by the Public Information Officer, the petitioner preferred appeal seeking information, as were sought in his application. Consequentially, it was communicated on 10.02.2012 that 36 persons have been selected for Management Trainees, but other information, which was sought by the petitioner, was not given to him on the plea that such information is exempted under Section 8(I)(j) and 8(I)(g) of the Right to Information Act, 2005. The first appellate authority also directed the Public Information Officer of Neelachal Ispat Nigam, vide its order dated 09.01.2013, to communicate the results. In response to the same, it was communicated that the petitioner had secured 86 marks in aggregate and, therefore, he could not be selected as the Management Trainee (Technical). The details of the marks secured by the were that 68 in the written test, 11 in the group discussion test and 7 in the interview. Therefore, since the petitioner secured 86 marks in aggregate, he could not be selected, hence this application.

3. Mr. J.K. Rath, learned Senior Counsel appearing along with Mr. A.K. Saa, learned counsel for the petitioner argued with vehemence that although the candidates securing lesser marks than the petitioner have been selected and appointed, the petitioner has been ignored even though his performance in the interview was quite satisfactory. It is further contended that the mark secured by the petitioner in the interview was not carried out properly and there may be some manipulation in awarding such mark, for which he has been awarded very less mark in the interview. On perusal of letter dated 24.01.2013 it appears that all the candidates who appeared at the interview have been awarded higher marks in the interview, whereas the petitioner has been awarded only seven marks. Therefore, the petitioner seeks for production of interview records and a direction to the opposite parties to give him appointment against the remaining six vacancies forthwith.

4. Pursuant to notice issued by this Court, though opposite parties no. 2 to 4 entered appearance through Mr. Prasanta Pradhan and associates and

filed counter affidavit, but at the time of call none was present. Perusing the counter affidavit filed by opposite parties no. 2 to 4, this Court finds that the opposite parties no.2 to 4 have admitted the fact that the written test was held on 19.10.2008 and the petitioner was provisionally shortlisted for group discussion test and interview. Out of 1749 applicants, 1337 were called for the written test, but 797 appeared and out of them 203 candidates, who qualified in the written test, were called for group discussion and interview, which were held at Pantha Nivas, Lewis Road, Bhubaneswar on 01.09.2009 at 2.00 p.m. Out of 203 candidates qualified in the written test, 149 appeared in group discussion and interview and 36 candidates were finally selected. The petitioner secured less mark than other selected candidates in his branch, i.e., electrical branch, as would be evident from the break ups of the petitioner's mark, such as, written test 68 out of 150, group discussion 11 out of 20, interview 07 out of 30 and total marks 86 out of 200. The petitioner is not disputing the marks awarded in the written test and group discussion and his only grievance is with regard to the marks awarded in the interview, which is not tenable, as the group discussion test and interview were conducted in the same day, i.e., on 01.09.2009. Therefore, the allegation of bias/improper marking by the committee in the interview cannot have any justification so as to warrant interference of this Court at this stage.

5. In view of the arguments advanced and pleadings made by the respective parties, it is to be seen whether this Court, while exercising the power of judicial review, can interfere with the marks awarded in the process of interview, as alleged by the petitioner, and further if a select list has already been prepared and candidates have been given appointment, without impleading those selected candidates as parties to this writ application, whether the same can be interfered with invoking the writ jurisdiction under Article 226 of the Constitution of India.

6. Admittedly, the petitioner filed application for consideration of his candidature for the post of Management Trainee (Technical). He appeared in the written test and on being qualified was called upon to appear in the group discussion test and also interview, in which he participated. The petitioner, having secured less percentage of marks than the persons selected, was not given appointment. While admitting the evaluation made in the written test and also group discussion test, he only assails the award of marks in the interview. As a matter of fact, such relative assessment and awarding of marks cannot be adjudged in exercise of power under Article 226 of the Constitution of India.

7. The petitioner has pleaded in paragrapg-6 of the writ application to the following effect:-

> *"**6.** ……Though, the advertisement for Technical was 40 and for HR was 5. Be that as it may, no where it was indicated in the advertisement to have break up of posts for different categories of Engineering Disciplines. Since the essential qualification was to have a Degree in Engineering, the merit list ought to be prepared taking into consideration of the merit of the candidates as per the process of selection adopted by them. In the counter filed by the opposite parties it is stated that the Management adopted a process of selection through a written test taking 150 marks, Group Discussion having 20 marks and interview having 30 marks. It is stated in the counter to the misc. case filed by the petitioner bearing No.21840 of 2014 that the minimum bench mark of 40 % was fixed both for written test and as well as interview so as to qualify a candidate belonging to SC/ST Category. It is not in dispute that the petitioner was declared qualified in the written test and in the group discussion test and therefore, was called to the viva voce test. Though the opposite parties have not filed the mark sheet of he selected candidates either in the counter to the writ application filed by the petitioner or in the counter to the misc. case filed by the petitioner bearing No. 21840 of 2014, a copy of the final mark sheet of the selected candidate was supplied to the father of the petitioner on his application under Right to Information Act vide letter No. 125 dated 19.03.2013, which clearly indicates that the statement made in the counter filed by the opposite parties are misleading, incorrect and baseless one. To the best of the information of the petitioner, the opposite parties have adopted a standard for taking 50% marks for the unreserved candidates and 40% marks for the reserved candidates for the purpose of selection. But from the list supplied to the petitioner's father, which is annexed to the writ application as **Annexure-7,** it would be seen that persons not having 50% marks in the written test and as well as in the Group Discussion test were selected and were issued with appointment order. It is pertinent to mention here that Shri Suresh Kumar Pari, who is shown at Sl. No. 7 of the Electrical Discipline and Deepak Kumar Behera who is shown at Sl. NO.8 of the said discipline and are belonging to unreserved category having secured 7 marks each in the Group Discussion and having secured 74 marks and 60 marks respectively in the written test, i.e. less than 50% of the marks in each of the test, were selected and issued with appointment order. Similarly in the Mechanical Discipline, Shri Deepak Gupta, Shri Niraj Kumar Dube, Adharkanta Deo and Kalloprasad Das who have secured in the Group Discussion 7, 7, 9 and 9 marks respective and Kalloprasad Das having secured 72 marks in the written test were selected and issued with appointment order. It would not be out of place to mention here that the same principle having been made applicable even in the selection of the Management Trainee (HR), Shri Siva Prasad Rout who is shown as Sl. No. 2 of HR discipline having secured 61 marks in the written test was selected and was issued with appointment order, though he had not secured 50 % of the written test marks as required."*

8. Pleadings made in paragraph-6 of the writ application have been answered by opposite partiesno.2 to 4 in paragraph-7 of the counter affidavit, which reads as follows:-

> *"That, the facts stated in Paras 5 and 6 are stoutly refuted and denied and the petitioner be put to strict proof of the same. The allegation of bias/improper*

marking by the Committee duly in respect of interview is untenable. The petitioner being not aggrieved by the marking under written test and group discussion has no right to allege bias/improper marking in respect of interview only.

The sole allegation of bias/improper marking in interview is purely speculative and afterthought. That, without prejudice to the interest of Opposite Party No.2 to 4 the present counter is filed with liberty to add/delete/amend the same of necessary."

In the rejoinder affidavit filed on 07.12.2014, no reply has been given to the averments made in paragraph-7 of the counter affidavit. Thereby, such averments are conclusive and binding on the petitioner.

9. As regards the allegations made by the petitioner in paragraph-6 of the writ petition that some of the candidates, namely, Suresh Kumar Pati, Deepak Kumar Behera, Deepak Gupta, Niraj Kumar Dube, Adharkanta Deo and Kalloprasad Das, belonging to different disciplines, having not secured even 50% of marks in the written test as well as in the group discussion test, have been selected and issued with appointment orders, it is worthwhile to mention that they have not been made parties to the writ application. With all fairness, if the petitioner alleged that the persons named above, having not secured 50% of marks in written test as well as group discussion test, have been selected, they should have been impleaded as parties, instead of making bald statement, so that they could have given opportunity to rebut the allegations made against them. Furthermore, the opposite parties no.2 to 4 in paragraph-7 of the counter affidavit have averred that the petitioner, being not aggrieved by the mark awarded in the written test and group discussion test, has no right to allege bias/improper marking in respect of interview. Be that as it may, if the petitioner alleges that the candidates of various disciplines named above, having secured less than 50% of marks in the written test as well as group discussion test, have been selected, they should have been impleaded as parties to the proceeding and opportunity of hearing should have been given to them in compliance of the principle of natural justice. Furthermore, in course of hearing, pursuant to a query made by this Court in the above respect, learned Senior Counsel appearing for the petitioner replied that since the petitioner has already pleaded in paragraph-6 of the writ application, the question of impleading the above named candidates as parties may not arise. In view of such position, this Court is of the considered view that the candidates, who have been selected having secured less than 50% of marks, as alleged by the petitioner, should have been impleaded as parties so as to give them a fair chance to participate in the proceeding and to give their reply to the allegations made in the writ application. Thereby, the writ petition suffers from non-joinder of proper parties.

10. In view of the above, the writ petition stands dismissed. No order as to costs.

2019 (II) ILR – CUT-386

DR. B.R. SARANGI, J.

W.P.(C) NO. 21523 OF 2016

PAPUNI SAHOO ……Petitioner

.Vs.

G. M., UCO BANK, KOLKATA & ORS. .....Opp. Parties

SERVICE LAW – Compassionate appointment under Rehabilitation assistance – Father of the petitioner rendered his service as 'Daftary' in UCO Bank for twenty five years – Having been incapacitated took voluntary retirement on medical grounds – Petitioner's application for compassionate appointment rejected on the ground that the father of the petitioner took voluntary retirement and was not an employee of the bank, therefore the petitioner is not eligible for such compassionate appointment under the scheme – Whether correct? – Held, No, the petitioner is entitled for compassionate appointment as per the scheme floated by the bank.

Case Laws Relied on and Referred to :-

1. (1997) 8 SCC 85 : Haryana State Electricity Board .Vs. Hakim Singh.
2. (2005) 7 SCC 206 : Commissioner of Public Instructions .Vs. K.R. Vishwanath.
3. (2003) 7 SCC 704 : State of Haryana .Vs. Ankur Gupta.

For Petitioner : M/s Y. S.P. Babu, S.Das,P.R. Singh & A.K. Mohanty
For Opp. Parties : Mr. S.K. Mohanty.

JUDGMENT Decided on : 28.02.2019

DR. B.R. SARANGI, J.

The petitioner has filed this writ application seeking direction to the opposite parties to grant him compassionate appointment, pursuant to application dated 02.07.2015, as per clause 8.1 of the scheme floated vide circular dated 29.09.2014 in Annexure-2, by quashing letter dated 22.09.2015 in Annexure-4 whereby he has been denied such appointment on the ground that the father of the petitioner took voluntary retirement on 27.05.2015 and that he was not an employee of the bank and, therefore, the petitioner is not eligible for the same.

2. The conspectus fact of the petitioner's case is that father of the petitioner late Hatakishroe Sahoo rendered his service as 'Daftary' from 01.01.1990 to 27.05.2015 with opposite party no.3, i.e., UCO Bank, Gondia Branch, Dhenkanal. The father of the petitioner suffered from bilateral diabetic foot ulcer and hypertension CKD and as such could not discharge

his duty perfectly. He applied for voluntary retirement from service on health ground and on consideration the same was accepted and approved on 27.05.2015. As the petitioner, his mother-Padmini Sahoo and younger brother-Manoj Kumar Sahoo were dependents on the petitioner's father for their daily maintenance and survival, the petitioner submitted his application on 02.07.2015 for compassionate appointment. But, the same was considered and rejected on the ground that the father of the petitioner took voluntary retirement on 27.05.2015 and was not an employee of the bank, therefore the petitioner is not eligible for such compassionate appointment under the scheme. Hence this application.

3. Mr. Y.S.P. Babu, learned counsel for the petitioner has contended that the petitioner, being a legal representative of an employee working under opposite parties-UCO Bank, claimed for compassionate appointment as per scheme for compassionate appointment floated vide circular dated 29.09.2014 in Annexure-2. Instead of considering the same in proper perspective, the opposite parties rejected the claim of the petitioner vide letter dated 22.09.2015 on the ground that petitioner's father took voluntary retirement on 27.05.2015 and the petitioner applied for compassionate appointment only on 02.07.2015, when his father was not an employee of the bank, though the letter of rejection itself indicates that the dependant of the permanent employee, dies while in service or retiring on medical grounds due to incapacitation before attaining the age of 55 years, can only apply for compassionate appointment. Since the petitioner's father retired from service due to medical incapacitation before attaining the age of 55 years, the petitioner has a right to apply for grant of compassionate appointment in accordance with voluntary retirement scheme framed by the opposite parties-UCO Bank.

4. Mr. S.K. Mohanty, learned counsel for the opposite parties, on the other hand, contended that since the petitioner's father took voluntary retirement from service, the benefit of compassionate appointment to the petitioner is not admissible and, as such, he supported the order of rejection communicated under Annexure-4, the letter dated 22.09.2015.

5. In exercise of the powers conferred by clause (f) of sub-section (2) of section 19 of the Banking Companies (Acquisition and Transfer of Understandings) Act, 1970, the Board of Directors of UCO Bank, after consultation with the Reserve Bank of India and with the previous sanction of the Central Government, framed a regulation called "UCO Bank

(Employees') Pension Regulations, 1995. Under the said Regulations, after retirement of the petitioner's father on medical ground, he is entitled to get pension. As the same was not adequate, the petitioner applied for compassionate appointment, because the breadwinner of the family was handicapped and unable to manage the family with paltry sum of money. On 29.09.2014, the UCO Bank floated a scheme for compassionate appointment in bank under Annexure-2.

6. Some of the clauses, which are relevant for the purpose of this case, are extracted hereunder:-

"1. COVERAGE:

1.1 To a dependent family member of permanent employee of UCO Bank who-

(a) *dies while in service (including death by suicide).*

(b) is retired on medical grounds due to incapacitation before reaching the age of 55 years.

(incapacitation is to be certified by a duly appointed Medical Board in a Government Medical College/ Government District Head Quarters Hospitals/Panel of Doctors nominated by the Bank for the purpose).

xx xx xx

4. POSTS TO WHICH APPOINTMENTS CAN BE MADE

4.1.The appointment shall be made in the clerical and sub-ordinate cadre only.

5. ELIGIBILITY

5.1 The family is indigent and deserves immediate assistance for relief from financial dissolution; and

5.2 Applicant for compassionate appointment should be eligible and suitable for the post in all respects under the provisions of the relevant Recruitment Rules.

xx xx xx

7. RELAXATIONS

7.1. Upper age limit cloud be relaxed wherever found to be necessary. The lower age limit should, however, in no case be relaxed below 18 years of age;

(Note-1 : Age eligibility shall be determined with reference to the date of application and not the date of appointment;

Note-2 : Authority competent to take a final decision for making compassionate appointment in a case shall be competent to grant relaxation of age limit also for making such appointment).

8. TIME LIMIT FOR CONSIDERING APPLICATIONS

8.1 Application for employment under the Scheme from eligible dependent should normally be considered upto five years from the date of death or retirement on medical grounds and decision to be taken on merit in each case."

7. In view of the provisions mentioned above, petitioner's father, who was rendering service under UCO Bank, took voluntary retirement from service on medical ground on 27.05.2015. Thereafter, the petitioner submitted application for compassionate appointment on 02.07.2015, a copy of which has been annexed as Annexure-A to the counter affidavit filed on behalf of the opposite parties. Serial No.9 of the application form, which was submitted by the petitioner, reads thus:-

9.	Reason for request for voluntary retirement (If request is under medical grounds, please state the ailment)/Resignation.	Medical Grounds

To the said application for compassionate appointment, an unfit certificate was appended, which was issued by the Superintendent, SCB Medical College and Hospital, Cuttack. It has been specifically mentioned therein that the petitioner's father was suffering from bilateral diabetic foot ulcer and hypertension CKD and was not able to fit for any other work or incapacity of his duty in office. It is therefore clear that petitioner's father sought voluntary retirement on medical ground and on consideration of the unfit certificate, referred to above, he was allowed to take voluntary retirement. The contention of the petitioner that his father took voluntary retirement on medical ground is evident from the application for voluntary retirement which is annexed to the counter affidavit filed on behalf of the opposite parties as Annexure-A. Therefore, the reason for non-grant of benefit of compassionate appointment to the petitioner is contrary to the scheme framed by the opposite parties UCO Bank.

8. Furthermore, the application for compassionate appointment having been filed within five years period of retirement of the petitioner's father, the same could not have been rejected on the ground that by the time the petitioner made the application his father was not an employee of the UCO Bank. Apart from the same, sub-clause (b) to clause-1, which deals with coverage, clearly envisages that a dependent family member of permanent employee of UCO Bank who is retired on medical grounds due to incapacitation before reaching the age of 55 years, and on the basis of the report furnished by the Superintendent of SCB Medical College and Hospital, Cuttack the petitioner is entitled to get compassionate appointment. Furthermore, in view of clause-5 of the scheme the family of the petitioner being in indigent condition deserving immediate assistance, the application of the petitioner for compassionate appointment should not have been rejected.

9. In ***Haryana State Electricity Board v. Hakim Singh***, (1997) 8 SCC 85, the Supreme Court explained the rationale of the rule relating to compassionate appointment in these words:

> *"The rule of appointments to public service is that they should be on merits and through open invitation. It is the normal route through which one can get into a public employment. However, as every rule can have exceptions, there are a few exceptions to the said rule also which have been evolved to meet certain contingencies. As per one such exception relief is provided to the bereaved family of a deceased employee by accommodating one of his dependants in a vacancy. The object is to give succor to the family which has been suddenly plunged into penury due to the untimely death of its sole breadwinner. This Court has observed time and again that the object of providing such ameliorating relief should not be taken as opening an alternative mode of recruitment to public employment."*

Similar view has also been taken in ***Commissioner of Public Instructions v. K.R. Vishwanath***, (2005) 7 SCC 206.

