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SUBJECT INDEX

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ADMISSION – Admission in class-1 of Kendriya Vidyalaya under the Right to Education(RTE) category – Admission denied on the ground of distance – As per the admission guideline the distance from School to the residence of children must be within the 5 Kms radius – Authority pleaded that, petitioner's house is not situated within 5 Kms radius – Petitioner pleaded that, his house is situated within the distance of 4.63 Kms as per Google Search – School authority measured the distance through motorbike & found the distance is 7.3 Kms. – The word 'radius' interpreted – Held, it is a straight line drawn from the centre of a circle to any point of the circumference – Applying the above meaning of the word, the distance between school to petitioner's house is 4.63 Kms as per the Google search, which is within the 5 kms radius – Therefore the distance calculated by going through motorbike, ascertaining as 7.3 Kms, cannot have any justification.

Rakesh Mahallick (Rep. by Father Guardian) -V- Dy. Commissioner, Kendriya Vidyalaya Sangathan, BBSR & Anr.
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ADVERSE POSSESSION – Whether a pure question of law? – Held, No – Plea of adverse possession is not a pure question of law but a blended one of fact and law – Ingredients to determine the factum of adverse possession – A person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed – A person pleading adverse possession has no equities in his favour – Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

Bairagi Sahoo & Anr. -V- State of Orissa & Anr.
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ARBITRATION & CONCILIATION ACT, 1996 – Section 9(d) – Grant of interim injunction before enforcement of the arbitral award – Disputes between the parties with regard to operation of mining – Opp.party/Judgment debtor is the lease holder & Petitioner/D.Hr. is the raising contractor – Hon'ble Apex Court appointed Sole Arbitrator – Both the parties mutually consented to each other & resolved to settled their disputes in accordance with the terms & conditions of existing joint venture agreement – Accordingly the arbitrator passed compromise decree – Application filed before the District Court for execution/enforcement of such award – An interim application also filed alleging therein that the judgment debtor is misappropriating the minerals as well as entering the raising contracts with the 3rd parties – On the first hearing of the interim application, the executing Court/ District Court directed the Judgment Debtor not to perform any mining operation while issuing summon against him – The Judgment debtor/ Opp.party appeared & filed an application for recall/to vacate the above order – The District Court hearing both the parties while vacating the above order observed that, the mining operation will boost the economic development of the state & stopping the same may cause a greater inconvenience to the state & held though prima faice case exist in favour of the petitioner/D.H.R but other two ingredients do not lean in his favour – The petitioner pleads that, as per the J.V agreement between the parties, their relationship shall be exclusively governed by the terms & conditions of agreements & will be binding on them. And all other documents, understanding, disputes shall deemed not to be in existence & shall become inoperative in view of the settlement – The Order of the District Court is challenged in the present Writ petition – Held, this court observes that in deciding the question of balance of convenience & irreparable loss the District Judge has totally

lost the sight of existence of a settlement award pending for execution as well as clandestine conduct of judgment debtor in misappropriating the minerals leased as well as entering into new raising contracts with 3rd parties – Accordingly the findings of the District Judge on balance of convenience and the part of irreparable loss, answers both in favour of the decree holder.

The Orissa Manganese & Minerals Ltd. -V- Birat Ch. Dagara.
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ARBITRAL AWARD – ENFORCEMENT / EXECUTION – Interim application before execution of such award – Application filed under section 151 of C.P.C – Maintainability of such application questioned in view of section 9 of the Arbitration & Conciliation Act, 1996 – Mentioning of wrong nomenclature pleaded – Whether it affects the merit of the case? – Held, No.

The Orissa Manganese & Minerals Ltd. -V- Birat Chandra Dagara.
2019 (II) ILR-Cut………. 840

BIHAR AND ORISSA EXCISE ACT, 1915 – Section 2 – Amendment – Insertion of the word 'molasses' in clause 12- a of Section 2 after the word "Mohua flower" – Plea that the inclusion of the word 'molasses' in Clause (12-a) after the words "Mohua flower" is in violation of Constitutional provisions, namely, Union List Entry-84 and Entry-8 and Entry-51 of State list – Further plea that the State Government has no power to levy excise duty unless it is for the purpose of being referred in Entry-8 of the State List coupled with Entry-51 – The court held the following :–

Sunil Kumar Dhanuka -V- State of Odisha & Ors.
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CIVIL PROCEDURE CODE, 1908 – Order 8 Rule 1 – Provisions under for filing of written statement – No longer be said to be directory, but can only be said to be mandatory – Defendant did not file written statement – Ex-parte decree passed and later set aside – Defendant filed written statement along with counter claim with a prayer to accept the same – Written statement whether can be accepted? – Held, No – Reasons indicated.

Amulya Kumar Biswal -V- Bijaylaxmi Biswal
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Order 21 Rule 26 and 29 – Provisions under – Stay of execution proceeding – Suit filed in 2004 – Decreed – Judgment Debtor filed another suit in the year 2019 – Thereafter an application was filed in the execution case to stay the execution case till disposal of the suit – No sufficient cause shown – Application rejected – Held, proper.

Dhoba Moharana -V- Smt. Lili Moharana & Ors.
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CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 **–** Writ petition – Tender – Challenge is made to the tender condition with regard to furnishing of "no relation certificate" – Plea that such a condition is directory and not mandatory – Held, No.

Upendra Jena -V- State of Odisha & Ors.
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Articles 226 and 227 – Writ petition challenging the order passed in an appeal by the Provident Fund Appellate Tribunal – Writ of certiorari – When can be issued? – Indicated.

M/s. Ballarpur Industries Ltd. -V- Employees Provident Fund Appellate Tribunal & Ors.

2019 (II) ILR-Cut………. 782

CRIMINAL PROCEDURE CODE, 1973 – Section 378 (1) (3) – Appeal by State against the order of acquittal – Offence under section 376 of Indian Penal Code – Interference by High court in appeal – Scope of – Discussed.

State of Orissa -V- Banka Jayasingh.

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Section 401 – Revision – Challenge is made to the order taking cognizance of the offence under section 13(1) (d) of the Prevention of Corruption Act and under sections 468/420/120-B of Indian Penal Code – First FIR quashed and was confirmed by apex court – Second FIR involving the same event, Charge sheet filed and order taking cognizance was passed – Effect of – Held, there cannot be a second FIR in respect of the same offence/event and whenever any further information is received by the Investigating Agency, it is always to be taken in furtherance to the FIR already in hand which course is no more available in the present case in view of quashment of the first FIR.

Akhaya Ku. Behera -V- State of Orissa & Anr.

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Section 468 – Limitation – Computation thereof – Offence under sections 23 and 25 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 – Plea that the order taking cognizance having been passed long after the filing of the complaint petition, the same is barred by the limitation – Held, No.

Satyabrata Patel -V- State of Orissa.

2019 (II) ILR-Cut………. 867

Section 482 – Inherent power – Prayer for quashing of the order taking cognizance – Alleged offences are under sections 420/468/467/465 of the Indian Penal Code – Materials suggest the dispute is civil in nature – The complainant in order to create pressure on the petitioner for obvious reasons has instituted the criminal proceeding – Since the criminal proceeding has been instituted with malafide intention and the ingredients of the offences are not attracted and the dispute between the parties being civil in nature, the continuance of such proceeding would amount to abuse of process – Entire criminal proceeding quashed.

Manorama Singh -V- State of Orissa.
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CRIMINAL TRIAL VIS-A-VIS FAIR TRIAL – Accused involved in the offence of 302 – Trial began – Recording of evidence of witnesses over – Case posted for argument but suffered several adjournment due to absent of lawyers from all sides owing to cease work – Trial judge after hearing the convict in absence of defence lawyer pronounced the judgment and passed the order of sentence – Whether such a course was permissible under law? – Held, No.

Ashok Majhi @ Ashok Kumar Majhi -V- State of Orissa.
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DISCIPLINARY PROCEEDING – Petitioner found guilty – Order of dismissal passed – Appeal – Punishment reduced to removal – Writ petition – Learned single judge upheld the order of punishment – Writ appeal – Plea that there has been failure to follow the principles of natural justice and therefore the order of punishment should be interfered with – When can High court interfere with the punishment awarded in a disciplinary proceeding? – Indicated.

Duryodhan Samantray -V- Sainik School Society & Ors.
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DISCIPLINARY PROCEEDING – Petitioner working as a Constable in CISF – While on medical leave there was an altercation with the Head Constable – Petitioner was suspended and after an enquiry he was removed from service – Punishment awarded appears to be in excess to the charges leveled – The question arose as to whether the contention of the petitioner for quashing the order of removal from service by the disciplinary authority being confirmed by the appellate authority and revisioning authority can come within the scope and ambit of doctrine of proportionality? – Held, Yes –The second point which falls for determination as to whether defence taken by the present petitioner has been properly considered vis-à-vis the evidence.

Sunil Ch. Mohapatra -V- Union of India & Ors.
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EMPLOYEES PROVIDENT FUND AND MISCLLANEOUS PROVISIONS ACT, 1952 – Section 7-A – Complaint by Union claiming provident fund dues for closure period – Admitted fact is that the industry was closed for the period from 1987 to 1991 – Whether the closure period is good or bad that was not the subject matter of dispute – During closure period from 1987 to 1991 no wages were paid to the workmen – Settlement arrived at between the parties not to make any claim before reopening on being taken over by another entity – Whether any deduction can be made for payment of provident fund dues? – Held, No – Reasons discussed.

M/s. Ballarpur Industries Ltd. -V- Employees Provident Fund Appellate Tribunal & Ors.
2019 (II) ILR-Cut……… 782

HINDU MARRIAGE ACT, 1955 – Section 13-B – Mutual divorce – An agreement was filed showing settlement of the matrimonial dispute – Agreement not signed by the husband and wife but by their parents – Whether can be accepted? – Held, No. – An agreement not signed by the competent parties having capacity to contract cannot be said to have legal effect of bindingness upon those non-executants – In other words, parties are not bound by the written agreement which they have not executed, though otherwise they are competent to do so – For this reason simplicitor, we exclude Ext.1 agreement to consider the entitlement of wife-respondent under section 25 of Hindu Marriage Act.

Smt. Arpita Mohanty -V- Sabyasachi Das.
2019 (II) ILR-Cut………. 741

Section 25 – Permanent alimony – Determination thereof – Mode – Indicated.

Smt. Arpita Mohanty -V- Sabyasachi Das.
2019 (II) ILR-Cut………. 741

INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction and life imprisonment – Quarrel between the accused and deceased – Effort by others to disengage them – Suddenly the accused gave a blow on the head of the deceased by means of a wooden stick – Evidence suggests accused had no intention of committing murder – Incident took place in the spur of the moment – Conviction altered to one under 304-Part - II – Sentence reduced to five years without fine.

Fighter Oram -V- State of Orissa.
2019 (II) ILR-Cut………. 739

INTERPRETATION OF STATUTE – Non obstante Clause – Use of the word 'notwithstanding' – Effect of – Held,

by using word "notwithstanding", which is a *non-obstante* clause, that has to be interpreted taking help of the provisions of the Interpretation of Statute - *Non obstante* is a Latin term, i.e., notwithstanding or not opposing – *Non obstante* clause means a clause in a statute which overrides all provisions of the statue – It is usually worded "notwithstanding anything in" – A non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment that is to say, to avoid the operation and defect of all contrary provisions.

M/s. Ballarpur Industries Ltd. -V- Employees Provident Fund Appellate Tribunal & Ors.

2019 (II) ILR-Cut………. 782

LIMITATION ACT, 1963 – Section 5 – Condonation of delay – Suit decreed – First appeal filed after the delay of more than five years – First appeal dismissed on the ground of delay – Second appeal by State – Delay of five years – No sufficient cause shown – Delay cannot be condoned.

State of Orissa (Collector, Balangir) & Anr. -V- Bipin Bihari Tripathy.

2019 (II) ILR-Cut………. 760

ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Sections 2(m) read with Sections 34 and 35 – Fragment and prevention of fragmentation – Provisions under – Restriction under the Act to alienate, partition of contiguous Chaka – Petitioner purchased an area of Ac.0.20 out of total area of Ac.2.27 decimal in village Sabaranga under Bhadrak Tahasil of the undivided district of Balasore through registered sale deed – However, after 29 years the Collector, Bhadrak passed an order directing Tahsildar to evict the petitioner from the land on the ground that, no permission was accorded by the

competent authority for alienation of part of chaka – Order of the Collector challenged – Held, on a conspectus of sec.2(m) of the OCH & PFL Act, it is manifestly clear that a compact parcel of agricultural land held by a land owner by himself or jointly with the comprising an area which is less than one Acre in the district of Cuttack, Puri, Balasore, Ganjam, Anandpur sub-division in the district of Keonjhar and two acres in other areas of the state cannot be construed as fragment – Court finds that the suit land situates in the district of Bhadrak – Nishakar Barik transferred an area of Ac.0.20 dec. out of Ac.2.27 dec. appertaining to Chaka No.304, Chaka Plot No.463 – If the same is deducted, the area comes to Ac.2.07 dec. – In view of the same, the Collector, Bhadrak dehors its jurisdiction in initiating proceeding under Sec.35 of the OCH & PFL Act – The proceeding is mis-conceived – Order set aside.

Purna Ch. Palai -V- Collector & District Magistrate, Bhadrak & Ors.

2019 (II) ILR-Cut……… 766

ORISSA GRAMA PANCHAYAT ACT, 1964 – Section 8 read with Section 148 – Provisions under – Reorganization and delimitation of Grama – Writ petition challenging the notification bifurcating a Gramapanchayat – Scope of interference by writ court – Discussed.

S. Balakrushna & Ors. -V- State of Odisha & Ors.

2019 (II) ILR-Cut……… 814

ORISSA LAND REFORMS ACT, 1960 – Section 22 – Applicability – Properties stand recorded jointly in the names of general and scheduled caste persons – Non-scheduled caste person wanted to sale his share – Refusal for registration by the Sub-Registrar on the ground of non-compliance of the provision under section 22 of the OLR Act – The question arose as to whether in such circumstances the provision of section 22 of the Act is applicable? – Held, No.

Bhaskar Narayan Mishra & Ors. -V- State of Odisha & Ors.
2019 (II) ILR-Cut……… 861

PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994 – Sections 23(1) and 23(2) – Provisions under – Writ petition – Challenge is made to certain provisions of the Act and seeking direction in the nature of certiorari/ mandamus for decriminalising anomalies in paperwork/record keeping/clerical errors in regard of the provisions of the Act for being violative of Articles 14, 19(1) (g) and 21 of the Constitution of India – The court considered pros and cons – Held, no case is made out for striking down the proviso to Section 4(3), provisions of Sections 23 (1), 23(2) or to read down Section 20 or 30 of the Act.

Federation of Obstetrics and Gynecological Societies of India (FOGSI) -V- Union of India & Ors.
2019 (II) ILR-Cut……… 657

RAILWAYS ACT, 1989 – Section 18, 113,114,115,124 and 147 read with Rule 4 of the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990 – Provisions under – Writ petition claiming compensation for death owing to an accident caused in an un-manned level crossing – Allegations of negligence and non compliance of statutory obligations as per the provisions of law and the victim lost her life in the said accident due to negligence on the part of the railway administration – Railways raised the question of maintainability of writ petition – Held, the writ petition maintainable and compensation awarded – Principles – Discussed.

Pranabandhu Pradhan & Ors. -V- Union of India & Anr.
2019 (II) ILR-Cut……… 770

RIGHT OF CHILDREN TO FREE & COMPULSORY EDUCATION RULES, 2010 – Rule 14 – Extended period of admission – Admission of petitioner denied on the ground of distance – Petitioner challenged the same & succeeded – Meantime 5 months elapsed – Admission process over & academic session already begun – School authority denied admission on the above plea – Action of the authority challenged – Provisions under Rule 14 of the Rules,2010 – Held, in the view of the aforesaid Rules, if the admission would be given to a child after extended period of six months from the commencement of academic year of the school, obligation will be on the part of the school to make him/her eligible to complete studies with the help of special training, as determined by the head teacher of the school. In the present case, the said six months period has not been elapsed – Therefore, if the petitioner is admitted into standad-1, then in view of Rule-14, he can be able to complete the study with the help of special training given by the head teacher of the school – Thereby, no prejudiced would be caused either to the petitioner or to the institution.

Rakesh Mahallick (Rep. by Father Guardian) -V- Dy. Commissioner, Kendriya Vidyalaya Sangathan, BBSR. & Anr.
2019 (II) ILR-Cut………. 801

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2019 (II) ILR - CUT- 657 (S.C.)

ARUN MISHRA, J & VINEET SARAN, J.

WRIT PETITION (CIVIL) NO. 129 OF 2017

FEDERATION OF OBSTETRICS AND GYNECOLOGICAL SOCIETIES OF INDIA (FOGSI) ………Petitioner

.Vs.

UNION OF INDIA & ORS. ……….Respondents

PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994 – Sections 23(1) and 23(2) – Provisions under – Writ petition – Challenge is made to certain provisions of the Act and seeking direction in the nature of certiorari/ mandamus for decriminalising anomalies in paperwork/record keeping/clerical errors in regard of the provisions of the Act for being violative of Articles 14, 19(1) (g) and 21 of the Constitution of India – The court considered pros and cons – Held, no case is made out for striking down the proviso to Section 4(3), provisions of Sections 23 (1), 23(2) or to read down Section 20 or 30 of the Act.

Relevant paragraphs for arriving at the conclusion.

83. There can be a legislative provision for imposing burden of proof in reverse order relating to gender justice. In the light of prevalent violence against women and children, the Legislature has enacted various Acts, and amended existing statutes, reversing the traditional burden of proof. Some examples of reversed burden of proof in statutes include Sections 29 and 30 of the Protection of Children from Sexual Offences (POCSO) Act in which there is presumption regarding commission and abetment of certain offences under the Act, and presumption of mental state of the accused respectively. In Sections 113A and 113B of the Indian Evidence Act there is presumption regarding abetment of suicide and dowry death, and in Section 114A of the Indian Evidence Act there is presumption of absence of consent of prosecutrix in offence of rape.

84. These provisions are a clear indication of the seriousness with which crimes against women and children have been viewed by the Legislature. It is also evident from these provisions that due to the pervasive nature of these crimes, the Legislature has deemed it fit to employ a reversed burden of proof in these cases. The presumption in the proviso to Section 4(3) of the Act has to be viewed in this light.

85. The Act is a social welfare legislation, which was conceived in light of the skewed sexratio of India and to avoid the consequences of the same. A skewed sexratio is likely to lead to greater incidences of violence against women and increase in practices of trafficking, 'bridebuying' etc. The rigorous implementation of the Act is an edifice on which rests the task of saving the girl child.

86. In view of the aforesaid discussion and in our opinion, no case is made out to hold that deficiency in maintaining the record mandated by Sections 5, 6 and the proviso to Section 4(3) cannot be diluted as the aforesaid provisions have been incorporated in various columns of the Form 'F' and as already held that it would not be a case clerical mistake but absence of sine qua non for undertaking a diagnostic test/procedure. It cannot be said to be a case of

clerical or technical lapse. Section 23(1) need not have provided for gradation of offence once offence is of nonmaintenance of the record, maintenance of which itself intend to prevent female foeticide. It need not have graded offence any further difference is so blur it would not be possible to prevent crime. There need not have been any gradation of offence on the basis of actual determination of sex and nonmaintenance of record as undertaking the test without the prerequisites is totally prohibited under the Act. The non maintenance of record is very foundation of offence. For first and second offences, gradation has been made which is quite reasonable.

87. Provisions of Section 23(2) has also been attacked on the ground that suspension on framing the charges should not be on the basis of clerical mistake, inadvertent clerical lapses. As we found it is not what is suggested to be clerical or technical lapse nor it can be said to be inadvertent mistakes as existence of the particular medical condition is mandated by Sections 4 and 5 including the age etc. Thus, suspension on framing of charges cannot be said to be unwarranted. The same intends to prevent mischief. We are not going into the minutes what can be treated as a simple clerical mistake that has to be seen case wise and no categorization can be made of such mistakes, if any, but with respect to what is mandatory to be provided in the Form as per provisions of various sections has to be clearly mentioned, it cannot be kept vague, obscure or blank as it is necessary for undertaking requisite tests, investigations and procedures. There are internal safeguards in the Act under the provisions relating to appeal, the Supervisory Board as well as the Appropriate Authority, its Advisory Committee and we find that the provisions cannot be said to be suffering from any vice as framing of the charges would mean prima facie case has been found by the Court and in that case, suspension cannot be said to be unwarranted.

88. It was also prayed that action should be taken under Section 20 after show cause notice and reasonable opportunity of being heard. There is already a provision in Section 20(1) to issue a show cause and in Section 20(2) contains the provision as to reasonable opportunity of being heard. Thus, we find no infirmity in the aforesaid provision.

89. There also the Appropriate Authority to consider each case on merits with the help of Advisory Body which has legal expert. The Advisory Committee consists of one legal expert which has to aid and advise the Appropriate Authority as provided in Sections 16 and 17(5)(6). Thus, the submission that legal advice should be taken before prosecution, in view of the provisions, has no legs to stand.

90. It was also contended that action of seizure of ultrasonography machine and sealing the premises cannot be said to be appropriate. The submission is too tenuous and liable to be rejected. Section 30 of the Act enumerates the power of search and seizure and Rules 11 and 12 of the Rules provide for the power of the Appropriate Authority to seal equipment, inspect premises and conduct search and seizure. It was pointed out by the respondents that a "Standard Operational Procedure", detailing the procedure for search and seizure has been developed by the Ministry of Health and Family Welfare. Further, regular training of Appropriate Authorities is being carried out at both the National and State level. All the States have also been directed to develop online MIS for monitoring the implementation of the Act. It is settled proposition that when offence is found to be committed, there can be seizure and sealing of the premises and equipment during trial as no license can be given to go on committing the offence. Such provisions of seizure/sealing, pending trial are to be found invariably in various penal legislations. The impugned provisions contained in the Act constitute reasonable restrictions to carry on any profession which cannot be said to be violative of Right to Equality enshrined under Article 14 or right to practise any profession under Article 19(1)(g). Considering the Fundamental Duties under Article 51A(e) and considering that female foeticide is most inhumane act and results in reduction in sex ratio,

such provisions cannot be said to be illegal and arbitrary in any manner besides there are various safeguards provided in the Act to prevent arbitrary actions as discussed above.

91. In light of the nature of offences which necessitated the enactment of the Act and the grave consequences that would ensue otherwise, suspension of registration under Section 23(2) of the Act serves as a deterrent. The individual cases cited by the petitionerSociety cannot be a ground for passing blanket directions, and the individuals have remedies under the law which they can avail. Moreover, the concept of double jeopardy would have no application here, as it provides that a person shall not be convicted of the same offence twice, which is demonstrably not the case here. Suspension is a stepinaid to further the intendment of act. It cannot be said to be double punishment. In case an employee is convicted for an offence, he cannot continue in service which can be termed to be double jeopardy.

92. Non maintenance of record is spring board for commission of offence of foeticide, not just a clerical error. In order to effectively implement the various provisions of the Act, the detailed forms in which records have to be maintained have been provided for by the Rules. These Rules are necessary for the implementation of the Act and improper maintenance of such record amounts to violation of provisions of Sections 5 and 6 of the Act, by virtue of proviso to Section 4(3) of the Act. In addition, any breach of the provisions of the Act or its Rules would attract cancellation or suspension of registration of Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, by the Appropriate Authority as provided under Section 20 of the Act.

93. There is no substance in the submission that provision of Section 4(3) be read down. By virtue of the proviso to Section 4(3), a person conducting ultrasonography on a pregnant woman, is required to keep complete record of the same in the prescribed manner and any deficiency or inaccuracy in the same amounts to contravention of Section 5 or Section 6 of the Act, unless the contrary is proved by the person conducting the said ultrasonography. The aforementioned proviso to Section 4(3) reflects the importance of records in such cases, as they are often the only source to ensure that an establishment is not engaged in sex determination.

94. Section 23 of the Act, which provides for penalties of offences, acts in aid of the other Sections of the Act is quite reasonable. It provides for punishment for any medical geneticist, gynecologist, registered medical practitioner or a person who owns a Genetic Counselling Centre, a Genetic Clinic or a Genetic Laboratory, and renders his professional or technical services to or at said place, whether on honorarium basis or otherwise and contravenes any provisions of the Act, or the Rules under it.

95. Therefore, dilution of the provisions of the Act or the Rules would only defeat the purpose of the Act to prevent female foeticide, and relegate the right to life of the girl child under Article 21 of the Constitution, to a mere formality.

<u>Case Laws Relied on and Referred to</u> :-

1. (2013) 2 SCC 801 : Arun Bhandari .Vs. State of U.P.
2. (2003) 8 SCC 398 : Centre for Enquiry into Health & Allied Themes (CEHAT) .Vs. Union of India.
3. (2009) 1 GLR 64 : Suo Motu .Vs. State of Gujarat.
4. (2016) 10 SCC 265 : Voluntary Health Association of Punjab .Vs. Union of India.
5. (2001) 5 SCC 577 : Centre for Enquiry into Health and Allied Themes (CEHAT) .Vs. Union of India.
6. (2013) 4 SCC 1 : Voluntary Health Association of Punjab .Vs. Union of India.
7. (2013) 1 SCC 745 : Namit Sharma .Vs. Union of India.
8. AIR 1960 SC 554 : Hamdard Dawakhana .Vs. The Union of India.

9. (W.P. (C) No.795 of 2010) : Raj Bokaria .Vs. Medical Council of India
10. (2013) 2 SCC 801 : Arun Bhandari .Vs. State of Uttar Pradesh,
11. (2018) 6 SCC 454 : Subhash Kashinath Mahajan .Vs. State of Maharashtra.
12. (1996) 2 SCC 648 : Gian Kaur .Vs. State of Punjab.
13. (2016) 7 SCC 221 : Subramanian Swamy .Vs. Union of India.
14. (2015) 5 SCC 1 : Shreya Singhal .Vs. Union of India.
15. (2018) 11 SCC 1 : Nikesh Tarachand Shah .Vs. Union of India.
16. (1994) 3 SCC 394 : P. Rathinam .Vs. Union of India.
17. (2019) 2 SCC 303 : State of Uttar Pradesh .Vs. Wasif Haider.

For Petitioner : KNC
For Respondents : M/s. Gaurav Sharma & Gurmeet Singh Makker.
Intervenor Adv. : Rashmi Nanda Kumar

JUDGMENT Date of Judgment 03.05. 2019

ARUN MISHRA, J.

1. The instant writ petition has been filed by the Federation of Obstetrics and Gynaecological Societies of India (FOGSI) (hereinafter referred to as 'the Society') highlighting the issues and problems affecting the practice of obstetricians and gynaecologists across the country under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as 'the Act') and challenging the constitutional validity of Sections 23(1) and 23(2) of the Act and seeking direction in the nature of certiorari/mandamus for decriminalising anomalies in paperwork/record keeping/clerical errors in regard of the provisions of the Act for being violative of Articles 14, 19(1)(g) and 21 of the Constitution of India. The Society is the apex body of obstetricians and gynaecologists of the country and is concerned for the welfare of its members.

2. The case set up on behalf of the petitioner-Society is that the Act was enacted with the objective to prohibit prenatal diagnostic techniques for determination of sex of the foetus leading to female foeticide. But unfortunately, its implementation is more in letter and less in spirit. The problem of sex determination and gender selection is a serious issue and is one of the biggest social problems faced by our society. Despite enactment of the Act and subsequent amendments, the Child Sex Ratio has not shown significant improvement, hence, putting sufficient concern and questions on the proper implementation of the Act. It is contended that equating clerical errors on the same footing with the actual offence of sex determination shows the inherent weakness in the language of the Act.