10. In ***State of Haryana v. Ankur Gupta***, (2003) 7 SCC 704, the apex Court held that such appointments cannot be made *dehors* any statutory policy and, more particularly, the compassionate appointment shall be done under a scheme providing therefor and such scheme must be commensurate with the constitutional scheme of equality.

11. Considering the factual aspects, as well as the law discussed above, this Court is of the considered view that the communication dated 22.09.2015 in Annexure-4 rejecting the application of the petitioner for compassionate appointment on the ground that the petitioner's father had taken voluntary retirement on 27.05.2015 and the petitioner submitted application for compassionate appointment on 02.07.2015, after his father retired from service, cannot sustain in the eye of law and is liable to be quashed and is accordingly hereby quashed. Consequentially, the opposite parties are directed to consider the application of the petitioner for compassionate appointment in terms of the compassionate appointment scheme floated, vide circular dated 29.09.2014 in Annexure-2, as expeditiously as possible, preferably within a period of three months from the date of communication of this order.

12. The writ petition is thus allowed. No order as to costs.

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2019 (II) ILR – CUT- 391

D. DASH, J.

CRA NO. 63 OF 2002

JUDHISTIR PATRA & ORS. ……..Appellants

.Vs.

STATE OF ORISSA ……Respondent

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 21 – Conviction and sentence – Seizure of brown sugar – Pre-conditions under section 50 for search of the accused person – Non compliance of such mandatory provisions – Effect of – Held, in view of the evidence there can be no finding as to the compliance of the provision of section 50 of the Act in its letter and spirit which is the base of the prosecution case – These rights are available to safeguard the accused persons from false implication and planting of cases having serious consequences and thus the evidence on that score has to be unimpeachable – The findings of the trial court on the score of compliance of the provision of section 50 of the Act is vulnerable – Conviction not sustainable.

For Appellants : M/s.D.P.Dhal, K.Dash, M/s. D.Panda, A.Parida, D.Pr. Dhal, G.R.Mohanty, D.K.Pattnaik, A.K.Budhia, S.K.Tripathy, D.Panda, S.S.Ghosh, P.K.Routray.

For Respondent : Mr. K.N.Nayak, Addl. Standing Counsel.

JUDGMENT Date of Hearing & Judgment: 24.04.2019

D. DASH, J.

This appeal has been directed against the judgment of conviction and order of sentence dated 15.03.2003 passed by the First Additional Special Judge, Puri in T.R. Case No. 3/91 of 2001/2000.

By the impugned judgment, the appellants have been convicted for commission of offence under section 21 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter called as 'the Act') and accordingly they have been sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- each in default to undergo rigorous imprisonment for a period of two years.

It may be mentioned here that during pendency of the appeal the appellant no.1 having died, the appeal in so far as that appellant no.1 is concerned has abated. In view of that the reference to the appellants hereinafter be taken as and for the appellant nos. 2 and 3.

2. The prosecution case in short is that on 19.08.2000 around 1.00 PM the I.I.C. of Konark Police Station (P.W.12) received reliable information as regards illegal possession of brown sugar (heroin) and sale of the same in the new bus stand area at Konark by the appellants. Having entered the same in the station book of the police station, he informed the said fact to the S.D.P.O. and Superintendent of Police, Puri over telephone in order to verify the correctness of the information. He with other police staffs left the police station at 1.15 PM in the official jeep carrying with them, two independent witnesses, P.Ws. 1 and 2. Having arrived at the Radio repairing shop of deceased accused Judhistir in the new bus stand area at Konark, they surrounded the said shop to prevent any one's escape from the place. It is stated that three persons were inside the shop and they gave their identity being so asked, who are the accused persons. Being told about the suspicion that they were having the brown sugar (heroin) with them, P.W.12 while expressing his intention to search, asked them as to whether they wanted to be searched in presence of a Gazetted Officer or an Executive Magistrate. It is stated that they opted in writing to be searched in presence of the Executive Magistrate. So, the A.S.I., P.W.7 was deputed to call the then Additional Tahasildar-cum-Executive Magistrate, P.W.6 to the spot for personal search of the appellants to be carried out. He arrived at the spot and gave his identity to the appellants. After giving personal search of the members of the raiding party and also others present to the accused persons; and then observing all the formalities, personal search of the accused persons one after the other commenced around 2.00 PM in presence of the Executive Magistrate, P.W.6 and other witnesses, P.Ws. 1 and 2 inside that Radio repairing shop. It is next stated that one polythene packet of brown sugar (heroin) was recovered from the back side pant pocket of accused Judhistir (since dead) and the packet net content of the brown sugar come to weight 11 grams. Similarly, the personal search of Pravat being carried out, one polythene packet of brown sugar (heroin) was recovered from the left pocket of his shirt and the next weight of the contents of brown sugar (heroin) therein came to 7 grams; at last the personal search of accused Ajay was taken up and from his left front pocket of the shirt, a polythene packet containing brown sugar (heroin) of 6 grams was recovered. It is stated that the samples were collected from the contents of each of those packets recovered from the accused persons separately and all other formalities including the preparation of the seizure list etc were observed. It is the case of the prosecution that after the search, recovery, seizure and observation of all such formalities, at the spot, the accused persons were arrested around

5.30 PM and thereafter FIR was lodged at the Police Station giving rise to the registration of Konark P.S. Case No. 62 of 2000 for commission of offence under section 21 of the NDPS Act.

3. Finally on completion of the investigation and after obtaining the report from the chemical examiner which confirmed the samples sent for examination as 'Diacetyl Morphine' (heroin/brown sugar) charge sheet was placed.

Accordingly, the accused persons faced the trial for offence under section 21 of the NDPS Act for being found to have been in possession of brown sugar (heroin).

The case of the accused persons is that of complete denial and false implication.

4. The trial court on analysis of evidence of twelve witnesses examined from the side of the prosecution and upon scrutiny of the documentary evidence, more particularly the FIR, Ext.4, seizure lists, report of the chemical examiner as also the consent memos said to have been given by the accused persons prior to their personal search, besides other documents has held the accused persons guilty for commission of offence under section 21 of the NDPS Act and they have been sentenced as aforesaid. Hence the appeal.

5. Learned counsel for the appellants at first submits that the finding of conviction returned by the trial court against the accused persons is vulnerable for non-compliance of the mandatory provision of section 50 of the N.D.P.S.Act. It is his submission that on close scrutiny of the evidence of P.Ws. 6 and 12 with a simultaneous reading being given to the evidence of other witnesses and on perusal of the seizure lists as well as the purported consent memos, no finding can be recorded that these accused persons were made aware of their right of being searched either before a Gazetted Officer or an Executive Magistrate and that as per their desire and volition they have been so searched before the Executive Magistrate, P.W.6, having so opted. According to him, the evidence on this score is wholly unacceptable and therefore the finding of conviction of the accused persons cannot be sustained as the very search and seizure forming the foundation of the prosecution case stand vitiated. In this connection, he has taken me through the depositions of the witnesses, especially P.Ws. 6 and 12 as also the seizure lists, Exts. 1/1, 2/1 and 3/1 and those consent memos.

6. Learned counsel for the State refuting the above submission contends that if the evidence of P.Ws. 6 and 12 are simultaneously read and appreciated in proper perspective, the finding of the trial court as to the compliance of the provision of section 50 of the Act cannot be found fault with. It is his submission that some minor discrepancies in the evidence of P.Ws. 6 and 12 ought not to be given so much of importance to discard their evidence in entirety as to the non-compliance of the provision of section 50 of the Act when there is no material to show that they had borne any grudge to falsely rope in the accused persons.

7. In view of the rival submission, keeping in mind the settled position of law that in case of personal search of a person suspected to be in possession of narcotic drugs or phycotropic substance, the compliance of the provision of section 50 of the Act in its letter and spirit stands as the mandate, the court is called upon to address the point raised by examining the evidence let in by the prosecution on that score in order to judge the sustainability of the finding of the trial court on that aspect. P.Ws. 1 and 2 who have been examined as the witnesses to the personal search of the accused persons as having gone with the members of the raiding party to the spot and who have been cited as witnesses to the so called seizure of brown sugar (heroin) from the possession of the accused persons have not supported the case of the prosecution and they having resiled from their previous versions given before the investigating officer, have been permitted to be cross-examined by the prosecution. It is their evidence that their signatures were taken on the blank papers though they have not seen any such search and seizure which form the foundation of the case of the prosecution.

P.W.6 is the star witness of the prosecution in so far as the compliance of section 50 of the Act as also the search, recovery and seizure are concerned as he is the Executive Magistrate in whose presence the entire search of three accused persons is said to have been carried out leading to recovery of contraband items from their possession. It is his evidence that on 19.08.2000, the I.I.C., P.W.12 had given the requisition to the Sub-Collector for deputation of an Executive Magistrate sending a memo to him and accordingly, he arrived at the spot. He has not stated to be present at the spot by the time of arrival of the members of the raiding party and his evidence is that he had not accompanied the members of the raiding party. As per his version, P.W.12 went to the spot first with others and he arrived later. P.W.7 is the A.S.I. of Police who was a member of the raiding party. It is his evidence that from the spot, P.W.12 sent him to the Additional Tahasildar,

P.W.6 with a requisition and he went in the official jeep with that requisition and brought P.W.6 to the spot whereas P.W.6 is silent to the effect that being approached by P.W.7 with the memo of the requisition, he went in the official jeep brought by P.W.7. The other witness is P.W.9 who being the constable is the member of the raiding party. His evidence is that after arriving at the spot with the members of the raiding party, they surrounded the shop of the deceased-accused Judhistir and then the IIC (P.W.12) called the Executive Magistrate and in presence of the Executive Magistrate they had conducted the search operation leading to recovery and seizure of the brown sugar from the possession of the accused persons.

Now both the P.Ws. 6 and 7 are silent on the score that the accused persons were made aware of having the right of being searched in person in presence of an Executive Magistrate or a Gazetted Officer, if they so like and they so opted to be searched in presence of Executive Magistrate. None of these two witnesses has stated that to his seeing any such communication was initiated from the side of the P.W.12 with the accused persons and pursuant to their desire further on their giving the option in writing, the service of the Executive Magistrate was so requisitioned by P.W.12. P.W.10 is the another A.S.I. of Police and a member of the raiding party. He has gone to say that P.W.12 disclosed before the accused persons that he was entertaining the reasonable suspicion as to the possession of the brown sugar (heroin) by them and so wanted to search. This witness is silent whether the P.W.12 told the accused persons to exercise any such option as to the search in presence of Executive Magistrate and accordingly, based on that and pursuant to the exercise of their option of being searched before the Executive Magistrate, they gave it in writing and then the A.S.I. of Police was sent in the official jeep to bring the Executive Magistrate to the spot, where after the Additional Tahasildar, P.W.6 arrived.

8. Coming to the evidence of P.W.12, it is seen that on their arrival at the spot after he expressed his suspicion before the accused persons as to the possession of the brown sugar by them and his intention to have the personal search, he told the accused persons of the option which they enjoy by virtue of the statutory provision and pursuant to their desire of being searched in presence of the Executive Magistrate, the A.S.I. of Police was sent in the official jeep to bring the Additional Tahasildar-cum-Executive Magistrate who arrived some time thereafter. With such evidence as to the commencement of the search in presence of the Executive Magistrate P.W.6, on going through the seizure list, Ext.1/1 in support of the seizure of

contraband from the possession of the accused-Judhistir since dead, it is found that the Executive Magistrate, P.W.6 was called after he exercised his option in his presence. Similar is the state of affair in the seizure list, Ext.2/2 in relation to the seizure of brown sugar (heroin) from the possession of accused Ajay. Keeping in view those two documents when the other seizure list concerning the seizure of contraband from accused Pravat is glanced at, it is seen that in the description of the same, there has been scoring of the word "PURBARU" meaning "before" or "prior to" which refers as to the presence of the Executive Magistrate at the spot before hand and not being called pursuant to the exercise of the option by the accused persons in that regard as available under section 50 of the Act. If the scoring is ignored, then it can be said that the same was carried after his arrival and in his presence and when the scoring is taken as such, then it has to be said that the Executive Magistrate was already present with the other members of the raiding party. With such discrepancy when the copy of the requisition given by the P.W.12 to the Sub-Collector requisitioning the service of the Executive Magistrate received in evidence and marked as Ext.14 is glanced at, it is seen to have been reflected there that the same has been sent after receiving the information as regards sale of the brown sugar at the spot and before proceeding to the place to ascertain the correctness of the said information but not after the accused persons so opted to be searched by giving in writing. The evidence of P.Ws. 6, 7 and 12 when are taken into consideration, it is seen that the Executive Magistrate arrived there after the accused persons exercised their option, whereas the connecting documents proved from the side of the prosecution as have been referred to above, do not speak so, that the service of the Executive Magistrate was requisitioned after the exercise of the option by the accused persons. Add to this, the doubt is fortified from the very factum of indication of the police station case number in all those options in writing, said to have been given by the accused persons and in the top of the seizure lists which have not been explained in any manner so as not to be viewed with suspicion. As the above discussed evidence on that score comes under the clouds, even accepting the prosecution case that the accused persons had exercised their option to be searched in presence of the Executive Magistrate, the very presence of the Executive Magistrate at the time of search of the accused persons and the consequential seizure are rendered doubtful.

9. In view of all the above, in my considered view, there can be no finding as to compliance of the provision of section 50 of the Act in its letter

and spirit which is the base of the prosecution case, here. These available right for the accused are to safeguard them from false implication and planting in such cases having serious consequences and thus the evidence on that score have be to unimpeachable which is not the case here. In that view of the matter, the findings of the trial court on that score of compliance of the provision of section 50 of the Act is vulnerable for which the finding of conviction of the appellants for commission of offence under section 21 of the Act cannot sustain.

For the aforesaid discussion and reasons, the judgment of conviction and order of sentence passed by the trial court in TR No.3/91 of 2001/2000 are liable to be set aside which is hereby done.

10. Accordingly, the appeal is allowed. The bail bonds executed by the accused persons shall stand discharged.

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2019 (II) ILR – CUT-397

S. PUJAHARI, J.

CRLMC NO. 126 OF 2019

PANDIA GOUDA .....Petitioner

.Vs.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 167(2) – Default bail for non filing of the charge sheet in time – Charge sheet was not filed on the 120th day but was filed on the 121st day after filing of the bail application – Whether the accused is entitled for bail under Section 167(2) of Cr.P.C. irrespective of the nature of the offence alleged? – Held, Yes.

Case Laws Relied on and Referred to :-

1. 1985 (1) OLR 105 : N. Sureya Reddy .Vs. State of Orissa.
2. (1996) 10 OCR : Ada alias Adeita Behera .Vs. State.
3. AIR 1986 SC 2130 : Dhaganti Satyanarayana & Ors. .Vs. State of Andhra Pradesh.
4. AIR 1992 SC 1768 : Central Bureau of Investigation, Special Investigation Cell-I, New Delhi .Vs. Anupam J. Kulkarni.
5. (1996) 11 OCR (SC) 167 : Sate of M.P. .Vs. Rustam & Ors.
6. (2000) 19 OCR 372 : Ada alias Adeita Behera (supra) and Jubraj Bariha .Vs. State of Orissa.
7. (2004) 27 OCR – 755 : Binod Kumar Nanda .Vs. State of Orissa.

8. (1996) 10 OCR (SC) 329 : State through C.B.I. .Vs. Mohd. Ashraft Bhat & Anr.
9. AIR 2005 SC 752 : Central Board of Dawoodi Bohra Community & Anr. .Vs. State of Maharashtra & Anr.
10. AIR 1992 SC 1768 : Central Bureau of Investigation, Special Investigation Cell-I, New Delhi .Vs. Anupam J. Kulkarni.
11. (2014) 59 OCR (SC) -226 : Union of India through C.B.I. .Vs. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav.
12. (2001) 5 SCC 453 : Uday Mohanlal Acharya .Vs. State of Maharashtra.

For Petitioner : Choudhury Aswin Kumar Das, Govt. Counsel.

ORDER Date of Order : 17.05.2019

S. PUJAHARI, J.

Heard, the learned counsel for the petitioner and the learned counsel for the State.

2. The petitioner, in this case having been denied to avail of the benefit of grant default bail under Section 167(2) of Cr.P.C. vide order dated 02.01.2019 passed by the learned Special Judge-cum-2nd Additional Sessions Judge, Berhampur in G.R. Case No.86 of 2018 arising out of Buguda P.S. Case No.204 of 2018, though according to him, charge sheet was not filed on the 120th day but was filed on the 121st day after filing of the bail application, challenged the said order to be illegal. Therefore, he is entitled to bail under Section 167(2) of Cr.P.C. by setting aside the impugned order.

3. It appears that the learned Special Judge-cum-2nd Additional Sessions Judge, Berhampur, taking note of the law laid down in the case of ***N. Sureya Reddy v. State of Orissa, reported in 1985 (1) OLR 105,*** wherein it has been held that when 90th day, which is 120 days in Odisha vide an amendment presented, which is a day for filing of the charge sheet is a holiday, on the next day if the charge sheet is filed, the same should be treated as sufficient compliance and in this case as 120th day was holiday, the charge sheet was filed on the next working day, there was no default on the part of the prosecution for filing of charge sheet on 120th day and as such, the petitioner in view of the ratio laid down in the case of ***N. Sureya Reddy (supra)*** was not entitled to bail under Section 167(2) of Cr.P.C.

4. Learned counsel appearing for the petitioner submits that such view of the learned Judge has no sanction of law inasmuch as this Court in the case of ***Ada alias Adeita Behera v. State, reported in (1996) 10 OCR*** has

already held that the decision of this Court in the case of ***N. Sureya Reddy (supra)*** has been impliedly overruled by Hon'ble the Supreme Court in the case of ***Dhaganti Satyanarayana and others v. State of Andhra Pradesh, reported in AIR 1986 SC 2130***; and in the case of ***Central Bureau of Investigation, Special Investigation Cell-I, New Delhi v. Anupam J. Kulkarni, reported in AIR 1992 SC 1768***; so also the decision rendered in the case of ***Sate of M.P. v. Rustam and others, reported in (1996) 11 OCR (SC) 167*** wherein it has been stated that either the date of remand or date of charge sheet has to be excluded in computation of the period under Section 167(2) of Cr.P.C. invoking the provision of General Clauses Act, has also not been accepted by this Court taking note of another later Bench decision of a Bench co-equal strength of the Apex Court and also this Court in the cases of ***Ada alias Adeita Behera (supra)*** *and* ***Jubraj Bariha v. State of Orissa, reported in (2000) 19 OCR 372.***

5. This Court, in the case of ***Binod Kumar Nanda v. State of Orissa, reported in (2004) 27 OCR – 755,*** relying on the aforesaid law laid down in the case of ***Jubraj Bariha (supra)*** wherein placing reliance on the cases of ***Rustam (supra)*** and ***State through C.B.I. v. Mohd. Ashraft Bhat and another, reported in (1996) 10 OCR (SC) 329***; and ***Ada alias Adeita Behera (supra)*** have held that the date of remand is to be included in computing the period of detention as prescribed under Section 167(2) of the Cr.P.C.

6. In view of the aforesaid, when the right had already accrued to the petitioner on the 121st day of his detention of remand by the time he has filed the petition and no charge sheet was filed and the same was filed later, there was no apparent reason on the part of the learned Judge to refuse him to grant bail, submits the learned counsel for the petitioner. As such, learned counsel for the petitioner submits to set aside the impugned order and direct the court below to release the petitioner on bail.

7. However, learned counsel for the State submits that since the petitioner has been indicted in heinous and serious offences committed under Sections 450/376(2)(i) of I.P.C. read with Section 6 of the POCSO Act and on the 121st day itself charge sheet was filed before consideration of the prayer for bail of the petitioner and also the day of remand is to be excluded, in view of the law laid down in the case of ***Rustam (supra)***, the petitioner has made out no case for his release on bail. So far as the law laid down in the case of ***Jubraj Bariha (supra)*** is concerned, in view of the a decision of the constitution Bench of the Supreme Court in the case of ***Central Board of***

Dawoodi Bohra Community and another v. State of Maharashtra and another, reported in AIR 2005 SC 752 on the law precedent, it having been held that "the law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength", the case of ***Rustam (supra),*** therefore, can be said to be the law inasmuch as the law laid down in the case of ***Jubraj Bariha (supra)*** with regard to precedent can be said to have been impliedly overruled. Therefore, the petitioner has made out no case for bail.

8. It is true that in the case of ***N. Sureya Reddy (supra)***, this Court has held that Section 10 of the General Clauses Act is made applicable for extension of the period of filing of charge sheet and on the day of filing of charge sheet, if it is a holiday of the court and charge sheet under Section 167(2) of Cr.P.C. is filed on the next working day, the same is sufficient compliance, but this Court, in the case of ***Ada alias Adeita Behera (supra)***, has held that the same has already been impliedly overruled by subsequent decision of the Apex Court.

9. In the case of ***Dhaganti Satyanarayana and others, reported in AIR 1986 SC 2130*** the Apex Court have held at paragraph-30 as follows:-

> *"As the terms of proviso (a) with reference to the total periods of detention can be interpreted on the plain language of the proviso itself we do not think it is necessary to invoke the provisions of the General Clauses Act or seek guidance from the Limitation Act to construe the terms of the proviso."*

10. In the case of ***Central Bureau of Investigation, Special Investigation Cell-I, New Delhi v. Anupam J. Kulkarni, reported in AIR 1992 SC 1768*** the Apex Court again held that the period of fifteen days in Section 167 of Cr.P.C. starts running as soon as the accused is produced before the Magistrate.

Placing reliance on the aforesaid two decisions, this Court in the case of *Ada alias Adeita Behera (supra)* have held that the period has to be calculated from and including the day of remand by the Magistrate under Section 167 of Cr.P.C. and in view of the same, the case of ***N. Sureya Reddy (supra)*** has been impliedly overruled. However, the learned Judge in oblivious to the same placed reliance on the ratio of the case of ***N. Sureya Reddy (supra)*** which has since been held to have been impliedly overruled by this Court, for rejection of the prayer.

11. Furthermore, so far as the ratio in the case of ***Rustam (supra)*** is concerned, therein it has also been held that either the day of remand or the day of filing of final form has to be excluded taking resort to General Clauses Act in computation of the period of completion of investigation under Section 167(2) of Cr.P.C. and this Court taking note of a later Bench decision of the Apex Court in the case of ***Mohd. Ashraft Bhat (supra)*** though have held in the case of ***Jubraj Bariha (supra),*** for computation of the period under Section 167(2) of Cr.P.C., the date of remand is to be included and thereby the General Clauses Act is held not applicable. The said ratio of ***Jubraj Bariha (supra)*** can be said to have been impliedly overruled in view of the ratio laid down in the case of ***Central Board of Dawoodi Bohra Community (supra)*** as the law precedent. Therefore, placing reliance in the case of ***Rustam (supra),*** it can very well be said that the charge sheet filed within the period stipulated and as such, no right had accrued under Section 167(2) of Cr.P.C. to the petitioner for default bail, as submitted by the learned counsel for the State. However, such contention of the learned counsel for the petitioner is without any substance for the reasons that prior to the case of ***Rustam (supra)***, a Bench of co-equal strength of the Apex Court in the case of ***Dhaganti Satyanarayana (supra)*** *and* ***Central Bureau of Investigation, Special Investigation Cell-I, New Delhi (supra)*** have held that General Clauses Act cannot come into play for computation of the period under Section 167 of Cr.P.C.. So, law of precedent, therefore, is also in favour of the petitioner notwithstanding the ratio laid down in the case of ***Jubraj Bariha (supra)*** has since been impliedly overruled vide the ratio laid down in the case of ***Central Board of Dawoodi Bohra Community (supra)*** on precedent of a judicial decisions. The petitioner, therefore, having availed of his right that has accrued on the expiry of 121st day before filing of the charge sheet by filing the application, even if the charge sheet thereafter was filed later on the same day, and before disposal of his application, the same cannot defeat his indefeasible right for being released on bail in any manner. Reliance in this regard can be placed in the decision of ***Union of India through C.B.I. v. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav, reported in (2014) 59 OCR (SC) -226*** wherein the decision rendered by the Apex Court in this regard in the case of ***Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453*** has been affirmed.

12. The heinousness and seriousness of the offence has got nothing to do for grant of default bail that has accrued under Section 167(2) of Cr.P.C. of an accused. Therefore, the contention of the learned counsel for the State to

defend the order of rejection of bail on that ground must fail. Accordingly, the order of the learned trial court impugned here in this case is indefensible.

13. Hence, this Criminal Misc. Case stands disposed of being allowed with a direction to the trial court to release the petitioner on bail under Section 167(2) of Cr.P.C. on such terms and conditions as it deem just and proper.

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2019 (II) ILR – CUT- 402

BISWANATH RATH, J.

W.P.(C) NO. 3321 OF 2018

TIKAYAT NAIK ……...Petitioner

.Vs.

STATE OF ODISHA, PANCHAYATIRAJ DEPT. & ORS. ……Opp. Parties

ORISSA GRAMA PANCHAYAT ACT, 1964 – Section 11 read with sections 25 and 26 – Qualification and disqualifications – Section 11(b) says as a Sarpanch or Naib-Sarpanch, if one has not attained the age of twenty-one years or is unable to read and write Oriya will not be eligible to contest the election whereas section 25 deals with the disqualification of membership of Grama Panchayat – Application under section 26 was filed before the Collector alleging the underage aspect as per section 11(b) – Whether the said petition is maintainable before the Collector? – Held, No – The only remedy was to file an election dispute.

"Therefore, this Court is of no doubt that for the attraction of provision at Section 11(b) of the Act, to the case at hand, the only remedy available to the petitioner was to prefer an Election Dispute under section 30 of the Act and no proceeding under Section 26(2) of the Act is maintainable particularly for the involvement of election of elected Sarpanch having not got the eligibility to contest the election for not his attaining the age of 21 years. It is in the circumstance, this Court finds the proceeding under Section 26(2) of the Act, 1964 was per se not maintainable. It is suffice to mention here that proceeding under 11 Section 26 of the Act can only be invited in the event there is attraction of any disqualification clause involving Section 25 of the Act. For the involvement of the provision of section 11(b) of the Act, proceeding under Section 26 of the Act was not maintainable and should have been dismissed by the Collector on this ground alone." *(Para 5)*

Case Laws Relied on and Referred

1. 2014 (1) OLR (FB) 867 : Debaki Jani .Vs. The Collector & Anr.
2. AIR 1999 SC 1723 : K.Venkatachalam .Vs. A.Swamickan & Anr.
3. 116(2013)CLT 593 : Mamita Thati .Vs. Nepura Pradhan & Anr.
4. 2008(2) OLR 198 : Smt. Parbati Majhi .Vs. Collector, Kalahandi & Anr.

For Petitioner : Mrs.Sujata Jena, Mr. S.Mohanty, P.Mohanty & A.K.Dei.
For Opp.Parties : Mr.U.K.Sahoo, Addl.Standing Counsel.
Mr.S.K.Dalai, M/s. R.K.Mahanta and S.K.Dwibedi.

JUDGMENT Date of Hearing: 14.02.2019 : Date of Judgment: 26.02.2019

BISWANATH RATH, J.

This is a writ petition filed by the election petitioner seeking indulgence of this Court in the order dated 16.12.2017 vide Annexure-7 involving rejection of a dispute under Section 26(2) of the Grama Panchayat Act, 1964 involving Balibandha Grama Panchayat under Jhumpura Block of Keonjhar district. The Section 26 (2) of the Orissa Grama Panchayat Act proceeding before the Collector, Keonjhar was dismissed for devoid of merit.

2. Short background involved in the case is that both the petitioner as well as the opposite party no.5 herein were the candidates in the election for the post of Sarpanch, Balibandha Grama Panchayat under Jhumpura Block of Keonjhar district, a reserved seat. During election process, on coming to know that there is some dispute with regard to the date of birth of the opposite party no.5, making him ineligible to contest the election, for being not completed 21 years, the petitioner during the process of Election filed written objection before the Block Development Officer, Jhumpura Blockopposite party no.4 on the date of scrutiny. It is alleged that on keeping the consideration of such application pending, the election was conducted and in the process, opposite party no.5 was declared elected for the post of Sarpanch on the declaration of result on 27.2.2017. It appears, on 10.3.2017, the petitioner submitted a representation to the Collector, Keonjhar-opposite party no.2 for initiating a proceeding under Section 26(2) of the Orissa Grama Panchayat Act bringing into the notice of the Collector that opposite party no.5 since not completed minimum age of 21 years as on the date of nomination, was ineligible to contest for the post of Sarpanch applying the provision under Section 11(b) of the Orissa Grama Panchayat Act and that opposite party no.5 has participated in the election on false affidavit involving her date of birth as well as residential certificate. It is further alleged that despite repeated approaches, the Collector did not take

appropriate steps within the reasonable period, for which petitioner was compelled to move this Court W.P.(C).No.9284 of 2017, which got disposed of on 19.5.2017 with permission, on withdrawal of the writ petition, to the petitioner for taking resort to proceeding under Section 26(2) of the Orissa Grama Panchayat Act (hereinafter called as "the Act") to the Collector, Keonjhar. Consequent upon such permission, the petitioner moved the proceeding under Section 26(2) of the Act, which was decided on contest with an order of dismissal. Thus, the writ petition involves the challenge to the said impugned order at Annexure-7.

3. Taking to the documents taken in support of the proceeding under Section 26(2) and the provision contained at Section 11(b) of the Act, Mrs. Sujata Jena, learned counsel appearing for the petitioner contended that there is failure of appreciating the allegation involved therein by the Collector and thereby resulting the illegal order of the Collector, which unless be interfered, the impugned order will lead to bad precedent. Mrs. Jena, learned counsel for the petitioner taking this Court to the documents taken in support of the plea of the petitioner before the Collector, further taking this Court to the discussions in the dismissal order of the Collector, submitted that there is no proper appreciation on the allegation of the petitioner resulting the bad impugned order assailed in the writ petition. Taking this Court to the documents and the provision at Section 11(b) of the Orissa Grama Panchayat Act, Mrs.Jena substantiating her contention submitted that for the wrong impugned order, this Court is required to interfere in the impugned order and set aside the same. Mrs. Jena also taking support of two decisions in the case of ***Debaki Jani v. The Collector and another, 2014 (1) OLR (FB) 867*** and in the case of ***K.Venkatachalam v. A.Swamickan and another, AIR 1999 SC 1723***, submitted that for the decisions referred to herein above even though a proceeding under Section 26 (2) of the Orissa Grama Panchayat Act is not maintainable yet High Court in exercise of power under Article 226 of the Constitution of India can interfere in such dispute and grant appropriate relief.

4. In his opposition, Sri S.K.Dalai, learned counsel, representing the counsel on behalf of opposite party no.5 contended that in the event of any of the breach of provision at Section 11 of the Orissa Grama Panchayat Act, nothing prevented the petitioner to approach the Election Tribunal involving the dispute therein. In filing a copy of the election dispute, taking this Court to the plaint of the petitioner submitted before the Collector and the document involving the case, Sri Dalai, learned counsel appearing for the

opposite party no.5 taking this Court to the provision contained in Section 25 of the Orissa Grama Panchayat Act contended that for no breach of the conditions involving Section 25 of the Orissa Grama Panchayat Act, there was no question of entertaining the application under Section 26(2) of the Act. Sri Dalai, learned counsel further submitted that High Court of Orissa in disposal of the writ petition permitting the petitioner to raise dispute under Section 26(2) of the Act can be maximum construed a consideration of the case of the petitioner under the provision of Section 26(2) of the Act and under no circumstance can be construed to be a proceeding in the trap of election dispute. Sri Dalai, learned counsel further taking this Court to a decision of this Court in the case of ***Mamita Thati v. Nepura Pradhan and Anr., 116(2013)CLT 593***, further taking this Court to the cardinal principle decided by the Hon'ble Apex Court, if a thing is required to be done in a particular manner, that has to be done in that manner or not at all, contended that for the clear provision enabling involvement of an election dispute involving the Orissa Grama Panchayat Act and further involvement of the allegation, more particularly, there was no question of interfering in the application under Section 26(2) of the Act. Sri Dalai, learned counsel for the petitioner further taking this Court to the requirement of law under the Grama Panchayat Act contended that for the provision at Section 11(b) a person contesting election for the post of Sarpanch is required to attained the age of 21 years. Thus taking the allegation involved herein, Sri Dalai learned counsel for the contesting opposite party submitted that the opposite party had already completed the age of 20 years and has thus attained 21 years of age and it is not necessary that she has completed the age of 21 years. It is in the above premises, Sri Dalai learned counsel requested this Court for not interfering in the impugned order and prays for dismissal of the writ petition.

5. Considering the rival contentions of the parties and for the relevancy with regard to the provision at Section 11(b) as well as Section 25 of the Orissa Grama Panchayat Act, this Court finds it necessary to take note of both the provisions, which runs as follows:

> Section 11(b) of the Orissa Grama Panchayat Act; Qualification for membership in the Grama Panchayat:
>
> xxx xxx xxx
>
> (b) as a Sarpanch or Naib-Sarpanch, if he has not attained the age of twenty-one years or is unable to read and write Oriya;
>
> xxx x xx xxx
> xxx xxx xxx

Section 25 of the Orissa Grama Panchayat Act.

Disqualification for membership of Grama Panchayat:

(1) A person shall be disqualified for being elected or nominated as a Sarpanch or any other member of the Grama Panchayat constituted under this Act, if he-

(a) is not a citizen of India; or

(b) is not on the electoral roll in respect of the Grama or of the ward, as the case may be; or

(c) is of unsound mind; or

(d) is an applicant to be adjudicated as an insolventor is an undischarged insolvent; or

(e) is a deaf-mute, or is suffering from tuberculosis, or in the opinion of the District Leporcy Officer is suffering from an infectious type of leprosy; or

(f) is convicted of an election offence under any law for the time being in force; or

(g) is convicted for an offence involving moral turpitude and sentenced to imprisonment of not less than six months unless a period of five years has elapsed since his release or is ordered to give security for good behavior under Section 110 of the Code of Criminal Procedure, 1898 (5 of 1998); or

(h) holds any office of profit under the State or Central Government or any local authority; or

(i) is a teacher in any school recognized under the provisions of the Orissa Education Code for the time being in force; or

(j) holds the office of a Minister either in the Central or State Government; or

(k) has been dismissed from the service of the State Government or of any local authority; or

(l) being a member of a Co-operative society, has failed to pay any arrear of any kind accrued due by him to such society before filing of the nomination paper in accordance with the provisions of this Act and the rules made thereunder;

Provided that in respect of such arrears a bill or a notice has been duly served upon him and the time, if any, specified therein has expired; or

(m) is in the habit of encouraging litigation in the Grama and has been declared to be so on enquiry by the Collector in the prescribed manner or by any other authority under any law for the time being in force; or

(n) is interested in a subsisting contract made with or in any work being done for the Grama Panchayat or the Samiti, or any government except as a shareholder other than a Director in an incorporated company or as a member of a Co-operative Society; or

(o) is a paid and trained legal practitioner on behalf of the Grama Sasan; or

(p) is a member of the Orissa Legislative Assembly or of either of the Houses of Parliament; or

(q) is a member of the Samiti elected under Clause (h) of Sub-Section (1) of Section 16 of the Orissa Panchayat Samiti Act, 1959 (Orissa Act 7 of 1960); or

(r) is disqualified by or under any law for the time being in force for the purposes of an election to be Legislature of the State; or (s) is disqualified by or under any law made by the Legislature of the State; or

(t) is in arrear of any dues payable by him to the Grama Panchayat; or

(u) has more than one spouse living; or

(v) has more than two children;

Provided that the disqualification under Clause (v) shall not apply to any person who has more than two children on the date of commencement of the Orissa Grama Panchayats (Amendment) Act, 1994 or, as the case may be, within a period of one year of such commencement, unless he begets an additional child after the said period of one year;

2. A Sarpanch or any other member of a Grama Panchayat shall be disqualified to continue and shall cease to be a member if he-

(a) incurs any of the disqualifications specified in Clauses (a) to (i) "Clauses (m) to (p) and Clauses (t) to (v) or Sub-section (1); or

(b) has failed to attend three consecutive ordinary meetings held during a period of four months commencing with effect from the date of the last meeting which he has failed to attend, or

(c) being a legal practitioner appears or acts as such against the Grama Sasan; or

(d) Being a member of a Co-operative Society has failed to pay any arrears of any kind accrued due by him to such society within six months after a notice in this behalf has been served upon him by the society.