3. It is further contended that the Appropriate Authority appointed under the Act conducts inspections and raids in various districts and cities and even if there are mere anomalies in the paperwork, it seals the sonography machine and files a criminal case under the Act. As a result, doctors who do not conduct sex determination and gender selection are being targeted on the basis of aforesaid anomalies. The inherent infirmity in the Act as it stands currently in its present form amounting to treating unequals as equals. The Act has failed to distinguish between criminal offences and the anomalies in paperwork like incomplete 'F'-Forms, clerical mistakes such as writing NA or incomplete address, no mentioning of the date, objectionable pictures of Radha Krishna in sonography room, incomplete filling of Form 'F', indication for sonography not written, faded notice board and not legible, striking out details in the Form 'F' etc., thereby charging the members of the petitioner-Society for heinous crime of female foeticide and sex determination and that too merely for unintentional mistakes in record keeping. The Act provides same punishment for the contravention of any provision of the Act, thus equating the anomalies in paperwork and the offence of sex determination and gender selection on the same pedestal. The sealing of machines directly deprives a woman in that vicinity of a critical medical aid and thereby putting the lives of the women in danger. The unreasonable sealing of the sonography machine not only impacts the welfare of the women as such, but it also amounts to undue harassment and mental torture of the members of the petitioner-Society.

4. It is further contended that the ambiguous wording of Section 23(1) of the Act has resulted in grave miscarriage of justice and the members of the petitioner-Society have faced grave hardships and have undergone criminal prosecution for act, which cannot be equated with the acts of sex determination.

5. It is averred that even the smallest anomaly in paperwork which is in fact an inadvertent and unintentional error has made the obstetricians and gynaecologists vulnerable to the prosecution by the Authorities all over the country.

6. Section 23(2) of the Act empowers the State Medical Council to suspend the registration of any doctor indefinitely, who is reported by the Appropriate Authority for necessary action, during the pendency of trial. The petitioner-Society Submitted that Section 23(2) of the Act is ultra vires the Constitution as it assumes the guilt of the alleged accused even before his/her conviction by a competent court and hence violates the fundamental right guaranteed under Article 21 of the Constitution.

7. It is contended that presumption of innocence is a cardinal principle of rule of law for which petitioner-Society has placed reliance on Article 14(2) of the International Covenant on Civil and Political Rights, 1966, which states that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Article 14(2) of the International Covenant on Civil and Political Rights, 1966 reads thus:

> "Article 14
>
> 1. ***
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

8. It is contended that the Act fails to distinguish between the cases of presence and absence of *mens rea* during the commission of minor clerical mistakes. *Mens rea* is not be presumed at the time of taking cognizance and must be established as held by this Court in ***Arun Bhandari v. State of U.P., (2013) 2 SCC 801.***

9. The petitioner-Society has further placed reliance on the decisions rendered by this Court in cases of penal statues to give proper effect to the scheme of the Act concerned and to balance various interests involved by striking down/reading down/ diluting the concerned penal provisions.

10. It is further contended that suspension of the medical licence at the stage of framing of charges is highly improper and harsh, which results in loss of livelihood of not only the members of the Society, but also his family as well as the dependents, who are deprived of financial security and well-being. The vague and ambiguous wordings of Section 23(1) renders Section 25 totally redundant.

11. It is further submitted that Form-F as it stands today does not serve the purpose for which it was made and there is no substantive evidence which proves that errors in Form-F have any direct nexus with the offence of sex selection and determination.

12. Respondent Nos.1 to 4 has refuted the claims of the Petitioner-Society altogether. It is contended that the Act is a social welfare legislation with a social objective to prevent elimination of girls before birth and it is not a general law providing any general right to practice medicine. The specific choice of legislature cannot be called arbitrary and is in no way *ultra vires* or violative of the Constitution. The Act is a Central legislation; however, its implementation lies primarily with the States, who are required to enforce the

law through the statutory bodies in the State, constituted under the Act. The Act empowers the Central Government to regulate the use of prenatal diagnostic techniques. The proliferation of the technology is resulting in a catastrophe in the form of female foeticide leading to severe imbalance in child sex ratio and sex ratio at birth. The Centre is duty bound to intervene in such a case to uphold the welfare of the society, especially of the women and the children. The Act was enacted with a purpose to ban the use of sex selection techniques before or after conception; prevent the misuse of prenatal diagnostic techniques for sex selection abortions and to regulate such techniques. It is mandatory to maintain proper record in respect of use of ultrasound machines under the Act. For effective implementation of the Act, a hierarchy of Appropriate Authority at State, District and Sub-District level is created.

13. It is contended that ultrasonography test on a pregnant woman is considered to be an important part of a prenatal diagnostic test and the person conducting such test has to maintain a complete record thereof in the manner prescribed in the rules and a deficiency or inaccuracy in maintaining such records would amount to an offence. Chapter VII of the Act prescribes offences and penalties and there is no gradation of offences under the Act as it does not classify offences. Equating the clerical errors on same footing with the actual offence of sex determination is in compliance with the provisions of the Act and rules thereunder. The Act does not differentiate among the violations committed by doctors and provides for punishment for all violations under the Act. The Act prescribes punishment in furtherance of its object and purposes which is to prevent detection of female foetus which is in the larger public interest, hence Section 23 of the Act does not violate Articles 14 and 21. It is further averred that right to practice a profession under Article 19(1)(g) of the Constitution is not an absolute right.

14. It is contended that petitioner-Society in the garb of social cause is trying to mislead this Court and a criminal act cannot be protected under the umbrella of the Article 19. The offences under the Act are *per se* criminal and no exemption can be sought for criminal violations in the guise of public interest or right to freedom.

15. It is contended that the Appropriate Authority conducts inspection pursuant to the directions issued by this Court in ***Centre for Enquiry into Health & Allied Themes (CEHAT) v. Union of India,*** **(2003) 8 SCC 398**, wherein it was directed to constitute National Inspection and Monitoring Committee for conducting inspections. As the sex determination is hatched in

secrecy and committed in privacy and as both the parties are hand in glove with each other, therefore it becomes difficult to detect the commission of the offence, hence traps are usually laid or raids are conducted by the inspecting authorities and sometimes non-maintenance of records or incomplete records may provide substantial evidence towards the commission of offence. It is further submitted that the Act specifically provides for the record keeping under Rule 9 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (hereinafter referred to as 'the Rules') and any deficiency or inaccuracy in record keeping amounts to violation of Sections 5 and 6 of the Act.

16. The respondents contend that record keeping is important for proper implementation of the Act and the stringent provisions with regard to maintenance of records and punishment for noncompliance cannot be equated or considered as infirmity of the Act. If it is exempted from the mandatory requirement, the probably involvement in sex determination and sex selection in the guise of use of diagnostic techniques would continue unabated.

17. It is also contended that the purpose of Form 'F' is to maintain personal and medical record of the patient visiting the Pre-Natal Diagnostic Clinic to avail the services and confirmation regarding the consent of the patient/pregnant woman with regard to the prohibition of communication of the sex of foetus so as to avoid abuse of the technology. Section 4(3) of the Act requires every Genetic Counselling Centre/Genetic Clinic to fill Form 'F'. The filling of Form 'F' is commensurate with the objects of the Act which is to regulate the technology and to avoid the abuse of the technology for the purpose of sex determination. It gives the insight into the reasons for conducting ultrasonography and incomplete Form 'F' raises presumption of doubt against the medical practitioner and in the absence of Form 'F', the Appropriate Authority will have no means to supervise the usage of the ultrasonography machine and shall not be able to regulate the use of the technique. The non-maintenance of records is not merely a technical or procedural lapse in the context of sex determination, it is the most significant piece of evidence for identifying the accused. It is further contended that clerical errors in Form 'F' fall under Section 4 of the Act and any deficiency or inaccuracy found therein shall amount to contravention of the provisions of Section 5 or 6 of the Act unless contrary is proved by the person conducting such ultrasonography.

18. It is contended that every aggrieved person, who suffered from any procedural irregularity, can avail legal remedy as provided under Section 21 of the Act and Rule 19 of the Rules.

19. The respondents have placed reliance on decision rendered by High Court of Gujarat in ***Suo Motu v. State of Gujarat, (2009) 1 GLR 64***, which dealt with the issue of proper maintenance of records and to the decision rendered by High Court of Rajasthan in *S.K. Gupta v. Union of India,* wherein it was observed that female infants have also right to live. There is right of still born child to be looked after properly during pregnancy. Once a child is conceived, it has to be treated with dignity. Such right cannot be denied and practice of female foeticide/infanticide is prevailing at large which is illegal and unconstitutional.

20. The respondents have also drawn our attention to the provisions of Regulation 1.3 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002; Regulation 6.2 of Pharmacy Practice Regulation, 2015; and Transplantation of Human Organs and Tissues Act, 1994, which contains the provisions with respect to maintenance of proper records.

21. It is submitted that Section 23 and Section 25 are complimentary to each other, not contradictory as contended by the petitioner-Society. It is lastly contended that no case for striking down the proviso to Section 4(3) is made out.

22. Shri Soli J. Sorabjee and Shri Shyam Divan, learned senior counsel urged that present is the classic example of unequals being treated as equals. Due to inherent infirmity in the Act, whereunder members of the petitioner Society are treated unequally as mere clerical errors has resulted in breach of personal liberties. The Act fails to classify offence of actual sex determination *visàvis* clerical error in maintenance of record. There is no gradation of offence.

23. The presumption of innocence ought not to be disposed away with under the Act. The same is part of human rights. Presumption of innocence continues until conviction. The provisions of suspension under Section 23(2) is draconian. Any deficiency or inaccuracy in maintenance of records ought not to amount to contravention under Section 5 or Section 6 and the proviso to Section 4(3) accordingly be diluted. It may be clarified that contravention of proviso to Section 4(3), Section 29 and Rule 9 or technical lapses attracting minor penalty should not attract Section 27 of the Act. The

provision of Section 23(2) be read down so that suspension should not fall under Section 23(2) in the case of clerical mistakes or inadvertent technical errors/lapses. Issuance of notice be made mandatory under Section 20. No action be taken on technical grounds such as writing short forms, writing 'NA' instead of "not applicable", writing initials of the doctors etc. while filing up Form 'F'. The competent authority should consider each case on merits with the aid of legal advisor. Denial of renewal of registration of Centre of a running unit on the ground of pendency of criminal trial is illegal and harsh. There should not be seizure of any equipment etc. as ultrasound machine are necessary for human use. It is not appropriate to keep such utilitarian instruments sealed.

24. Ms. Pinki Anand, Additional Solicitor General appearing on behalf of respondents countering the submission raised on behalf of petitioner-Society contended that there is alarming decline inthe child sex ratio in India and in several districts it is worse as the ratio per thousand is below 800. She has also relied upon the purpose and legislative history of enactment of the Act including amendments made thereunder and the Rules. It has been made mandatory to maintain proper records in respect of use of ultrasound machines. The Act provides for prohibition of sex selection/determination as well as regulation of prenatal diagnostic techniques. The rate of conviction is extremely poor, despite 24 years of the existence of the Act, it is only 586 out of 4202 cases registered, resulting into action against 138 medical licenses. Emphasis has been laid by this Court in several decisions on proper maintenance of records. Section 23 is the central provision in the scheme of the Act. Form 'F' is very important as it gives the details and the reasons for conducting ultrasonography and incomplete Form 'F' raises the presumption of doubt against the medical practitioner. Section 23 and Form 'F' are interlinked, thus, the provisions cannot be diluted. She further contended that the non-maintenance of records is not merely procedural lapse, it is key evidence given the collusive nature of the crime. There exist effective and efficacious remedies to the instances cited by the petitioner-Society. She also relied upon a case study on record keeping as an implementation tool of Prabhakar Hospital in Panipat. The Act enjoys a presumption of constitutionality and no case of violation of fundamental rights has been made out by the petitioner-Society. The Act is regulatory and is for the wholesome purpose same advances the intendment of other provisions applicable to medical fraternity, which requires rigorous maintenance of records. Considering the wide prevalence of violence against women and

children in different forms, the Legislature has enacted several Acts in order to ensure gender justice and to take care of cry of female foetus. No case for striking down, dilution or issuance of any guidelines is made out by the petitioner-Society.

25. It was urged on behalf of intervenor that Section 28 of the Act makes it clear that no court shall take cognizance of an offence unless on a complaint made by Appropriate Authority. The composition of Appropriate Authority is provided under Section 17(3)(a), which is a High Powered Body. The Supervisory Board shall review the activities of the Appropriate Authorities as provided under Section 16A(1)(ii). The Supervisory Committee consists of large body. Thus, there are adequate safeguards to maintain check and balance provided within the Act.

26. Before we dilate upon various aspects, we take note of provisions of the Act. The Act was introduced by Parliament with the following Statement of Objects and Reasons:

> "STATEMENT OF OBJECTS AND REASONS
>
> It is proposed to prohibit prenatal diagnostic techniques for determination of sex of the foetus leading to female foeticide. Such abuse of techniques is discriminatory against the female sex and affects the dignity and status of women. A legislation is required to regulate the use of such techniques and to provide deterrent punishment to stop such inhuman act.
>
> The Bill, *inter alia*, provides for:—
>
> (i) prohibition of the misuse of prenatal diagnostic techniques for determination of sex of foetus, leading to female foeticide;
>
> (ii) prohibition of advertisement of prenatal diagnostic techniques for detection or determination of sex;
>
> (iii) permission and regulation of the use of prenatal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders;
>
> (iv) permitting the use of such techniques only under certain conditions by the registered institutions; and
>
> (v) punishment for violation of the provisions of the proposed legislation.
>
> 2. The Bills seeks to achieve the above objectives."

The concern of the Legislature was that the female child is not welcomed with open arms in most of Indian families and the diagnostic technique is being used to commit female foeticide.

27. The female foeticide is not only the concern of India, but of various countries. The United Nations General Assembly had adopted Resolution No. 52/106 on 11.2.1998 expressing concern about pre-natal sex

selection, female infanticide and female genital mutilation. The said Resolution also urged all States to enact and enforce legislation protecting girls from all forms of violence, including female infanticide and prenatal sex selection. The United Nations Fourth World Conference on Women in September, 1995 adopted the Beijing Declaration and Platform for Action. Beijing Declaration and Platform for Action identified “violence against women” to “include forced sterilization and forced abortion, coercive/forced use of contraceptives, female infanticide and prenatal sex selection”. It further urged Governments to “enact and enforce legislation against the perpetrators of practices and acts of violence against women,such as female genital mutilation, female infanticide, pre-natal sex selection and dowryrelated violence”.Further urged Governments to “Eliminate all forms of discrimination against the girl child and the root causes of son preference, which result in harmful and unethical practices such as prenatal sex selection and female infanticide; this is often compounded by the increasing use of technologies to determine foetal sex, resulting in abortion of female foetuses”.

28. Beijing Declaration and Platform for Action was adopted at the 16th Plenary Meeting of the Fourth World Conference on Women held on 15.9.1995 at Beijing. The relevant extract relating to violence against women and actions to be taken is reproduced hereunder:

> “115. Acts of violence against women also include forced sterilization and forced abortion, coercive/forced use of contraceptives, female infanticide and prenatal sex selection.
>
> Strategic objective L.2. Eliminate negative cultural attitudes and practices against girls
>
> Actions to be taken
> 276. By Governments:
>
> (a) Encourage and support, as appropriate, nongovernmental organizations and community-based organizations in their efforts to promote changes in negative attitudes and practices towards
>
> girls;
>
> (b)**
> (c)**
>
> (d) Take steps so that tradition and religion and their expressions are not a basis for discrimination against girls.
>
> 277. By Governments and, as appropriate, international and Nongovernmental organizations:
>
> (a)**

> (b)**
>
> (c) Eliminate all forms of discrimination against the girl child and the root causes of son preference, which result in harmful and unethical practices such as prenatal sex selection and female infanticide; this is often compounded by the increasing use of technologies to determine foetal sex, resulting in abortion of female foetuses"

29. The 1994 Programme of Action of the International Conference on Population and Development (ICPD) resolved to eliminate all forms of discrimination against the girl child and the root causes of son preference, which result in harmful and unethical practices regarding female infanticide and prenatal sex selection, and also to increase public awareness of the value of the girl child. Further urged Governments to take necessary measures to prevent infanticide, prenatal sex selection, trafficking of girl children and forcing of girls in prostitution and pornography. The International Conference on Population and Development adopted the Programme of Action of the International Conference on Population and Development and passed the resolution at the 14th Plenary meeting held on 13.9.1994. The relevant portion of the aforesaid resolution is extracted hereunder:

> "4.15. Since in all societies discrimination on the basis of sex often starts at the earliest stages of life, greater equality for the girl child is a necessary first step in ensuring that women realize their full potential and become equal partners in development. In a number of countries, the practice of pre-natal sex selection, higher rates of mortality among very young girls, and lower rates of school enrolment for girls as compared with boys, suggest that"son preference" is curtailing the access of girl children to food, education and health care. This is often compounded by the increasing use of technologies to determine foetal sex, resulting in abortion of female foetuses. Investments made in the girl child's health, nutrition and education, from infancy through adolescence, are critical.
>
> Objectives
>
> 4.16. The objectives are:
>
> (a) To eliminate all forms of discrimination against the girl child and the root causes of son preference, which results in harmful and unethical practices regarding female infanticide and prenatal sex selection;
>
> (b) To increase public awareness of the value of the girl child, and concurrently, to strengthen the girl child's selfimage, selfesteem and status;
>
> (c) To improve the welfare of the girl child, especially in regard to health, nutrition and education.
>
> 4.23. Governments are urged to take the necessary measures to prevent infanticide, pre-natal sex selection, trafficking in girl children and use of girls in prostitution and pornography."

30. The Resolution 56/139 adopted by the U.N. General Assembly, on 26.2.2002 expressed deep concern about discrimination against the girl child, including practices such as female infanticide, incest, early marriage, pre-natal sex selection etc. The Resolution also urged States to enact and enforce legislation to protect girls from all forms of violence, including female infanticide and pre-natal sex

selection, female genital mutilation, rape, domestic violence, incest, sexual abuse, sexual exploitation, child prostitution and child pornography, and to develop age-appropriate safe and confidential programmes and medical, social and psychological support services to assist girls who are subjected to violence. The General Assembly of United Nations adopted the following resolution no.56/139 on 26.2.2002:

> "Deeply concerned about discrimination against the girl child and the violation of the rights of the girl child, which often result in less access for girls to education, nutrition and physical and mental health care and in girls enjoying fewer of the rights, opportunities and benefits of childhood and adolescence than boys and often being subjected to various forms of cultural, social, sexual and economic exploitation and to violence and harmful practices, such as female infanticide, incest, early marriage, pre-natal sex selection and female genital mutilation.
>
> 10. Also urges all States to enact and enforce legislation to protect girls from all forms of violence, including female infanticide and prenatal sex selection, female genital mutilation, rape, domestic violence, incest, sexual abuse, sexual exploitation, child prostitution and child pornography, and to develop age-appropriate safe and confidential programmes and medical, social and psychological support services to assist girls who are subjected to violence."

31. Resolution 70/138, adopted by the U.N. General Assembly on 17.12.2015, also expressed its concern at discrimination against girl child including prenatal sex selection, and urged states "to enact and enforce legislation to protect girls from all forms of violence, discrimination, exploitation and harmful practices in all settings, including female infanticide and pre-natal sex selection".

32. The General Assembly of United Nations in the 80th Plenary Meeting adopted resolution no.70/138 dated 17.12.2015 concerning the girl child, the relevant portion of the said resolution reads thus:

> "…Deeply concerned also about discrimination against the girl child and the violation of the rights of the girl child, including girls with disabilities, which often result in less access for girls to education, and to quality education, nutrition, including food allocation, and physical and mental healthcare services, in girls enjoying fewer of the rights, opportunities and benefits of childhood and adolescence than boys, and in leaving them more vulnerable than boys to the consequences of unprotected and premature sexual relations and often being subjected to various forms of cultural, social, sexual and economic exploitation and violence, abuse, rape, incest, honour-related crimes and harmful practices, such as female infanticide, child, early and forced marriage, prenatal sex selection and female genital mutilation.
>
> 20. Urges all States to enact and enforce legislation to protect girls from all forms of violence, discrimination, exploitation and harmful practices in all settings, including female infanticide and prenatal sex selection, female genital mutilation, rape, domestic violence, incest, sexual abuse, sexual exploitation, child prostitution and child pornography, trafficking and forced migration, forced labour and child, early and forced marriage, and to develop age-appropriate, safe, confidential and disability-accessible programmes and medical, social and psychological support services to assist girls who are subjected to violence and discrimination.
>
> 29. Calls upon Governments, civil society, including the media, and non-governmental organizations to promote human rights education and full respect for and the enjoyment of

> the human rights of the girl child, inter-alia, through the translation, production and dissemination of age-appropriate and gender-sensitive information material on those rights to all sectors of society, in particular to children.
>
> 30. Requests the Secretary-General, as Chair of the United Nations System Chief Executives Board for Coordination, to ensure that all organizations and bodies of the United Nations system, individually and collectively, in particular the United Nations Children's Fund, the United Nations Educational, Scientific and Cultural Organization, the World Food Programme, the United Nations Population Fund, the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), the World Health Organization, the Joint United Nations Programme on HIV/AIDS, the United Nations Development Programme, the Office of the United Nations High Commissioner for Refugees and the International Labour Organization, take into account the rights and the particular needs of the girl child in country programmes of cooperation in accordance with national priorities, including through the United Nations Development Assistance Framework."

33. The General Assembly of United Nations adopted the following resolution no.52/106 on 12.12.1997 keeping in view the discrimination against the girl child and violation of her rights:

> "Deeply concerned about discrimination against the girl child and the violation of the rights of the girl child, which often result in less access for girls to education, nutrition, physical and mental health care and in girls enjoying fewer of the rights, opportunities and benefits of childhood and adolescence than boys and often being subjected to various forms of cultural, social, sexual and economic exploitation and to violence and harmful practices such as incest, early marriage, female infanticide, prenatal sex selection and female genital mutilation.
>
> 3. Also urges all States to enact and enforce legislation protecting girls from all forms of violence, including female infanticide and prenatal sex selection, female genital mutilation, incest, sexual abuse, sexual exploitation, child prostitution and child pornography, and to develop age-appropriate safe and confidential programmes and medical, social and psychological support services to assist girls who are subjected to violence."

34. The concern world over as to female foeticide and infanticide is writ large from aforesaid resolution. It is worthwhile to quote the statistics of World Factbook, 2016 of the Central Intelligence Agency of the United States of America on female foeticide/infanticide across the world, which is to the following effect:

Rank	Name of the country	Sex ratio at birth
1.	Liechtenstein	126 males/100 females
2.	China	115 males/100 female
3.	Armenia	113 males/100 females
4.	India	112 males/100 females
5.	Azerbaijan	111 males/100 females
5.	Viet Nam	111 males/100 females
6.	Albania	110 males/100 females
7.	Georgia	108 males/100 females
8.	South Korea	107 males/100 females
8.	Tunisia	107 males/100 females

9.	Nigeria	106 males/100 females
10.	Pakistan	105 males/100 females
11.	Nepal	104 males/100 females

35. There is sharp decline in the sex ratio in India. In the year 1901 where 972 females as against 1000 males were recorded. In 1961, it was recorded as 941; in 1971 it was 930; in 1981 it was reported 934; in 1991 it was 927; in 2001 it was 933 and in 2011 it was 943. On behalf of respondent-Union of India following State wise data has been furnished:

"Sex Ratio (Female per 1000 Male) at Birth by residence, India and bigger States, SRS 201214 to 201416

S.N.	India and	2012-	2013-	Change	2013-	2014-	Change
	India	906	918	-6	900	898	-2
1.	Andhra Pradesh	919	918	-1	918	913	-5
2.	Assam	918	900	-18	900	896	-4
3.	Bihar	907	916	9	916	908	-8
4.	Chhattisgarh	973	961	-12	961	963	2
5.	Delhi	876	869	-7	869	857	-12
6.	Gujarat	907	854	-53	854	848	-6
7.	Haryana	866	831	-35	831	832	1
8.	Himachal	938	924	-14	924	917	-7
9.	Jammu & Kashmir	899	899	0	899	906	7
10	Jharkhand	910	902	-8	902	918	16
11.	Karnataka	950	939	-11	939	935	-4
12.	Kerala	974	967	-7	967	959	08
13	Madhya Pradesh	927	919	-8	919	922	3
14.	Maharashtra	896	878	-18	878	876	-2
15.	Orissa	953	950	- 3	950	948	-2
16.	Punjab	870	889	19	889	893	4
17.	Rajasthan	893	861	-32	861	857	-4
18.	Tamil Nadu	921	911	-10	911	915	4
19.	Telangana	N.A	N.A	N.A	N.A	901	N.A
20.	Uttar Pradesh	869	879	10	879	882	3
21.	Uttarakhand	871	844	-27	844	850	6
22..	West Bengal	952	951	-1	951	937	-14

The aforesaid table indicates decline in 18 States and maximum decline of 53 points was recorded in Gujarat followed by Haryana by 35 points and Rajasthan by 32 points. Sex ratio of the States in 20142016 indicates decline in 13 States. The maximum decline of 14 points was recorded in West Bengal followed by Delhi recorded at 12 points. In a publication of United Nations (UNFPA), it was published that 0.46 million

girls were missing at birth on an average annually during the period 20012012 as a result of sex-selective abortions. The fall in sex ratios does not only have an impact on the demography of the nation, but it also gives rise to violent practices such as trafficking of women and bride buying. The Act was conceived out of the urgency for the prohibition of sex selection practices and prohibition of the advertisement of the pre-natal diagnostic techniques for detection/determination of sex. It came into force in the year 1996. It was amended in 2003 following a PIL which was filed in 2000 to improve regulation of technology capable of sex selection. By way of amendment in the Act, the name of the Act has been changed to Pre-Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. The main purpose of the Act is to ban the use of sex selection and misuse of prenatal diagnostic technique for sex selective abortions and to regulate such techniques. The amendments have brought techniques of preconception sex - selection within the ambit of the Act and have also brought use of ultrasound machines under its umbrella. It has further provided for constitution of Central and State Level Supervisory Board. More stringent punishments have been provided. The Appropriate Authorities have been given powers of civil court for search, seizure and sealing. The maintenance of record has been made mandatory in respect of use of ultrasound machines. It has also regulated the sale of ultrasound machines only to the registered bodies. The Act provides for prohibition of sex selection/determination and regulate prenatal diagnostic technology. Several important amendments were notified in the Rules. Rule 11(2) was amended in 2011 to provide for confiscation of the unregistered machines and Section 23(1) prescribes imprisonment upto three years and with fine upto ten thousand rupees against the unregistered clinic/facilities and on any subsequent conviction, the imprisonment may extend to five years and with fine which may extend to fifty thousand rupees and Section 23(3) prescribes imprisonment upto three years of imprisonment and with fine upto fifty thousand rupees against the unregistered clinic/facilities for the first offence and for any subsequent offence, the imprisonment may extend to five years and with fine which may extend to one lakh rupees. Rule 3A(3) has been inserted in 2012 to restrict the registration of medical practitioners qualified under the Act to conduct ultrasonography in maximum of two ultrasound facilities within a district only. Number of hours during which the Registered Medical Practitioner would be present in each clinic would be specified clearly to the Appropriate Authority. The amendment made to Rule 13 in 2012 requires every Genetic Counselling Centres, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic

and Imaging Centre to intimate every change of employee, place, address and equipment installed to the Appropriate Authority 30 days in advance of the expected date of such change and seeks issuance of a new certificate with the changes duly incorporated. Rules for six months' training in ultrasound for the MBBS doctors have been notified vide GSR 14(E) dated 10.1.2014. The Rules include the training curriculum, criteria for accreditation of institutions which will impart training and procedure for Competency Based Evaluation Test for such trained medical practitioners. Revised Form 'F' has been notified vide GSR 77 (E) date 4.2.2014. The revised format is more simplified as the details of invasive and noninvasive diagnostic procedures have been separated and made more simplified.