(3) Without prejudice to the provisions of the foregoing Sub-sections the Sarpacnh of a Grama Panchayat shall be disqualified to continue and cease to be the Sarpanch, if he fails to attend three consecutive ordinary meetings of the Samiti, of which he is a member, without the previous permission in writing of the said Samiti;

(4) Notwithstanding anything contained in the foregoing sub-sections-

(a) The State Government may remove any one or more of the disqualifications specified in Clauses (f), (g), (k) and (l) of Sub-section (1);

(b) When a person ceases to be a Sarpanch or NaibSarpanch or any other member in pursuance of Clause (g) of Sub-section (1), he shall be restored to office for such portion of the term of office as may remain unexpired on the date of such restoration, if the sentence is reversed or quashed or appeal or revision on the offence is pardoned or the disqualification is removed by an order of the State Government; and any person filling the vacancy in the interim period shall on such restoration vacate the office."

Reading both the above provisions, this Court from reading of Section 11(b) of the Act, finds this is a provision making a candidate for the post of Sarpanch and Naib-Sarpanch ineligible, if he has not attained the age of 21 years or is unable to read and write Oriya. Looking to the allegation in the plaint to the Collector, it became clear that the challenge is made to the election of the petitioner to the post of Sarpanch on her not satisfying the age criteria at Section 11(b) of the Orissa Grama Panchayat Act. However, in the specific ground of challenge, this Court finds for there being no availability of the ground under Section 25 of the Orissa Grama Panchayat Act, the only remedy for the petitioner was to avail the remedy under Section 30 of the Orissa Grama Panchayat Act. Admittedly, there is no election dispute within the time framed. Further, facts involved herein also discloses that the petitioner moved this Court in an earlier writ petition much after the time for raising an election dispute, may be for no scope available to the petitioner, this Court considering the liberty requested by the petitioner and as an application under Section 26(2) of the Orissa Grama Panchayat Act was already pending before the Collector, this Court permitted her to move under Section 26(2) of the Act to the Collector of the concerned district. Now looking to the provision at Section 25 read with Section 26(2) of the Act, this Court finds the provision at Section 25 does not include ineligibility of a candidate on account of not attaining the age of 21 years on the date of filing of the nomination. Further, reading of both the provisions at Section 11 as well as Section 25 of the Orissa Grama Panchayat Act, this Court finds Section 11 of the Act deals with qualification for membership in a Grama Panchayat election whereas Section 25 of the Act deals with disqualification of membership of a Grama Panchayat for being elected or nominated as a Sarpanch. Provision at Section 11 of the Act restricts the persons from contesting the election. Provision at Section 25 of the Act restricts a person from continuing even after being elected. Looking to the allegation, particularly, attracting the provision at Section 11(b) of the Act to make the elected candidate disqualified, here looking to the provision at Section 26 of the Act, this Court finds the Section 26 of the Act provides procedure to give effect to disqualification, which undoubtedly means the cases involving the adjudication of disqualification as enumerated under section 25 of the Act. Therefore, this Court is of no doubt that for the attraction of provision at Section 11(b) of the Act, to the case at hand, the only remedy available to the petitioner was to prefer an Election Dispute under section 30 of the Act and no proceeding under Section 26(2) of the Act is maintainable particularly for the involvement of election of elected Sarpanch having not got the eligibility

to contest the election for not his attaining the age of 21 years. It is in the circumstance, this Court finds the proceeding under Section 26(2) of the Act, 1964 was per se not maintainable. It is suffice to mention here that proceeding under Section 26 of the Act can only be invited in the event there is attraction of any disqualification clause involving Section 25 of the Act. For the involvement of the provision of section 11(b) of the Act, proceeding under Section 26 of the Act was not maintainable and should have been dismissed by the Collector on this ground alone. It is at this stage, a decision of this Court in the case of ***Smt. Parbati Majhi v. Collector, Kalahandi and another, 2008(2) OLR 198*** where the case also involves initiation of a proceeding under Section 26(2) of the Act on account of the elected Sarpanch not attaining the age of 21 years thereby attracting the provision of section 11(b) of the Act. In the aforesaid decision, this Court in a Single Bench has also the view that in such circumstance, the only remedy was to go for the election dispute and proceeding under Section 26(2) of the Act was not maintainable. For the observation of this Court that the proceeding under Section 26(2) of the Act before the Collector was not maintainable, this Court is not inclined to interfere in the merit involving the impugned order leaving other issues involved herein to be decided in appropriate application, if any, raised.

6. It is at this stage, considering the other request of the learned counsel for the petitioner that for the allegation contained therein, this Court had otherwise the scope of interfering in the impugned action in exercise of power under Article 226 of the Constitution of India. This Court taking into account the nature of the writ petition, the cause title, the pleadings, the prayer and the challenge to the impugned order herein finds the writ petition even though nomenclated as an application under Article 226 read with Article 227 of the Constitution of India can under no stretch of imagination, be construed to be a writ petition under Article 226 of the Constitution of India. For the exercise of power of this Court under Article 227 of the Constitution of India, this Court finds the nature of contest cannot expand its jurisdiction and treat the writ petition a petition under Article 226 of the Constitution of India. In the circumstances, this Court observes that there is no application of the decision in the case of K.Venkatachalam (supra) to the case at hand.

7. In the circumstance and for the finding of this Court that application under Section 26(2) of the Orissa Grama Panchayat Act for the facts involved therein was otherwise not maintainable, this Court, accordingly, finds no scope for interfering in the impugned order involving the writ petition. Consequently, the writ petition fails. However, there is no order as to cost.

2019 (II) ILR – CUT- 410

BISWANATH RATH, J.

W.P.(C) NO. 5772 OF 2018

SMT. SARASWATI NAYAK .....Petitioner

.Vs.

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

(A) ORISSA GRAMA PANCHAYAT ACT, 1964 – Section 11 (b) – Qualification for membership in the Grama Panchayat – As a Sarpanch or Naib-Sarapanch, "if he has not attained the age of twenty-one years or is unable to read and write Oriya" – Interpretation of the provision – Held, the provision is clear to the extent that one must have attained the age of 21 years on the date of filing of nomination, which means a person already completing 20 years of age.

(B) ELECTION DISPUTE – Dispute Relating to the age of the Candidate – Election petitioner has relied on the documents such as Voter List, Copy of Aadhar Card and Copy of HSC Certificate for proving the age whereas the returned candidate has relied on documents such as original Birth Certificate, Authorisation Letter by the Medical Officer in-charge-cum-Registrar of Birth and Death, the Birth & Death Register, the concerned page of the Birth & Death Register – Which documents are to be accepted? – Held, Considering the decisions and the settled position of law through the judgments referred to herein above, this Court finds, the judgments referred to by the contesting O.P.5 are of no help to the case at hand – It is at this stage considering the findings of both the Election Tribunal as well as the Appellate Court on giving emphasis to the non-statutory document over the statutory document and for the law of land, as discussed herein and taken note herein above, this Court finds, both the courts erred in law in appreciating the material documents available on record and discarding the same – There is no doubt that both the courts below failed in appreciating the value in the documents filed by the elected candidate – As a consequence while answering both the questions framed in favour of the petitioner, this Court interfering with the impugned judgments sets aside the both. (Paras 7 & 8)

Case Laws Relied on and Referred to :-

1. (2007) 37 OCR 680 : Siba Prasad Jena .Vs. Puspanjali Jena & Anr.
2. AIR 1965 SC 282 : Brij Mohan Singh .Vs. Priya Brat Narain Sinha & Ors.
3. 2010 (II) CLR (SC) : Madan Mohan Singh & others .Vs. Rajni Kant & Anr.
4. 2004 (Supp.) OLR 335 : Chandrakanti Jena .Vs. Banalata Jena & & Ors.
5. 2006 (Supp.-I) OLR- 111 : Prasanta Kumar Sahoo .Vs. Chiranjaya Sahoo & Ors.

6. AIR 1965 SC 282 : Brij Mohan Singh .Vs. Priya Brat Narain Sinha & Ors.
7. 2010 (II) CLR (SC) 660 : Madan Mohan Singh & Ors .Vs. Rajni Kant & Anr.

For Petitioner : M/s. A.P.Bose, V.Kar, D.J.Sahu, S.S.Dash & N.Hota
For Opp.Parties : Sri S.N.Mishra, Addl. Gov. Adv.
M/s.P.K.Ray, A.R.Sethy & S.Devi.

JUDGMENT Date of Hearing : 09.04.2019 : Date of Judgment : 19.04.2019

BISWANATH RATH, J.

This is a writ petition under Article 227 of Constitution of India involving the impugned judgments arising out of Election Appeal No.1 of 2018 disposed of by the Additional District Judge, Champua, vide Annexure-1 thereby confirming the judgment involving Election Misc. Case No.2 of 2017 disposed of by the Civil Judge (Jr.Divn.), Champua, vide Annexure-2.

2. Background involving the case is that O.P.5 herein filed election dispute involving the petitioner, the elected candidate, O.P.4 therein and another contesting candidate, Sulochana Nayak, O.P.5 therein thereby assailing the election of the present petitioner on the premises of the present petitioner being a disqualified candidate to contest the election for her not attaining the age of 21 years and that there has been illegal acceptance of the nomination paper of O.P.4 therein.

Background involving the election dispute remains that O.Ps.4 & 5 and the present petitioner contested for the post of Sarapanch of Sadangi Gram Panchayat under Champua Block. Election for the post of Sarapanch was held on 21.2.2017. O.P.5 was allotted with symbol “Sun” whereas O.P.4 herein also appearing as O.P.5 in the election dispute was allotted with symbol “Machha” and the present petitioner appearing as O.P.4 therein was allotted with symbol “Khola Bahi”. Date for filing of nomination was 17.1.2017 and the date for scrutiny was on 18.1.2017. It is alleged that in spite of allegation the petitioner, O.P.5 herein objected the candidature of present petitioner, O.P.4 therein to disqualify from being contesting the election following the provision of the Gram Panchayat Act for her not attaining 21 years of age. She was allowed to contest the election even before turning down the objection of O.P.5 herein, and therefore, there was an allegation of improper acceptance of nomination of the present petitioner. Election was held on 21.2.2017. Present petitioner, O.P.4 therein was announced and declared by the Election Officer on 23.2.2017, who has been elected as Sarapanch of Sadangi Gram Panchayat. It was alleged therein that

the date of birth of the present petitioner, O.P.4 was 10.10.1996. O.P.4 had filed her affidavit showing her age to be 20 years and as such she was clearly disqualified. Thus filing the election dispute the election petitioner, O.P.5 herein while seeking declaring the election of the present petitioner as bad also sought for a declaration to declare O.P.5 herein, i.e., election petitioner to have been elected in the election involved. On her appearance O.P.4, i.e. the present petitioner filed objection. The present petitioner while disputing the claim of the election of the petitioner, who has raised objection on the age of the petitioner, answering on the dispute on her age while stating that she had already attained the age of 21 years at the time of filing of her nomination, the petitioner also justified her claim attaining the qualified age by producing several certificates in proof of her age. Thus the elected candidate, the petitioner contested the case on the premises that she had sufficient proof of her being qualified by attaining the required age on the date of nomination.

To satisfy their respective case, the election petitioner examined six witnesses (P.Ws.1 to 6) and exhibited (Exts.1 to 29), whereas O.P. therein examined two witnesses (O.P.Ws.1 & 2) and also exhibited (Exts.A to C/1).

3. Based on the pleading of the parties and filing of document, the Tribunal framed the issues as follows :-

> "(a) Whether the Election petition is maintainable ?
>
> (b) Whether the Election petitioner has any cause of action to file the Election petition ?
>
> (c) Whether the Election petition is barred for non-joinder or mis-joinder of necessary parties or proper parties ?
>
> (d) Whether the Election petition is barred by the principles of limitation ?
>
> (e) What is the actual date of birth of O.P.No.4 and whether O..No.4 was ineligible to contest the Election for the post Sarapanch on the ground of age as she had not complete twenty one years on the date of nomination and whether any corrupt practice had been reported by O.P.No.4 to contest and win the election ?
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> (f) Whether the Election petitioner had objected before the Election Officer against O.P.No.4 at the time of scrutiny of the nomination forms on the grounds of age and if the Election Officer illegally accepted the nomination paper of O.P.No.4 without hearing the objection of the petitioner ?
>
> (g) Whether on declaration of the election of the elected candidate (O.P.No.4) as null & void and the candidate securing the 2nd highest votes or the Election petitioner can be declared as elected ?

(h) Whether the notices on O.Ps.1 & 3 have been served in accordance with law ?

(i) Whether the Election petitioner is entitled to any other relief or relief(s) ?"

4. Considering the rival contentions of the parties, the Tribunal while answering issue nos.5, 6 & 7 though actually the issue numbers are (e), (f) & (g) in favour of the election petitioner ultimately allowed the election dispute thereby declaring the election of O.P.4, i.e., the preset petitioner as Sarapanch as null and void and applying the provision at Section 38(2)(a) of the Gram Panchayat Act, further declared that there is casual vacancy created for the declaration of that Court.

On Appeal by the present petitioner, the Appeal was registered as Election Appeal No.1 of 2018 on the file of Additional District Judge, Champua and was dismissed by the judgment dated 27.3.2018 resulting the present writ petition.

5. Sri A.P.Bose, learned counsel for the petitioner reiterating his client's plea in the courts below and taking this Court to the materials available on record such as documentary and oral evidence contended that the petitioner had a clear attempt to satisfy her case for attaining the qualified age to contest for the post of Sarapanch by relying upon the document, vide Ext.A to Ext.C/1 thereby producing original Birth Certificate as Ext.A, Authorisation Letter of the Medical Officer in-charge-cum Registrar, Birth & Death, Kaptipada CHC, Mayurbhanj as Ext.B and Birth and Death Register of the year 1994 of Kaptipada CHC, Mayurbhanj as Ext.C, whereas Sl.No.2426 of Page-163 of Birth & Death Register of the year 1994 of Kaptipada CHC as Ext.C/1 and accordingly also laid oral evidence through the witnesses produced there to satisfy her case that the petitioner was already over 20 years of age and met the age requirement. Taking this Court to the provision of the Act, Sri Bose, learned counsel for the petitioner particularly relying on the provision at Section 11(b) contended that for the document produced by the elected candidate clearly establishing that she had already attained the age of 21 years, she had the qualification to contest the election. Referring to the document relied and the evidence supporting the document at the instance of the election petitioner, learned counsel for the petitioner contended that for the election petitioner relying on non-statutory documents to establish that the elected petitioner had not attained the age of 21 years. Learned counsel for the petitioner alleged that the courts below have all failed in appreciating the difference between the statutory document and the non-statutory document. Further taking this Court to the decision of this Court in W.P.(C)

No.3321/2018 decided on 26.2.2019 (unreported), the decision in ***Siba Prasad Jena vrs. Puspanjali Jena & another*** : (2007) 37 OCR 680 and two decisions of the Hon'ble apex Court in ***Brij Mohan Singh vrs. Priya Brat Narain Sinha & others*** : AIR 1965 SC 282 and ***Madan Mohan Singh & others vrs. Rajni Kant & another*** : 2010 (II) CLR (SC) 660, Sri Bose, learned counsel for the petitioner contended that for the support of the case of the petitioner through the aforesaid decisions of this Court as well as the Hon'ble apex Court, both the courts have erred in law in allowing the election dispute and thereby also dismissing the Appeal.

6. In his opposition, Sri P.K.Ray, learned counsel for the contesting O.P.5 on reiteration of the stand of his client in the election dispute, in the election Appeal and the counter affidavit filed herein contended that for production of material evidence as well as oral evidence, the Tribunal as well as the Appellate Authority have all considered the case involved herein in its right perspective. Sri Ray, therefore, contended that there requires no interference in either of the orders. Sri Ray, learned counsel for O.P.5 also contended that for the concurrent finding of fact by both the courts, this Court has very limited scope for interfering in the impugned judgments. Further taking this Court to the decision in ***Chandrakanti Jena vrs. Banalata Jena & others*** : 2004 (Supp.) OLR 335 and referring to paragraphs-6 & 7 therein, learned counsel for O.P.5 submitted that the decision relying on the matriculation certificate has the basis and foundation of age of a person. Sri Ray again contended that the impugned judgments are also legal. Further taking this Court to a decision of the Division Bench of this Court in ***Prasanta Kumar Sahoo vrs. Chiranjaya Sahoo & others*** : 2006 (Supp.-I) OLR- 111, Sri Ray further contended that for the petitioner unable to bring the case under the fold of the impugned order suffers from apparent error and on erroneous admission of inadmissible evidence, there is also no scope otherwise to interfere with the impugned judgment.

7. Considering the rival contentions of the parties, it is at this stage this Court finds, the moot question remains here to be decided as to whether the Tribunal and the Appellate Court below erred in law in giving more attachment to the document filed by the election petitioner, such as Voter List, Aadhar Card and Copy of HSC Certificate, above the documents filed by the elected candidate, the present petitioner through Exts-A, B, C & C/1 such as Birth Certificate, Authorisation Letter of the Medical Officer in-charge-cum-Registrar, Birth and Death, Birth & Death Register of the particular year, further concerned Serial Page of the Birth and Death Register

or the year 1994 ? and further as to whether for the provision at Section 11(b), the candidate contesting the election for the post of Sarapanch is required to attain the age of 21 years ?

Considering the rival contentions of the parties through the evidence oral and material, this Court here finds, one party has given attachment to the documents such as Voter List, Copy of Aadhar Card and Copy of HSC Certificate, vide Exts, whereas the other side has relied on documents such as original Birth Certificate, Authorisation Letter by the Medical Officer in-charge-cum-Registrar of Birth and Death, the Birth & Death Register, the concerned page of the Birth & Death Register, vide Exts.A to C/1. It is at this stage taking into account the provision at Section 11(b) of the Act, this Court finds, the provision reads as follows :-

> "11.Qualification for membership in the Grama Panchayat :- Notwithstanding anything in Section 10 no member of a Grama Sasan shall be eligible to stand for election-
>
> (b) as a Sarpanch or Naib-Sarapanch, if he has not attained the age of twenty-one years or is unable to read and write Oriya;"

8. This Court here finds, the provision is clear to the extent that one must have attained the age of 21 years on the date of filing of nomination, which means a person already completing 20 years of age. This proposition having been considered on repeated occasions, a judgment has already been given by this Court itself, vide W.P.(C) No.3321/2018 wherein this Court has come to observe that requirement of law is one must attain the age of 21 years. It is not unlike the provision in the Representation of People's Act where a person to contest election is required to complete the age of 25 years for particular election. Taking into another decision of the Hon'ble apex Court in ***Brij Mohan Singh vrs. Priya Brat Narain Sinha & others*** : AIR 1965 SC 282 and taking into account the importance of Certificate of Birth & Death Registrar, the Hon'ble apex Courtin the above judgment in paragraph 20 therein held as follows :-

> "20. An objection was faintly raised by Mr. Agarwal as regards the admissibility of Ext.2 on the ground that the register is not an official record or a public register. It is unnecessary to consider this question as the fact that such an entry was really made in the admission register showing the appellant's date of birth as October 15, 1937 has all along been admitted by him. His case is that this was an incorrect statement made at the request of the person who went to get him admitted to the school, the request was made, it is suggested, to make him appear two years younger than he really was so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed.

> The appellant's case is that once this wrong entry was made in the admission register it was necessarily carried forward to the Matriculation Certificate and was also adhered to in the application for the post of a Sub-Inspector of Police. This explanation was accepted by the Election Tribunal but was rejected by the High Court as untrustworthy. However much one may condemn such an act of making a false statement of age with a view to secure an advantage in getting public service, a judge of facts cannot ignore the position that in actual life this happens not infrequently. We find it impossible to say that the Election Tribunal was wrong in accepting the appellant's explanation. Taking all the circumstances into consideration we are of opinion that the explanation may very well be true and so it will not be proper for the court to base any conclusion about the appellant's age on the entries in these three documents, vis., Ext.2, Ext.8 and Ex.18."

Similarly taking into account another decision of the Hon'ble apex Court in ***Madan Mohan Singh & others vrs. Rajni Kant & another*** : 2010 (II) CLR (SC) 660, Hon'ble apex Court examining the admissibility of document and its probated value, the Hon'ble apex Court further taking into account series of judgments in paragraphs-15, 16 & 17 came to observe as follows :-

> "15. Such entries may be in any public document, i.e. school register, voter list or family register prepared under the Rules and Regulations etc. in force, and may be admissible under Section 35 of the Evidence Act as held in Mohd. Ikram Hussain Vs. The State of U.P. & Ors. AIR 1964 SC 1625; and Santenu Mitra Vs. State of West Bengal AIR 1999 SC 1587.
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> 16. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.
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> 17. For determining the age of a person, the best evidence is of his/her parents, if it is supported by un-impeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the un-impeccable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc, the entry in the school register is to be discarded. (Vide: Brij Mohan Singh Vs. Priya Brat Narain Sinha & Ors. AIR 1965 SC 282; Birad Mal Singhvi Vs. Anand Purohit AIR 1988 SC 1796; Vishnu Vs. State of Maharashtra (2006) 1 SCC 283; and Satpal Singh Vs. State of Haryana JT 2010 (7) SC 500)."

9. Considering the decisions cited by the learned counsel for O.P.5 and for the settled position of law through the judgments referred to herein above, this Court finds, the judgments referred to by the contesting O.P.5 are of no

help to the case at hand. It is at this stage considering the findings of both the Election Tribunal as well as the Appellate Court on giving emphasis to the non-statutory document over the statutory document and for the law of land, as discussed herein and taken note herein above, this Court finds, both the courts erred in law in appreciating the material documents available on record and discarding the same. There is no doubt that both the courts below failed in appreciating the value in the documents filed by the elected candidate. As a consequence while answering both the questions framed in favour of the petitioner, this Court interfering with the impugned judgments at Annexures-1 & 2 sets aside the both. For quashing of the judgments at Annexures-1 & 2, this Court observes, in the event the petitioner, the elected candidate has been made to unseat in the meantime, her position as Sarapanch may be restored forthwith on receipt of copy of this judgment. The writ petition succeeds. No cost.

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2019 (II) ILR – CUT- 417

BISWANATH RATH, J.

ARBP NO.10 OF 2013

M/S. JAGANNATH CHOUDHURY, SPECIAL CLASS CONTRACTOR, BBSR. .....Petitioner

.Vs.

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

ARBITRATION AND CONCILIATION ACT, 1996 – Section 11 – Appointment of Arbitrator – Petitioner a Contractor completed the contract work – The final bill and price-escalation adjustment and payments were accepted unopposed and without indication of any further claim – Further plea of the State that the Clause 23.1 of DTCN does not permit settlement of future disputes – The question arose as to whether after receipt of the final bill and escalation amount the contractor can make a prayer for appointment of Arbitrator in absence of an express clause to that effect ? – Held, No – Reasons Indicated.

"From the fact narration of the case, the claim of the petitioner clearly appears to be inside the scope of the contract. Hence, Clause 23.1 of the terms of contract cannot come to the rescue of the petitioner and for agreement on the conditions contained in the terms of contract, parties not only bound by the same and this Court finds the opposite parties get the benefit of said protection. Coming to the other aspect of the matter, this Court finds the conduct of the petitioner already established that the final payment was received by him voluntarily. There is

even no allegation of duress or coerce by the opposite parties in the matter of receipt of final payment. Thus, the petitioner is stopped from raising any further claim and requiring the dispute resolved through Arbitrator in exercise of power under Section 11 of the Arbitration & Conciliation Act, 1996" (Para 5)

Case Laws Relied on and Referred to :-

1. 1994 Supp (3) SCC 126 : M/s. P.K.Ramaiah and Company .Vs. Chairman & Managing Director, National Thermal Power Corpn.
2. 1995 Supp (3) SCC 324 : Nathani Steels Ltd. .Vs. Associated Constructions.
3. (2011) 12 SCC 349 :Union of India & Ors .Vs. Master Construction Company.
4. (2009) 1 SCC 267: National Insurance Company limited .Vs. Boghara Polyfab Pvt. Ltd.
5. (2011) 12 SCC 349 : Union of India & Ors .Vs Master Construction Company.
6. (2014) 13 SCC 638 : Gayatri Project Limited .Vs. Sai Krishna Construction.

For Petitioner : M/s. P.Behera, B.A.Prusty & S.R.Debta.
For Respondents: Mr. P.K. Muduli, Additional Standing Counsel.

JUDGMENT Date of Hearing: 12.7.2016 Date of Judgment: 27.7.2016

BISWANATH RATH, J.

This arbitration proceeding filed under Section 11 of the Arbitration and Conciliation Act, 1996 praying therein for appointment of Arbitrator in exercise of power under Section 11 of the Arbitration & Conciliation Act, 1996 for adjudication of the dispute between the parties.

2. In filing the application, the petitioner contended that the petitioner is a reputed Super Class Contractor Firm in the State of Odisha and is undertaking several construction work of road, bridges, canals etc. under different departments of the State Government and has successfully completed several such contracts, which are of very high value. In the process, the petitioner was awarded with the contract work "Construction of left bank canal from RD 50.50 Km. to 55.50 Km. with all structures other than H.R. and C.R." of Rengali Irrigation Project for a value of Rs.15,65,44,778.00. The parties entered into an agreement bearing Agreement No.LCB-2/97-98 having the date of commencement of the contract work as 31.12.1997 and the stipulated date of completion was 30.12.1999. It is the case of the petitioner that soon after execution of the agreement, the petitioner mobilized men, material and machineries at the work site and started execution of contract work. But during execution of the contract work, petitioner faced several hindrances like delay in acquiring the private lands, non-receipt of clearance from the forest department, delay in diversion of existing high power electric lines/towers from the canal

alignment and frequent obstructions created by the local villagers. There also existed frequent change of drawing, designing and alignment of the work, non-payment of R.A. bills and escalation, variation in work/extra work also seriously affected the progress of the work. Finding the completion of the work beyond the control of the petitioner and that the delay of execution of the work was not attributable to the petitioner, the petitioner completed the work with the cooperation of the opponent not only by extending the date of completion of work till 31.12.2007 but with the benefit of price escalation from time to time. Considering the approach of the petitioner, the opponent also approved the deviation statement vide order No.31235 dated 21.11.2009. It is alleged that in spite of extension of time and awarding benefit of price escalation and approval of the final deviation statement, some dues in respect of the petitioner is still remain unsettled. The petitioner claimed that following Clause-43 of the condition of the contract, he is very much entitled to the benefit of price escalation on the basis of price index up to the last quarter of 2007 and the same is not paid to him. Considering the request of the petitioner in the matter of illegal deduction of certain amount, the objection of the petitioner was forwarded by the Executive Engineer to the Superintending Engineer vide its letter No.5035 dated 4.9.2010 and in the meanwhile the Superintending Engineer has forwarded the same to the Chief Engineer vide its letter dated 6.10.2010 for consideration. Unfortunately, it did not yield any result. Finding no resolution of the matter, petitioner invoked for settlement of the dispute under Clause 23 of the condition of Contracts and by letter dated 4.7.2012 requested the Engineer-in-Charge to expedite the action for payment of his legitimate dues, which also yielded no result compelling the petitioner to prefer appeal before the employer vide his letter dated 21.11.2012 and it is how pending before the Chief Engineer-opposite party no.2. Finding no response from the opponent, the petitioner claimed to have compelled to request this Court for invoking power under Section 11 of the Arbitration & Conciliation Act, 1996 for appointment of an arbitrator for adjudicating the dispute between the parties.

3. In response to the aforesaid action of the petitioner, the opposite party nos. 1 to 3 filing a common response in some and substance contended that the arbitration proceeding as led is not maintainable either in fact or law. The arbitration proceeding is also wholly misconceived. It is next pointed out by the opposite party nos.1 to 3 that the provision of Clause 23.1 of the conditions of Contract has no application to the facts of the present case. It is specifically submitted by the opposite party nos.1 to 3 that this clause is

applicable in two contingencies i.e. (i) any work demanded from the contractor by the employer considered to be outside the scope of the contract or (ii) considers any drawing, record or ruling of the Engineer-in-Charge on any matter in connection with or arising out of the contract or the carrying out of the work to be acceptable. Clause 23 is clear as to in respect of which an arbitration can be preferred. It is further claimed that the disputes involved under Annexure-7 are not within the purview of Clause 23 of the terms of contract. It is further contended by the opposite party nos.1 to 3 that the Clause 23.1 does not permit settlement of future disputes consequently invocation of the provision of Clause 23.1 for settlement of dues is wholly misconceived. It is further contended by the opposite parties 1 to 3 that the work was completed on 01.12.2007 and the final bill was prepared on 8.12.2007 vide 51st Running Account Bill vide M.B.No.467/06. The 52nd and 53rd Running Account Bills were prepared only for price-escalation adjustment and payments have been made accordingly in the year 2010. The petitioner-contractor having accepted the amount determined by the authority unopposed and without indication of any further claim, he is now stopped to have any future claim and as such there is no requirement of appointment of an Arbitrator at this stage. In justifying their claim, the opposite parties 1 to 3 have also relied on three decisions, which are as follows:

M/s. P.K.Ramaiah and Company v. Chairman & Managing Director, National Thermal Power Corpn., *1994 Supp (3) Supreme Court Cases 126*, ***Nathani Steels Ltd. v. Associated Constructions,*** *1995 Supp (3) Supreme Court Cases 324* and ***Union of India and others v. Master Construction Company***, *(2011) 12 Supreme Court Cases 349.*

4. From the facts narrated in the application for appointment of Arbitrator and its objection, this Court finds that the petitioner makes a claim for arbitration of the dispute raised by him on the premises that in spite of extension of time and awarding benefit of price escalation and approval of final deviation statement, some dues in respect of the petitioner still remain unsettled. Petitioner further pleaded that his such claim not only being entertained by Executive Engineer but the same has also been forwarded to the Superintending Engineer from his consideration and finding no response, he was constrained to invoke the settlement of the dispute clause, on applying 23 of the conditions of contract and under the circumstances, claim raised by the petitioner cannot be treated outside the conditions of contract. Reading of document vide Annexures-9 and 10, clearly discloses same relates to illegal deduction of certain amount from the final bill which

is related to the same contract. Further reading of averments made in paragraph 5 and the contents of documents vide Annexures-5 and 6, the claim prima facie pointing out to the particular contract and certain act involving the contract whereas the opposite party has the sole objection that the claim from the side of the petitioner appears to be future dispute and further since the petitioner has accepted the final payment without endorsing any objection, he is precluded from taking a reverse plea. Petitioner even though pleaded that the claims involved necessitating a arbitration proceeding is not future claim but from reading of the Clause 23 of the contract, this Court finds the petitioner miserably failed to dislodge the allegation of the opposite parties 1 to 3 that the claim raised by him is outside the scope of the contract looking to the provision contained in Clause 23 of the contract. For both parties relying on Clause 23.1 of the terms of contract, it is necessary here to refer to Clause 23.1 of the terms of the contract, which quoted as herein below:

> "If the Contractor considers any work demanded of him to be outside the scope of the contract or considers any drawing, record or ruling of the Engineer-in-Charge, on any matter in connection with or arising out of the contract or the carrying out of work to be unacceptable, he shall promptly ask the Engineer-in-Charge in writing for written instruction or decision. There upon the Engineer-in-Charge shall give his written instructions or decision within a period of thirty days of such request. Upon receipt of the written instruction or decision the Contractor shall promptly proceed without delay to comply with such instruction or decision. If the Engineer-in-Charge fails to give his instruction or decision in writing within a period of thirty days after being requested or if the contractor is dissatisfied with the instruction or decision of the Engineer-in-charge, the contractor may within thirty days after receiving instruction or decision of Engineer-in-Charge appeal to the Employer who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal. The employer shall give his decision within a period of thirty days after the contractor has given the said evidence in support of his appeal".

5. From the fact narration of the case, the claim of the petitioner clearly appears to be inside the scope of the contract. Hence, Clause 23.1 of the terms of contract cannot come to the rescue of the petitioner and for agreement on the conditions contained in the terms of contract, parties not only bound by the same and this Court finds the opposite parties get the benefit of said protection. Coming to the other aspect of the matter, this Court finds the conduct of the petitioner already established that the final payment was received by him voluntarily. There is even no allegation of duress or coerce by the opposite parties in the matter of receipt of final payment. Thus, the petitioner is stopped from raising any further claim and

requiring the dispute resolved through Arbitrator in exercise of power under Section 11 of the Arbitration & Conciliation Act, 1996. Hon'ble Apex Court in deciding a similar situation in the case of ***National Insurance Company limited v. Boghara Polyfab Private Limited***, *(2009) 1 Supreme |Court Cases 267* referring to several decisions of the very Apex Court, in paragraph 25 of the said judgment held as follows:

> "We may next examine some related and incidental issues. Firstly, we may refer to the consequences of discharge of a contract. When a contract has been fully performed, there is a discharge of the contract by performance, and the contract comes to an end. In regard to such a discharged contract, nothing remains neither any right to seek performance nor any obligation to perform. In short, there cannot be any dispute. Consequently, there cannot obviously be reference to arbitration of any dispute arising from a discharged contract. Whether the contract has been discharged by performance or not is a mixed question of fact and law, and if there is a dispute in regard to that question, that is arbitrable. But there is an exception. Where both the parties to a contract confirm in writing that the contract has been fully and finally discharged by performance of all obligations and there are no outstanding claims or disputes, courts will not refer any subsequent claim or dispute to arbitration. Similarly, where one of thee parties to the contract issues a full and final discharge voucher (or no-due certificate, as the case may be) confirming that he has received the payment in full and final satisfaction of all claims, and he has no outstanding claim, that amounts to discharge of the contract by acceptance of performance and the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or revive any settled claim nor can it seek reference to arbitration in respect of any claim".