36. There are only 586 convictions out of 4202 cases registered even after 24 years of existence. It reflects the challenges being faced by the Appropriate Authority in implementing this social legislation. Below is the chart showing State wise status of implementation of the Act as on September 2018 submitted on behalf of respondents:

State wise status of implementation of the PC&PNDT Act as on SEPTEMBER, 2018							
S.No.	States/UTs	No. of registered bodies	No. of ongoing Court/ Police cases	No. of Machines seized/ sealed	Convictions*	Medical licenses cancelled/ suspended	Number of cases decided/ closed
1	Andhra Pradesh	3119	20	18	0	0	8
2	Arunachal Pradesh	97	0	-	0	0	-
3	Assam	930	11	4	1	0	4
4	Bihar	2761	132	38	6	0	32
5	Chhattisgarh	700	14	0	0	0	7
6	Goa	174	1	1	1	0	
7	Gujarat	5994	235	2	18	7	199
8	Haryana	2144	313	562	85	21	157
9	Himachal Pradesh	404	0	4	1	0	3
10	Jammu & Kashmir	493	3	13	1	0	-
11	Jharkhand	761	32	0	2	0	-
12	Karnataka	4711	49	58	38	0	41
13	Kerala	1737	0	-	0	0	-
14	Madhya Pradesh	1723	50	17	4	3	9
15	Maharashtra	8672	587	462	99	79	358
16	Manipur	130	0	--	0	0	-
17	Meghalaya	50	0	-	0	0	-
18	Mizoram	61	0	-	0	0	-
19	Nagaland	49	0	0	0	0	-

20	Odisha	1001	66	-	5	0	4
21	Punjab	1603	147	38	31	1	93
22	Rajasthan	3039	701	506	149	21	368
23	Sikkim	27	0	0	0	0	-
24	Tamil Nadu	6717	123	-	109	2	83
25	Telangana	3547	24	108	3	0	25
26	Tripura	48	1	-	0	0	-
27	Uttarakhand	647	47	12	4	0	16
28	Uttar Pradesh	6031	139	39	20	1	10
29	West Bengal	3238	24	29	0	0	1
30	A & N Island	17	0	-	0	0	-
31	Chandigarh	183	1	-	0	0	2
32	D & N Haveli	16	0	-	0	0	-
33	Daman & Diu	10	0	0	0	0	-
34	Delhi	1584	104	170	10	3	57
35	Lakshadeep	9	0	-	0	0	-
36	Puducherry	109	1	-	0	0	-
	TOTAL	62596	2825	2081	586	138	1377
Note: *Convictions and Medical licenses data up to June 2018							

37. In the light of aforesaid, we examine the submission raised on behalf of petitioner based upon clerical errors. It was urged that the license of members of noble charitable profession are being suspended on account of clerical errors/mistakes in paper work under the Act and the Rules made thereunder. On account of clerical errors in filling up of the forms, it would not be appropriate to inflict the punishment. In case of actual offence of sex determination, the provisions of the Act may govern the field. As submission appears to be attractive and it requires deep scrutiny whether it is a clerical error in filling up of the forms or is foundation of substantial breach of the provisions of the Act and Rules framed thereunder. It was urged that Section 23 of the Act treats unequals as equals and there is infirmity in the Act as the clerical error in filling up of the Form 'F' cannot be treated at par with actual offence of sex determination. There is no gradation of the offence under the Act. Learned senior counsel has placed reliance on ***Uttar Pradesh Power Corporation Ltd. vs. Ayodhya Prasad Mishra,*** **(2008) 10 SCC 139**, wherein this Court held that unequals cannot be treated equally. Treating of unequals as equals would as well offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution. The same is extracted hereunder:

> "40. It is well settled that equals cannot be treated unequally. But it is equally well settled that unequals cannot be treated equally. Treating of unequals as equals would as well offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution. The High Court was, therefore, right in holding that Executive Engineers placed in Category I must get priority and preference for promotion to the post of Superintendent Engineer over Executive Engineers found in Category II."

38. It is contended that merely clerical error cannot be equated with offences as mentioned in Sections 5 and 6 of the Act. The main purpose and the object of the Act is being misused and more than 60 per cent cases registered under the Act, are pertaining to non-maintenance of record.

39. In order to appreciate whether it is clerical omission or otherwise, we have to delve on the provisions of the Act what is mandated thereunder. Section 3 provides for regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics, Section 3A deals with prohibition of sex-selection and Section 3B deals with prohibition on sale of ultrasound machine, etc. to persons, laboratories, clinics, etc. not registered under the Act. The same are extracted hereunder:

> "**3. Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics.**— On and from the commencement of this Act, —
>
> (1) no Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic unless registered under this Act, shall conduct or associate with, or help in, conducting activities relating to prenatal diagnostic techniques;
>
> (2) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall employ or cause to be employed or take services of any person whether on honorary basis or on payment who does not possess the qualifications as may be prescribed;
>
> (3) no medical geneticist, gynaecologist, paediatrician, registered medical practitioner or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any other person, any prenatal diagnostic techniques at a place other than a place registered under this Act.
>
> **3A. Prohibition of sex-selection.** — No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them.
>
> **3B. Prohibition on sale of ultrasound machine, etc., to persons, laboratories, clinics, etc., not registered under the Act .**— No person shall sell any ultrasound machine or imaging machine or scanner or any other equipment capable of detecting sex of foetus to any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other person not registered under the Act." (emphasis supplied)

40. Section 4 deals with regulation of prenatal diagnostic techniques, which is extracted hereunder:

> "**4. Regulation of prenatal diagnostic techniques**. — On and from the commencement of this Act,—
>
> (1) no place including a registered Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting prenatal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3);
>
> (2) no prenatal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely: —

(i) chromosomal abnormalities;
(ii) genetic metabolic diseases;
(iii) haemoglobinopathies;
(iv) sexlinked genetic diseases;
(v) congenital anomalies;
(vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board;

(3) no prenatal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing that any of the following conditions are fulfilled, namely:—

(i) age of the pregnant woman is above thirtyfive years;

(ii) the pregnant woman has undergone of two or more spontaneous abortions or foetal loss;

(iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;
(iv) the pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, spasticity or any other genetic disease;
(v) any other condition as may be specified by the Board;

Provided that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in clinic in such manner, as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of the provisions of section 5 or section 6 unless contrary is proved by the person conducting such ultrasonography;

(4) no person including a relative or husband of the pregnant woman shall seek or encourage the conduct of any prenatal diagnostic techniques on her except for the purposes specified in clause (2).

(5) no person including a relative or husband of a woman shall seek or encourage the conduct of any sex-selection technique on her or him or both."

(emphasis supplied)

There is prohibition created under Section 4(1) to use any registered Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic for conducting pre-natal diagnostic techniques except for the purposes specified in subsection (2) of Section 4. Wrong expression has been used as clause (2) in the Act, where it should be sub-section (2). Be that as it may. Section 4(2) provides for conducting of pre-natl diagnostic techniques for the purpose of detection of abnormalities.

Section 4(3) provides that no pre-natal diagnostic techniques shall be used unless the person qualified to do so is satisfied for the reasons to be recorded in writing that prescribed conditions are fulfilled such as age of the pregnant women is above thirtyfive years; the pregnant woman has undergone two or more spontaneous abortions or foetal loss; she had been exposed to potentially teratogenic agents such as drugs, radiation, infection or

chemicals; the pregnant woman or her spouse has a family history of mental retardation or physical deformities as prescribed therein; or any other condition as may be specified by the Board.

In the absence of aforesaid fulfilment of the aforesaid conditions provided in Section 4(3) and in the absence of abnormality as provided in Section 4(2), no such test can be performed. Proviso to Section 4(3) makes it mandatory that person conducting ultrasonography on a pregnant woman shall keep complete record as may be prescribed and any deficiency or inaccuracy found therein shall amount to contravention of the provisions of Section 5 or Section 6 unless contrary is proved by the person conducting such ultrasonography. Section 5 provides for written consent of pregnant woman and prohibition of communicating the sex of foetus, whereas Section 6 provides that determination of sex is prohibited. Sections 5 and 6 are extracted below:

> **"5. Written consent of pregnant woman and prohibition of communicating the sex of foetus**.—
>
> (1) No person referred to in clause (2) of section 3 shall conduct the pre-natal diagnostic procedures unless—
>
> (a) he has explained all known side and after effects of such procedures to the pregnant woman concerned;
>
> (b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and
>
> (c) a copy of her written consent obtained under clause (b) is given to the pregnant woman.
>
> (2) No person including the person conducting prenatal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs, or in any other manner.
>
> **6. Determination of sex prohibited.—** On and from the commencement of this Act, —
>
> (a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, prenatal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;
>
> (b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus.
>
> (c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception." (emphasis supplied)

41. Independently, specific provisions have been made barring use of technology i.e., prenatal diagnostic techniques for determination of sex of foetus under Section 6 of the Act. The use of technology can only be for the purposes as provided in Section 4(2) and with the preconditions as provided in Section 4(3).

42. As a safeguard to arbitrary use of powers by concerned authorities the constitution of State Supervisory Board and Union Territory Supervisory Board is provided in Section 16A, which is a large body consisting of various representatives. It has to create public awareness, review the activities of the Appropriate Authorities and to monitor the implementation of the provisions of the Act and to send the periodical report. Relevant portion of Section 16A of the Act reads thus:

> "**16A. Constitution of State Supervisory Board and Union territory Supervisory Board**.—
>
> (1) Each State and Union territory having Legislature shall constitute a Board to be known as the State Supervisory Board or the Union territory Supervisory Board, as the case may be, which shall have the following functions:—
>
> (i) to create public awareness against the practice of preconception sex selection and prenatal determination of sex of foetus leading to female foeticide in the State;
>
> (ii) to review the activities of the Appropriate Authorities functioning in the State and recommend appropriate action against them;
>
> (iii) to monitor the implementation of provisions of the Act and the rules and make suitable recommendations relating thereto, to the Board;
>
> (iv) to send such consolidated reports as may be prescribed in respect of the various activities undertaken in the State under the Act to the Board and the Central Government; and
>
> (v) any other functions as may be prescribed under the Act.
>
> (2) The State Board shall consist of,—
>
> (a) the Minister in charge of Health and Family Welfare in the State, who shall be the Chairperson, *ex-officio*;
>
> (b) Secretary in charge of the Department of Health and Family Welfare who shall be the ViceChairperson, *ex-officio*;
>
> (c) Secretaries or Commissioners in charge of Departments of Women and Child Development, Social Welfare, Law and Indian System of Medicines and Homoeopathy, *exofficio*, or their representatives;
>
> (d) Director of Health and Family Welfare or Indian System of Medicines and Homoeopathy of the State Government, *ex-officio*;
>
> (e) three women members of Legislative Assembly or Legislative Council;
>
> (f) ten members to be appointed by the State Government out of which two each shall be from the following categories:—
>
> (i) eminent social scientists and legal experts;
>
> (ii) eminent women activists from non-governmental organizations or otherwise;
>
> (iii) eminent gynaecologists and obstetricians or experts of *striroga* or *prasutitantra*;
>
> (iv) eminent paediatricians or medical geneticists;
>
> (v) eminent radiologists or sonologists;
>
> (g) an officer not below the rank of Joint Director in charge of Family Welfare, who shall be the Member Secretary, *ex-officio*.
>
> (3) The State Board shall meet at least once in four months."

43. The constitution of Appropriate Authority and Advisory Committee is provided in Section 17. It consists of an officer of or above the rank of the Joint Director of Health and Family Welfare as Chairperson, an eminent woman representing women's organization and an officer of Law Department of the State or the Union Territory as members as the case may be. The functions of the Appropriate Authority are prescribed in Section 17(4). It empowers the Appropriate Authority to grant, suspend or cancel the registration, enforce standards, investigate complaints and to do other acts as provided therein. Constitution of Advisory Committee is also provided under Section 17(6), to aid and advise the Appropriate Authority, consisting of three medical experts from amongst gynaecologists, obstetricians, paediatricians and medical geneticists, one legal expert, an officer as provided thereunder, and three eminent social workers. No person who has been associated with the use or promotion of prenatal diagnostic techniques for determination of sex or sex selection can be member of the Advisory Committee. Section 17 is extracted hereunder:

"**17. Appropriate Authority and Advisory Committee**.—

(1) The Central Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for each of the Union territories for the purposes of this Act.

(2) The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the whole or part of the State for the purposes of this Act having regard to the intensity of the problem of prenatal sex determination leading to female foeticide.

(3) The officers appointed as Appropriate Authorities under subsection
(1) or subsection (2) shall be,—

(a) when appointed for the whole of the State or the Union territory, consisting of the following three members:—

(i) an officer of or above the rank of the Joint Director of Health and Family Welfare-Chairperson;

(ii) an eminent woman representing women's organization; and

(iii) an officer of Law Department of the State or the Union territory concerned:

Provided that it shall be the duty of the State or the Union territory concerned to constitute multimember State or Union territory level Appropriate Authority within three months of the coming into force of the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002:

Provided further that any vacancy occurring therein shall be filled within three months of the occurrence.

(b) when appointed for any part of the State or the Union territory, of such other rank as the State Government or the Central Government, as the case may be, may deem fit.

(4) The Appropriate Authority shall have the following functions, namely:—

(a) to grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;

(b) to enforce standards prescribed for the Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic;

(c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action;

(d) to seek and consider the advice of the Advisory Committee, constituted under subsection (5), on application for registration and on complaints for suspension or cancellation of registration;

(e) to take appropriate legal action against the use of any sex selection technique by any person at any place, *suo motu* or brought to its notice and also to initiate independent investigations in such matter;

(f) to create public awareness against the practice of sex selection or prenatal determination of sex;

(g) to supervise the implementation of the provisions of the Act and rules;

(h) to recommend to the Board and State Boards modifications required in the rules in accordance with changes in technology or social conditions;

(i) to take action on the recommendations of the Advisory Committee made after investigation of complaint for suspension or cancellation of registration.

(5) The Central Government or the State Government, as the case may be, shall constitute an Advisory Committee for each Appropriate Authority to aid and advise the Appropriate Authority in the discharge of its functions, and shall appoint one of the members of the Advisory Committee to be its Chairman.

(6) The Advisory Committee shall consist of—

(a) three medical experts from amongst gynaecologists, obstericians, paediatricians and medical geneticists;

(b) one legal expert;

(c) one officer to represent the department dealing with information and publicity of the State Government or the Union territory, as the case may be;

(d) three eminent social workers of whom not less than one shall be from amongst representatives of women's organisations.

(7) No person who has been associated with the use or promotion of prenatal diagnostic techniques for determination of sex or sex selection shall be appointed as a member of the Advisory Committee.

(8) The Advisory Committee may meet as and when it thinks fit or on the request of the Appropriate Authority for consideration of any application for registration or any complaint for suspension or cancellation of registration and to give advice thereon:

Provided that the period intervening between any two meetings shall not exceed the prescribed period.

> (9) The terms and conditions subject to which a person may be appointed to the Advisory Committee and the procedure to be followed by such Committee in the discharge of its functions shall be such as may be prescribed."

44. Section 17A empowers Appropriate Authority to summon any person who is in possession of any information relating to violation of the provisions of the Act and production of documents, issue search warrant etc. It is mandatory that such Genetic Counselling Centres, Laboratories or Clinics should be registered under Section 18 of the Act.

45. Section 20 deals with cancellation or suspension of registration. An action can be taken as provided under Section 20(2) after giving reasonable opportunity of being heard. In case there is breach of provisions of the Act or the Rules, and the same is without prejudice to any criminal action that it may take against such Centres, Laboratory or Clinic, the Appropriate Authority in public interest for reasons to be recorded in writing, can suspend the registration of any Genetic Counselling Centres, Laboratories or Clinics under Section 20(3) of the Act without issuing any notice referred to in sub-section (1) of Section 20. The provisions of appeal against the order of suspension or cancellation of registration passed by Appropriate Authority has been provided in Section 21. Sections 20 and 21 are extracted hereunder:

> "**20. Cancellation or suspension of registration.**— (1). The Appropriate Authority may *suo moto* , or on complaint, issue a notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice.
>
> (2) If, after giving a reasonable opportunity of being heard to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that there has been a breach of the provisions of this Act or the rules, it may, without prejudice to any criminal action that it may take against such Centre, Laboratory or Clinic, suspend its registration for such period as it may think fit or cancel its registration, as the case may be.
>
> (3) Notwithstanding anything contained in subsections (1) and (2), if the Appropriate Authority is of the opinion that it is necessary or expedient so to do in the public interest, it may, for reasons to be recorded in writing, suspend the registration of any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic without issuing any such notice referred to in subsection (1).
>
> **21. Appeal**.— The Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic may, within thirty days from the date of receipt of the order of suspension or cancellation of registration passed by the Appropriate Authority under section 20, prefer an appeal against such order to—
>
> (i) the Central Government, where the appeal is against the order of the Central Appropriate Authority; and (ii) the State Government, where the appeal is against the order of the State Appropriate Authority,
>
> in the prescribed manner." (emphasis supplied)

46. Section 22 deals with prohibition of advertisement relating to preconception and prenatal determination of sex and punishment for contravention.

47. Section 23 deals with offences and penalties. Section 23(1) provides for contravention of any provisions of the Act or Rules made thereunder, punishment with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees. Section 23(2) contains provision with respect to reporting of name of the registered medical practitioner by the Appropriate Authority to the State Medical Council concerned for passing appropriate order including suspension of the registration, if the charges are framed by the Court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence. Any person who seek aid of any Genetic Counselling Centre, Laboratory, Clinic or ultrasound clinic or imaging clinic etc. for sex selection, shall be punishable with imprisonment which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees. If a woman is compelled by her husband or any other relative to undergo pre-natal diagnostic technique for the purpose of Section 4(2), such person shall be liable for abetment of offence under Section 23(3). Sections 23 and 24 are extracted hereunder:

> "**23. Offences and penalties**.— (1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.
>
> (2) The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.
>
> (3) Any person who seeks the aid of any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex-selection or for conducting prenatal diagnostic

> techniques on any pregnant women for the purposes other than those specified in subsection (2) of section 4, he shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees.
>
> (4) For the removal of doubts, it is hereby provided, that the provisions of sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection.
>
> **24. Presumption in the case of conduct of prenatal diagnostic techniques** .— Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), the court shall presume unless the contrary is proved that the pregnant woman was compelled by her husband or any other relative, as the case may be, to undergo prenatal diagnostic technique for the purposes other than those specified in subsection (2) of section 4 and such person shall be liable for abetment of offence under subsection (3) of section 23 and shall be punishable for the offence specified under that section."
>
> (emphasis supplied)

48. Section 25 of the Act deals with the penalty for contravention of the provisions of the Act or rules for which no specific punishment is provided. Any contravention under this Section shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees or both and in case of continuing contravention with an additional fine which may extend to five hundred rupees for every day.

49. Section 27 makes offence to be cognizable, non-bailable and non-compoundable. Section 27 is extracted hereunder:

> "27. **Offence to be cognizable, non-bailable and non-compoundable.-**Every offence under this Act shall be cognizable, non-bailable and non-compoundable."

50. The mode of taking cognizance of offence is provided in Section 28 on a complaint made by the Appropriate Authority or any officer authorised in this behalf; or by a person who has given notice of not less than fifteen days to the Appropriate Authority of the alleged offence and of his intention to make a complaint to the court. The Metropolitan Magistrate or a Judicial Magistrate is competent to try any offence punishable under this Act. Maintenance of records is provided in Section 29 and that has to be preserved for two years. In case any criminal or other proceedings are instituted against any Genetic Counselling Centre, Laboratory or Clinic, the records shall be preserved till the final disposal of such proceedings. Section 30 empowers Appropriate Authority to search and seize records etc. Section 31 provides for protection of action taken in good faith.

51. Section 32 empowers the Central Government to make rules for carrying out the provisions of the Act. Section 33 gives power to the Board to make regulations with the previous sanction of the Central Government. Rules and

regulations are required to be laid before the Parliament as provided in Section 34.

52. Rule 9 of the Rules provides for maintenance and preservation of records. The same is extracted hereunder:

> **9. Maintenance and preservation of records**.—
>
> (1) Every Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic including a mobile Genetic Clinic, Ultrasound Clinic and Imaging Centre shall maintain a register showing, in serial order, the names and addresses of the men or women given genetic counselling, subjected to prenatal diagnostic procedures or prenatal diagnostic tests, the names of their spouse or father and the date on which they first reported for such counselling, procedure or test.
>
> (2) The record to be maintained by every Genetic Counselling Centre, in respect of each woman counselled shall be as specified in Form D.
>
> (3) The record to be maintained by every Genetic Laboratory, in respect of each man or woman subjected to any prenatal diagnostic procedure/technique/test, shall be as specified in Form E.
>
> (4) The record to be maintained by every Genetic Clinic including a mobile Genetic Clinic, in respect of each man or woman subjected to any pre-natal diagnostic procedure/technique/test, shall be as specified in Form F.
>
> (5) The Appropriate Authority shall maintain a permanent record of applications for grant or renewal of certificate of registration as specified in Form H. Letters of intimation of every change of employee, place, address and equipment installed shall also be preserved as permanent records.
>
> (6) All case related records, forms of consent, laboratory results, microscopic pictures, sonographic plates or slides, recommendations and letters shall be preserved by the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, Ultrasound Clinic or Imaging Centre for a period of two years from the date of completion of counselling, prenatal diagnostic procedure or pre-natal diagnostic test, as the case may be. In the event of any legal proceedings, the records shall be preserved till the final disposal of legal proceedings, or till the expiry of the said period of two years, whichever is later.
>
> (7) In case the Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic or Ultrasound Clinic or Imaging Centre maintains records on computer or other electronic equipment, a printed copy of the record shall be taken and preserved after authentication by a person responsible for such record.
>
> (8) Every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre shall send a complete report in respect of all pre-conception or pregnancy related procedures/techniques/tests conducted by them in respect of each month by 5th day of the following month to the concerned Appropriate Authority."

Rule 9 makes it mandatory to maintain a register showing in serial order the names and addresses of the men or women given genetic counselling, subjected to prenatal diagnostic procedures or prenatal diagnostic tests, the name of their spouse or father and the date on which they first reported for such counselling. Rule 9(2) states that record to be maintained uniformly. Rule 9(4) provides that record to be maintained by very Genetic Clinic in respect of

each man or woman subjected to any prenatal diagnostic procedure/technique/test, shall be specified in Form 'F'. Rule 10 deals with conditions for conducting prenatal diagnostic procedures. Rule 10(1A) provides that it is mandatory for every person conducting ultrasonography to declare that he/she has neither detected nor disclosed the sex of foetus of the pregnant woman to anybody. The pregnant woman shall declare before undergoing the test that she does not want to know the sex of her foetus. Rule 19 provides for an appeal against the decision of Appropriate Authority. Form 'F', which is the bone of contention of the learned counsel for the parties, is extracted hereunder:

"FORM F
FORM FOR MAINTENANCE OF RECORD IN RESPECT OF PREGNANT WOMAN BY GENETIC CLINIC/ULTRASOUND CLINIC/IMAGING CENTRE

1. Name and address of the Genetic Clinic/Ultrasound Clinic/Imaging Centre.
2. Registration No.
3. Patient's name and her age
4. Number of children with sex of each child
5. Husband's/Father's name
6. Full address with Tel. No., if any
7. Referred by (full name and address of Doctor(s) / Genetic Counselling Centre (referral note to be preserved carefully with case papers)/self referral
8. Last menstrual period/weeks of pregnancy
9. History of genetic/medical disease in the family (specify)
Basis of diagnosis:
(a) Clinical
(b) Biochemical
(c) Cytogenetic
(d) Other (e.g. radiological, ultrasonography etc. specify)

10. Indication for prenatal diagnosis
A. Previous child/children with:
(i) Chromosomal disorders
(ii) Metabolic disorders
(iii) Congenital anomaly
(iv) Mental retardation
(v) Haemoglobinopathy
(vi) Sex linked disorders
(vii) Single gene disorder
(viii) Any other (specify)
B. Advanced maternal age (35 years)
C. Mother/father/sibling has genetic disease (specify)
D. Other (specify)

11. Procedures carried out (with name and registration No. of Gynaecologist/ Radiologist/ Registered Medical Practitioner) who performed it.
    Non-Invasive
    (i) Ultrasound (specify purpose for which ultrasound is to done during pregnancy) [List of indications for ultrasonography of pregnant women are given in the note below]
    Invasive
    (ii) Amniocentesis
    (iii) Chorionic Villi aspiration
    (iv) Foetal biopsy
    (v) Cordocentesis
    (vi) Any other (specify)
12. Any complication of procedure – please specify
13. Laboratory tests recommended
    (i) Chromosomal studies
    (ii) Biochemical studies
    (iii) Molecular studies
    (iv) Preimplantation genetic diagnosis
14. Result of
    (a) pre-natal diagnostic procedure (give details)
    (b) Ultrasonography Normal/Abnormal (specify abnormality detected, if any).
15. Date(s) on which procedures carried out.
16. Date on which consent obtained. (In case of invasive)
17. The result of prenatal diagnostic procedure were conveyed to ……….on …………
18. Was MTP advised/conducted?
19. Date on which MTP carried out

Date …………….. Name, Signature and Registration number
Place…………….. of the Gynaecologist/Radiologist/Director of the Clinic

DECLARATION OF PREGNANT WOMAN

I, Ms…………………..(name of the pregnant woman) declare that by undergoing ultrasonography /image scanning etc. I do not want to know the sex of my foetus.

Signature/Thump impression of pregnant woman

DECLARATON OF DOCTOR/PERSON CONDUCTING ULTRASONOGRAPHY/IMAGE SCANNING

I,……………………(name of the person conducting ultrasonography/image scanning) declare that while conducting ultrasonography/image scanning on Ms…………………..(name of the pregnant woman), I have neither detected nor disclosed the sex of her foetus to any body in any manner.

Name and signature of the person conducting ultrasonography/image scanning/Director or owner of genetic clinic/ultrasound clinic/imaging centre.

Important Notes:—

(i) Ultrasound is not indicated/advised/performed to determine the sex of foetus except for diagnosis of sexlinked diseases such as Duchenne Muscular Dystrophy, Haemophilia A & B, etc.

(ii) During pregnancy Ultrasonography should only be performed when indicated. The following is the representative list of indications for ultrasound during pregnancy.

(1) To diagnose intrauterine and/or ectopic pregnancy and confirm viability.
(2) Estimation of gestational age (dating).
(3) Detection of number of foetuses and their chorionicity.
(4) Suspected pregnancy with IUCD in-situ or suspected pregnancy following contraceptive failure/MTP failure.
(5) Vaginal bleeding / leaking.
(6) Followup of cases of abortion.
(7) Assessment of cervical canal and diameter of internal os.
(8) Discrepancy between uterine size and period of amenorrhoea.
(9) Any suspected adenexal or uterine pathology / abnormality.
(10) Detection of chromosomal abnormalities, foetal structural defects and other abnormalities and their followup.
(11) To evaluate foetal presentation and position.
(12) Assessment of liquor amnii.
(13) Preterm labour / preterm premature rupture of membranes.
(14) Evaluation of placental position, thickness, grading and abnormalities (placenta praevia, retroplacental haemorrhage, abnormal adherence etc.).
(15) Evaluation of umbilical cord – presentation, insertion, nuchal encirclement, number of vessels and presence of true knot.
(16) Evaluation of previous Caesarean Section scars.
(17) Evaluation of foetal growth parameters, foetal weight and foetal well being.
(18) Colour flow mapping and duplex Doppler studies.
(19) Ultrasound guided procedures such as medical termination of pregnancy, external cephalic version etc. and their followup.
(20) Adjunct to diagnostic and therapeutic invasive interventions such as chorionic villus sampling (CVS), amniocenteses, foetal blood sampling, foetal skin biopsy, amnioinfusion, intrauterine infusion, placement of shunts etc.
(21) Observation of intrapartum events.
(22) Medical/surgical conditions complicating pregnancy.
(23) Research/scientific studies in recognised institutions.