This view of the Hon'ble Apex Court also gets support of a subsequent decision of the Hon'ble Apex Court in the case of ***Union of India and others v. Master Construction Company***, *(2011) 12 Supreme Court Cases 349.*

6. Now considering the decision cited by the petitioner in the case of ***Gayatri Project Limited v. Sai Krishna Construction,*** *(2014) 13 Supreme Court Cases 638.* For difference in the factual position clearly narrated in paragraph 17 of the said decision, the decision referred to in this paragraph has no application to the case at hand,

In the case of ***M/s. P.K.Ramaiah and Company v. Chairman & Managing Director, National Thermal Power Corpn.,*** *1994 Supp (3) Supreme Court Cases 126*, the Hon'ble Apex Court held as follows:

> "On those facts, this Court held that although there was alleged payment as final satisfaction of the contract, yet as the respondent did not give any receipt accepting the settlement of the claim, the payment was unilateral, so the dispute still subsisted

and therefore it was arbitrable dispute and the reference was valid. In *Bhan Prakash case* also there was no full and final settlement and payment was not received under a receipt. In *L.K.Ahuja & Co case*, this Court while laying the general law held that if the bill was prepared by the department, the claim gets weakened. That was not a case of accord and satisfaction but one of pleading bar of limitation without prior rejection of the claim. Therefore, the ratio therein is of little assistance. The Calcutta High Court merely followed the statement of law laid in Ahuja & Co. case. It is not shown to us that the Chief Construction Manager was competent to acknowledge the liability or an authority to refer the dispute for arbitration. So neither his letter binds the respondent nor operates as an estoppels. Admittedly the full and final satisfact5ion was acknowledged by a receipt in writing and the amount was received unconditionally. Thus there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an afterthought and a devise to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given. In Russell on Arbitration, 19th Edn., p.396 it is stated that "an accord and satisfaction may be pleaded in an action on award and will constitute a good defence". Accordingly, we hold that the appellant having acknowledged the settlement and also accepted measurements and having received the amount in full and final settlement of the claim, there is accord and satisfaction. There is no existing arbitrable dispute for reference to the arbitration. The High Court is, therefore, right in its finding in this behalf. The appeals are dismissed but in the circumstances without costs".

7. Looking to the factual position narrated hereinabove, the observation made hereinabove, particularly, keeping in view the fact that the petitioner's claim remained within the scope of the contract and that he has received the full and final settlement without any protest and the law laid down by the Hon'ble Apex Court reflected hereinabove, this Court finds the claim of the petitioner for appointment of Arbitrator is unsustainable. Consequently, the Arbitration Petition stands dismissed. Parties are to bear their own cost,

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2019 (II) ILR – CUT- 423

S. K. SAHOO, J.

CRLMC NO. 2670 OF 2018

TRILOCHAN KHORA ……Petitioner

.Vs.

STATE OF ORISSA ……...Opp. party

CRIMINAL INVESTIGATION – Application, filed under section 91 of the Code of Criminal Procedure seeking a direction to the investigating agency to consider a particular material on behalf of the accused during investigation, rejected – Order challenged under section 482 of Cr. P. C. – Scope of interference by the High Court – Indicated.

"In case of Manohar Lal Sharma -Vrs.- Principal Secretary reported in A.I.R. 2014 Supreme Court 666, it is held that in the criminal justice system, the investigation of an offence is the domain of the police. The power to investigate into the cognizable offences by the police officer is ordinarily not impinged by any fetters. However, such power has to be exercised consistent with the statutory provisions and for legitimate purpose. The Courts ordinarily do not interfere in the matters of investigation by police, particularly, when the facts and circumstances do not indicate that the investigating officer is not functioning bona fide. In very exceptional cases, however, where the Court finds that the police officer has exercised his investigatory powers in breach of the statutory provision putting the personal liberty and/or the property of the citizen in jeopardy by illegal and improper use of the power or there is abuse of the investigatory power and process by the police officer or the investigation by the police is found to be not bona fide or the investigation is tainted with animosity, the Court may intervene to protect the personal and/or property rights of the citizens."

Case Laws Relied on and Referred to :-

1. (2005) 30 OCR (SC) 177 : State of Orissa .Vs. Debendra Nath Padhi.
2. A.I.R. 2014 SC 666 : Manohar Lal Sharma .Vs. Principal Secretary.

For Petitioner : Mr. Manoranjan Padhy
For Opp. Party: Mr. Prem Kumar Patnaik Addl. Govt. Adv.

JUDGMENT Date of Argument and Order: 17.06.2019

S. K. SAHOO, J.

This is an application under section 482 of the Code of Criminal Procedure filed by the petitioner Trilochan Khora to quash the impugned order dated 20.08.2018 passed by the learned Special Judge, Koraput, Jeypore in T.R. Case No.16 of 2018 in which the petition filed by the petitioner under section 91 of Cr.P.C. praying to direct the investigating officer for consideration of the C.C.T.V. footage installed in front of the house of the petitioner was rejected on the ground that the document or thing necessary or desirable for the defence of the accused cannot be entertained at the stage of investigation.

As it appears Boriguma P.S. Case No.68 of 2018 was instituted on 07.04.2018 on the first information report submitted by Karunakar Dharua, Sub-Inspector of Police of Boriguma police station on the accusation that on that day at about 5.30 a.m. the petitioner along with co-accused persons were carrying commercial quantity of ganja to the tune of 927.400 kgs. in a truck bearing registration no. CG-04-JB-4699 on NH 26 road near Petrol Pump, Jayantigiri which was seized. The petitioner was arrested on the spot. On such F.I.R., a case under sections 20(b)(ii)(C)/29 of the N.D.P.S. Act was registered.

During investigation of the case, a petition was filed by the petitioner under section 91 of Cr.P.C. for a direction to the investigating officer to consider the C.C.T.V. footage installed in front of the house of the petitioner. It is stated in the petition that on the date of occurrence i.e. on 07.04.2018 the petitioner was in his house till 8.30 a.m. which would be clear from the close circuit camera which was installed in front of the house of the petitioner situated in Down Street (Harijan Street) of village Umuri and therefore, the case of the prosecution that at about 5.30 a.m. on that day the petitioner was carrying contraband ganja in a truck and arrested at the spot is a fabricated story.

On such petition, the prosecution filed its objection and the learned Special Judge, Koraput, Jeypore considering the submission made by the learned counsel for the respective parties and taking into account the provision under section 91 of Cr.P.C. and the ratio laid down by the Hon'ble Supreme Court in the case of **State of Orissa -Vrs.- Debendra Nath Padhi reported in (2005) 30 Orissa Criminal Reports (SC) 177**, rejected the petition. In the said decision, the Hon'ble Court held as follows:-

> "25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is 'necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code'. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. In so far as the accused is concerned, his entitlement to seek order under section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or accused. If under section 227 what is necessary and relevant is only the record produced in terms of section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under section 91, summons for production of document can be issued by court and under a written order, an officer in charge of police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced, process may be initiated to compel production thereof."

In case of **Manohar Lal Sharma -Vrs.- Principal Secretary reported in A.I.R. 2014 Supreme Court 666**, it is held that in the criminal justice system, the investigation of an offence is the domain of the police. The power to investigate into the cognizable offences by the police officer is ordinarily not impinged by any fetters. However, such power has to be exercised consistent with the statutory provisions and for legitimate purpose. The Courts ordinarily do not interfere in the matters of investigation by police, particularly, when the facts and circumstances do not indicate that the investigating officer is not functioning bona fide. In very exceptional cases, however, where the Court finds that the police officer has exercised his investigatory powers in breach of the statutory provision putting the personal liberty and/or the property of the citizen in jeopardy by illegal and improper use of the power or there is abuse of the investigatory power and process by the police officer or the investigation by the police is found to be not bona fide or the investigation is tainted with animosity, the Court may intervene to protect the personal and/or property rights of the citizens.

In this case, the plea which has been taken in the petition filed under section 91 of Cr.P.C. by the petitioner is basically relates to plea of alibi. Law is well settled that the accused has to prove such plea by adducing cogent and satisfactory evidence at the stage of trial and such a plea must be proved with absolute certainty so as to completely exclude the presence of the person concerned at the time when and the place where the incident took place. The accused cannot insist the prosecuting agency to collect materials for him to prove such plea.

It is stated at the bar that in the meantime, the investigation has been completed and charge sheet has already been submitted.

Since the petitioner would get ample opportunity to adduce evidence in support the plea of alibi if taken during the stage of trial and the learned trial Court is expected to consider the same in accordance with law and there is lack of material to doubt the bonafide conduct of investigating officer in investigating the case, I find no illegality or impropriety in the impugned order passed by the learned Special Judge, Koraput, Jeypore.

Therefore, I am not inclined to invoke my inherent power to interfere with the impugned order. Accordingly, the CRLMC application being devoid of merits, stands dismissed.

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2019 (II) ILR – CUT- 427

S. K. SAHOO, J.

CRLMC NO. 3171 OF 2018

SRIMATI SABITARANI SARKAR .....Petitioner

.Vs.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Prayer for quashing of the order taking cognizance under section 176/34 of the Indian Penal Code read with section 21(2) of the Protection of Children from Sexual Offences Act, 2012 – Petitioner was the Hostel Superintendent where the victim was an inmate and became pregnant – Petitioner took the victim and left her with her parents – Charge Sheet filed cognizance taken – Plea that the petitioner did not intentionally omitted to furnish any information to any public servant and as such the ingredients of the offences are not attracted – Held, ingredients of offence under section 176 of the Indian Penal Code are not attracted, however in the present case, it is prima facie apparent from the statement of the victim and other materials on record that after coming to know about the commission of the offence from the victim relating to her rape and her pregnancy, the petitioner being the Hostel Superintendent has not intimated either to the Special Juvenile Police Unit or to the local police unit – She simply took the victim to her house and left her in the custody of her parents – Such a provision has been incorporated in the POCSO Act so that there can be early reporting of the incident to the police which would be helpful in registering the case and investigating the matter at an earliest and taking all consequential step for the arrest of the accused and to prevent disappearance of the evidence – In the present case, the matter was only reported by the father of the victim on 14.03.2015 – Therefore, the necessary ingredients for commission of offence under section 21(2) of the POCSO Act are prima facie attracted against the petitioner.

For Petitioner : Mr. S.K. Mishra.
For Opp. Party : Mr. Prem Kumar Patnaik, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Order: 24.06.2019

S. K. SAHOO, J.

This is an application under section 482 of the Code of Criminal Procedure filed by the petitioner Srimati Sabitarani Sarkar praying for quashing the impugned order dated 18.06.2015 passed by the learned S.D.J.M., Malkangiri in G.R. Case No. 88 of 2015 which arises out of

Malkangiri P.S. Case No.33 of 2015 in taking cognizance of offences under sections 176/34 of the Indian Penal Code read with section 21(2) of the Protection of Children from Sexual Offences Act, 2012 (hereafter 'POCSO Act') and issuance of process against her. The said case is now subjudiced in the Court of learned Addl. Sessions Judge -cum- Special Judge, Malkangiri in C.T. Case No.107 of 2015.

The criminal law was set into motion on the presentation of the first information report by one Deba Kabasi before the Inspector in charge of Malkangiri police station wherein it is alleged that on 21.02.2015 the petitioner was the Hostel Superintendent of U.G. Govt. High School, Pedakunda, Malkangiri and she brought the victim to her house and left her in the custody of the informant who is the father of the victim and told him that the victim was pregnant. The victim was prosecuting her studies in that School and she was staying in the hostel and sometimes she use to come to the village. After the petitioner left the victim in the house, the informant asked the victim relating to her pregnancy and she disclosed that on the last Dussehra vacation when she had come to the house, co-villager Bhima Madkami took her inside the jungle situated nearer to her village and committed rape on her for which she became pregnant. The informant called the relatives and gentlemen of the village for amicable settlement and the Superintendent in charge and others came to the house of the victim and they took the victim to the Govt. Hospital at Malkangiri and after preliminary treatment, the doctors opined that the victim was pregnant for six months and she is to be treated properly. The accused Bhima Madkami absconded from the village.

On the basis of the first information report, Malkangiri P.S. Case No.33 of 2015 was registered under section 376(1) of the Indian Penal Code read with sections 4/5-J(ii)/8 of the POCSO Act. After completion of investigation, charge sheet was submitted for commission of offences under sections 376(1)/176/34 of the Indian Penal Code read with sections 6/21(2) of the POCSO Act. So far as the petitioner is concerned, after receipt of charge sheet, the learned S.D.J.M.,Malkangiri vide under impugned dated 18.06.2015 took cognizance of offences under sections 176/34 of the Indian Penal Code read with section 21(2) of the POCSO Act and issued process.

Mr. S.K. Mishra, learned counsel appearing for the petitioner contended that there is absolutely no justification on the part of the learned Magistrate to take cognizance of offences under sections 176/34 of the Indian Penal Code read with section 21(2) of the POCSO Act and issue process

against the petitioner. It is further contended that the materials on record indicate that on 20.02.2015 the victim communicated to the petitioner in the hostel about her pregnancy and on the very next day, the petitioner brought her back to her house and left there and intimated everything to the parents of the victim and therefore, it cannot be said that the petitioner intentionally omitted to furnish any information to any public servant and as such the ingredients of the offences are not attracted.

Mr. Prem Kumar Patnaik, learned Addl. Govt. Advocate on the other hand contended that in view of section 21(2) of the POCSO Act, the petitioner being the in charge of the hostel after coming to know about the commission of offence should have reported the matter either to the Special Juvenile Police Unit or to the local police as envisaged under the said sub-section. She only left the victim girl in her house but did not give information relating to commission of offences as envisaged under section 19(1) of the POCSO Act and therefore, the ingredients of offence under section 21(2) of the POCSO Act are clearly attracted against the petitioner.

Adverting to the contentions raised by the learned counsel for the petitioner as well as the opp. party, it is not in dispute that the petitioner was the Hostel Superintendent of U.G. Govt. High School, Pedakunda and the victim was staying in the hostel. There are materials on record to show that the rape was committed on the victim in 2014 during Dussehra festival by co-accused Bhima Madkami and she became pregnant and it was communicated to the petitioner on 20.02.2015.

Section 176 of the Indian Penal Code prescribes punishment for omission to give notice or information to public servant by person legally bound to give. The ingredients of the offence are as follows:-

> (i) that the person must be legally bound to give any notice or to furnish information on any subject to any public servant;
>
> (ii) that he intentionally omits to give such notice or furnish such information in the manner and at the time required by law.

Section 39 of Cr.P.C. deals with the duty of the public to give information forthwith relating to commission of certain offences if they became aware of such commission or of the intention of any other person to commit such offence. In absence of any reasonable excuse, since it is the duty of public to forthwith give information to the nearest Magistrate or police officer relating to the commission of offences or of the intention of any other person to commit any offence as specified under section 39 of Cr.P.C., if a

person takes a plea of any reasonable excuse for not giving such information then the burden of proving such excuse shall lie on him.

It is noticed that section 376 of the Indian Penal Code which is alleged to have been committed in the present case has not been incorporated in section 39 of Cr.P.C. Therefore, it cannot be said that the ingredients of offence under section 176 of the Indian Penal Code are satisfied. There is no material on record that the petitioner intentionally omitted to give such information either to the Magistrate or to the police officer. Therefore, I am of the humble view that the ingredients of offence under section 176 of the Indian Penal Code are not attracted.

Coming to section 21(2) of the POCSO Act, it prescribes that if any person who is in charge of any company or an institution, inter alia, fails to report the commission of an offence under sub-section (1) of section 19 in respect of the subordinate under its control, he/she shall be punished with imprisonment for a term which may extend to one year and with fine. Therefore, the person concerned must be either in charge of any company or institution and there must be failure on his/her part to report the commission of offence in respect of a subordinate under his/her control either to Special Juvenile Police Unit or to the local police unit.

In the present case, it is prima facie apparent from the statement of the victim and other materials on record that after coming to know about the commission of the offence from the victim relating to her rape by accused Bhima Madkami and her pregnancy on account of such rape, the petitioner being the Hostel Superintendent has not intimated either to the Special Juvenile Police Unit or to the local police unit. She simply took the victim to her house and left her in the custody of her parents.

Such a provision has been incorporated in the POCSO Act so that there can be early reporting of the incident to the police which would be helpful in registering the case and investigating the matter at an earliest and taking all consequential step for the arrest of the accused and to prevent disappearance of the evidence.

In a present case, the case was only reported by the father of the victim on 14.03.2015. Therefore, I am of the humble view that the necessary ingredients for commission of offence under section 21(2) of the POCSO Act are prima facie attracted against the petitioner.

In view of the forgoing discussions, I am of the humble view that the ingredients of offence under section 176 of the Indian Penal Code are not attracted against the petitioner and therefore, the impugned order relating to cognizance of such offence and issuance of process against the petitioner for such offence stands quashed. So far as the commission of offence under section 21(2) of the POCSO Act is concerned, I am of the view that there is no illegality in the order of the learned S.D.J.M., Malkangiri. Accordingly, the CRLMC application allowed in part.

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2019 (II) ILR – CUT- 431

K.R. MOHAPATRA, J.

M.A. NO. 1081 OF 1999

STATE OF ORISSA & ANR. ..... Appellants

.Vs.

DEEPAK KUMAR DAS & ORS. .....Respondents

CODE OF CIVIL PROCEDURE, 1908 – Order 23 Rule 03 – Compromise of suit – G.A Department granted lease of a plot in favour of one Gopala Chandra Das who wanted the same land to be recorded in the name of his elder son which was permitted by the G.A Dept. – Younger son filed a suit for partition – Suit disposed of in terms of compromise between the parties including the Officials of the G.A Department – Appeal by State on the ground that the compromise petition had not been signed by the officers concerned but signed by the Govt. Pleader – No allegation of fraud or unlawful terms in the compromise – The question arose as to whether the Govt. Pleader was competent to sign the compromise petition? – Held, Yes.