Person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic/centre in Form F and any deficiency or inaccuracy found therein shall amount to contravention of provisions of section 5 or section 6 of the Act, unless contrary is proved by the person conducting such ultrasonography."

53. The Act and Rules are not the only regulatory framework which requires the medical fraternity to keep proper record. The medical profession has highly specialised nature and considering the nature of services rendered by medical professional, proper maintenance of records is an integral part of

the medical services. It is contended on behalf of Medical Council of India that the Medical Council of India (MCI) under Section 33 of the Indian Medical Council Act, 1956 has framed the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, which also placed a burden on physicians to observe the law of the country. By the said Regulations, it is mandatory for every doctor to maintain the records of the patients treated by him/her and non maintaining of records is a misconduct. MCI Regulation 1.3 deals with maintenance of medical records, which reads thus:

> "**1.3 Maintenance of medical records**:
>
> 1.3.1 Every physician shall maintain the medical records pertaining to his / her indoor patients for a period of 3 years from the date of commencement of the treatment in a standard proforma laid down by the Medical Council of India and attached as Appendix 3.
>
> 1.3.2. If any request is made for medical records either by the patients / authorised attendant or legal authorities involved, the same may be duly acknowledged and documents shall be issued within the period of 72 hours.
>
> 1.3.3 A Registered medical practitioner shall maintain a Register of Medical Certificates giving full details of certificates issued. When issuing a medical certificate he / she shall always enter the identification marks of the patient and keep a copy of the certificate. He / She shall not omit to record the signature and/or thumb mark, address and at least one identification mark of the patient on the medical certificates or report. The medical certificate shall be prepared as in Appendix 2.
>
> 1.3.4 Efforts shall be made to computerize medical records for quick retrieval."
>
> (emphasis supplied)

54. Regulation 7.1 under Chapter 7 deals with misconduct committed by a doctor by violating any provisions of the Regulations, whereas Regulation 7.2 provides that the failure to maintain the medical records of indoor patient for a period of three years and refusal to provide the medical record to a patient on request within 72 hours is a misconduct. Regulation 7.6 deals with misconduct relating to sex determination and termination of pregnancy. The relevant portion of Regulation 7 is reproduced hereunder:

> "**7. MISCONDUCT**
>
> The following acts of commission or omission on the part of a physician shall constitute professional misconduct rendering him/her liable for disciplinary action.
>
> **7.1 Violation of the Regulations**: If he/she commits any violation of these Regulations.
>
> 7.2 If he/she does not maintain the medical records of his/her indoor patients for a period of three years as per regulation 1.3 and refuses to provide the same within 72 hours when the patient or his/her authorised representative makes a request for it as per the regulation 1.3.2.
>
> *** *** ***

7.6 Sex Determination Tests: On no account sex determination test shall be undertaken with the intent to terminate the life of a female foetus developing in her mother's womb, unless there are other absolute indications for termination of pregnancy as specified in the Medical Termination of Pregnancy Act, 1971. Any act of termination of pregnancy of normal female foetus amounting to female foeticide shall be regarded as professional misconduct on the part of the physician leading to penal erasure besides rendering him liable to criminal proceedings as per the provisions of this Act."

55. Regulation 8 of the MCI Regulation deals with punishment and disciplinary action for misconduct committed by a doctor. The relevant portion of Regulation 8 reads thus:

"**8. PUNISHMENT AND DISCIPLINARY ACTION**

8.1 It must be clearly understood that the instances of offences and of Professional misconduct which are given above do not constitute and are not intended to constitute a complete list of the infamous acts which calls for disciplinary action, and that by issuing this notice the Medical Council of India and or State Medical Councils are in no way precluded from considering and dealing with any other form of professional misconduct on the part of a registered practitioner. Circumstances may and do arise from time to time in relation to which there may occur questions of professional misconduct which do not come within any of these categories. Every care should be taken that the code is not violated in letter or spirit. In such instances as in all others, the Medical Council of India and/or State Medical Councils have to consider and decide upon the facts brought before the Medical Council of India and/or State Medical Councils.

8.2 It is made clear that any complaint with regard to professional misconduct can be brought before the appropriate Medical Council for Disciplinary action. Upon receipt of any complaint of professional misconduct, the appropriate Medical Council would hold an enquiry and give opportunity to the registered medical practitioner to be heard in person or by pleader. If the medical practitioner is found to be guilty of committing professional misconduct, the appropriate Medical Council may award such punishment as deemed necessary or may direct the removal altogether or for a specified period, from the register of the name of the delinquent registered practitioner. Deletion from the Register shall be widely publicized in local press as well as in the publications of different Medical Associations/ Societies/Bodies."

56. It is further pointed out that Pharmacy Practice Regulations, 2015 also require pharmacists to maintain records. The relevant portion of the Regulations is extracted hereunder:

"**6.2 Maintenance of patient records**.—

(a) Every registered pharmacist shall maintain the medical/ prescription records pertaining to his / her patients for a period of 5 years from the date of commencement of the treatment as laid down by the Pharmacy Council of India in Appendix II.

(b) If any request is made for medical records either by the patients/authorised attendant or legal authorities involved, the same may be duly acknowledged and documents shall be issued within the period of 72 hours.

(c) Efforts shall be made to computerize medical/prescription records for quick retrieval."

57. Reference has also been made to the provisions of the Transplantation of Human Organs and Tissues Act, 1994 and Rules, which contain provisions that are similar to the Act. Section 20 of the Transplantation of Human Organs and Tissues Act, 1994, reads thus:

> "**20. Punishment for contravention of any other provision of this Act.—** Whoever contravenes any provision of this Act or any rule made, or any condition of the registration granted, thereunder for which no punishment is separately provided in this Act, shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to twenty lakh rupees."

58. Reference has also been made to the Medical Termination of Pregnancy Act, 1971, which also places an obligation on medical professional to maintain proper records.

59. When we scrutinise the Form 'F' with the provisions of the Act/Rules and there cannot be any dispute with respect to serial Nos.1 and 2 wherein name and address of Genetic Laboratory and its registration number is required to be mentioned in the Form as it is necessary to have a registration under Section 18 of the Act. It cannot be said to be a clerical requirement. Patient name and her age at serial No.3 is also absolutely necessary so as to identify a person who is undergoing the test and before the age of 35 years, it cannot be conducted as provided under Section 4(3)(i). The same is as per the mandatory requirement of Section 4. Husband's/father's name is also necessary as per the statutory mandate for the purpose of identification of patient. Full address is also mandatory so as to ascertain the identity who is undergoing such test. In case these information are kept vague, the violation of the Act would be blatant and unchecked and offence can never be detected. Information at serial No.8 of the Form 'F' requires last menstrual period/weeks of pregnancy to be mentioned, same is also necessary to be mentioned as it has correlation with the investigations and provisions of the Act and the rules framed thereunder. The column in Form at serial No.9 requires history of genetic/medical disease in the family to be specified which is as per the mandate of Section 4(3)(iv) of the Act. Form 'F' at serial No.10 requires indication for prenatal diagnosis which is mandatory as per the provisions contained in Section 4(2) as except for the purposes as mentioned in Sections 4(2) and 4(3) no such tests/procedures can be performed. Thus, what is mandated by the Sections and in Rule 9 has been mentioned in the Form 'F'. Procedure carried whether invasive or Noninvasive has to be obviously mentioned and in case any laboratory tests have been recommended that is to be mentioned along with the result. The note attached

to Form 'F' also contains the representative list of indications when ultrasound during pregnancy can be performed. Thus, though the submission that Form 'F' is clerical requirement urged by learned counsel appearing for the petitioner-Society appears at the first blush to be worthy examination, but on close scrutiny it is found that in case any information in the Form is avoided, it will result in the blatant violation of the provisions of Section 4 and may lead to result which is prohibited under Section 6. It cannot be said to be a case of clerical error as doctor has to fulfil prerequisites for undertaking the procedure in case the conditions precedent for undertaking prenatal diagnostic test is not specifically mentioned, it would be violative of provisions contained in Section 4. The Form 'F' has to be prepared and signed by either Gynaecologist/Medical Geneticist / Radiologist / Paediatrician / Director of the Clinic/Centre/Laboratory. In case the indications and the information are not furnished as provided in the Form 'F' it would amount that condition precedent to undertake the test/procedure is absent. There is no other barometer except Form 'F' to find out why the diagnostic test/procedure was performed. In case such an important information beside others is kept vague or missing from the Form, it would defeat the very purpose of the Act and the safeguards provided thereunder and it would become impossible to check violation of provisions of the Act. It is not the clerical job to fill the form, it is condition precedent for undertaking test/procedure. With all due regards to the submission advanced on behalf of petitioner-Society that it is a clerical job, is wholly without substance but it is a responsible job of the person who is undertaking such a test i.e., the Gynaecologist/ Medical Geneticist/ Radiologist / Paediatrician / Director of the Clinic/Centre/Laboratory to fill the requisite information. In case he keeps it vague, he knows fully well that he is violating the provisions of the Act and undertaking the test without existence of the conditions precedent which are mandatory to exist he cannot undertake test/procedure without filling such information in the form. There is no other way to ensure that test is undertaken on fulfilment of the prescribed conditions. There is nothing else but the record which required to be maintained and on the basis of which countercheck can be made. There is no other barometer or criteria to find out the violation of the provisions of the Act. Rule 9(4) also requires that every Genetic Clinic to fill Form 'F' wherein information with regard to details of the patient, referral notes with indication and case papers of the patient are required to be filled and preserved. Form 'F' lays down the indicative list for conducting ultrasonography during pregnancy. Form 'F' being technical in nature gives the insight into the reasons for conducting

ultrasonography and incomplete Form 'F' raises the presumption of doubt against the medical practitioner. In the absence of Form 'F', Appropriate Authorities will have no tool to supervise the usage of ultrasound machine and shall not be able to regulate the use of the technique which is the object of the Act.

60. It is rightly contended on behalf of respondents that there are different forms for record keeping prescribed under the Act and the Rules they are important and interlinked, operate in tandem with one another. These records have to be maintained only when the procedure or tests are conducted on pregnant woman or when patient may have been advised to use preconception diagnostic tools to conceive a child. It is required for Genetic Counselling Centre advising the procedure/test with a potential of detecting or determining the sex of the foetus and referring a person to a Genetic Clinic/Imaging Centre/Ultrasound Clinic to record the details of Genetic Clinic to which patient is referred at point 15 of the Form 'D' along with the details of the diagnosis and relevant medical details of the person. Accordingly, Genetic Clinic/Imaging Centre/Ultrasound Clinic conducting the aforesaid referred procedure has to record the name and address of Genetic Counselling Centre with the referral slip along with the relevant medical record of the person on whom procedure/test/technique is conducted. The aforesaid record keeping procedure shall be followed by Genetic Laboratories also. The scheme of the Act makes it evident that record keeping is meant to track/monitor and regulate the use of technology that has potential of sex selection and sex determination. Section 23 is not standalone Section. It is rather used in the enforcement of other provisions of the Act and violations of Section 23 are often accompanied by violations of provisions of Sections 4, 5, 6 and 18 of the Act. It is submitted that non-maintenance of record in the context of sex determination is not merely a technical or procedural lapse. It is most significant piece of evidence for identifying offence and the accused. The inspection of records is crucial to identify wrongdoers as the crime of sex determination being a collusive crime given the nexus between the patients and the doctors. Accordingly, punishment is provided in Section 23 for not maintaining the records.

61. Ms. Pinki Anand, learned Additional Solicitor General has relied upon a case study on record keeping as an implementation tool of Prabhakar Hospital in Panipat. In this case Hospital had not sent the report of IVF done at its Centre to the Appropriate Authority despite meeting held on 10.10.2013 and subsequent reminders. After thirteenth reminder dated 27.11.2014, a show cause notice was issued to the Hospital on 2.2.2015. The aforesaid case study reads thus:

> "In the case of this Hospital the report of IVF done at the centre was not sent to the Appropriate Authority despite meetings held on 10.10.2013 and reminders sent on 6.3.2014, 14.3.2014, 20.3.2014, 21.3.2014, 25.3.2014, 28.3.2014, 31.3.2014 and finally with a thirteenth reminder on 27.11.2014.
>
> During inspection following discrepancies were found-
>
> a. In form no.9338, Invitro Fertilization (IVF) was done on patient with 2 female children with repeated history of 4 abortions.
>
> b. In form no.9700, woman with 8 female children received IVF.
>
> c. In form no.10385, patient Santosh with 7 female children received IVF but did not fill the section C in F-Form. Section C in form F pertains to the records of the invasive procedures which requires records of all diagnostic procedures done on men and women which has potential of sex determination/selection to be recorded.
>
> d. Form no.10389, woman with 3 female children received IVF, form F Section C not filled in.
>
> e. Form no.9338, woman had 2 female children and 6 abortions, and received IVF.
>
> f. Form no.9700, a woman with 8 female children received IVF.
>
> The hospital was asked why patients who had female children underwent IVF as evident from the records. In several of the cases it is inexplicable why the samples were sent to Delhi and Bombay. In many F forms many female patients with wrong phone numbers were mentioned. Similarly in other Form F, patients with wrong identity proofs, address proof and no identity proofs were found. In another set of form F wrong Obstetric and Abortion history was mentioned as confirmed from the patients. Difference history on referral slip and Form F was observed. Signature of patient was found to be missing in the consent form in many forms. The Signature of the witness Doctor/Counsellor was missing in all consent forms of IVF patients. Accordingly a complaint has been filed in the court." (emphasis supplied)

62. It is submitted that the record keeping provide information on individual patients who could have potentially undergone sex selection/determination techniques, which is an offence under this Act. If record keeping is diluted or exempted from the mandatory requirement of the Act, the probable involvement in sex determination and sex selection in the guise of use of diagnostic techniques would continue unbated.

63. The way in which the non-maintenance of record can be used for violating the provisions of the Act, is apparent from the aforesaid example. The aforesaid facts have been mentioned in the show cause notice that had been issued. In many Form 'F' female patients with wrong phone numbers were mentioned. In other Form 'F' patients with wrong identity, proof of address and no identity proof were found. In another set of Form 'F' wrong obstetric and abortion history was mentioned. Signature of patient was also found missing in the consent forms. Thus, the non-filling of information cannot be termed to be clerical error, but in case it is kept vague that itself

facilitates an offence. It would definitely a blatant and intentional violation of the provisions of the Act in order to prevent the mischief which is intended to by maintenance of record, filling up details of the forms is mandated by Sections 4 and 5. The wholesome social legislation would be defeated in case Form is not filled which is *sine qua non toto* undertake tests/procedures if such condition does not exist, no such procedure can be performed and diluting the provisions would be against the gender justice. It is in order to create the equality that the provisions have been enacted not that unequals are being treated equally. The non-maintenance of form/not reflecting correct medical condition is offence, not mentioning it would also be an offence or keeping it vague.

64. It was pointed on behalf of petitioner-Society by filing certain affidavits of the medical practitioners raising grievances with regard to the criminal cases filed against them by the Appropriate Authority on certain grounds. Acquittals have also been recorded, but they are not attributable to the deficiency in the Act. The provision of the law cannot be struck down on the ground of allegation of such exercise of power in arbitrary manner, especially when 0.46 million girls were stated to be missing at birth as a result of sex selective abortions.

65. In ***Voluntary Health Association of Punjab v. Union of India*, (2016) 10 SCC 265,** this Court observed as under:

> "46. Now, we shall advert to the prayers in Writ Petition (Civil) No. 575 of 2014. The writ petition has been filed by Indian Medical Association (IMA). It is contended that Sections 3A, 4, 5, 6, 7, 16, 17, 20, 23, 25, 27 and 30 of the Act and Rules 9(4), 10 & Form "F" (including footnote), which being the subject matter of concern in the instant writ petition, are being misused and wrongly interpreted by the authorities concerned thereby causing undue harassment to the medical professionals all over the country under the guise of the 'socalled implementation'. It is also urged that, implementation of steps and scrutiny of records was started at large scale all over the country and lot of anomalies were found in records maintained by doctors throughout the country. It is however pertinent to mention here that the majority of the defaults were of technical nature as they were merely minor and clerical errors committed occasionally and inadvertently in the filing of Form "F". It is also put forth that the Act does not classify the offences and owing to the liberal and vague terminology used in the Act, it is thrown open for misuse by the implementing authorities concerned and has resulted into taking of cognizance of non-bailable (punishable by three years) offences against doctors even in the cases of clerical errors, for instance non-mentioning of N.A. (Not Applicable) or leaving of any column in the Form "F" concerned as blank. It is further submitted that the said unfettered powers in the hands of implementing authority have resulted into turning of this welfare legislation into a draconian novel way of encouraging demands for bribery as well as there is no prior independent investigation as mandated Under Section 17 of the Act by these Authorities. It is also set forth that the Act states merely

that any contravention with any of the provisions of the Act would be an offence punishable Under Section 23(1) of the said Act and further all offences under the Act have been made non-bailable and non-compoundable and the misuse of the same can only be taken care of by ensuring that the Appropriate Authority applies its mind to the fact of each case/complaint and only on satisfaction of a prima facie case, a complaint be filed rather than launching prosecution mechanically in each case. With these averments, it has been prayed for framing appropriate guidelines and safeguard parameters, providing for classification of offences as well, so as to prohibit the misuse of the PCPNDT Act during implementation and to read down this Sections 6, 23, 27 of the PCPNDT Act. That apart, it has been prayed to add certain provisos/exceptions to Sections 7, 17, 23 and Rule 9 of the Rules.

47. In our considered opinion, whenever there is an abuse of the process of the law, the individual can always avail the legal remedy. As we find, neither the validity of the Act nor the Rules has been specifically assailed in the writ petition. What has been prayed is to read out certain provisions and to add certain exceptions. We are of the convinced view that the averments of the present nature with such prayers cannot be entertained and, accordingly, we decline to interfere." (emphasis supplied)

66. The emphasis of this Court is on the proper maintenance of records. In ***Centre for Enquiry into Health and Allied Themes (CEHAT) v. Union of India,*** **(2001) 5 SCC 577**, this Court observed thus:

"3. It is apparent that to a large extent, the PNDT Act is not implemented by the Central Government or by the State Governments. Hence, the petitioners are required to approach this Court under Article 32 of the Constitution of India……Prima facie it appears that despite the PNDT Act being enacted by Parliament five years back, neither the State Governments nor the Central Government has taken appropriate action for its implementation. Hence, after considering the respective submissions made at the time of hearing of this matter, as suggested by the learned Attorney-General for India, Mr Soli J. Sorabjee, the following directions are issued on the basis of various provisions for the proper implementation of the PNDT Act:

II. Directions to the Central Supervisory Board (CSB)

1. ***
2. ***

3. CSB shall issue directions to all State/UT appropriate authorities to furnish quarterly returns to CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:

(i) survey of bodies specified in Section 3 of the Act;

(ii) registration of bodies specified in Section 3 of the Act;

(iii) action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records;

(iv) complaints received by the appropriate authorities under the Act and action taken pursuant thereto;

(v) number and nature of awareness campaigns conducted and results flowing therefrom.…."

67. In ***Voluntary Health Association of Punjab v. Union of India,*** **(2013) 4 SCC 1**, the Court dealt with the issue of maintenance of record and issued the following directions:

> "9.4. The authorities should ensure also that all genetic counselling centres, genetic laboratories and genetic clinics, infertility clinics, scan centres etc. using preconception and prenatal diagnostic techniques and procedures should maintain all records and all forms, required to be maintained under the Act and the Rules and the duplicate copies of the same be sent to the district authorities concerned, in accordance with Rule 9(8) of the Rules.
>
> 9.6. There will be a direction to all genetic counselling centres, genetic laboratories, clinics etc. to maintain Forms A, E, H and other statutory forms provided under the Rules and if these forms are not properly maintained, appropriate action should be taken by the authorities concerned."

68. The High Court of Gujarat in ***Suo Motu v. State of Gujarat,*** **(2009) 1** Gujarat Law Reporter 64, dealt at length with the issue of proper maintenance of record and observed as under:

> "5. A conjoint reading of the above provisions would clearly indicate a well-knit legislative scheme for ensuring a strict and vigilant enforcement of the provisions of the Act directed against female foeticide and misuse of prenatal diagnostic techniques….
>
> *** *** ***
>
> 7. As seen earlier, the Act and the Rules made thereunder provide for an elaborate scheme to ensure proper implementation of the relevant legal provisions and the possible loopholes in strict and full compliance are sought to be plugged by detailed provisions for maintenance and preservation of records. In order to fully operationalise the restrictions and injunctions contained in the Act in general and in Secs. 4, 5 and 6 in particular, to regulate the use of pre-natal diagnostic technique, to make the pregnant woman and the person conducting the prenatal diagnostic tests and procedures aware of the legal and other consequences and to prohibit determination of sex, the Rules prescribe the detailed forms in which records have to be maintained. Thus, the Rules are made and forms are prescribed in aid of the Act and they are so important for implementation of the Act and for prosecution of the offenders, that any improper maintenance of such record is itself made equivalent to violation of the provisions of Secs. 5 and 6, by virtue of the proviso to subsec. (3) of Sec. 4 of the Act. It must, however, be noted that the proviso would apply only in cases of ultrasonography conducted on a pregnant woman. And any deficiency or inaccuracy in the prescribed record would amount to contravention of the provisions of Secs. 5 and 6 unless and until contrary is proved by the person conducting such ultrasonography. The deeming provision is restricted to the cases of ultrasonography on pregnant women and the person conducting ultrasonography is, during the course of trial or other proceeding, entitled to prove that the provisions of Secs. 5 and 6 were, in fact, not violated.
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> 8. It needs to be noted that improper maintenance of the record has also consequences other than prosecution for deemed violation of Secs. 5 or 6. Section 20 of the Act provides for cancellation or suspension of registration of Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic in case of breach of the provisions of the Act or the Rules. Therefore, inaccuracy or deficiency in maintaining the prescribed record shall also amount to violation of the prohibition imposed by Sec. 6 against the Genetic

> Counselling Centre, Genetic Laboratory or Genetic Clinic and expose such clinic to proceedings under Sec. 20 of the Act. Where, by virtue of the deeming provisions of the proviso to sub-sec. (3) of Sec. 4, contravention of the provisions of Secs. 5 or 6 is legally presumed and actions are proposed to be taken under Sec. 20, the person conducting ultrasonography on a pregnant woman shall also have to be given an opportunity to prove that the provisions of Secs. 5 or 6 were not violated by him in conducting the procedure. Thus, the burden shifts on to the person accused of not maintaining the prescribed record, after any inaccuracy or deficiency is established, and he gets the opportunity to prove that the provisions of Secs. 5 and 6 were not contravened in any respect. Although it is apparently a heavy burden, it is legal, proper and justified in view of the importance of the Rules regarding maintenance of record in the prescribed forms and the likely failure of the Act and its purpose if procedural requirements were flouted. The proviso to subsec. (3) of Sec. 4 is crystal clear about the maintenance of the record in prescribed manner being an independent offence amounting to violation of Secs. 5 or 6 and, therefore, the complaint need not necessarily also allege violation of the provisions of Secs. 5 or 6 of the Act. A rebuttable presumption of violation of the provisions of Secs. 5 or 6 will arise on proof of deficiency or inaccuracy in maintaining the record in the prescribed manner and equivalence with those provisions would arise for punishment as well as for disproving their violation by the accused person. That being the scheme of these provisions, it would be wholly inappropriate to quash the complaint leging inaccuracy or deficiency in maintenance of the prescribed record only on the ground that violation of Secs. 5 or 6 of the Act was not alleged or made out in the complaint. It would also be improper and premature to expect or allow the person accused of inaccuracy or deficiency in maintenance of the relevant record to show or prove that provisions of Secs. 5 or 6 were not violated by him, before the deficiency or inaccuracy were established in Court by the prosecuting agency or before the authority concerned in other proceedings."

69. The Act enjoys a presumption of constitutionality. We find no violation of the constitutional principles. The problem of female foeticide is worldwide and the matters of common knowledge, reports and history are the basis of the legislation, provisions of which cannot be termed to be illegal or arbitrary in any manner. In ***Namit Sharma v. Union of India,*** **(2013) 1 SCC 745**, this Court has laid down as under:

> "18. The principles for adjudicating the constitutionality of a provision have been stated by this Court in its various judgments. Referring to these judgments and more particularly to Ram Krishna Dalmia v. Justice S.R. Tendolkar, AIR 1958 SC 538 and Budhan Choudhry v. State of Bihar, AIR 1955 SC 191, the author Jagdish Swarup in his book Constitution of India (2nd Edn., 2006) stated the principles to be borne in mind by the courts and detailed them as follows: (Ram Krishna Dalmia case, AIR pp. 54748, para 11)
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> "(*a*)**
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> (*b*) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
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> (*c*) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

> (*d*)**
> (*e*) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and
> (*f*)**"

70. The petitioner has not shown which of the entry is not mandatory in the form. As the entries are mandatory and *sine qua non* for undertaking a test/procedure, the assertion that their fundamental rights are being violated by not providing requisite information is not germane and is without substance.

71. The Act intends to prevent mischief of female foeticide and the declining sex ratio in India. When such is the objective of the Act and the Rules and mischief which it seeks to prevent, violation of the rights under Part III of the Constitution is not found. This Court in ***Hamdard Dawakhana v. The Union of India,*** **AIR 1960 SC 554**, has laid down the following principles:

> "8. Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary i.e. its subject matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy; Bengal Immunity co. Ltd. v. State of Bihar, 19552 SCR 603 at pp. 632, 633 ((S) AIR 1955 SC 661 at p.674); R.M.D. Chamarbaughwala v. Union of India, 1957 SCR 930 at p. 936: ((S) AIR 1957 SC 628 at p.631); Mahant Moti Das v. S.P. Sahi, AIR 1959 SC 942 at p. 948.
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> 9. Another principle which has to borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment. Charanjit Lal v. Union of India, 1950 SCR 869: (AIR 1951 SC 41); State of Bombay v. F.N. Bulsara, 1951 SCR 682 at p. 708: (AIR 1951 SC 318 at p. 326); AIR 1959 SC 942."

72. The mischief sought to be remedied is grave and the effort is being made to meet the challenge to prevent the birth of the girl child. Whether Society should give preference to male child is a matter of grave concern. The same is violative of Article 39A and ignores the mandate of Article 51A(e) which casts a duty on citizens to renounce practices derogatory to the

dignity of women. When sex selection is prohibited by virtue of provisions of Section 6, the other interwoven provisions in the Acts to prevent the mischief obviously their constitutionality is to be upheld.

73. The provisions of MTP Act came up for consideration before the High Court of Delhi in ***Raj Bokaria v. Medical Council of India*** **(W.P. (C) No.795 of 2010)**, it observed:

> "11. On a reading of Section 5 of the MTP Act, it appears to this Court that the opinion formed by the medical practitioner to go for either MTP or preterm inducement of labour when the pregnancy is beyond 20 weeks, has necessarily to be in writing and in the prescribed format. There was no question of there not being any record whatsoever of the forming of such opinion of the medical practitioner. The argument advanced by Ms. Acharya that in a case of emergency there may be no time for recording such opinion cannot explain the failure to record an opinion in the present case. The facts narrated by the Petitioner herself show that a very conscious decision was taken of going for a preterm inducement of labour sometime around 6th October 2003 when the deceased was admitted to Respondent No. 3 hospital. Even at that time the opinion of the Petitioner should have been recorded. The preterm induced delivery took place on 8th October 2003. There was sufficient time, therefore, for the Petitioner to record her opinion, mandatorily required by Section 5(1). In terms of Rule 3(1) of the Medical Termination of Pregnancy Regulations, 2003 the medical practitioner has to record her opinion in Form I. The non-maintenance of records to show the basis on which an opinion was formed to going in for a preterm inducement in a case where the pregnancy is beyond the 20th week is indeed a very serious lapse. There can be no excuse whatsoever for a medical practitioner seeking to defend herself with reference to Section 5 of the MTP Act not maintaining any record of the formation of the opinion in terms of Section 5(1) read with the Regulations of 2003. In the considered view of this Court, the above factor alone is enough to demonstrate the gross negligence on the part of the Petitioner." (emphasis supplied)

74. On behalf of petitioner-Society, reliance has been placed regarding *mens rea* on ***Arun Bhandari v. State of Uttar Pradesh,*** **(2013) 2 SCC 801**, wherein the Court observed as under:

> "22. In G.V. Rao v. L.H.V. Prasad,(2000) 3 SCC 693, this Court has held thus: (SCC pp. 69697, para 7)
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> "7. As mentioned above, Section 415 has two parts. While in the first part, the person must 'dishonestly' or 'fraudulently' induce the complainant to deliver any property; in the second part, the person should intentionally induce the complainant to do or omit to do a thing. That is to say, in the first part, inducement must be dishonest or fraudulent. In the second part, the inducement should be intentional. As observed by this Court in Jaswantrai Manilal Akhaney v. State of Bombay, AIR 1956 SC 575, a guilty intention is an essential ingredient of the offence of cheating. In order, therefore, to secure conviction of a person for the offence of cheating, 'mens rea' on the part of that person, must be established. It was also observed in Mahadeo Prasad v. State of W.B., AIR 1954 SC 724, that in order to constitute the offence of cheating, the intention to deceive should be in existence at the time when the inducement was offered."

No sustenance can be drawn from the aforesaid decision as keeping the information blank is definitely a violation of the Act and very basic fundamental requisite for undertaking the test. Thus, when form has not been filled up, obviously the act is dishonest, fraudulent and can be termed intentional also. Such case cannot be classified into clerical error.

75. Reliance has also been placed on the decision of this Court in ***Dr. Subhash Kashinath Mahajan v. State of Maharashtra*, (2018) 6 SCC 454**, in which this Court observed that the Court has to balance the right of liberty of the accused guaranteed under Article 21, which could be taken away only by just, fair and reasonable procedure and to check abuse of power by police and injustice to a citizen. Thus, some filters were required to be incorporated to meet the mandate of Articles 14 and 21. The substantive as well as procedural laws must conform to Articles 14 and 21. The expression procedure established by law under Article 21 implies just, fair and reasonable procedure. The court to make purposive interpretation and consider the doctrine of proportionality. This Court has observed thus:

> "12. The learned Amicus submitted that under the scheme of the Atrocities Act, several offences may solely depend upon the version of the complainant which may not be found to be true. There may not be any other tangible material. One sided version, before trial, cannot displace the presumption of innocence. Such version may at times be selfserving and for extraneous reason. Jeopardising liberty of a person on an untried unilateral version, without any verification or tangible material, is against the fundamental rights guaranteed under the Constitution. Before liberty of a person is taken away, there has to be fair, reasonable and just procedure. Referring to Section 41(1)(*b*) CrPC it was submitted that arrest could be effected only if there was "credible" information and only if the police officer had "reason to believe" that the offence had been committed and that such arrest was necessary. Thus, the power of arrest should be exercised only after complying with the safeguards intended under Sections 41 and 41A CrPC. It was submitted that the expression "reason to believe" in Section 41 CrPC had to be read in the light of Section 26 IPC and judgments interpreting the said expression. The said expression was not on a par with suspicion. Reference has been made in this regard to Joti Parshad v. State of Haryana, 1993 Supp (2) SCC 497, Badan Singh v. State of U.P., 2001 SCC OnLine All 973, Adri Dharan Das v. State of W.B., (2005) 4 SCC 303, Tata Chemicals Ltd. v. Commr. Of Customs, (2015) 11 SCC 628 and Ganga Saran & Sons (P) Ltd. v. CIT, (1981) 3 SCC 143. In the present context, to balance the right of liberty of the accused guaranteed under Article 21, which could be taken away only by just, fair and reasonable procedure and to check abuse of power by police and injustice to a citizen, exercise of right of arrest was required to be suitably regulated by way of guidelines by this Court under Article 32 read with Article 141 of the Constitution. Some filters were required to be incorporated to meet the mandate of Articles 14 and 21 to strengthen the rule of law.
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> 31. We may, at the outset, observe that jurisdiction of this Court to issue appropriate orders or directions for enforcement of fundamental rights is a basic feature of the

Constitution. This Court, as the ultimate interpreter of the Constitution, has to uphold the constitutional rights and values. Articles 14, 19 and 21 represent the foundational values which form the basis of the rule of law. Contents of the said rights have to be interpreted in a manner which enables the citizens to enjoy the said rights. Right to equality and life and liberty have to be protected against any unreasonable procedure, even if it is enacted by the legislature. The substantive as well as procedural laws must conform to Articles 14 and 21. Any abrogation of the said rights has to be nullified by this Court by appropriate orders or directions. Power of the legislature has to be exercised consistent with the fundamental rights. Enforcement of a legislation has also to be consistent with the fundamental rights. Undoubtedly, this Court has jurisdiction to enforce the fundamental rights of life and liberty against any executive or legislative action. The expression "procedure established by law" under Article 21 implies just, fair and reasonable procedure.

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53. It is well settled that a statute is to be read in the context of the background and its object. Instead of literal interpretation, the court may, in the present context, prefer purposive interpretation to achieve the object of law. Doctrine of proportionality is well known for advancing the object of Articles 14 and 21. A procedural penal provision affecting liberty of citizen must be read consistent with the concept of fairness and reasonableness." (emphasis supplied)

No sustenance can be drawn from aforesaid decision as the procedure under the Act is due procedure of law with the safeguards of not only of appeals under Section 21 and Rule 19, but there is a State Supervisory Board in Section 16A. The constitution of multimember Appropriate Authority is provided in Section 17(3)(a) and the Advisory Committee as provided in Section 17(6) which is again also a multimember Committee. The Advisory Committee has to aid and advise the Appropriate Authority in discharge of its functions. Thus, internal safeguards are provided in the Act and the Rules which conform to Articles 14 and 21.

76. Reliance has also been placed on ***Gian Kaur v. State of Punjab*****, (1996) 2 SCC 648**, wherein this Court dealt with the provisions of right to die within the ambit of Article 21. While discussing the aforesaid, this Court has observed thus:

"43. This caution even in cases of physicianassisted suicide is sufficient to indicate that assisted suicides outside that category have no rational basis to claim exclusion of the fundamental principles of sanctity of life. The reasons assigned for attacking a provision which penalises attempted suicide are not available to the abettor of suicide or attempted suicide. Abetment of suicide or attempted suicide is a distinct offence which is found enacted even in the law of the countries where attempted suicide is not made punishable. Section 306 IPC enacts a distinct offence which can survive independent of Section 309 in the IPC. The learned Attorney General as well as both the learned amicus curiae rightly supported the constitutional validity of Section 306 IPC."

(emphasis supplied)

77. In ***Subramanian Swamy v. Union of India,*** **(2016) 7 SCC 221**, it was observed that restriction that goes beyond the requirement of public interest cannot be considered as a reasonable restriction and would be arbitrary. The same reasonableness is not a static concept. Articles 14 and 19 are part of Article 21. Misuse of a provision or its possibility of abuse is no ground to declare Section 499 IPC as unconstitutional. If a provision of law is misused or abused, it is for the Legislature to amend, modify or repeal it.

This Court has observed thus:

> "9.3. Section 499 IPC *ex facie* infringes free speech and it is a serious inhibition on the fundamental right conferred by Article 19(1)(*a*) and hence, cannot be regarded as a reasonable restriction in a democratic republic. A restriction that goes beyond the requirement of public interest cannot be considered as a reasonable restriction and would be arbitrary. Additionally, when the provision even goes to the extent of speaking of truth as an offence punishable with imprisonment, it deserves to be declared unconstitutional, for it defeats the cherished value as enshrined under Article 51A(*b*) which is associated with the national struggle for freedom. The added requirement of the accused having to prove that the statement made by him was for the public good is unwarranted and travels beyond the limits of reasonableness because the words "public good" are quite vague as they do not provide any objective standard or norm or guidance as a consequence the provisions do not meet the test of reasonable restriction and eventually they have the chilling effect on the freedom of speech.
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> 9.4. "Reasonableness" is not a static concept, and it may vary from time to time. What is considered reasonable at one point of time may become arbitrary and unreasonable at a subsequent point of time. The colonial law has become unreasonable and arbitrary in independent India which is a sovereign, democratic republic and it is a well-known concept that provisions once held to be reasonable, become unreasonable with the passage of time.
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> 10.3. Reasonable restriction is founded on the principle of reasonableness which is an essential facet of constitutional law and one of the structural principles of the Constitution is that if the restriction invades and infringes the fundamental right in an excessive manner, such a restriction cannot be treated to have passed the test of reasonableness. The language employed in Sections 499 and 500 IPC is clearly demonstrative of infringement in excess and hence, the provisions cannot be granted the protection of Article 19(2) of the Constitution. Freedom of expression is quintessential to the sustenance of democracy which requires debate, transparency and criticism and dissemination of information and the prosecution in criminal law pertaining to defamation strikes at the very root of democracy, for it disallows the people to have their intelligent judgment. The intent of the criminal law relating to defamation cannot be the lone test to adjudge the constitutionality of the provisions and it is absolutely imperative to apply the "effect doctrine" for the purpose of understanding its impact on the right of freedom of speech and expression, and if it, in the ultimate eventuality, affects the sacrosanct right of freedom, it is *ultra vires* . The basic concept of "effect doctrine" would not come in the category of exercise of power, that is, use or abuse of power but in the compartment of direct effect and inevitable result of law that abridges the fundamental right.

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17.2. Articles 14 and 19 have now been read to be a part of Article 21 and, therefore, any interpretation of freedom of speech under Article 19(1) (*a*) which defeats the right to reputation under Article 21 is untenable. The freedom of speech and expression under Article 19(1)(*a*) is not absolute but is subject to constrictions under Article 19(2). Restrictions under Article 19(2) have been imposed in the larger interests of the community to strike a proper balance between the liberty guaranteed and the social interests specified under Article 19(2). One's right must be exercised so as not to come in direct conflict with the right of another citizen. The argument of the petitioners that the criminal law of defamation cannot be justified by the right to reputation under Article 21 because one fundamental right cannot be abrogated to advance another, is not sustainable. It is because (*i*) the right to reputation is not just embodied in Article 21 but also built in as a restriction placed in Article 19(2) on the freedom of speech in Article 19(1)(*a*); and (*ii*) the right to reputation is no less important a right than the right to freedom of speech.

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18.2. Misuse of a provision or its possibility of abuse is no ground to declare Section 499 IPC as unconstitutional. If a provision of law is misused or abused, it is for the legislature to amend, modify or repeal it, if deemed necessary. Mere possibility of abuse of a provision cannot be a ground for declaring a provision procedurally or substantively unreasonable.

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76. The submission is that Sections 499 and 500 IPC are not confined to defamation of the State or its components but include defamation of any private person by another private person totally unconnected with the State. In essence, the proponement is that the defamation of an individual by another individual can be a civil wrong but it cannot be made a crime in the name of fundamental right as protection of private rights qua private individuals cannot be conferred the status of fundamental rights. If, argued the learned counsel, such a pedestal is given, it would be outside the purview of Part III of the Constitution and run counter to Articles 14, 19 and 21 of the Constitution. It is urged that defamation of a private person by another person is unconnected with the fundamental right conferred in public interest by Article 19(1)(*a*); and a fundamental right is enforceable against the State but cannot be invoked to serve a private interest of an individual. Elucidating the same, it has been propounded that defamation of a private person by another person cannot be regarded as a "crime" under the constitutional framework and hence, what is permissible is the civil wrong and the remedy under the civil law. Section 499 IPC, which stipulates defamation of a private person by another individual, has no nexus with the fundamental right conferred under Article 19(1)(*a*) of the Constitution, for Article 19(2) is meant to include the public interest and not that of an individual and, therefore, the said constitutional provision cannot be the source of criminal defamation. This argument is built up on two grounds: (*i*) the common thread that runs through the various grounds engrafted under Article 19(2) is relatable to the protection of the interest of the State and the public in general and the word "defamation" has to be understood in the said context, and (*ii*) the principle of *noscitur a sociis*, when applied, "defamation" remotely cannot assume the character of public interest or interest of the crime inasmuch a crime remotely has nothing to do with the same.

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90. In ***R. Sai Bharath i* v. *J. Jayalalitha*, (2004) 2 SCC 9**, while opining about crime, it has been observed as under: (SCC pp. 5455, para 56)

"*56*. Crime is applied to those acts, which are against social order and are worthy of serious condemnation. Garafalo, an eminent criminologist, defined " *crime* " in terms of immoral and antisocial acts. He says that:

' crime is an immoral and harmful act that is regarded as criminal by public opinion because it is an injury to so much of the moral sense as is possessed by a community — a measure which is indispensable for the adaptation of the individual to society '.

The authors of the Indian Penal Code stated that:

'… We cannot admit that a Penal Code is by any means to be considered as a body of ethics, that the legislature ought to punish acts merely because those acts are immoral, or that, because an act is not punished at all, it follows that the legislature considers that act as innocent. Many things which are not punishable are morally worse than many things which are punishable. The man who treats a generous benefactor with gross ingratitude and insolence deserves more severe reprehension than the man who aims a blow in passion, or breaks a window in a frolic; yet we have punishment for assault and mischief, and none for ingratitude. The rich man who refuses a mouthful of rice to save a fellow creature from death may be a far worse man than the starving wretch who snatches and devours the rice; yet we punish the latter for theft, and we do not punish the former for hardheartedness.'"

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96. We have referred to this facet only to show that the submission so astutely canvassed by the learned counsel for the petitioners that treating defamation as a criminal offence can have no public interest and thereby it does not serve any social interest or collective value is sans substratum. We may hasten to clarify that creation of an offence may be for some different reason declared unconstitutional but it cannot be stated that the legislature cannot have a law to constitute an act or omission done by a person against the other as a crime. It depends on the legislative wisdom. Needless to say, such wisdom has to be in accord with constitutional wisdom and pass the test of constitutional challenge. If the law enacted is inconsistent with the constitutional provisions, it is the duty of the Court to test the law on the touchstone of the Constitution.

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122. In *State of Madras* v. *V.G. Row*, AIR 1952 SC 196, the Court has ruled that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

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127. In *Sahara India Real Estate Corpn. Ltd. v. SEBI*, (2012) 10 SCC 603, this Court reiterated the principle of social interest in the context of Article 19(2) as a facet of reasonable restriction. In *Dwarka Prasad Laxmi Narain* v. *State of U.P.*, AIR 1954 SC 224, while deliberating upon "reasonable restriction" observed that it connotes that the limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. It was also observed that to achieve quality of reasonableness a proper balance between the freedom guaranteed under Article 19(1)(*g*) and the social control permitted by clause (6) of Article 19 has to be struck." (emphasis supplied)

When we consider the aforesaid dictum and apply to the Act, nothing can be more sinister, immoral and antisocial Act allowing female foeticide. In *R. Sai Bharathi v. J. Jayalalitha* (supra) it has been observed that crime is against social order, immoral and harmful act. It has also been observed by this Court that legislature can have a law to constitute an act or omission done by a person against the other as a crime. Considering the evils sought to be remedied it cannot be said that the imposition in the Act in question is disproportionate. The restrictions and the provisions of punishment have close nexus with the object sought to be achieved. It is not possible to term action as merely clerical one as that is prerequisite for the test/procedure and that is what is intended by the Act, if it is given a gobye under the guise of clerical error, the Act would be rendered otiose. Restriction cannot be said to be excessive and beyond what is required in the public interest, they cater to the felt need of the society and the complex issues facing people which the legislature intends to solve.

78. In ***Shreya Singhal v. Union of India,*** **(2015) 5 SCC 1**, the Court dealt with provisions of Section 66A of Information Technology Act, 2000. This Court has observed thus:

> 55. The US Supreme Court has repeatedly held in a series of judgments that where no reasonable standards are laid down to define guilt in a section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable. Thus, in Musser v. Utah , 92 L Ed 562 a Utah statute which outlawed conspiracy to commit acts injurious to public morals was struck down.
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> 59. It was further held that a penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness. Ordinary people should be able to understand what conduct is prohibited and what is permitted. Also, those who administer the law must know what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place.
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> 66. In Federal Communications Commission v. Fox Television Stations Inc., 132 S Ct 2307 it was held: (S Ct p. 2317)
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> "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally* v. *General Construction Co.*, 269 US 385, US 391 ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou* v. *Jacksonville*, 405 US 156, US 162 {"Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids'" [quoting *Lanzetta* v. *New Jersey*, 306 US 451, US 453 (alteration in original)]}. This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth

> Amendment. See *United States* v. *Williams*, 553 US 285, US 304. It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid* . As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See *id* ., at 306.
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> Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See *Grayned* v. *Rockford*, 33 L Ed 2d 222, US 108109. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." " (emphasis supplied)

It is apparent from the aforesaid discussion in *Shreya Singhal* (supra) in a case where no reasonable standards are laid down to define guilt in a section which creates an offence, it would be arbitrary and unconstitutional. It is absolutely clear that the provisions in the Act in question cannot be termed as arbitrary or illegal or unreasonable. The provisions are not vague. A responsible doctor is supposed to know before undertaking such prenatal diagnostic test etc. what is he undertaking and what his responsibilities are. If he cannot understand the form he is required to fill and the impact of medical findings and its consequences which is virtually the prerequisite for undertaking a test, he is not fit to be a member of a noble medical profession. Such culpable negligence is not warranted from a doctor. It is crystal clear from the provisions of the Act which can be gathered by a person of ordinary intelligence and they can have fair notice of what is prohibited and what omission they should not make. The principles deliberated upon in *Shreya Singhal* (supra) rather supports the constitutionality of the Act and the Rules framed thereunder.

79. The reliance has also been placed by the petitioner in ***Nikesh Tarachand Shah v. Union of India,*** **(2018) 11 SCC 1**, in which Court observed thus:

> "10. On the other hand, the learned Attorney General Shri K.K. Venugopal impressed upon us the fact that the Parliamentary legislation qua money laundering is an attempt by Parliament to get back money which has been siphoned off from the economy. According to the learned Attorney General, scheduled offences and offences under Sections 3 and 4 of the 2002 Act have to be read together and the said Act, therefore, forms a complete code which must be looked at by itself. According to the learned Attorney General, it is well settled that classification which is punishment centric has been upheld by a catena of judgments and so have the twin conditions been upheld by

various decisions which were referred to by him. According to him, the expression "any offence" in Section 45(1)(*ii*) would mean offence of a like nature and not any offence, which would include a traffic offence as well. According to the learned Attorney General, Section 45 can easily be read down to make it constitutional in two ways. First, the expression "there are reasonable grounds for believing that he is not guilty of such offence" must be read as the making of a prima facie assessment by the court of reasonable guilt. Secondly, according to the learned Attorney General, in any case the conditions contained in Section 45(1)(ii) are there in a different form when bail is granted ordinarily insofar as offences generally are concerned and he referred to State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21 for this purpose. According to the learned Attorney General, if harmoniously construed with the rest of the Act, Section 45 is unassailable. He relied upon Section 24 of the Act, which inverts the burden of proof, and strongly relied upon Gautam Kundu v. Directorate of Enforcement, (2015) 16 SCC 1 and Rohit Tandon v. Directorate of Enforcement, (2018) 11 SCC 46. In answer to Shri Rohatgi's argument on the object of the 2012 Amendment Act, according to the learned Attorney General, it is well settled that where the language of the Act is plain, no recourse can be taken to the object of the Act and he cited a number of judgments for this proposition. He referred us to Section 106 of the Evidence Act, 1872 and argued that when read with Section 24 of the 2002 Act, it would be clear that the twin conditions contained in Section 45 are only in furtherance of the object of unearthing black money and that we should, therefore, be very slow to set at liberty persons who are alleged offenders of the cancer of money laundering. Ultimately, according to the learned Attorney General, Section 45 being part of a complete code must be upheld in order that the 2002 Act work, so that money that is laundered comes back into the economy and persons responsible for the same are brought to book.

*** *** ***

46. We must not forget that Section 45 is a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of any offence. Before application of a section which makes drastic inroads into the fundamental right of personal liberty guaranteed by Article 21 of the Constitution of India, we must be doubly sure that such provision furthers a compelling State interest for tackling serious crime. Absent any such compelling State interest, the indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature.

*** *** ***

49. The learned Attorney General relied heavily on Section 24 of the 2002 Act to show that the burden of proof in any proceeding relating to proceeds of crime is upon the person charged with the offence of money laundering, and in the case of any other person i.e. a person not charged with such offence, the court may presume that such proceeds are involved in money laundering. Section 45 of the Act only speaks of the scheduled offence in Part A of the Schedule, whereas Section 24 speaks of the offence of money laundering, and raises a presumption against the person prosecuted for the crime of money laundering. This presumption has no application to the scheduled offence mentioned in Section 45, and cannot, therefore, advance the case of the Union of India." (emphasis supplied)

Considering the compelling general public interest and gender justice and declining sex ratio, we have no hesitation in upholding the validity of the provisions of Section 23(1) of the Act.

80. Reliance has also been placed in ***P. Rathinam v. Union of India,* (1994) 3 SCC 394**, this Court observed thus:

> 48. <u>The aforesaid show that law has many promises to keep including granting of so much of liberty as would not jeopardise the interest of another or would affect him adversely, i.e., allowing of stretching of arm up to that point where the other fellow's nose does not begin.</u> For this purpose, law may have "miles to go". <u>Then, law cannot be cruel, which it would be because of what is being stated later, if persons attempting suicide are treated as criminals and are prosecuted to get them punished,</u> whereas what they need is psychiatric treatment, because suicide basically is a "call for help", as stated by Dr (Mrs) Dastoor, a Bombay Psychiatrist, who heads an organisation called "Suicide Prevent". May it be reminded that a law which is cruel violates Article 21 of the Constitution, *a la,* Deena v. Union of India, (1983) 4 SCC 645.
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> *** *** ***
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> 51. A crime presents these characteristics: (1) it is a harm, brought about by human conduct which the sovereign power in the State desires to prevent; (2) among the measures of prevention selected is the threat of punishment; and (3) legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so. (See pp. 1 to 5 of Kenny's Outlines of Criminal Law, 19th Edn., for the above propositions.) (emphasis supplied)

81. We find that Act intends not to jeopardise the female foetus. As such curtailment of the liberty in cause of such a violation cannot be said to be disproportionate.

82. Reliance has also been placed on ***State of Uttar Pradesh v. Wasif Haider,* (2019) 2 SCC 303,** in which it has been laid down that an offence has to be proved beyond reasonable doubt. The relevant portion of the decision is extracted hereunder:

> "22. In the instant appeals before us, the prosecution has failed to link the chain of circumstances so as to dispel the cloud of doubt about the culpability of the respondent-accused. It is a well-settled principle that a suspicion, however grave it may be cannot take place of proof i.e. there is a long distance between "may be" and "must be", which must be traversed by the prosecution to prove its case beyond reasonable doubt [See Narendra Singh v. State of M.P., (2004) 10 SCC 699]."

There is no dispute with the aforesaid proposition, but that is not the question before us. When trial takes place obviously the commission of the offence has to be proved as required under the relevant applicable law.

83. There can be a legislative provision for imposing burden of proof in reverse order relating to gender justice. In the light of prevalent violence against women and children, the Legislature has enacted various Acts, and amended existing statutes, reversing the traditional burden of proof. Some examples of reversed burden of proof in statutes include Sections 29 and 30 of the Protection of Children from Sexual Offences (POCSO) Act in which there is presumption regarding commission and abetment of certain offences under the Act, and presumption of mental state of the accused respectively. In Sections 113A and 113B of the Indian Evidence Act there is presumption regarding abetment of suicide and dowry death, and in Section 114A of the Indian Evidence Act there is presumption of absence of consent of prosecutrix in offence of rape.

84. These provisions are a clear indication of the seriousness with which crimes against women and children have been viewed by the Legislature. It is also evident from these provisions that due to the pervasive nature of these crimes, the Legislature has deemed it fit to employ a reversed burden of proof in these cases. The presumption in the proviso to Section 4(3) of the Act has to be viewed in this light.

85. The Act is a social welfare legislation, which was conceived in light of the skewed sex-ratio of India and to avoid the consequences of the same. A skewed sex-ratio is likely to lead to greater incidences of violence against women and increase in practices of trafficking, ‘bride-buying’ etc. The rigorous implementation of the Act is an edifice on which rests the task of saving the girl child.

86. In view of the aforesaid discussion and in our opinion, no case is made out to hold that deficiency in maintaining the record mandated by Sections 5, 6 and the proviso to Section 4(3) cannot be diluted as the aforesaid provisions have been incorporated in various columns of the Form ‘F’ and as already held that it would not be a case clerical mistake but absence of *sine qua non* for undertaking a diagnostic test/procedure. It cannot be said to be a case of clerical or technical lapse. Section 23(1) need not have provided for gradation of offence once offence is of non-maintenance of the record, maintenance of which itself intend to prevent female foeticide. It need not have graded offence any further difference is so blur it would not be possible to prevent crime. There need not have been any gradation of offence on the basis of actual determination of sex and non-maintenance of record as undertaking the test without the prerequisites is totally prohibited under the Act. The non-maintenance of record is very foundation of offence. For first and second offences, gradation has been made which is quite reasonable.

87. Provisions of Section 23(2) has also been attacked on the ground that suspension on framing the charges should not be on the basis of clerical mistake, inadvertent clerical lapses. As we found it is not what is suggested to be clerical or technical lapse nor it can be said to be inadvertent mistakes as existence of the particular medical condition is mandated by Sections 4 and 5 including the age etc. Thus, suspension on framing of charges cannot be said to be unwarranted. The same intends to prevent mischief. We are not going into the minutes what can be treated as a simple clerical mistake that has to be seen case wise and no categorization can be made of such mistakes, if any, but with respect to what is mandatory to be provided in the Form as per provisions of various sections has to be clearly mentioned, it cannot be kept vague, obscure or blank as it is necessary for undertaking requisite tests, investigations and procedures. There are internal safeguards in the Act under the provisions relating to appeal, the Supervisory Board as well as the Appropriate Authority, its Advisory Committee and we find that the provisions cannot be said to be suffering from any vice as framing of the charges would mean *prima facie* case has been found by the Court and in that case, suspension cannot be said to be unwarranted.

88. It was also prayed that action should be taken under Section 20 after show cause notice and reasonable opportunity of being heard. There is already a provision in Section 20(1) to issue a show cause and in Section 20(2) contains the provision as to reasonable opportunity of being heard. Thus, we find no infirmity in the aforesaid provision.

89. There also the Appropriate Authority to consider each case on merits with the help of Advisory Body which has legal expert. The Advisory Committee consists of one legal expert which has to aid and advise the Appropriate Authority as provided in Sections 16 and 17(5)(6). Thus, the submission that legal advice should be taken before prosecution, in view of the provisions, has no legs to stand.

90. It was also contended that action of seizure of ultrasonography machine and sealing the premises cannot be said to be appropriate. The submission is too tenuous and liable to be rejected. Section 30 of the Act enumerates the power of search and seizure and Rules 11 and 12 of the Rules provide for the power of the Appropriate Authority to seal equipment, inspect premises and conduct search and seizure. It was pointed out by the respondents that a "Standard Operational Procedure", detailing the procedure for search and seizure has been developed by the Ministry of Health and Family Welfare. Further, regular training of Appropriate Authorities is being

carried out at both the National and State level. All the States have also been directed to develop online MIS for monitoring the implementation of the Act. It is settled proposition that when offence is found to be committed, there can be seizure and sealing of the premises and equipment during trial as no license can be given to go on committing the offence. Such provisions of seizure/sealing, pending trial are to be found invariably in various penal legislations. The impugned provisions contained in the Act constitute reasonable restrictions to carry on any profession which cannot be said to be violative of Right to Equality enshrined under Article 14 or right to practise any profession under Article 19(1)(g). Considering the Fundamental Duties under Article 51A(e) and considering that female foeticide is most inhumane act and results in reduction in sex ratio, such provisions cannot be said to be illegal and arbitrary in any manner besides there are various safeguards provided in the Act to prevent arbitrary actions as discussed above.