"There can be no quarrel on the fact that a party can always act through his duly authorised representative/ agent. If a power of attorney holder can enter into an agreement or compromise on behalf of his principal, so there can be no controversy over the competency of a counsel, who had accepted the brief/ case of a litigant by executing vakalatnama, can act on behalf of his client by signing the petition for compromise. Any controversy with regard to the competence of learned counsel to sign a petition for compromise on behalf of his client would be travesty of law and will give rise to an argument, which would be inconsistent with legislative object of attaining finality of the litigation." The Legislature cannot be presumed to have fundamentally altered the position of the counsel or a recognized agent as traditionally understood in the system of law in practice followed in India.

It is the settled law that a compromise can only be challenged on the ground of fraud or misrepresentation and that it is not lawful. The allegation of fraud or misrepresentation are conspicuously absent in the present case. Further, signing of the compromise petition by the Government Pleader on behalf of defendant Nos.4 and 5 cannot be held to be unlawful. Even though defendant Nos.4 and 5 had not signed the petition for compromise filed on 23.01.1999 before the learned Civil Judge (Senior Division), Bhubaneswar, their authorised representative, namely, the Government Pleader, who had accepted the brief on their behalf and was prosecuting the suit, was competent to sign the petition for compromise on their behalf. It is not the case of the appellants (defendant Nos.4 and 5) that they are prejudiced by the compromise in question recorded between the parties by learned Civil Judge (Senior Division), Bhubaneswar. Rather, it has helped in curtailing unnecessary time consuming procedure and saved precious judicial time of the Court.

Case Laws Relied on and Referred to :-

1. (1992) 1 SCC 31 : Byram Pestonji Gariwala .Vs. Union Bank of India & Ors.
2. 74 (1992) C.L.T. 235 : Hema Chandra Singh alias Prava Chandra Singh .Vs. Jasaketa Singh & Ors.

For Appellants : Mr. R.P. Mohapatra, Addll. Govt. Adv.
For Respondents : M/s. M. Mishra, P.K.Das, D.S.Mohanty, D.K.Patnaik, S. K.Pradhan, P.K.Mohanty, S.Senapaty, S. Mohapatra, S.Patnaik, S.Mishra, L.Mishra & A.K. Nayak.

JUDGMENT Heard and Disposed of : 22.04.2019

K.R. MOHAPATRA, J.

This appeal has been filed by the State of Odisha and its functionaries assailing the judgment and decree dated 23.01.1999 and 30.04.1999 respectively passed by learned Civil Judge (Senior Division), Bhubaneswar in T.S. No.727 of 1998, whereby he decreed the suit recording compromise between the parties.

2. Initially the respondents herein had raised a question of maintainability of the appeal. However, this Court vide order dated 27.01.2004, held the appeal to be maintainable. Now, this appeal has come up for final hearing.

3. A short narration of fact, which is necessary for adjudication of this appeal, is as follows:

3.1 The State Government leased out a part of plot no.30 with an area measuring 60'x90' of Block-A in Nayapalli Mouza (now Jaydev Vihar) at Bhubaneswar (herein referred to as 'the suit land'). The suit land stood recorded in the name of General Administration Department (Drawing No.409). On an application, the suit land was leased out in favour of one Sri

Gopal Chandra Das (defendant No.1/respondent No.2). Accordingly, lease deed was executed between the Government and defendant No.1 in the year, 1971 and possession was handed over to him. Subsequently, defendant No.1 filed an application for transfer of the suit land in favour of one of his sons, namely, Sri Ashok Kumar Das (defendant No.2/respondent No.3) by way of gift. Considering his application for transfer, the Government allowed the same and intimated the lessee-defendant No.1 to deposit a sum of Rs.92,976/- for transfer of the land in the name of defendant No.2 and also required a tripartite agreement to be executed between the Govt. of Orissa, defendant no.1 and defendant no.2 before the Sub-Registrar, Bhubaneswar to that effect. While the matter stood thus, another son of Sri Gopal Chandra Das (defendant No.1), the lessee, filed Title Suit No.727 of 1998 in the court of learned Civil Judge (Senior Division), Bhubaneswar for partition claiming 1/3rd share in the suit land impleading the lessee, namely, Sri Gopal Chandra Das as defendant No.1, Shri Ashok Kumar Das as defendant No.2, daughter of the lessee, namely, Smt. Minati Das as defendant No.3 and the appellants herein as defendant Nos.4 and 5. The suit for partition was filed on 23.12.1998. Subsequently, on 23.01.1999, a petition under Order 23 Rule 3 of CPC was filed for decreeing the suit on compromise. The compromise petition was signed by the plaintiff and defendant Nos.1 to 3. However, the Government Pleader had signed the compromise petition on behalf of defendant Nos.4 and 5. On the same day, the matter was taken up and learned Civil Judge (Senior Division), Bhubaneswar decreed the suit in terms of the compromise. Amongst other, it was agreed between the parties that the defendant No.2, namely, Sri Ashok Kumar Das is the rightful title holder of the suit land and in lieu thereof, plaintiff-defendant Nos.1 and 3 would get share from other lands of the 'Karta', namely, Sri Gopal Chandra Das (defendant No.1). It was also agreed upon between the parties that defendant No.4, namely, Director of Estate-cum-Joint Secretary,General Administration Department, Government of Odisha, would take necessary steps for correction of the ROR accordingly. On the same premises, the suit was decreed in terms of the compromise. Being aggrieved by the recording of the said decree the terms of compromise, this appeal has been filed.

4. Mr. Mohapatra, learned Additional Government Advocate vehemently submitted that the learned Civil Judge (Senior Division), Bhubaneswar has committed serious error of law in ignoring the fact that the defendant Nos.4 and 5 had not signed the petition for compromise. Defendant Nos.4 and 5 were also not present in the Court when the compromise was recorded. Although defendant nos. 4 and 5 were not present in person,

learned Civil Judge (Senior Division), Bhubaneswar erroneously recorded a finding that both the parties were present and the petition for compromise was read over and explained to the parties. Since the defendant Nos.4 and 5 had not signed the petition for compromise, the decree passed in terms of compromise is not binding on them and only on that ground the decree is not sustainable in law.

5. Learned counsel for the respondents, on the other hand, contended that although defendant Nos.4 and 5 were not present in person and had not signed the petition for compromise, which was filed on 23.01.1999, the Government Pleader, who was the authorized representative, had signed the petition for compromise without any objection and as such, the decree of compromise is also binding on defendant Nos.4 and 5. The same cannot be also held to be illegal or invalid as the authorized representative of the appellants had signed the petition for compromise on their behalf. Since the appellants do not allege fraud or misrepresentation, they cannot plead for setting aside a compromise decree only on the ground that they had not signed the petition for compromise. It is also not the plea of the appellants that the Government Pleader was not the authorized to represent their case before the learned Civil Judge (Senior Division), Bhubaneswar. In support of his case, he relied upon a decision of the Hon'ble Supreme Court in the case of ***Byram Pestonji Gariwala-v-Union Bank of India and others***; reported in (1992) 1 SCC 31 and ***Hema Chandra Singh alias Prava Chandra Singh-v-Jasaketa Singh and others***; reported in 74 (1992) C.L.T. 235. Hence, he prayed for dismissal of the appeal.

6. Heard learned counsel for the parties and perused the case record. Admittedly, there is no allegation of fraud or misrepresentation in recording the compromise before learned Civil Judge (Senior Division), Bhubaneswar. It is also not the case of the appellants that the terms of compromise were not lawful. Thus the only question that arises for consideration is whether a petition for compromise signed by a legal practitioner for and on behalf of the parties, is valid and a compromise can be recorded on that basis? The issue is no more *res integra*. In the case of ***Byram Pestonji Gariwala (supra)***, the Hon'ble Supreme Court at paragraphs-38 and 39 held as follows:

> *"38. Considering the traditionally recognized role of counsel in the common law system, and the evil sought to be remedied by Parliament by the C.P.C. (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise decree to comprehend even matters*

falling outside the subject-matter of the suit, but relating to the parties, the legislature cannot, in the absence of express words to such effect, be perused to be disallowed the parties to enter into a compromise by counsel in their cause or by itself duly authorized agents. Any such presumption would be inconsistent with the legislative object of attaining quick reduction of arrears in Court by elimination of uncertainties and enlargement of the scope of compromise.

39. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorized representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorization by Vakalatnama, act on behalf of his client. Not to recognize such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in Court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated."

7. This Court in the case of ***Hema Chandra Singh alias Prava Chandra Singh (supra)*** relying upon the decision of the Hon'ble Supreme Court in the case of ***Byram Pestonji Gariwala (supra)*** held at paragraph-4 as follows:

"4. So far as the first contention of Mr. Patra, learned counsel for the petitioner that the petitioner having not signed the memorandum for compromise which formed the basis for disposal of the appeal by order dated 8-3-1973 is concerned, it is necessary to quote the provisions of Order 23, Rule 2, C.P.C.

"3. Compromise of suit:

Where it is proved to the satisfaction of the Court that the suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit.

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question but no adjournment shall be granted for the purpose deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjustment."

The words 'in writing and signed by the parties" were inserted by the C.P.C. (Amendment) Act, 1976. However, prior to such insertion with effect from 7.5.1954, by Orissa High Court Amendment, after the words 'where it is proved....by any lawful agreement or compromise and preceding the comma, the words "in writing and signed by the parties in token of their consent to such agreement or compromise" were added. Clause (i) of the Orissa Amendment to rule 3 of the Order 23 was deleted by Orissa Gazette Part IIIA, No.21-D/25-5-1984. In the instant case, the compromise memorandum was signed on 8-3-1973, that is prior to 1976 Amendment. However, the Orissa High Court Amendment referred to above contained almost identical words and held the field so far as the case at hand is concerned. After the amendment of 1976, a consent decree is executable in terms thereof, even if it comprehends matters falling outside the subject-matter of the suit, but concerning the parties. In the system of law and practice followed in India and other common law countries, the time-honoured role of lawyers in the conduct of cases and doing everything in the interest and benefits of the clients cannot be lost sight of. By insertion of the words "in writing and signed by the parties" it cannot be construed that the legislative intention was that the agreement or compromise should be signed by the parties in person, since the responsibility for compromise the suit, including matters failing outside its subject-matter, is to be borne by none but the parties themselves. It cannot be legislative intent to have fundamentally altered the position of counsel or a recognized agent. A look at the preparatory work such as the 54th Report of the Law Commission dated 6-2-1973 or the statement of Objects and Reasons does not indicate that such was the intention of the legislature. There is no reason to assume that the legislature intended to curtail the implied authority of counsel, engaged in the trial of proceedings in Court, to compromise or agree on matters relating to the parties. Therefore, on a plain reading of Order 23, Rule 3, C.P.C., after amendment of C.P.C. in 1976, and prior to that, so far as the State of Orissa is concerned, in terms of Orissa High Court amendment of 1954, we are not persuaded to accept the submissions made on behalf of the petitioner that even though the counsel appearing for the petitioner in this Court had signed the memorandum of compromise, that was not sufficient compliance of Order 23, Rule 3, C.P.C. Our view has the authoritative seal of approval of the apex Court. (See Byram Pestonji Gariwala-v-Union Bank of India and others; AIR 1991 SC 2234." (emphasis supplied)

8. There can be no quarrel on the fact that a party can always act through his duly authorized representative/ agent. If a power of attorney holder can enter into an agreement or compromise on behalf of his principal, so there can be no controversy over the competency of a counsel, who, had accepted the brief/case of a litigant by executing Vakalatnama, can act on behalf of his client by signing the petition for compromise. Any controversy

with regard to the competence of learned counsel to sign a petition for compromise on behalf of his client would be a travesty of law and will give rise to an argument, which would be inconsistent with the legislative object of attaining finality of the litigation. The Legislature cannot be presumed to have fundamentally altered the position of the counsel or a recognized agent as traditionally understood in the system of law in practice followed in India.

It is the settled law that a compromise can only be challenged on the ground of fraud or misrepresentation and that it is not lawful. The allegation of fraud or misrepresentation are conspicuously absent in the present case. Further, signing of the compromise petition by the Government Pleader on behalf of defendant Nos.4 and 5 cannot be held to be unlawful. Even though defendant Nos.4 and 5 had not signed the petition for compromise filed on 23.01.1999 before the learned Civil Judge (Senior Division), Bhubaneswar, their authorised representative, namely, the Government Pleader, who had accepted the brief on their behalf and was prosecuting the suit, was competent to sign the petition for compromise on their behalf. It is not the case of the appellants (defendant Nos.4 and 5) that they are prejudiced by the compromise in question recorded between the parties by learned Civil Judge (Senior Division), Bhubaneswar. Rather, it has helped in curtailing unnecessary time consuming procedure and saved precious judicial time of the Court.

9. Hence, I am not persuaded to accept the arguments and contentions raised by Mr. Mohapatra, learned Additional Government Advocate for the appellants. Accordingly, the appeal being devoid of merit stands dismissed. No cost.

2019 (II) ILR – CUT- 437

J.P. DAS, J.

CRLMC NO. 4109,4110 & 3326 OF 2009

MAHESH VERMA .....Petitioner

Vs.

M/S. FUTURE TECHNOLOGIES .....Opp. Party

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 – Dishonour of Cheques – Complaint petition filed by the constituted power of attorney holder – Power of attorney, the instrument not filed – There is also no averment that the Attorney Holder had the personal and direct

knowledge about the transactions – Order taking cognizance of the offences passed – Challenge is made to the order taking cognizance before High court in an application under section 482 of Cr. P. C – The question arose as to whether in such state of affair, the Complaint petition filed by the Power of attorney maintainable? – Held, No, the power of attorney holder must produce the power of attorney before the court for perusal and the attorney holder must have personal or direct knowledge about the transactions with specific mention in that regard in the complaint petition – In absence of the required ingredients order taking cognizance quashed.

Case Laws Relied on and Referred

1. 2009(1) DCR 626 : Ravi Gupta .Vs. R.C. Tiwari
2. 2009(1) DCR 27 : Shankar Finance and Investments .Vs .State of Andhrapradesh & Ors.
3. (AIR 2018 SC 1198) : A.C. Narayanan .Vs. State of Maharashtra & Anr.

For Petitioner : M/s. Subash Chandra Lal and S. Lal.
For Opp. Party : M/s. Debasis Das.

JUDGMENT Date of Hearing : 04.04.2019 : Date of Judgment : 17.05.2019

J.P. DAS, J.

This common order shall dispose of the aforesaid three applications filed under Section 482 of the Code of Criminal Procedure (in short 'the Cr.P.C.) assailing the order of cognizance passed by the learned S.D.J.M., Bhubanswar in three separate complaint petitions filed by the opposite party in all the three cases, under Section 138 of the Negotiable Instruments Act (in short 'the N.I. Act') alleging bouncing of three cheques issued by the present petitioner in favour of the complainant-opposite party.

2. The factual scenario is not in dispute. The present petitioner issued three separate cheques in favour of the opposite party, a proprietorship firm amounting to Rs.25,800/-, Rs.52,090/- and Rs.41,100/- towards value of certain goods received by him from the opposite party-complainant in course of business transactions. The three cheques were placed in Bank by the opposite party but all the three cheques were bounced with the note "EXCEEDS ARRANGEMENT". Thereafter since the petitioner did not pay the amount despite notices, three separate petitions were filed in respect of three cheques by the present opposite party-firm represented by its Constituted Attorney Shri Mahendra Kumar Pradhan, Law Officer of the complainant firm. Learned S.D.J.M., Bhubaneswar taking initial statement of the legal presentative passed the impugned order of cognizance in all the

three cases and directed for issuance of summons to the present petitioner as accused.

3. The sole ground on which the present three applications have been filed assailing the order of cognizance is that although the complaint petition was filed by the Power of Attorney holder of the proprietorship firm, still learned S.D.J.M., Bhubaneswar took cognizance of the offence ignoring the mandatory requirements in a case where the complaint is filed by the Power of Attorney holder and hence, the impugned order of cognizance in all the three cases is illegal and is liable to be set aside. In the application, it was submitted that the Power of Attorney holder could not have filed the complaint in absence of the complainant, namely, the proprietor of the firm as the payee of the cheques, apart from the facts that the Power of Attorney holder did not file the Power of Attorney before the court along with the complaint petition nor the permission of the court was sought for to file the complaint by the Power of Attorney holder. It was also submitted that the learned S.D.J.M., Bhubaneswar did not have territorial jurisdiction to take cognizance of the offence in the cases. However, at the time of submission, it was fairly conceded by learned counsel for the petitioner that as per the settled positions of law, the Power of Attorney holder can maintain a complaint before the court and the court of learned S.D.J.M., Bhubaneswar has territorial jurisdiction to the application. The only contention that was advanced by learned counsel for the petitioner was that as per the settled position of law, when a complaint petition is filed by the Power of Attorney holder, the said Power of Attorney must be placed before the court for perusal by the concerned court and the Power of Attorney holder should take permission of the court to file the complaint on behalf of the payee and in the last but not the least, the Power of Attorney holder must have personal or direct knowledge about the transactions with specific mention in that regard in the complaint petition. It was submitted that all these requirements having not been complied with in the three cases, learned S.D.J.M., Bhubaneswar erred in law by taking cognizance of the offence against the petitioner as accused.