91. In light of the nature of offences which necessitated the enactment of the Act and the grave consequences that would ensue otherwise, suspension of registration under Section 23(2) of the Act serves as a deterrent. The individual cases cited by the petitioner-Society cannot be a ground for passing blanket directions, and the individuals have remedies under the law which they can avail. Moreover, the concept of double jeopardy would have no application here, as it provides that a person shall not be convicted of the same offence twice, which is demonstrably not the case here. Suspension is a step-in-aid to further the intendment of act. It cannot be said to be double punishment. In case an employee is convicted for an offence, he cannot continue in service which can be termed to be double jeopardy.

92. Non maintenance of record is spring board for commission of offence of foeticide, not just a clerical error. In order to effectively implement the various provisions of the Act, the detailed forms in which records have to be maintained have been provided for by the Rules. These Rules are necessary for the implementation of the Act and improper maintenance of such record amounts to violation of provisions of Sections 5 and 6 of the Act, by virtue of proviso to Section 4(3) of the Act. In addition, any breach of the provisions of the Act or its Rules would attract cancellation or suspension of registration of Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, by the Appropriate Authority as provided under Section 20 of the Act.

93. There is no substance in the submission that provision of Section 4(3) be read down. By virtue of the proviso to Section 4(3), a person conducting ultrasonography on a pregnant woman, is required to keep complete record of

the same in the prescribed manner and any deficiency or inaccuracy in the same amounts to contravention of Section 5 or Section 6 of the Act, unless the contrary is proved by the person conducting the said ultrasonography. The aforementioned proviso to Section 4(3) reflects the importance of records in such cases, as they are often the only source to ensure that an establishment is not engaged in sex-determination.

94. Section 23 of the Act, which provides for penalties of offences, acts in aid of the other Sections of the Act is quite reasonable. It provides for punishment for any medical geneticist, gynecologist, registered medical practitioner or a person who owns a Genetic Counselling Centre, a Genetic Clinic or a Genetic Laboratory, and renders his professional or technical services to or at said place, whether on honorarium basis or otherwise and contravenes any provisions of the Act, or the Rules under it.

95. Therefore, dilution of the provisions of the Act or the Rules would only defeat the purpose of the Act to prevent female foeticide, and relegate the right to life of the girl child under Article 21 of the Constitution, to a mere formality.

96. In view of the above, no case is made out for striking down the proviso to Section 4(3), provisions of Sections 23(1), 23(2) or to read down Section 20 or 30 of the Act. Complete contents of Form 'F' are held to be mandatory. Thus, the writ petition is dismissed. No costs.

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2019 (II) ILR - CUT- 713

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

W.P.(C) NO. 21563 OF 2018

UPENDRA JENA ……..Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Arts. 226 & 227 – Writ petition – Tender – Challenge is made to the tender condition with regard to furnishing of "no relation certificate" – Plea that such a condition is directory and not mandatory – Held, No.

"On the first issue, we can safely conclude that in view of the circular which was issued with regard to Additional Performance Security, in our considered opinion, is binding on the Government and that cannot be a ground to reject the bid of the petitioner. However, having participated in the tender, it will not be open for

the petitioner to challenge the tender condition of submission of Additional Performance Security at this stage. But that will not make much difference inasmuch as the other issue which is more important, i.e. the language of Clause-4 'No Relation Certificate' shall be furnished by the contractor along with tender to the effect that he is not related to any officer in the rank of an Assistant Executive Engineer & above in the State Panchayati Raj Department or Assistant/Under Secretary & above in the Panchayanti Raj Department is mandatory. Format of Schedule-A clearly envisages that the fact given in the formant 'Schedule-A' subsequently proved to be false, the contract is liable to be rescinded. The earnest money and the total security will be forfeited and he shall be liable to make good the loss or damages resulting for such cancellation. It is also the requirement that the proforma for no relationship certificate has to be furnished separately vide Schedule-A. In that view of the matter and the language employed in Clause-4 'No Relation Certificate', we are of the considered opinion that the same is mandatory, which cannot be made a directory and diluted under any circumstance." (Para 15)

Case Laws Relied on and Referred to :-

1. AIR 2007 SC 437 : Mr. B.S.N. Joshi & Sons Ltd. .Vs. Nair Coal Services Ltd. & Ors.
2. AIR 2005 SC 3353 : Salem Advocate Bar Association, Tamil Nadu .Vs. Union of India.
3. (2002) 6 SCC 315 : Kanhaiya Lal Agrawal .Vs. Union of India & Ors.
4. AIR 2016 (SC) 3814 : Central Coal Fields Limited & Anr .Vs. SLL-SML (Joint Venture Consortium) & Ors.
5. (2000) 2 SCC 617 : AIR India Ltd. .Vs. Cochin International Airport Ltd. & Ors.
6. AIR 2001 SC 682 : West Bengal Electricity Board .Vs. Patel Engineering Co. Ltd. & Ors.
7. AIR 2000 SC 2272 : M/s Monarch Infrastructure (P) Ltd. .Vs. Commissioner, Ulhasnagar Municipal Corporation & Ors.

For Petitioner : M/s Alok Kumar Mohapatra, B. Panda, A.K. Mohapatra, S. Sarangi, A Pati, S. Nath, T. Dash & B. Subudhi

For Opp. Parties : M/s. Prabodha Chandra Nayak, S.K. Rout & A.K. Patra
Mr. M.S. Sahoo, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment: 28.03.2019

K.S. JHAVERI, C.J.

By way of this writ petition, the petitioner has challenged the action of the opposite parties whereby rejecting the lowest offer of the bid given the petitioner, the authority accepted the bid of opposite party no. 5.

2. Pursuant to the tender call notice under Annexure-2, the petitioner being eligible contractor with Class-B license applied for the work in question along with bid documents. The petitioner in course of argument

drew our attention to the Details of the Documents to be Furnished for Bidding, which reads as under:

"**DETAILS OF THE DOCUMENTS TO BE FURNISHED FOR BIDDING**.

Details of documents to be furnished.

1.2.1 The following documents to be submitted along with the Tender paper.

1.2.2 DD towards tender cost

1.2.3 Duly pledged EMD

1.2.4 VAT clearance certificate

1.2.5 PAN Card

1.2.6 Registration certificate

1.2.7 Affidavit regarding correctness of information/certificate.

1.2.8 Affidavit regarding no relation certificate.

1.2.9 The Engineer contactors desirous of availing exemption of EMD should submit an affidavit as regards the fact of availing award of work without submission of EMD/ISD during the current financial year, otherwise their tenders will be liable for rejection.

1.2.10 Labour license

xxx xxx xxx

4. **No Relation Certificate**

The contractor shall furnish a certificate along with the tender to the effect that he is not related to any officer in the rank of an Assistant Executive Engineer & above in the state Panchayati raj dept. or Assistant/Under Secretary & above in the Panchayati raj Department. If the fact subsequently proved to be false, the contract is liable to be rescinded. The earnest money & the total security will be forfeited & he shall be liable to make good the loss or damages resulting for such cancellations. The proforma for no relationship certificate is contained in a separate sheet vide Schedule-A."

3. Learned counsel for the petitioner thus contended that although the language used in Clause-4 (supra) is 'shall', it should be read as 'may', since the petitioner is also required to file an affidavit regarding 'No Relation Certificate'. Thus, filing of separate certificate in Schedule-A is directory and not mandatory and the same can be given subsequently also. For our ready reference, format of certificate in Schedule-A is reproduced below:

SCHEDULE-A

CERTIFICATE OF NO RELATIONSHIP

"I/We hereby certify that I/We "am/are" related/not **related** (*) to any officer of the rank of Assistant Executive Engineer & above and any officer of the rank of Assistant/Under Secretary and above of the P.R. Department, Govt. of Orissa I/We "am/are" aware that if the facts subsequently proved to be false, my/our contract will be rescinded with forfeiture of E.M.D. and security deposit and I/We shall be liable to make good the loss or damage resulting from such cancellation. I/We also note that, non-submission of this certificate will render my/our tender liable for rejection."

He further contended that pursuant to the judgment passed by this Court on 24.07.2017 in W.P.(C) No. 7120 of 2017, the Government of Odisha in Works Department have come out with the amendment in Clause-3.5.5(v) of OPWD Code, Vol-I, which reads as under:

"Government of Odisha
Works Department
***

Office Memorandum

FileNo.07556900012013-14299/W. dated,03.10.2017

Sub: Amendment to Para-3.5.5.(v) of OPWD Code, Vol-I

After careful consideration Government have been pleased to make amendment to Para-3.5.5.(v) of OPWD Code, Vol-I with following modification.

"Additional Performance Security shall be obtained from the bidder when the bid amount is less than estimated cost put to tender. In such an event, only the successful bidder who has quoted less bid price/rates than the estimated cost put to tender shall have to furnish the exact amount of differential cost i.e. estimated cost put to tender minus the quoted amount as Additional Performance Security (APS) in shape of Demand Draft/Term Deposit Receipt pledged in favour of the Divisional Officer within seven days, otherwise the bid shall be cancelled and the security deposit shall be forfeited. Further proceeding for blacklisting shall be intimated against bidder."

1. This amendment shall take effect from 24th July, 2017.
2. The Works Department Office Memorandum No.5288/W dt.04.05.2016 (Annexure-I-A) stands modified accordingly pursuant to the judgment dated 24.7.2017 of the Hon'ble High Court of Orissa.
3. This has been concurred in by the Law Department and Finance Department vide their U.O.R. No.1668/L. dt.19.8.2017 & U.O.R. No.56-WF-I dt.24.8.2017 respectively.

Sd/-
EIC-cum-Secretary to Government."

Thus, non-furnishing of Additional Performance Security is not fatal.

4. Learned counsel for the petitioner has taken us to the counter affidavit filed by opposite party nos.2 and 4 wherein it has been stated at paragraph-4, the relevant portion of which reads as under:

"………The Block Level Tender Committee consisting of five Members examined all the tender documents of the four bidders and the comparative statement of bids submitted by bidders was prepared. Out of four bidders, the petitioner has quoted-7-2 % less over the estimated cost. But the petitioner has not submitted the Additional Performance Security as per Clause No.8 of DTCN which is a mandatory requirement. The petitioner has also not furnished the "No Relation Certificate" separately in Schedule 'A' which is also mandatory requirement as per Clause-1.2.8 of th e DTCN. Hence, the Block Level Tender Committee

unanimously decided to reject the bid of the petitioner and decided to place order in favour of 2nd lowest bidder (Opp. Party No.5) who has quoted-1% less over the estimated cost and already deposited the Additional Performance Security as per DTCN."

It is also submitted that the successful bidder (Opp. party No.5) has been intimated vide letter No.5388, dtd. 28.12.2018 regarding acceptance of his tender by the Tender Committee (Annexure-C/3). Till date, no agreement has been executed. Therefore, it is crystal clear that the Block Level Tender Committee has not done any illegality and arbitrariness in selecting the Opp. Party No.5 as the successful bidder. Hence, the contrary allegations made by the petitioner is baseless, based on facts and being devoid of any merits, is liable to be rejected."

5. Learned counsel for the petitioner has further taken us to the rejoinder filed by him and relied upon the decision of this Court in the case of ***Sri Kaustava Sahu –v- State of Odisha and others*** in W.P.(C) No.3572 of 2017, which was disposed of on 27.03.2017, wherein it has been held that the deposit of E.M.D. is not *sine qua non* and is not mandatory.

6. He has also relied upon the decision of the Hon'ble Supreme Court in the case of ***Mr. B.S.N. Joshi & Sons Ltd. -v- Nair Coal Services Ltd. & Ors***., reported in AIR 2007 SC 437, wherein it has been observed at paragraphs-57 and 71 as under:

"57. It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.

71. While saying so, however, we would like to observe that that having regard to the fact that a huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which is economically beneficial to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a latter stage or quote a lower rate upon ascertaining the rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and

> cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction."

7. Learned counsel for the petitioner has also relied upon the decision of the Hon'ble Supreme Court in the case of ***Salem Advocate Bar Association, Tamil Nadu –v- Union of India***, reported in AIR 2005 SC 3353, wherein it has been observed at paragraph-21 as under:

> "21. The use of the word "shall" in Order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules of procedure are the handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

8. Therefore, the petitioner contended that hyper technicalities should not come on the way of rendering substantial justice. Thereby, the Government will also save public money. The offer given by the opposite party no. 5 is only 1% less of the estimated cost and the petitioner has offered 7.2% less of the estimated cost. As such, the Government will be benefitted by 6.2% of the tender cost.

9. Learned counsel for the opposite parties-State has relied upon the decision of the Hon'ble Supreme Court in the case of ***Kanhaiya Lal Agrawal –v- Union of India and others***, reported in (2002) 6 SCC 315 more particularly at paragraph-6, which reads as under:

> 6. It is settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term. This legal position has been well explained in *G.J. Fernandez* v. *State of Karnataka* [(1990) 2 SCC 488] .

10. Learned counsel for the opposite party no. 5 has also relied upon the decision of the Hon'ble Supreme Court in the case of ***Central Coal Fields Limited and another –v- SLL-SML (Joint Venture Consortium) and others***, reported in AIR 2016 (SC) 3814, more particularly at paragraphs-4, 36, 37, 52 and 55, which read as under:

"4. The question for our consideration is generally whether furnishing a bank guarantee in the format prescribed in the bid documents is an essential requirement in the bidding process of Central Coalfields Ltd. and specifically whether a bid not accompanied by a bank guarantee in the format prescribed in the bid documents of Central Coalfields Ltd. could be treated as non-responsive in view of Clause 15.2 of the general terms and conditions governing the bidding process? The answer to the general and the specific question is in the affirmative.

36. It was further held that if others (such as the appellant in *Ramana Dayaram Shetty case* [*Ramana Dayaram Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489]) were aware that non-fulfilment of the eligibility condition of being a registered IInd class hotelier would not be a bar for consideration, they too would have submitted a tender, but were prevented from doing so due to the eligibility condition, which was relaxed in the case of Respondent 4. This resulted in unequal treatment in favour of Respondent 4 — treatment that was constitutionally impermissible. Expounding on this, it was held:

" … It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle *it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege*." (emphasis supplied)

Applying this principle to the present appeals, other bidders and those who had not bid could very well contend that if they had known that the prescribed format of the bank guarantee was not mandatory or that some other term(s) of NIT or GTC were not mandatory for compliance, they too would have meaningfully participated in the bidding process. In other words, by rearranging the goalposts, they were denied the "privilege" of participation.

37. For JVC to say that its bank guarantee was in terms stricter than the prescribed format is neither here nor there. It is not for the employer or this Court to scrutinize every bank guarantee to determine whether it is stricter than the prescribed format or less rigorous. The fact is that a format was prescribed and there was no reason not to adhere to it. The goalposts cannot be rearranged or asked to be rearranged during the bidding process to affect the right of some or deny a privilege to some.

52. There is a wholesome principle that the courts have been following for a very long time and which was articulated in *Nazir Ahmad* v. *King Emperor* [*Nazir Ahmad* v. *King Emperor*, AIR 1936 PC 253 (2) : (1935-36) 63 IA 372 : 1936 SCC OnLine PC 41] , namely: (SCC OnLine PC)

"….. where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

There is no valid reason to give up this salutary principle or not to apply it mutatis mutandis to bid documents. This principle deserves to be applied in contractual disputes, particularly in commercial contracts or bids leading up to commercial

contracts, where there is stiff competition. It must follow from the application of the principle laid down in *Nazir Ahmad* [*Nazir Ahmad* v. *King Emperor*, AIR 1936 PC 253 (2) : (1935-36) 63 IA 372 : 1936 SCC OnLine PC 41] that if the employer prescribes a particular format of the bank guarantee to be furnished, then a bidder ought to submit the bank guarantee in that particular format only and not in any other format. However, as mentioned above, there is no inflexibility in this regard and an employer could deviate from the terms of the bid document but only within the parameters mentioned above.

55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, in so far as the present appeals are concerned very bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribe format was sufficient reason for CCL to reject its bid."

11. He also relied upon the decision of the Hon'ble Supreme Court in the case of ***AIR India Ltd. –v- Cochin International Airport Ltd. and others***, reported in (2000) 2 SCC 617, more particularly at paragraph-7, which reads as under:

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty* v. *International Airport Authority of India* [(1979) 3 SCC 489] , *Fertilizer Corpn. Kamgar Union (Regd.)* v. *Union of India* [(1981) 1 SCC 568], *CCE* v. *Dunlop India Ltd.* [(1985) 1 SCC 260 : 1985 SCC (Tax) 75] , *Tata Cellular* v. *Union of India* [(1994) 6 SCC 651], *Ramniklal N. Bhutta* v. *State of Maharashtra* [(1997) 1 SCC 134] and *Raunaq International Ltd.* v. *I.V.R. Construction Ltd.* [(1999) 1 SCC 492] The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is

called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

12. He further relied upon the decision of the Hon'ble Supreme Court in the case of ***West Bengal Electricity Board –v- Patel Engineering Co. Ltd. & others,*** reported in AIR 2001 SC 682, more particularly at paragraphs-24, 25, 26 and 32, which read as under:

> 24. The mistakes/errors in question, it is stated, are unintentional and occurred due to the fault of computer termed as "a repetitive systematic computer typographical transmission failure". It is difficult to accept this contention. A mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake. Here the mistakes may be unintentional but it was not beyond the control of Respondents 1 to 4 to correct the same before submission of the bid. Had they been vigilant in checking the bid documents before their submission, the mistakes would have been avoided. Further, correction of such mistakes after one-and-a-half months of opening of the bids will also be violative of clauses 24.1, 24.3 and 29.1 of the ITB.
>
> 25. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest.
>
> 26. For all these reasons, in such a highly competitive bid of global tender, the appellant was justified in not permitting Respondents 1 to 4 to correct the errors of the nature and the magnitude which, if permitted, would have given a different complexion to the bid. The High Court erred in directing the appellant to permit Respondents 1 to 4 to correct the errors in the bid documents.

> 32. The submission that remains to be considered is that as the price bid of Respondents 1 to 4 is lesser by 40 crores and 80 crores than that of Respondents 11 and 10 respectively, public interest demands that the bid of Respondents 1 to 4 should be considered. The Project undertaken by the appellant is undoubtedly for the benefit of the public. The mode of execution of the work of the Project should also ensure that the public interest is best served. Tenders are invited on the basis of competitive bidding for execution of the work of the Project as it serves dual purposes. On the one hand it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work and, on the other hand it affords the appellant a choice to select the best of the competitors on a competitive price without prejudice to the quality of the work. Above all, it eliminates favouritism and discrimination in awarding public works to contractors. The contract is, therefore, awarded normally to the lowest tenderer which is in public interest. The principle of awarding contract to the lowest tenderer applies when all things are equal. It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. Merely because a bid is the lowest the requirements of compliance with the rules and conditions cannot be ignored. It is obvious that the bid of Respondents 1 to 4 is the lowest of bids offered. As the bid documents of Respondents 1 to 4 stand without correction there will be inherent inconsistency between the particulars given in the annexure and the total bid amount, it (*sic* they) cannot be directed to be considered along with the other bids on the sole ground of being the lowest.

13. He further relied upon the decision of the Hon'ble Supreme Court in the case of ***M/s Monarch Infrastructure (P) Ltd. –v- Commissioner, Ulhasnagar Municipal Corporation & others***, reported in AIR 2000 SC 2272, more particularly at paragraphs-2 and 12, which read as under:

> 2. Ulhasnagar Municipal Corporation issued a notice inviting tenders for appointment of agents for collection of octroi subject to the terms and conditions set forth therein fixing 4 p.m. on 23-3-2000 to be the time of submission of the tender and fixing 5 p.m. on the same day for opening of the tenders. On 21-3-2000 Millennium Infrastructure (P) Ltd. filed Writ Petition No. 1456 of 2000 in the High Court at Mumbai challenging the imposition of two conditions contained in clauses 6(*a*) and 6(*b*) of the Tender Booklet as unconstitutional and seeking deletion of these two conditions as prerequisite for its participation in the tender. On 21-3-2000, a Division Bench of the High Court having heard the parties adjourned the matter till 24-3-2000 at 11 a.m. by making it clear that there shall be no interim relief except that Ulhasnagar Municipal Corporation shall not issue work order till further orders. However, on 23-3-2000 Millennium Infrastructure (P) Ltd. withdrew the aforesaid writ petition. Five persons tendered their documents and papers and they are Konark Infrastructure (P) Ltd., appellant in civil appeal arising out of SLPs (C) Nos. 6717-18 of 2000, Monarch Infrastructure (P) Ltd., appellant in civil appeal arising out of SLP (C) No. 6298 of 2000 and Respondent 3, Jai Krishna Infrastructure (P) Ltd., Respondent 4, Oriental Veneers (P) Ltd., Respondent 5, M/s Sample Infrastructure, Respondent 6 in the appeal filed by Konark Infrastructure (P) Ltd. The Commissioner of Ulhasnagar Municipal Corporation, however, intimated

> the tenderers that as the High Court was seized of a writ petition he did not propose to open the tenders until further orders from the High Court on 24-3-2000. However, he sought for information of the number of the tenders filed and the tenderers qualifying and not qualifying conditions clauses 6(*a*) and 6(*b*) of the Tender Booklet. On 24-3-2000 the tenders were opened and an objection was raised that Monarch Infrastructure (P) Ltd. did not fulfil the conditions either under clause 6(*a*) or clause 6(*b*) in spite of which, it is stated, the Commissioner insisted on opening the same. The Commissioner informed the parties that clause 6(*a*) had been waived of by reason of the order made by the Government in exercise of its powers under Section 451 of the Bombay Provincial Municipal Corporations Act, 1949. The Commissioner allowed Monarch Infrastructure (P) Ltd. to furnish a certificate as to clause 6(*b*) by a chartered accountant as to its networth which discloses Rs 4.5 crores approximately. The Commissioner proceeded to finalise the tenders on the basis that clause 6(*a*) had stood waived or deleted in view of the order of the Government issued under Section 451 of the Bombay Provincial Municipal Corporations Act and awarded the contract in favour of Monarch Infrastructure (P) Ltd. The appellant Konark Infrastructure (P) Ltd. filed a writ petition challenging the award of contract to Monarch Infrastructure (P) Ltd. on various grounds.
>
> 12. If we bear these principles in mind, the High Court is justified in setting aside the award of contract in favour of Monarch Infrastructure (P) Ltd. because it had not fulfilled the conditions relating to clause 6(*a*) of the Tender Notice but the same was deleted subsequent to the last date of acceptance of the tenders. If that is so, the arguments advanced on behalf of Konark Infrastructure (P) Ltd. in regard to the allegation of mala fides of the Commissioner of the Municipal Corporation in showing special favour to Monarch Infrastructure (P) Ltd. or the other contentions raised in the High Court and reiterated before us are insignificant because the High Court had set aside the award made in favour of Monarch Infrastructure (P) Ltd. The only question therefore remaining is whether any contract should have been awarded in favour of Konark Infrastructure (P) Ltd. The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition a wider net will be permissible and a larger participation or more attractive bids could be offered.

14. We have heard learned counsel for the parties.

15. On the first issue, we can safely conclude that in view of the circular which was issued with regard to Additional Performance Security, in our considered opinion, is binding on the Government and that cannot be a ground to reject the bid of the petitioner. However, having participated in the tender, it will not be open for the petitioner to challenge the tender condition of submission of Additional Performance Security at this stage. But that will not make much difference inasmuch as the other issue which is more

important, i.e. the language of Clause-4 'No Relation Certificate' shall be furnished by the contractor along with tender to the effect that he is not related to any officer in the rank of an Assistant Executive Engineer & above in the State Panchayati Raj Department or Assistant/Under Secretary & above in the Panchayanti Raj Department is mandatory. Format of Schedule-A clearly envisages that the fact given in the formant 'Schedule-A' subsequently proved to be false, the contract is liable to be rescinded. The earnest money and the total security will be forfeited and he shall be liable to make good the loss or damages resulting for such cancellation. It is also the requirement that the proforma for no relationship certificate has to be furnished separately vide Schedule-A. In that view of the matter and the language employed in Clause-4 'No Relation Certificate', we are of the considered opinion that the same is mandatory, which cannot be made a directory and diluted under any circumstance.

16. In that view of the matter, the decision taken by the opposite parties cannot be said to be erroneous and we find no fault with the same. Thus, the writ petition being devoid of any merit deserves to be dismissed and the same is dismissed. No cost.

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2019 (II) ILR - CUT- 724

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

OJC NO. 3110 OF 2002

(Along with following batch of Writ Petitions)

Sl.No.	Case Nos.	Petitioner(s)	Advocate on behalf of the petitioner
01.	**OJC No.3110 of 2002**	**SUNIL KUMAR DHANUKA**	M/s. P.K. Padhi, U.R. Bastia, M.P. Jagdevroy
02.	OJC No.935 of 2001	M/s Gopal Feeds	M/s. S.S. Das, Miss Susamarani Sahoo
03.	OJC No.1311 of 2001	M/s. Orissa Feeds Private Limited	M/s. S.S. Das, Miss Susamarani Sahoo
04.	OJC No.3132 of 2001	M/s. Utkal Agro Products	M/s.S.S. Das, Miss Susamarani Sahoo
05.	OJC No.4692 of 2001	M/s. Ferro Alloys Corporation Ltd.	M/s.S.S. Das, B.R. Das
06.	OJC No.7683 of 2001	M/s. Whole-sale Distribution	M/s. S.S. Das, Susumarani Sahoo
07.	OJC No.9695 of 2001	M/s.Sankar Milling Industries	M/s. P.K. Padhi, U.R. Bastia
08.	W.P.(C) No.7282 of 2008	Suit Kumar Agarwal	M/s. Sharat Ku. Das, S. Swain.
09.	W.P.(C) No.19763 of 2009	Sumit Kumar Agarwal	M/s. Shyam Sundar Das, S. Sahoo, G.C. Swain

10.	W.P.(C) No.15866 of 2011	M/s. Kalinga Gudakhu Udyog	M/s. Narasingh Patra, B.N. Shadangi, A.K. Patra
11.	W.P.(C) No.15888 of 2011	M/s. Prabhat Gudakhu Fact.	M/s. Narasingha Patra, A.K. Patra, B.N. Shadangi
12.	RVWPET No.85 of 2013	M/s. Uma Enterprise	M/s. S. Mohapatra, P. Jena, S.K. Mohanty
13.	W.P.(C) No.17022 of 2016	Sumit Kumar Agarwal	M/s. Milan Kanungo, S.K. Mishra, S.R. Mohanty, S.K. Mohanty, S.K. Naik, P. Jena
14.	W.P.(C) No. 6851 of 2018	M/s. Vedant Agro Products	M/s. Milan Kanungo, S.K. Mohanty, P. Jena, S. Naik, S. Mishra, S. Mohanty
15.	W.P.(C) 9715 of 2018	M/s. Bhagabati Enterprisers	M/s. Shyam Sunder Das, S. Sahoo
16.	W.P.(C) No. 13733 of 2018	Rajesh Kumar Khedia	M/s. Milan Kanungo
17.	W.P.(C) No. 14410 of 2018	M/s. Kamala Enterprises	M/s. Milan Kanungo, P. Jena, S.R. Mohanty, S.K. Mishra, S.K. Mohanty
18.	W.P.(C) No. 22366 of 2018	M/s.Jagadamba Gudakhu Factory	M/s. Devashis Panda, S.Panda, G. Mohanty, A. Ratho, D. Das, G.K. Dash
19.	W.P.(C) No. 2580 of 2019	M/s. Khairi Gudakhu Factory	M/s. Susanta Kumar Nayak, P.K. Dash, N. Biswal
20.	W.P.(C) No. 4609 of 2019	M/s. Sanjaya Gudakhu Factory	M/s. Siba Narayan Biswal, A. Pati, S.N. Biswal,
21.	W.P.(C) NO. 6678 of 2019	M/s. Jugal Chandra Sen	M/s. Susanta Kumar Nayak, P.K. Dash, N. Biswal
22.	OJC No. 3111 of 2002	Subhas Agarwal	M/s. P.K. Padhi, M.P. Jagdeveroy, U.R. Bastia
23.	W.P.(C) No. 8758 of 2017	M/s. Shree Biswavijay Industries	M/s. Milan Kanungo, S.K. Mohanty, P. Jena, S.K. Mishra, S.R. Mohanty
24.	W.P.(C) No. 8822 of 2017	M/s. Pramila Gudakhu Factory	M/s. Milan Kanungo, S.K. Mohanty, P. Jena, S.K. Mishra, S.R. Mohanty
25.	W.P.(C) No. 8753 of 2017	M/s. Prabhat Gudakhu Factory	M/s. Milan Kanungo, S.K. Mohanty, P. Jena, S.K. Mishra, S.R. Mohanty

.Vs.

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

For State of Orissa : Addl. Govt. Adv.

BIHAR AND ORISSA EXCISE ACT, 1915 – Section 2 – Amendment – Insertion of the word 'molasses' in clause 12- a of Section 2 after the word "Mohua flower" – Plea that the inclusion of the word 'molasses' in Clause (12-a) after the words "Mohua flower" is in violation of Constitutional provisions, namely, Union List Entry-84 and Entry-8 and Entry-51 of State list – Further plea that the State Government has no power to levy excise duty unless it is for the purpose of being referred in Entry-8 of the State List coupled with Entry-51 – The court held the following :–

*"Taking into consideration earlier Division Bench decision of this Court in the case of **M/s Uma Enterprises (supra)**, we are of the considered opinion that taking into consideration the power of the State Government for enacting the Act, the matter is not required to be referred to larger Bench. However, while interpreting the amended entry regarding 'molasses', the contention of the petitioners regarding power of the State Government coupled with Entry-8 and Entry-51 save and except for consumption other than the distillery purpose, the State Government will not have power to levy excise duty, in view of Entry-84 of Union List. Therefore, while upholding the Constitutional validity of the Entries, we make it clear that the molasses, which is used other than distillery purpose, the petitioners are not required to pay local tax, i.e., excise duty. If the molasses is used for cattle feeds, poultry or for preparation of 'gutka', then it will be exempted from excise duty." (Para 8)*

Case Laws Relied on and Referred to :-

1. (1990) 1 SCC 109 : Synthetics & Chemicals Ltd. etc. Vs. State of U.P. & Ors.
2. AIR 2004 SC 1151 : State of Bihar & Ors.Vs. Industrial Corporation Pvt. Ltd. & Ors.
3. 2012 (II) ILR-CUT-211 : M/s. Uma Enterprises Vs. State of Orissa & Ors.
4. (1995) 1 SCC 257 : Sitaram and Bros. Vs. State of Rajasthan.

ORDER Heard and Disposed of on 16.07.2019

BY THE BENCH

By way of these Writ Petitions, the petitioners have mainly challenged the amended provision of Section 2 of the Bihar and Orissa Excise Act, 1915 (for short, 'the Act') by Orissa Act-2 of 1999, the relevant portion of which is reads thus:-

"In Section-2 of the Bihar and Orissa Excise Act, 1915 (hereinafter referred to as the Principal Act), in Clause (12-a), after the words "Mohua flower", the words and molasses shall be inserted."

2. It is contended that Inclusion of the word 'molasses' in Clause (12-a) after the words "Mohua flower" is in violation of Constitutional provisions, namely, Union List Entry-84 and Entry-8 and Entry-51 of State list which are quoted hereunder for ready reference:-

Entry-84 of Union List

"Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) Alcoholic liquors for human consumption,

(b) Opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

Entry-8 and 51 of State List

Entry-8 "Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors."

Entry-51 Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :--

(a) Alcoholic liquors for human consumption;

(b) Opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

3. In support of his contentions, learned counsel for the petitioner placed strong reliance on the judgment of the Hon'ble Supreme Court in the case of ***Synthetics & Chemicals Ltd. etc. Vs. State of U.P. and others***, reported in (1990) 1 SCC 109, wherein the Hon'ble Court, more particularly in paragraphs 53, 54, 65 and 67, observed as under:-

53. It was further submitted by the State that the State has exclusive right to deal in liquor. This power according to the counsel for the State, is reserved by and/or derived under Articles 19(6) and 19(6)(ii) of the Constitution. For parting with that right a charge is levied. It was emphasised that in a series of decisions some of which have been referred to hereinbefore, it has been ruled that the charge is neither a fee nor a tax and termed it as privilege. The levy is on the manufacture, possession of alcohol. The rate of levy differs on its use, according to the State of U.P. The impost is also stipulated under the trading powers of the State under Article 298 and it was contended that the petitioners and/or appellants were bound by the terms of their licence. It was submitted that the Parliament has no power to legislate on industrial alcohol, since industrial alcohol was also alcoholic liquor for human consumption. Entry 84 in List I expressly excludes alcoholic liquor for human consumption; and due to express exclusion of alcoholic liquor for human consumption from List I, the residuary Entry 97 in List I will not operate as against its own legislative interest. These submissions have been made on the assumption that industrial liquor or ethyl alcohol is for human consumption. It is important to emphasise that the expression of a constitution must be understood in its common and normal sense. Industrial alcohol as it is, is incapable of being consumed by a normal human being. The expression 'consumption' must also be understood in the sense of direct physical intake by human beings in this context. It is true that utilisation in some form or the other is consumption for the benefit of human beings if industrial alcohol is utilised for production of rubber, tyres used. The utilisation of those tyres in the vehicle of man cannot in the context in which the expression has been used in the Constitution, be understood to mean that the alcohol has been for human consumption.

54. We have no doubt that the framers of the Constitution when they used the expression 'alcoholic liquor for human consumption' they meant at that time and still the expression means that liquor which as it is is consumable in the sense capable of being taken by human beings as such as beverage of drinks. Hence, the expression under Entry 84, List I must be understood in that light. We were taken through various dictionary and other meanings and also invited to the process of manufacture of alcohol in order to induce us to accept the position that

denatured spirit can also be by appropriate cultivation or application or admixture with water or with others, be transformed into 'alcoholic liquor for human consumption' and as such transformation would not entail any process of manufacture as such. There will not be any organic or fundamental change in this transformation, we were told. We are, however, unable to enter into this examination. Constitutional provisions specially dealing with the delimitation of powers in a federal polity must be understood in a broad commonsense point of view as understood by common people for whom the Constitution is made. In terminology, as understood by the framers of the Constitution, and also as viewed at the relevant time of its interpretation, it is not possible to proceed otherwise; alcoholic or intoxicating liquors must be understood as these are, not what these are capable of or able to become. It is also not possible to accept the submission that vend fee in U.P. is a pre-Constitution imposition and would not be subject to Article 245 of the Constitution. The present extent of imposition of vend fee is not a pre-Constitution imposition, as we noticed from the change of rate from time to time.

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65. On behalf of State of U.P., Mr Trivedi, learned Additional Advocate-General further submitted that Entry 52 of List I is an exceptional entry. It not only prescribes the field of legislation but also enables and empowers the Parliament to make laws to the exclusion of the State. According to him, being exclusionary in nature unlike entries merely delineating fields of legislation, Entry 52 has to be strictly and, therefore, narrowly construed. The other question that has to be judged, according to him, is that whenever the Constitution intended the Parliament to assume legislative competence in respect of the entire field, a declaration of an unqualified nature is provided for, unlike a qualified provision like Entry 52 of List I. The words 'control' and 'regulation' are at times, held to be interchangeable or used synonymously, their use in the various entries either singly or jointly, indicates that they are sought to convey a different sense. The word 'control' has in the context, a narrower meaning, excluding details of regulatory nature by the State. According to him, comparing entries 7, 23, 24, 27, 62, 64 and 67 of List I with Entry 52, would demonstrate that under Entry 52 it is not the entire field which is sought to be covered but only the control of industries; and that the absence of inclusion of qualifying words like 'the control of which' cannot be brushed aside. By referring to the several decisions, he contended that in view of the declarations made in Section 2 of the IDR Act and the provisions made therein the entire field was not occupied and the vend fee or other impost by the State legislatures were not infringing in the field treaded by the central legislature.

xx xx xx

67. It is well to remember that the meaning of the expressions used in the Constitution must be found from the language used. We should interpret the words of the Constitution on the same principle of interpretation as one applies to an ordinary law but these very principles of interpretation compel one to take into account the nature and scope of the Act which requires interpretation. A Constitution is the mechanism under which laws are to be made and not merely an Act which declares what the law is to be. It is also well settled that a Constitution

> must not be construed in any narrow or pedantic sense and that construction which is most beneficial to the widest possible amplitude of its power, must be adopted. An exclusionary clause in any of the entries should be strictly and, therefore, narrowly construed. No entry should, however, be so read as not (sic) to rob it of entire content. A broad and liberal spirit should, therefore, inspire those whose duty it is to interpret the Constitution, and the courts are not free to stretch or to pervert the language of an enactment in the interest of any legal or constitutional theory. Constitutional adjudication is not strengthened by such an attempt but it must seek to declare the law but it must not try to give meaning on the theory of what the law should be, but it must so look upon a Constitution that it is a living and organic thing and must adapt itself to the changing situations and pattern in which it has to be interpreted. It has also to be borne in mind that where division of powers and jurisdiction in a federal Constitution is the scheme, it is desirable to read the Constitution in harmonious way. It is also necessary that in deciding whether any particular enactment is within the purview of one legislature or the other, it is the pith and substance of the legislation in question that has to be looked into. It is well settled that the various entries in the three lists of the Indian Constitution are not powers but fields of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. The three lists of the Seventh Schedule to the Constitution are legislative heads or fields of legislation. These demarcate the area over which the appropriate legislatures can operate. It is well settled that widest amplitude should be given to the language of the entries in three Lists but some of these entries in different lists or in the same list may override and sometimes may appear to be in direct conflict with each other, then and then only comes the duty of the court to find the true intent and purpose and to examine the particular legislation in question. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an entry it would not be reasonable to import any limitation by comparing or contrasting that entry with any other in the same list. It has to be interpreted as the Constitution must be interpreted as an organic document in the light of the experience gathered. In the constitutional scheme of division of powers under the legislative lists, there are separate entries pertaining to taxation and other laws. The aforesaid principles are fairly well settled by various decisions of this Court and other courts. Some of these decisions have been referred to in the decision of this Court in Civil Appeal No. 62 (N)/70 —India Cement Ltd. v. State of Tamil Nadu [(1990) 1 SCC 12]"

Relying upon the discussion made in the above decision, it is contended that the State Government has no power to levy excise duty unless it is for the purpose of being referred in Entry-8 of the State List coupled with Entry-51.

4. Learned counsel for the petitioners in their respective writ petitions also relied upon another decision of the Hon'ble Supreme Court in the case of ***State of Bihar and others Vs. Industrial Corporation Pvt. Ltd. and others***, reported in AIR 2004 SC 1151, the Hon'ble Court, more particularly in paragraphs- 16, 17 and 18 observed as under:-

> "16. In the present case, what we find is that before creating a demand of penal duty or penalty, there was no adjudication by any authority as regard to the breach committed by the respondents. We also find that no opportunity of any kind was offered to the respondents before the demand as regard the penal duty was pressed against the respondents. The matter was not even examined as to what was the reason for shortfall in the production of rectified spirit. The Molasses Act does not provide for imposition of such penalty in the event of shortfall of spirit. It must, therefore, necessarily be held that the imposition of the impugned penalty being against the principles of natural justice is illegal and void.
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> 17. The statutory authorities must act within the four-corners of a statute. They could take recourse to the proceeding for levy of penalty and the recovery thereof from the respondents only in the event there existed any agreement or statutory provision therefor. Such a power did not exist in the Commissioner of Excise or the Superintendents of Excise who had issued the impugned demand notices.
>
> 18. The statutory authorities also could not have sought to levy penalty relying on or on the basis of the audit report only. They were required to apply their own independent mind for the purpose of finding out as to whether the respondents in law had committed any breach of the terms and conditions of licence or the provisions of 1947 or 1915 Acts so as to make them liable for levy of penalty. The concerned authorities acting in terms of the statutory provisions, therefore, without any further investigation could not have acted mechanically on the audit report."

5. They further submitted that this Court in an earlier occasion in a similar case of ***M/s. Uma Enterprises Vs. State of Orissa and others***, reported in 2012 (II) ILR-CUT-211, more particularly in paragraph-11 has not considered the decision of the Hon'ble Supreme Court in the case of *Synthetics & Chemicals Ltd. (supra)*, for which the matter is required to be referred to the larger Bench. Reliance is also placed on paragraphs-14 and 15 of the judgment in the case of *Uma Enterprises (supra)*, which are quoted hereunder along with paragraph-11 for ready reference.

> "11. Further, the State Government has contended that so far as Molasses meant for being used for potable purpose is concerned, it shall be under the exclusive control of the State from the moment it is cleared and removed for that purpose. The power to prohibit and to regulate the manufacture, production, sale, transport or consumption of liquors being ancillary there to it is therefore under the jurisdiction of the State Government and therefore no illegality has been committed by including molasses under Section 2(12-a) of the Bihar and Orissa Excise Act.
>
> xx xx xx
>
> 14. Our answer to the aforesaid points is in negative for the following reasons. Inclusion of Molasses to the definition of 'intoxicant' is from Entry No.8 inter-related to Entry nos.6 and 51 and in the backdrop of the said inclusion it must be considered de-controlling of the molasses the Government of India Molasses order, 1961, which was framed under Section 18(g) of the Industries (Development & Regulation) Act, 1951. Further, the Government of India at the time of withdrawal of Molasses Order, 1961 the Government of India, Ministry of Chemicals and

> Fertilizers, Department of Chemicals and Petro Chemicals have in their letter dated 11.6.1993 advised the State Governments in the manner stated supra. The said relevant factor was taken into consideration and further the State Legislature keeping in view the Orissa Act 2 of 1999 has rightly incorporated the Molasses as an intoxicant taking into consideration the suggestions given by Justice B.K. Behera who was appointed as one-man Commission to enquire into the aforesaid liquor Tragedy in the State. In his report, he has also referred to the percentage of the Molasses that 60% alcohol goes for manufacture of potable liquor and 40% towards industrial use resulting in low capacity utilization of the alcohol based industries. Further, lot of material is collected with regard to use of Molasses manufactured liquor and selling the same is not brought under control of the Excise Act and Rules thereby the tragedies which have taken away the lives of poor and socially and economically backward class people by consuming the same. On account of deregulated Molasses being used for manufacture of illicit liquor periodical tragedy are taken place in the State of Orissa is the reason for brining the said Molasses under the definition of Section 2 (12-a) of the Act. It is also rightly placed reliance upon the decision of the Supreme Court in State of Bihar v. Industrial Corporation Pvt. Ltd., AIR 2004 SC 1151, wherein, Molasses has been defined as 'intoxicant' in other States like Bihar, U.P. and Maharashta the vires were challenged that have been extensively dealt with and answered in the aforesaid judgment. The aforesaid decision with all fours is applicable to the present case.
>
> 15. In view of the aforesaid decision and the reasons which have been assigned by the State Government in support of the inculcation of Molasses as 'intoxicant' to the definition of Section 2 (12-a) of the Excise Act, we do not find any good ground to interfere with the same. The writ petition is devoid of merit and is dismissed as such."

6. Learned counsel for the State reiterated the stand of Government, in view of the in earlier Division Bench decision of this Court in ***M/s. Uma Enterprises,*** which has upheld the amendment of Section-12 of the Act taking note of the Entry No.8 and Entry-6 and Entry-51. He also contended that the view of the Hon'ble Supreme Court in the case of ***Sitaram and Bros. v. State of Rajasthan*,** reported in (1995) 1 SCC 257, paragraph-4 is also required to be considered

> "4. Thereby, it would appear that the Legislature intended to regulate the import, export, transport or possession of molasses. The question is whether the Amendment Act is repugnant to the provisions of the Industries Development Regulation Act or the Molasses Control Order, 1961 made by the Central Government exercising the power under Section 18-G of the Industries (Development and Regulation) Act, 65 of 1951. Clause (17-A) inserted by the Amendment Act is in pari materia is the definition given in clause 2(a) of the Molasses Control Order, 1961 which came into effect for the State of Rajasthan with effect from 1-11-1975. The question, therefore, is whether Section 4 of the Amendment Act introducing molasses in clause (d) of sub-section (2) of Section 41 of the Rajasthan Excise Act, 1950, is repugnant to the provisions of the Molasses Control Order or any other relevant order occupied under Act 65 of 1951. The Molasses Control Order, 1961 regulate restriction on sale, clause (3), restriction on removal, clause (4), storage of molasses, clause (5), grading of molasses, clause (6) and pricing maximum for the sale regulated by clause (7). As seen the operation of the Molasses Control Order and the operation of the Amendment Act have not occupied the same

> field nor run into collision course. It is seen that the Amendment Act was made by the State Legislature exercising the power under Entry 33(a) of the Concurrent List read with Entry 24 of State List as molasses is a by-product of a sugar industry covered by the Industries Development Regulation Act. The Amendment Act does not enter into the occupied field of the Molasses Control Order. There is no inconsistency in their operation and that therefore both the Amendment Act and the Molasses Control Order would harmoniously co-exist and operate in their respective fields. The State Legislature had thereby made the Amendment Act regulating the import, export, transport or possession of molasses within the State of Rajasthan. Thus, we find that the Amendment Act is within the legislative competence under Article 246(3) of the Constitution. The appeals are dismissed accordingly but without costs."

7. We heard learned counsel for the parties at length and perused the case law as well as the relevant constitutional and statutory provisions.

8. So far as Division Bench decision of this Court in the case of ***M/s Uma Enterprises (supra)*** is concerned, we are of the considered opinion that taking into consideration the power of the State Government for enacting the Act, as well as the view taken in ***Synthetics and Chemicals Ltd*. (*Supra*)**, the matter is not required to be referred to larger Bench. However, while interpreting the amended entry regarding 'molasses', the contention of the petitioners regarding power of the State Government coupled with Entry-8 and Entry-51 save and except for consumption other than the distillery purpose, the State Government will not have power to levy excise duty, in view of Entry-84 of Union List. Therefore, while upholding the Constitutional validity of the Entries, we make it clear that the molasses, which is used other than distillery purpose, the petitioners are not required to pay local tax, i.e., excise duty. If the molasses is used for cattle feeds, poultry or for preparation of 'gutka', then it will be exempted from excise duty.

9. In that view of the matter, the writ petitions are allowed to the aforesaid extent. The provisions of the Act vis-à-vis the amendment undertaken thereto is upheld with a rider that the consumption of molasses if used other than distillery purpose, then the petitioners are not required to pay excise duty and will be entitled for refund of excise duty from the date of filing of the petition, if already paid.

10. Now, the question crops up that whether after 1st of July, 2017, the impugned amended provision will remain in force in view of Entry-1703 (Molasses), which is now included under the Goods and Services Tax.

11. In view discussion made and postion of law at present, this question will not arise after 1st of July, 2017. If an application is made along with relevant documents supporting the claim for refund within six weeks with the

justification of concession that the molasses is used for carrying on their business other than the distillery purpose, the State Government will consider the same within a period of three months from the date of such application and refund shall be made immediately.

11.5 It is made clear that if the refund is not made within a period of three months of such application, the petitioners will be entitled for interest at the rate of 8% from the date of filing of writ petition herein before this Court, and in case of delay in refund the amount of interest which would occur for such delay, would be collected from the salary of the Officer who would be held responsible for making delay in deciding the matter. We make it further clear that the petitioners have to apply for the licence and have to pay the licence fee, excise duty etc. to avail the benefit of refund.

12. All the writ petitions are allowed to the extent indicated above.

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2019 (II) ILR - CUT- 733

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

A.H.O NO.143 OF 2001

DURYODHAN SAMANTRAY ……….Petitioner

.Vs.

SAINIK SCHOOL SOCIETY & ORS. ……….Opp. Parties

DISCIPLINARY PROCEEDING – Petitioner found guilty – Order of dismissal passed – Appeal – Punishment reduced to removal – Writ petition – Learned single judge upheld the order of punishment – Writ appeal – Plea that there has been failure to follow the principles of natural justice and therefore the order of punishment should be interfered with – When can High court interfere with the punishment awarded in a disciplinary proceeding? – Indicated.

"So far as the punishment imposed on the petitioner-appellant, the learned Single Judge has observed that as per the settled principle of law, the high court in exercise of jurisdiction under Article 226 of the Constitution cannot interfere with the punishment once it has agreed with the findings of the Enquiring Officer since the quantum of punishment is within the domain of the disciplinary authority. Only in cases where it appears to the High Court that the punishment imposed is shocking in relation to the charges framed, this Court can interfere on the question of quantum of punishment. It has also been observed that three out of four charges have been well-established against the petitioner-appellant and the appellate authority had taken into consideration the contentions raised on behalf of the petitioner-appellant and while agreeing with the findings of the disciplinary authority, taking a lenient view reduced the penalty of 'dismissal' to 'removal' from service." (Para 13)

For petitioner : M/s B.S Tripathy-1, J.Das, J.Sahoo & P.S.Das.
For opp. Party : Mr. Aurovinda Mohanty (C.G.A.).

JUDGMENT Date of Hearing : 15.02.2019 Date of Judgment : 01.03.2019

J.P. DAS, J.

This letter patent appeal has been preferred by the appellant assailing the judgment dated 13.03.2001 passed by the learned Single Judge of this Court in O.J.C. No.3131 of 1990 rejecting the application filed by the appellant as petitioner under Section 226 and 227 of the Constitution of India wherein the petitioner had assailed his removal from service as illegal.

2. The case of the petitioner-appellant was that he entered into the service as general employee Watchman in the Sainik School, Bhubaneswar in December 1973 and was regularized on 01.04.1975. On 06.04.1988 a memorandum of charges was served on the petitioner asking him to file show-cause. The petitioner submitted his show-cause raising objection to the decision of the authority for initiating a disciplinary proceeding on the ground of failure to follow the due procedure. The present respondent no.5 as the Principal of School appointed a Court of Enquiry on 22.04.1988 and challenging the initiation of the proceeding, the petitioner preferred an appeal before the opposite party-respondent no.3. During pendency of the appeal, the Court of Enquiry commenced the proceeding and the petitioner submitted a detailed explanation in relation to the charges leveled against him. It was further alleged that before completion of proceeding, the opposite party-respondent gave press statement in local daily newspapers expressing his personal opinion relating to memorandum of charges with the purpose of influencing the Court of Enquiry. On 19.07.1988 the Court of Enquiry submitted its findings holding the petitioner partially guilty of charge no.2 and guilty of all other charges. On being asked, the petitioner submitted his representation/reply against the findings of the Court of Enquiry raising several objections. Again on 22.08.1988 he submitted his explanation to the second show-cause notice indicating the infirmities in the proceeding. But, ignoring his explanation, the opposite party-respondent no.5 as the disciplinary authority passed an order of dismissal against him on 23.01.1989. The petitioner challenged the said order of punishment in appeal before the opposite party respondent no.2 and the appellate authority by order dated 26/27.09.1989 rejected the appeal but modified the order of ‘dismissal’ to ‘removal’ from service. The petitioner in the writ petition assailed the correctness and legality of the findings in the disciplinary proceedings as well as that of the appellate authority.

3. The petitioner assailed the findings on the following grounds: (i) the charges were vague in nature and hence unsustainable in law; (ii) before submission of explanation, the Court of Enquiry was appointed which was without jurisdiction; (iii) no document on the basis of which the charges were framed was supplied to the petitioner; (iv) the enquiry was conducted by the Court of Enquiry as per dictates of opposite party nos.4 and 5 in a manner contrary to the principles of natural justice so also the petitioner was not permitted to cross-examine the prosecution witnesses; (v) one member of Court of Enquiry was changed by the opposite party no.5 without the knowledge of the petitioner and in violation of the disciplinary Rules; (vi) during pendency of the enquiry the Disciplinary Authority gave press statements in relation to a proceeding; (vii) without obtaining prior approval from the Chairman, L.B.A, the petitioner was dismissed arbitrarily by opposite party-respondent no.5.

4. The learned Single Judge considering all the grounds raised by the petitioner-appellant point-wise reached the conclusion that all the points raised on behalf of the petitioner failed and accordingly dismissed the writ petition by the impugned order.

5. The learned counsel appearing for the appellant mainly contended that the charges were vague since those were not supported by any material or document and also ignoring the explanation submitted by the petitioner. It was further submitted that the disciplinary authority as well as the appellate authority found him guilty of the charges illegally and the learned Single Judge has failed to appreciate the contentions raised on behalf of the appellant in proper perspective.

6. Per contra, it was submitted by the learned counsel for the respondent that the charges as framed against the appellant, were well understood by him, which he tried to explain and justify in his show-cause. It was also submitted that the learned Single Judge has made a threadbare discussion of all the contentions raised on behalf of the petitioner-appellant in reaching the conclusion of dismissal of the writ application calling for the interference.

7. In the view of the specific submissions made on behalf of the petitioner-appellant, it would be appropriate to place the four charges framed against him on record.

> **"*Charge no.1*-** In violation of Rule 9.01(g) of the above rules, it is found and I am satisfied that you are neither dignified nor polite for temperate in your speech correspondence and behavior. You have been writing letters to the school authorities in the name and style of General Employees Association, Sainik School,

> Bhubaneswar knowing fully well that the Sainik school authorities don't recognize any such association vide Rule 10.17 of the above rules. Also, you have been writing letters to the School authorities in the name and style of office bearer viz. General Secretary of an Association which is not recognized. From the tone of your letter, it is found that, it is intimidating, threatening and impolite.
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> ***Charge no.2***- In violation of Rule 0.03(a) of the above rules, you have become an active supporter of a political party and you are in constant touch with an eminent member of that party.
>
> ***Charge no.3***- In violation of Rule 0.03(g) and 10.17 of the above rules, you represent your grievances without proper channel and try to canvass such grievances by non-officials and through political influence.
>
> ***Charge no.4***- In violation of Rule 0.01(a) & (e), you are further charged for gross misconduct, indiscipline and violation of conduct rules, Chapter IX of the above rules for organizing a meeting inside the School premises on 31 Mar,1988 at about 16.30 hours inviting outsiders to the school campus, without caring for the instructions and warnings issued to you by the school authorities to refrain from such activities. At about 16.45 hours on 31 March, 1988, you held a public meeting in the school premises using microphones and loudspeakers. You invited from amongst many outsiders, to persons of a political party and you along with these two leaders of political party actively associated in giving speeches in loud voice inciting and instigating the other members of the staff and thus committing an act of gross indiscipline.

8. We have carefully gone through the observations and findings of the learned Single Judge wherein each and every point raised on behalf of the petitioner-appellant has been meticulously considered. Learned Single Judge has analyzed the charges vis-à-vis the contentions raised on behalf of the petitioner-appellant and considering the materials available on record has reached the conclusion that the contentions as raised on behalf of the petitioner were not sustainable in law. As regards the vagueness of the charges as mainly contended on behalf of the appellant-petitioner, the learned Single Judge has discussed the four charges and has observed the charge no.2 as vague and unsustainable since it did not specify any instance or did not contain the specific material in support of the charge. It may be mentioned here that the Enquiry Committee had also held the Charge No.2 to be partially established. As regards other three charges, it is evident on record that the petitioner was writing letters to the authorities in the name and style of office bearer viz, General Secretary of an association within the school which was not recognized by the school authority and further the speech and correspondence were neither dignified nor polite. In reply to the said charge the petitioner-appellant had categorically claimed himself to be Secretary of an Association and he did not deny the allegation of such correspondences and hence, it can never be said that charge was vague or it was not

understood by the petitioner-appellant. So far as the charge no.3 is concerned, it has been observed by the learned Single Judge that although details of the allegation that the petitioner was representing his grievances without proper channel by non-official ways have not been mentioned, still it cannot be said that the petitioner did not understand the charge. So far as the charge no.4 is concerned, all the detailed particulars including the date and time has been given. Lastly, one point was raised on behalf of the petitioner-appellant that without obtaining prior written approval from the Chairman, Local Board of Association (in short 'LBA'), the opposite party no.5 passed the order of dismissal illegally and arbitrarily. It was found out by the learned Single Judge on the materials placed on behalf of the opposite party-respondent that on 07.01.1989 the Chairman accorded approval under Rule–10.03 for imposition of the major penalty. On 17.01.1989 the school authority prayed for clarification and on 22.01.1989 the Chairman, LBA approved the punishment by treating the period of suspension as such. The relevant documents were also placed before the Court to hold that the contentions raised on behalf of the petitioner was not sustainable.