4. Per contra, it was submitted by learned counsel for the opposite party that the complaint petition was duly filed by the legal representative of the proprietorship firm and Shri Mahendra Kumar Pradhan working for gain as Law Officer of the firm was duly authorized to prosecute the accused under Section 138 of the N.I. Act in respect of the bounced cheques. It was further contended that the Power of Attorney duly executed by the proprietor of the

firm was also brought on record. Thus, it was submitted that all the three complaints were duly filed complying with all the requirements and hence, the order of cognizance is unassailable.

5. Learned counsel for the petitioner relied upon the decision of the Hon'ble Apex Court in the case of ***Shankar Finance and Investments vrs .State of Andhrapradesh and others;*** 2009(1) DCR 27 wherein Hon'ble Apex Court observed that the Power of Attorney holder can validly file the complaint if he has personal knowledge of the particular transactions. Relying upon the observation, it was submitted that in the present case the complaint petitions were filed by one Mahendra Kumar Pradhan, who is an Advocate by profession but working for gain as Law Officer of the opposite party-firm. It was further submitted that no where in the complaint petitions as placed before the court, it has been even whispered that the said Power of Attorney holder had any personal knowledge about the transactions between the opposite party and the accused firm or he had performed any act relating to the said transactions. It was further submitted that admittedly, the Power of Attorney was not placed before the court along with the complaint petition nor it was mentioned in the list of the documents to be relied upon by the complainant. In this regard, the learned counsel for the petitioner placed reliance on a decision of the Delhi High Court in the case on ***Ravi Gupta vrs. R.C. Tiwari*** reported in 2009(1) DCR 626 wherein it was held as follows:-

> "(i) A complaint under Section 138, N.I. Act can be filed by a complainant through a POA.
>
> (ii) However, the complainant will have to seek the permission of the Court concerned for pursuing the complainant through a POA.
>
> (iii) The leave of the Court to file the complaint through a POA can be sought by making an averment in the body of the complaint or by filing a separate application for that purpose along with the complaint.
>
> (iv) The complaint filed through a POA has to be accompanied by a copy of the deed of special or general POA executed by the complainant. Where the complainant is a company this requirement can be satisfied even after the filing of the complaint.
>
> (v) The examination of the POA holder upon oath at the time of presentation of the complaint and reduction into writing the substance of such examination shall be sufficient compliance with of procedure contemplated under the Cr.P.C. It is unnecessary thereafter for the complainant to also be examined on oath on his appearance on a future date."

Learned counsel for the petitioner also relied upon another decision in the case of ***A.C. Narayanan vrs. State of Maharashtra and another***; (AIR 2018 Supreme Court 1198). In that case, in similar circumstances, it was observed that the learned Magistrate should not have taken cognizance without prima facie establishing the fact as to whether the Power of Attorney existed for the first place and whether it was in order. Further, the Power of Attorney holder had also not stated that he has filed the complaint having been instructed by payee or holder in due course of the cheques. In the instant case admittedly, Power of Attorney was not placed before the court at the time of taking cognizance and there is no mention in the complaint petitions that the Power of Attorney holder had any personal knowledge about the transactions between the parties. The only mention that finds place in this regard in the complaint petition is that "the opposite party-the proprietorship firm represented by its constituted Power of Attorney Shri Mahendra Kumar Pradhan working for gain as Law Officer authorized to prosecute under Section 138 of the N.I. Act."

Thus, on the touch stone of the principles as settled by different pronouncements, as referred to above, the contentions, as raised on behalf of the petitioner, are acceptable that the learned S.D.J.M., Bhubaneswar took cognizance of the offence under Section 138 of the N.I. Act in all the three cases without looking for the existence of any Power of Attorney or any material in that regard on record and personal knowledge of the Power of Attorney holder regarding the transactions. Hence, the impugned orders of cognizance in all the three cases are not sustainable in law

6. Accordingly, the impugned orders of cognizance dated 01.12.2008 in I.C.C. No.4311 of 2008 in CRLMC No.4109 of 2009, dated 01.12.2008 in I.C.C. No.4312 of 2008 in CRLMC No.4110 of 2009 and dated18.11.2008 in I.C.C. No.4126 of 2008 in CRLMC No.3326 of 2009 passed by the learned S.D.J.M., Bhubaneswar are set aside. All the three CRLMCs are disposed of accordingly.

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2019 (II) ILR – CUT- 442

DR. A. K. MISHRA, J.

CRLMC NO.1645 OF 2005

SMT. PRATIBHA DAS ……...Petitioner

.Vs.

THE STATE OF ORISSA ……Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Prayer for quashing of the order taking cognizance under sections 309/306/506/34 of the Indian Penal Code – Petitioner, a mother of a child who died during treatment – Petitioner out of stress sat in 'dharana' and attempted to commit suicide demanding action against the Doctor – Charges under 306 of IPC is not made out as there is no suicide – Section 115 of the Mental Health Care Act, 2017 pleaded and taken into consideration – Held, for want of criminal intent, the offence alleged cannot be said to have been made out against the petitioner-mother and as such continuance of the proceeding against her is an abuse of the process of the Court – Proceeding quashed.

Case Laws Relied on and Referred to :-

1. (1996) 2 SCC 648 : Lokendra Singh .Vs. State of Madhya Pradesh.

For Petitioner : Mr. Brundaban Rout
For Opp.Party : Mr. J.Katikia, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment: 25.06.2019

DR. A.K.MISHRA, J.

This is a proceeding under Section 482 Cr.P.C. to quash the cognizance order dated 28.6.2004 passed in G.R. Case No. 1487 of 2002 pending in the court of learned S.D.J.M., Sadar, Cuttack in respect of accused-petitioner Smt. Pratibha Das, who is one of the accused persons.

2. Heard learned counsel for the petitioner and Mr. J.Katikia, learned Addl. Government Advocate for the State.

3. The impugned cognizance order reveals that after taking cognizance under Sections 309/306/506/34 I.P.C., sufficient ground was found to proceed against three accused persons, namely, Sri Ambuja Kumar Das, Sri Ranjit Kumar Banarjee and Smt. Pratibha Das.

4. The F.I.R.(Annexure-1) reveals that the petitioner is the mother of one Abinash Das, child of 3 ½ years old who expired during treatment in S.V.P. Post Graduate Institute of Paediatrics, Cuttack on 5.10.2002. On the allegation made by the father of the child, an enquiry was conducted

regarding negligence of doctor and the enquiry report was submitted to the Director, Medical Education and Training on 18.10.2002. On 28.10.2002, the mother of the deceased sat on hunger-strike in front of the Outdoor, threatening to die, demanding appropriate action. Basing upon the F.I.R. submitted by Superintendent of SVP PG Institute of Paediatrics, after investigation, the police report was submitted and cognizance was taken.

5. Having heard learned counsel for the petitioner and learned Additional Government Advocate, I am of the considered view t hat the mother whose child died during treatment and allegation of negligence in treatment by the doctor was entertained for enquiry, she could be said under severe stress. Her action cannot be said mala-fide. Due to strike, she could not decide the consequence of demand for action and to go for hunger-strike.

6. As per the prosecution, no person has committed suicide. Hence, the offence of abetment of suicide under Sec.306 I.P.C. is not made out. The section requires that suicide must be committed as a result of the abetment and the deceased must have been abetted by the accused to commit suicide. Abetment may be caused by instigation, conspiracy or intentional aiding as provided by section 107 of the Code.

7. There is no dispute that the constitution Bench of the Hon'ble Supreme Court in the case of **Lokendra Singh Vrs. State of Madhya Pradesh**, reported in (1996) 2 SCC 648 has upheld the vires of Section 309 I.P.C.

7.1 But section 115 of the Mental Health Care Act, 2017 reads as follows:-

> *"**115. Presumption of severe stress in case of attempt to commit suicide**. – (1) Notwithstanding anything contained in section 309 of the Indian Penal Code (45 of 1860) any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code.*
>
> *(2) The appropriate Government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit suicide."*

8. For want of criminal intent, the offence as alleged cannot be said to have been made out against the petitioner-mother and continuance of the proceeding against her is an abuse of process of the court.

9. In the result the proceeding in G.R. Case No. 1487 of 2002 arising out of Lalbag P.S. Case No. 238 of 2002 pending in the court of learned S.D.J.M., Sadar, Cuttack in respect of petitioner Smt. Pratibha Das stands quashed.

10. Accordingly, the CRLMC is disposed of.

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2019 (II) ILR – CUT- 444

DR. A. K. MISHRA, J.

CRLMC NO. 3135 OF 2008

PARBATI CHINTADA .....Petitioner

.Vs.

GOPAL KRISHNA CHINTADA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 125 read with Section 17(2) of the Registration of Births and Deaths Act, 1969 – Petitioner wife, on the promise of marriage was induced by the opposite party (putative husband) and became pregnant – On 10.03.1998, the minor daughter took birth – The putative father did not marry her and left the village – The birth of the daughter of the petitioner was registered and the date of registration was 21.03.1998 as per Certificate of Birth – On 10.04.2003, a petition was filed U/s. 125 of Cr.P.C. claiming maintenance for the child as the father had sufficient income – Allowed by the learned court below after considering the evidence – Opp. Party husband preferred revision disputing the paternity of the petitioner-minor girl and the order granting maintenance was set aside – Whether legally correct? – Held, No, as the provisions of Registration of Births and Deaths Act, 1969 provides that the extract given by the State Government i.e. Certificate shall be admissible evidence for the purpose of proving the birth or death to which the entry relates – The Revisional Court has exceeded its jurisdiction when he entered to re-assess the evidence on record and that too relied upon a decision which was prior to the commencement of the Registration of Births and Deaths Act, 1969 – The proceeding U/s.125 Cr.P.C. is summary in nature and its decision is subject to final order in any civil proceeding – The scope of revision against the order granting maintenance U/s. 125 of Cr.P.C. being limited, the impugned order not sustainable.

Case Laws Relied on and Referred to :-

1. AIR 1962 Madras 141 : B. Mahadeva Rao .Vs. Yesoda Bai.
2. 2010 (I) OLR 443 : Bikram Ray .Vs. Smt. Jema Hembram & Anr.
3. 1999(1) OLR (SC) 387 : Santosh (Smt.) .Vs. Naresh Pal.
4. (2011) 12 SCC 189 : Pyla Mutyalamma @ Satyavathi .Vs. Pyla Suri Demudu & Anr.
5. (2005) 30 OCR (SC) 386 : Union of India & Ors. .Vs. Ex. FLT. LT.G.S. Bajwa
6. AIR 2014 SC 932 : Nandlal Wasudeo Badwaik .Vs. Lata Nandlal Badwaik & Anr.

For Petitioner : M/s. V. Narasingh, B.P. Pradhan & B.R. Sahu.
For Opp. Party : None

JUDGMENT Date of Hearing: 12.03.2019 : Date of Judgment: 26.03.2019

DR. A. K. MISHRA, J.

In this proceeding U/s. 482 Cr.P.C., the order dated 25.07.2008 in Criminal Revision No.14 of 2006 by the learned Addl. Sessions Judge, Gajapati is assailed, whereby the revisional court has set aside the maintenance order in favour of the present petitioner-minor daughter, passed by the learned SDJM, Parlakhemundi in M.C. 5/2003.

2. Adumbrated in brief, the fact runs thus:

The present petitioner is the daughter of Martha Pani who is the mother-guardian in all forums for her maintenance. The maintenance was claimed against the father who is the opposite party here.

It is the specific case that the mother of the petitioner on the promise of marriage was induced by the opposite party and became pregnant. On 10.03.1998, the minor daughter took birth. The putative father did not marry her and left the village. The birth of the petitioner was registered and the date of registration was 21.03.1998 as per Certificate of Birth (Ext.1). On 10.04.2003, a petition was filed U/s. 125 of Cr.P.C. claiming maintenance for the child as the father had sufficient income.

2-a. The opposite party-husband filed counter disputing the paternity of the petitioner-minor girl. He denied any such access or marriage with the mother of minor daughter. The evidence was taken up. The mother of the petitioner, her sister and another independent witness were examined while the opposite party-husband, School Headmaster and co-villagers were examined on behalf of opposite party. Birth Certificate and School admission register were exhibited.

2-b. Learned SDJM, Parlakhemundi analyzed the evidence and held that the petitioner-minor daughter was entitled to get maintenance from father-opposite party and accordingly allowed monthly maintenance of Rs.350/- from the date of filing of the petition.

3. The putative-father filed criminal revision. Learned Addl. Sessions Judge, Gajapati re-appreciated the evidence both oral and documentary. He found that the father's name of the child was not mentioned in the School Register and relied upon a decision reported in *AIR 1962 Madras 141* in the case of **B. Mahadeva Rao vrs. Yesoda Bai** to the effect that Birth Certificate was not the proof of paternity. The revisional court set aside the order granting maintenance of the learned SDJM, Parlakhemundi. The said order of revisional court is now impugned in this case.

4. None appears on behalf of opposite party.

5. Learned counsel for the petitioner submits that learned revisional court had exceeded its jurisdiction in re-appreciating the evidence in a proceeding U/s.125 of Cr.P.C. and thereby has allowed the child to starve. Further **B. Mahadeva Rao** (supra) decision was prior to the commencement of the Registration of Births and Deaths Act, 1969 under which provision, the present Birth Certificate of the petitioner (Ext.1) was issued, as such the ratio of that decision is not applicable.

6. In the case at hand, the mother has given evidence that opposite party was the father of the minor daughter. Other two witnesses on her behalf had admitted the same. The Birth Certificate (Ext.1) has been issued by the Registrar of Births and Deaths U/s.12 of the Registration of Births and Deaths Act, 1969, wherein the present opposite party-Gopal Krishna Chintada has been shown as father. The entry of birth was made on 21.03.1998. Thus, it was much prior to the litigation.

6-a. Section 17(2) of the Registration of Births and Deaths Act, 1969 provides that the extract given by the State Government i.e. Certificate shall be admissible evidence for the purpose of proving the birth or death to which the entry relates. In this regard the decision of this Court in the case of **Bikram Ray vrs. Smt. Jema Hembram and another** reported in 2010 (I) OLR 443, it has been held at para-6:-

> ***"6.*** *The register is maintained in Form No.11 in accordance with Rule 13 of the Orissa Registration of Births and Deaths Rules, 1970. Therefore, birth certificate is admissible as a public document. The Court further held that*

when birth certificate has been issued by the Registrar of Births and Deaths, it should be treated as a public document issued on the basis of the register maintained under the Registration of Births and Deaths Act, 1969. Therefore, no formal proof is necessary. So keeping in view the settled principle of law that the Birth Certificate issued by competent authority is a public document, which is admissible in evidence, the burden heavily rests on the opposite party to disprove the content thereof."

6-b. In a summary procedure case U/s.125 Cr.P.C., a public document like birth certificate issued under the Registration of Births and Deaths Act, 1969 is admissible and if entry therein is found to have made in an undisputed period, the same can be considered to corroborate the oral testimony of mother in a case of paternity dispute.

6-c. The Magistrate was expected to pass order after being prima facie satisfied about the marital status of the parties. It is obvious that the said decision is tentative decision and this is what reiterated in the decision reported in 1999(1) OLR (SC) 387 in the case of **Santosh (Smt.) vrs. Naresh Pal.**

6-d. It may be stated that **B. Mahadev's** decision has been referred to in the aforesaid **Bikram Ray** (supra) case. In view of the above legal position, it cannot be said that the order granting maintenance U/s.125 of Cr.P.C. by the learned SDJM, Parlakhemundi was contrary to the law or an outcome of irregular procedure.

7. The revisional court has exceeded its jurisdiction when he entered to re-assess the evidence on record and that too relied upon a decision which was prior to the commencement of the Registration of Births and Deaths Act, 1969. The proceeding U/s.125 Cr.P.C. is summary in nature and its decision is subject to final order in any civil proceeding. The scope of revision against the order granting maintenance U/s. 125 of Cr.P.C. is limited. In this regard, the decision reported in (2011) 12 SCC 189 in the case of **Pyla Mutyalamma @ Satyavathi vrs. Pyla Suri Demudu & Another**, wherein it is held at para-10:-

*"**10.** xxx xxx xxx*

Thus, the ratio decidendi which emerges out of a catena of authorities on the efficacy and value of the order passed by the Magistrate while determining maintenance under Section 125 Cr.P.C. is that it should not be disturbed while exercising revisional jurisdiction."

8. The petitioner was given birth on 10.03.1998. Maintenance case U/s. 125 Cr.P.C. was filed against opposite party on 10.03.2003. She was five years old then. She cannot be allowed to starve because her parental status is disputed by the putative father. In this regard but in different context, the Hon'ble Supreme Court in the case of **Union of India and others vrs. Ex. FLT. LT.G.S. Bajwa** reported in (2005) 30 OCR (SC) 386, has observed that *"we cannot permit the children to starve simply because the respondent persists with his contentions regarding the paternity of those children"*.

9. Child should not be the victim of dispute between the parents. The father is he, to whom the mother indicates. In a decision rendered by the Hon'ble Supreme Court in the case of **Nandlal Wasudeo Badwaik vrs. Lata Nandlal Badwaik and another** reported in AIR 2014 SC 932, wherein their Lordships have stated about the relevance of scientific advancement with regard to paternity dispute in the following words:-

> ***"Para-17.*** *We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate, although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served be ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former."*

10. Learned SDJM has not exceeded its jurisdiction to pass order granting maintenance to the petitioner. The revisional court instead of finding any legal infirmity, has exceeded its jurisdiction to set aside the order grating maintenance U/s.125 Cr.P.C. Such order is not sustainable in the eye of law.

11. Consequently, the impugned order dated 25.07.2008 passed by the learned Addl. Sessions Judge, Gajapati in Criminal Revision No.14 of 2006 is hereby set aside. The order dated 06.02.2006 passed by the learned SDJM, Parlakhemundi in M.C.No.5 of 2003 is restored. Accordingly, the CRLMC is allowed. LCR be returned immediately to the lower court.

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