9. Thus, we have no hesitation to concur with the findings of the learned Single Judge that the allegation of vagueness in the charges is unsustainable.

10. As regards the other contentions in assailing the findings of the disciplinary authority, the learned Single Judge has also analyzed and discussed point-wise. The contention that before submission of show-cause by the petitioner-appellant, the Court of Enquiry was appointed, was not correct since memorandum of charges was served on the petitioner on 06.04.1988. The petitioner submitted his show-cause on 14.04.1988 denying the charges and considering the same, the Court of Enquiry was appointed on 22.04.1988. Similarly, as regards non-supply of documents, it was the case of the opposite party-respondent that since none of the charges based on any document, there was no question of supplying those documents to the petitioner. It was further contended on behalf of the respondents that the petitioner was allowed to verify and inspect all the documents besides the memo of evidence and hence, such contention raised on behalf of the petitioner-appellant falls to the ground. As regards the contention of the petitioner-appellant that the enquiry was conducted as per the dictates of the opposite party nos.4 and 5 was not supported with any material except being bald allegation. As regards the contention that the petitioner-appellant was not permitted to cross-examine the prosecution witnesses was also found to be false since it was found out from record that the petitioner himself has

cross-examined some witnesses and the Defence Assistant had also cross-examined some witnesses. The other contention was that one member of the Court of Enquiry was changed without the knowledge of the petitioner. It is also not sustainable in view of the fact that one of the member of the Court of Enquiry was transferred on official order and there was no prohibition or bar to engage another officer in his place. The allegation of giving press statement by the opposite party–respondent no.5 affecting the enquiry was also found to be not correct since it was simply stated by opposite party no.5 that some Trade Union leaders have been invited for holding a meeting inside the school premises for creating disturbance in the school and threatening the authorities. The said fact was reported to the Police and Police had taken action. Thus, learned Single Judge has rightly found out that such statement made by the Principal of the institution could have any influence on the members of the Court of Enquiry in conducting the enquiry.

11. Some case laws were cited on behalf of the petitioner-appellant in support of the contention that vagueness of the charges, failure to follow the principles of natural justice, denying the delinquent officer proper opportunity to defend his case and non-supply of materials in support of the allegations to the delinquent officer are individually sufficient ground to quash the proceeding. But, as detailed hereinbefore, we found no deviation in conduct of the proceeding or any substance in the contention raised on behalf of the petitioner-appellant so as to take recourse to the cited case laws, the principles laid down wherein are not at all in dispute.

12. It was submitted by the learned counsel for the respondent that in an organization like Sainik School in which discipline and dignity are the fundamental guidelines, the behavior and attitude shown by the petitioner-appellant are well established against him to be thrown out in order to safeguard the dignity of the institution. It was further submitted that the charges as leveled against the petitioner-appellant justified action of the disciplinary authority in view of the nature of the allegations and the activities of the petitioner-appellant which were unbecoming of an employee or a member of an institution like Sainik School.

13. So far as the punishment imposed on the petitioner-appellant, the learned Single Judge has observed that as per the settled principle of law, the high court in exercise of jurisdiction under Article 226 of the Constitution cannot interfere with the punishment once it has agreed with the findings of the Enquiring Officer since the quantum of punishment is within the domain of the disciplinary authority. Only in cases where it appears to the High Court

that the punishment imposed is shocking in relation to the charges framed, this Court can interfere on the question of quantum of punishment. It has also been observed that three out of four charges have been well-established against the petitioner-appellant and the appellate authority had taken into consideration the contentions raised on behalf of the petitioner-appellant and while agreeing with the findings of the disciplinary authority, taking a lenient view reduced the penalty of 'dismissal' to 'removal' from service.

14. In view of the facts and circumstances discussed hereinbefore, we find no reason to interfere with the findings reached by the learned Single Judge in dismissing the writ petition filed by the petitioner-appellant.

15. Accordingly, the writ appeal is dismissed being devoid of merit. However there is no order as to cost.

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2019 (II) ILR - CUT- 739

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

JCRLA NO. 73 OF 2007

FIGHTER ORAM ……….Appellant.

.Vs.

STATE OF ORISSA ……..… Respondent.

INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction and life imprisonment – Quarrel between the accused and deceased – Effort by others to disengage them – Suddenly the accused gave a blow on the head of the deceased by means of a wooden stick – Evidence suggests accused had no intention of committing murder – Incident took place in the spur of the moment – Conviction altered to one under 304-Part - II – Sentence reduced to five years without fine.

For Appellant : M/s. C. R. Sahu, S.R. Sahoo
For Respondent : Mr. J. Katikia (Addl. Govt. Adv.)

JUDGMENT Date of Hearing and Judgment : 09.04.2019

S. K. MISHRA, J.

In this appeal the convict-appellant, assails the judgment dated 18.05.2007 passed by the learned Sessions Judge, Keonjhar in S.T. Case No.6 of 2007 convicting him u/s.302 of the Indian Penal Code, 1986 (hereinafter referred to as 'I.P.C.' for the brevity) and sentencing him to undergo imprisonment for life.

2. The case of the prosecution in brief is that the occurrence took place on 13.09.2006. On that date, the informant and the deceased were sitting on the verandah. The accused with another came there and dragged the deceased to the village road and assaulted him with the handle of an axe, as a result of which, the deceased expired. Prior to this incident, the accused had quarreled with the wife of the deceased. This incident was reported to the police and, in due course, after completion of investigation charge-sheet was submitted and the accused was put to trial.

3. To prove its case prosecution has examined as many as seven witnesses including the wife of deceased, out of whom P.Ws.1, 2 and 3 are the eye witness of the occurrence.

4. No witness has been examined on behalf of the defence.

5. It is apparent from the statement of P.W. 6, that on 14.09.2006 he conducted post-mortem examination over the dead body of the deceased, Rahasa Ojha and noticed one lacerated injury over his right eye-brow, the right orbital and frontal bone were fractured and there was extensive haemorrhage into the right cerebral hemisphere and ecchymosis below the left eye. He opined that the death of the deceased was due to shock and excessive hemorrhage of the right cerebral hemisphere. The injuries were taken to be anti-mortem in nature and were found sufficient to cause death in the ordinary course of nature.

6. P.W.2 is the wife of the deceased, she has stated that on the date of occurrence the deceased, herself and other family members were sitting on the verandah. In the morning, while returning from the weekly market the accused dashed his motor cycle for which there was a quarrel between the witness and the accused. At the evening the accused and Kanhu came to the house and dragged her husband under a jack fruit tree and the accused assaulted her husband with the handle of an axe, as a result of which, her husband sustained injury on his head and fell down and died at the spot. Though cross-examined, nothing substantial has been brought out from the mouth of this witness.

P.W.1 is the informant and the son of the deceased of this case and P.W.3 who happens to be the daughter-in-law of the deceased have also supported the case of the prosecution as deposed by P.W.2. So from the evidence of P.Ws.1, 2, 3 and 6, we are of the opinion that the prosecution has brought home his case that the appellant has committed the homicide of the deceased.

Now the question remains whether it is a homicide amounting to murder or homicide not amounting to murder.

Apparently, there was quarrel between the accused and the wife of the deceased. It is also borne out from the F.I.R. that there was a quarrel between the deceased and the accused-appellant. Then the accused dragged the deceased from the verandah to the village road and under a jack fruit tree he again picked up quarrel with the deceased. At that time others started to disengage them from further quarrel, but the accused became aggressive and gave a blow by means of a wooden stick (KATHA BENTIARE) on the head, for which he fell down. From this aspect it is clear that the accused has no intention of committing murder of the deceased. All these incident took place in a spur of moment and only one blow that to by means of a wooden plank has been given by the appellant to the deceased.

7. So we are of the view that an offence under section 302 of IPC is not sustainable, rather an offence under section 304 (part-II) of the IPC is made out.

8. Accordingly we allow the appeal in part and convert the conviction of the appellant under section 302 of the IPC to conviction under section 304 (Part-II) of the IPC for committing the offence of culpable homicide not amounting to murder.

9. We reduce the sentence to five years R.I. Period undergone as UTP as well as the convict be set off. We do not impose any fine to the appellant-petitioner. The appeal is partly allowed. L.C.Rs. be returned immediately.

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2019 (II) ILR - CUT-741

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

MATA NOS. 101 & 111 OF 2013

SMT. ARPITA MOHANTY ……….Appellants

.Vs.

SABYASACHI DAS ....Respondents

(A) HINDU MARRIAGE ACT, 1955 – Section 13-B – Mutual divorce – An agreement was filed showing settlement of the matrimonial dispute – Agreement not signed by the husband and wife but by their parents – Whether can be accepted? – Held, No. – An agreement not signed by the competent parties having capacity to contract cannot be said to have legal effect of bindingness upon those non-executants – In other

words, parties are not bound by the written agreement which they have not executed, though otherwise they are competent to do so – For this reason simplicitor, we exclude Ext.1 agreement to consider the entitlement of wife-respondent under section 25 of Hindu Marriage Act.

(B) HINDU MARRIAGE ACT, 1955 – Section 25 – Permanent alimony – Determination thereof – Mode – Indicated.

In the decision reported in (2013) 2 SCC-114 ***U. Sree Vs. U.Srinivas*** *, the Hon'ble Apex Court have stated the broad principles to fix the amount in the following words:-*

"xxx xxx xxx As a decree is passed, the wife is entitled to permanent alimony for her sustenance. Be it stated, while granting permanent alimony, no arithmetic formula can be adopted as there cannot be mathematical exactitude. It shall depend upon the status of the parties, their respective social needs, the financial capacity of the husband and other obligations. In ***Vinny Parmvir Parmar v. Parmvir Parmar,*** *while dealing with the concept of permanent alimony, this court has observed that while granting permanent alimony, the Court is required to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party."*

(Paras 9.1 and 10.1)

Case Laws Relied on and Referred to :-

1. (2013) 2 SCC-114 : U. Sree Vs. U.Srinivas

For Appellants : M/s. Prasan Kr. Sahu, A.K.Swain, A.C.Mohapatra, A.K.Panda, S.C.Mohanty & A.A. Lenka. (MATA No. 101/2013)

M/s. Sidheswar Mohanty, S.K.Routray, L.Mohapatra,S.Pattnaik & A.Das.(MATA No.111/2013)

For Respondents : None (MATA No.101 of 2013)

M/s.Ajaya Kumar Swain, A.S.Mohapatra,S.S.Mohanty, A.A.Lenka and A.K.Paul. (MATA No. 111/2013)

JUDGMENT Date of Hearing : 23.07.2019: Date of Judgment : 31.07.2019

DR.A.K. MISHRA, J.

Decree of divorce subject to payment of permanent alimony of Rs.5,00,000/-(Rupees five lakhs) passed vide order dated 21.09.2013 in C.P. No. 806 of 2009 by the learned Judge, Family Court, Cuttack is challenged in these two appeals, hence, this common judgment.

2. For party position, notwithstanding the appeal memos, the wife shall be referred to as appellant while husband shall be referred to as respondent hereinafter.

3. Appellant married the respondent as per the Hindu rites and customs on 27.06.2007. After some days, the wife deserted alleging cruelty against the husband and stayed in the house of her parents. Both of them were of highly educated. There was a Panchayat Faisala Nama on 26.12.2008 to settle their dispute amicably. As per settlement, the father of the appellant-wife received Rs.4,80,000/-(Rupees four lakhs eighty thousand) towards presentation and ornaments given during the marriage. It was also settled to go for mutual divorce. Accordingly, a mutual divorce case under Section 13(B) of the Hindu Marriage Act, bearing C.P. No. 538 of 2009 was filed. But the appellant wife having not cooperated, the case was dismissed. Thereafter, the husband filed this divorce proceeding under Section 13 of the Hindu Marriage Act on 15.09.2009 bearing C.T. No. 806 of 2009 before the learned Judge, Family Court, Cuttack. The allegation of cruelty and desertion were challenged by the wife. Both the parties adduced their evidence. Husband and an independent witness to the agreement are examined as P.Ws 1 and 2. The certified copy of Panchayat Faisala Nama and other document were executed as Exhibits-1 and 2. On behalf of the wife, she herself and her father were examined as P.Ws. 1 and 2. Certified copy of the R.O.R. showing the landed properties in favour of the husband is marked vide Exhibit-A/1 series. Learned Judge, Family Court has recorded the finding that both the couples had reached the point of no return. The allegation of cruelty and desertion were not proved. The payment of Rs.4,80,000/- as per the agreement Exhibit-1 was not towards the permanent alimony. Considering the landed properties and income of the husband, the learned Judge, Family Court while dissolving the marriage between them solemnised on 27.06.2007 by a decree of divorce, allowed permanent alimony of Rs.5,00,000/- to be paid by the husband to the wife within three months.

3.1 The wife filed MATA No. 101 of 2013 challenging the said decree. The husband has also filed MATA No. 111 of 2013 assailing the quantum of permanent alimony in specific.

4. Learned Advocate of both parties, in course of hearing, did not dispute the decree of divorce but assiduously advanced a disputation on the amount granted as permanent alimony.

5. Learned counsel for respondent submits that as the wife-appellant agreed for divorce on receipt of Rs.4,80,000/- vide Panchayat Faisala Nama (Ext.1) and gave consent in mutual divorce petition after receipt of said amount, she is not entitled to permanent alimony.

6. Secondly, the husband – appellant has no source of income being unemployed and thus has no capacity to pay any amount towards permanent alimony.

7. Per contra, learned counsel for wife – appellant submits that the amount of Rs.4,80,000/- was paid towards the gift received by husband from wife's family during marriage and Ext.1 agreement cannot be read to bind the wife for relinquishment of her claim to permanent alimony.

7.1. Further, it is countered that there is evidence adduced to show that the husband has income from his properties amounting rupees one lakh per month and has sufficient landed properties to spare a good amount for her sustenance.

8. Following two points have emerged contentious for us.

(i) Whether agreement (Ext.1) bars the wife to claim permanent alimony U/s.25 of Hindu Marriage Act; and

(ii) If the wife is found entitled to permanent alimony, whether the amount granted by learned Judge, Family Court needs to be interfered with?

Answer to point no.1

9. We carefully read the contents of Ext.1. It is an agreement for settlement of marital dispute between Appellant and Respondent. It was executed on 26.12.2008. It is not signed by the both spouses, i.e., wife and husband, whose marriage was the thrust of controversy. Both of them were major and educated then. The said agreement was executed by the respective father of the parties and mediator including P.W.2. This ex facie facts is deposed by P.W.2. in paragraph-10 of his evidence.

9.1 An agreement not signed by the competent parties having capacity to contract cannot be said to have legal effect of binding-ness upon those non-executants. In other words, parties are not bound by the written agreement which they have not executed, though otherwise they are competent to do so. For this reasons simplicitor, we exclude Ext.1 agreement to consider the entitlement of wife-respondent under section 25 of Hindu Marriage Act.

9.2 Notwithstanding above, the content of Ext.1, so called agreement does not support the respondent-husband's submission. Expressly it is stated therein that the amount Rs.4,80,000/- was to be paid towards value of presentation and gold ornaments brought by the wife during marriage.

Contextually no other meaning is either possible or permissible. Consequently, Ext.1 agreement is not a bar to claim permanent alimony by the wife-appellant.

Answer to point No.(II)

10. Learned Family Judge has awarded Rs.5 lakhs towards permanent alimony to be paid by husband to wife. This amount is now the core of contest.

10.1 In the decision reported in (2013) 2 SCC-114 ***U. Sree Vs. U.Srinivas*** , the Hon'ble Apex Court have stated the broad principles to fix the amount in the following words:-

> "xxx xxx xxx *As a decree is passed, the wife is entitled to permanent alimony for her sustenance. Be it stated, while granting permanent alimony, no arithmetic formula can be adopted as there cannot be mathematical exactitude. It shall depend upon the status of the parties, their respective social needs, the financial capacity of the husband and other obligations. In* ***Vinny Parmvir Parmar v. Parmvir Parmar,*** *while dealing with the concept of permanent alimony, this court has observed that while granting permanent alimony, the Court is required to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party."*

10.2. In the case at hand, admittedly no document is filed to show the income of the wife and thus she is unable to maintain herself. In evidence as OPW-1 she claimed Rs.20,000/- per month towards food, clothing, shelter with regards to dignity and prestige. On her behalf, during cross-examination of husband as P.W.1 suggestion was given for rupees ten lakh for permanent alimony.

10.3. Husband, P.W.1, in his evidence does not show that he was unable to earn. He has no other liability as his mother is getting family pension and elder brother is not a dependent. His father died leaving landed properties and Building. Ext. A/1 ROR stands in his mother's name while Ext. A/2, A/3 RORs are in respect of landed properties at villages. Considering the fact that the husband-respondent is an able bodied educated man and has sufficient interest on the joint family immoveable properties, we are persuaded to arrive at a conclusion that he can spare rupees eight lakhs towards his estranged wife. Appellant-wife needs security however meager may be and provision

qua the status would be a determining factor for permanent alimony. A visible source of financial security as subsistence would be the income from the fixed deposit interest. Balancing the entitlement and capacity, regards being had to the status of the parties, we fix the quantum of permanent alimony at rupees eight lakhs. Accordingly, the quantum of permanent alimony fixed by learned Judge should be enhanced and is hereby enhanced to rupees eight lakhs.

11. In the result, the decree of divorce dtd.21.04.2013 in C.P. No.806 of 2009 dissolving the marriage between appellant and respondent by the Judge, Family Court, Cuttack is confirmed. The amount of permanent alimony is enhanced to Rs.8,00,000/- (Eight lakhs) to be paid by the husband-respondent to wife- appellant. The payment shall be made within four months failing which it would carry interest at the rate of 9% per annum from today till its realization.

12. In result, MATA No.101 of 2013 is allowed in part and MATA No. 111 of 2013 is dismissed.

13. LCRs. be returned immediately to the lower court by the Registry.

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2019 (II) ILR - CUT- 746

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

CRLA NO. 255 OF 2017

ASHOK MAJHI @ ASHOK KUMAR MAJHI ....Appellant

.Vs.

STATE OF ORISSA ....Respondent

CRIMINAL TRIAL VIS-A-VIS FAIR TRIAL – Accused involved in the offence of 302 – Trial began – Recording of evidence of witnesses over – Case posted for argument but suffered several adjournment due to absent of lawyers from all sides owing to cease work – Trial judge after hearing the convict in absence of defence lawyer pronounced the judgment and passed the order of sentence – Whether such a course was permissible under law? – Held, No.

“The order sheet in detail and observation of the trial judge in the judgment leave no scope to doubt that the accused who was facing trial was deprived of getting fair and impartial trial. He has right to be defended under law, regardless of merit of the case. Keeping the said law in view, we are persuaded in the facts of the

case to order for retrial in exercise of powers of Appellate Court under Section 386 Cr.P.C. Hence, it is ordered:- The conviction and sentence of appellant is set aside. The case is remitted back for retrial by the court of Addl. Sessions Judge, Sundergarh but the retrial would be taken up from the stage of defence."

Case Laws Relied on and Referred to :-

1. AIR 2012 SC 750 : Md. Hussain @ Julfikar Ali Vs. State (Govt. of NCT) Delhi. 2

For Appellant : M/s. B. Sahoo, B.Mohanty,
For the informant : M/s. Sk. Zafarulla,J.Kamila, & B.Mohnaty.
For Respondent : Addl. Govt. Adv. (Mr. J. Katikia)

ORDER Date of Order 16.08.2019

S.K. MISHRA, J.

At stake is the procedure adopted in a criminal trial by the learned Addl. Sessions Judge, Sundargarh in convicting the appellant under section 302/34 IPC and passing sentence of life imprisonment in S.T. Case No. 62/60 of 2013. Because, the fair trial has not been given fair deal resulting the denial of right to accused to be defended by an advocate of his choice as mandated under Section 303 Cr.P.C. Outlining the core of context in the memorandum of appeal, we proceed to hear the appeal on merit.

2. Heard Mr. S.S. Ray learned counsel for the appellant who filed memo of appearance in the court today. The same be kept on record. We have also heard Mr. Sk. Zafarulla, learned counsel for the informant and Addl. Govt. Advocate, Mr. J. Katikia.

3. Perused the impugned judgment and the lower court record. The conviction and sentence having been challenged for want of fair trial, the facts need to be narrated in nutshell to address the same.

Learned counsel for the appellant Mr. Ray assails the conviction and sentence of the appellant on the ground that the Right to Defence has been violated and thereby the appellant-accused is deprived of getting fair trial. He relied upon a decision reported in AIR 2012 SC 750 ***Md. Hussain @ Julfikar Ali Vs. State (Govt. of NCT) Delhi.*** 2

The appellant as an accused faced trial for the charge under section 302/34 IPC, Section 25 (1-B) (a) and Section 27 (1) of the Arms Act.

The accusation against him was that on 21.5.2011 at 8.30 a.m at Barangakhol forest chowk he committed murder of one Madha Minz by means of Gainti and fire-arms in furtherance of common intention with others.

On 20.06.2014, the accused did not plead guilty to the charges and also prayed the court that as he had no means to engage private defence, State defence counsel should be engaged to defend him. Accordingly, advocate Sri S. Panigrahi was appointed as State Defence Counsel by the learned Addl. Sessions Judge, Sundergarh. The trial was ensued, 10 witnesses were examined.

3.a On 11.11.2016, the statement of accused under Section 313 Cr.P.C. was recorded. On the prayer of learned State Defence Counsel, P.W.8 was recalled for further cross-examination. It was completed on 21.01.2017. On 27.01.2017, the learned State Defence Counsel filed memo closing the defence evidence. On 3.2.2017, on being engaged by accused in custody, leaned advocate, Sri S. K. Mohapatra and others filed Vakalatnama. On that date petition under section 311 Cr.P.C. was also filed to recall P.W.7 and the same was rejected. The case was posted for argument. Thereafter the trial suffered three adjournments. On 22.2.2017, accused was not produced. Neither the defence counsel nor Addl. Public Prosecutor appeared in the court. On 2.3.2017, the accused was produced from custody but learned Defence Counsel did not turn up for argument. On 16.3.2017, a petition was filed for adjournment of the case and to provide a Legal Aid Counsel to argue the case of accused. On 17.3.2017, after hearing the accused, the case was posted to 21.3.2017 for argument. It was mentioned on that date in the order sheet that "since the local Bar Members have boycotted this court neither the Addl. P.P. nor the defence counsel and Legal Aid Counsel turn up to the court to conduct the case of the accused. However, the accused is directed to come on the date fixed for argument positively." On 21.3.2017, accused was produced from custody and filed a petition for adjournment and the case was again adjourned to 23.3.2017 for hearing of argument. On that date again it was adjourned to 27.3.2017. On that date the accused expressed his inability to argue the case but the case was posted for judgment to the next date. On the next date, i.e., 28.3.2017 the accused filed a petition for time on the ground that advocates of the Bar were not turning up but the learned Addl. Sessions Judge did not allow further time and rejected the prayer. Thereafter, the judgment was pronounced convicting the accused-appellant under section 302/34 IPC while acquitting him of the offences under Section 25(1-B)(a) and Section 27 (1) of the Arms Act.

3.b On the next date, hearing on sentence was heard from convict in absence of defence lawyer and Addl. P.P. and convict was sentence to undergo imprisonment for life with a fine of Rs.25,000/-(rupees twenty five thousand), in default to further undergo R.I. for one year.

Learned Addl. Sessions Judge, also directed that the sentences for life shall be considered as not less than 25 years of R.I. and in case the State desires to remit the sentence the same might be considered only after 20 years.

It is pertinent to note that the judgment has also contained the following observation:-

> *"At the end of the trial the accused-convict had became defenceless due to absence of lawyers and Addl. P.P. as well. A defenceless convict should not be awarded with extreme penalty. The prosecution may agitate the matter before the Hon'ble High Court by filing appeal for enhancement of sentence"*

4. The order sheet in detail and observation of the trial judge in the judgment leave no scope to doubt that the accused who was facing trial was deprived of getting fair and impartial trial. He has right to be defended under law, regardless of merit of the case.

5. Learned counsel for informant, Mr. Zafarulla and learned Addl. Govt. Advocate, Mr. Katikia submit that accused was involved in number of cases. Such contention bears no merit to take away the right of fair and impartial trial of an accused in a trial. Under constitution such right is absolute and the court guards it jealously.

6. In the decision cited by learned counsel for the appellant in Md. Hussain Case (Supra), the Hon'ble Apex Court has also elucidated the above principle. It is stated therein that:-

> "*11. In my view, every person, therefore, has a right to a fair trial by a competent court in the sprit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and reasonable trial of charge in a criminal case. This Court, in the case of* ***Zahira Habibullah Sheikh (5) v. Stae of Gujarat*** *MANU/SC/1344/2006: (2006) 3 SCC 374 has explained the concept of fair trial to an accused and it was central to the administration of justice and the cardinality of protection of human rights.*
>
> *xxxxx xxxxxx xxxxxxx*
>
> *17. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result, the accused charged with a serious offence must not be stripped of his valuable right of a fair ad impartial trial. To do that, would be negation of concept of due process of law, regardless of the merits of the appeal. The Code of Criminal Procedure provides that in all criminal prosecutions, the accused has a right to have the assistance of a Counsel and the Code of Criminal Procedure. Also requires the court in all criminal cases, where the accused is unable to engage Counsel, to appoint a Counsel for him at the expenses of the State. Howsoever guilty the appellant upon the inquiry might have been, he is until convicted, presumed to be innocent. It was the duty of the Court, having these cases in charge, to see that he is denied no*

necessary incident of a fair trial. In the present case, not only the accused was denied the assistance of a Counsel during the trial and such designation of Counsel, as was attempted at a late stage, was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. The Court ought to have seen to it that in the proceedings before the Court, the accused was dealt with justly and fairly by keeping in view the cardinal principles that the accused of a crime is entitled to a Counsel which may be necessary for his defence, as well as to facts as to law. The same yardstick may not be applicable in respect of economic offences or where offences are not punishable with substantive sentence of imprisonment but punishable with fine only. The fact that the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our judicial proceedings. The necessity of Counsel was so vital and imperative that the failure of the trial court to make an effective appointment of a Counsel was a denial of due process of law. It is equally true that the absence of fair and proper trial would be violation of fundamental principles of judicial procedure on account of breach of mandatory provisions of Section 304 of Code of Criminal Procedure."

7. Keeping the said law in view, we are persuaded in the facts of the case to order for retrial in exercise of powers of Appellate Court under Section 386 Cr.P.C. Hence, it is ordered:-

The conviction and sentence of appellant in S.T. Case No.62/60 of 2013 is set aside. The case is remitted back for retrial by the court of Addl. Sessions Judge, Sundergarh but the retrial would be taken up from the stage of defence. LCRs be returned immediately. With the above observation and direction the CRLA stands disposed of.

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2019 (II) ILR - CUT- 750

DR. A.K. RATH, J.

C.M.P.NO. 242 OF 2017

AMULYA KUMAR BISWAL ....Petitioner

.Vs.

BIJAYLAXMI BISWAL ....Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Order 8 Rule 1 – Provisions under for filing of written statement – No longer be said to be directory, but can only be said to be mandatory – Defendant did not file written statement – Ex-parte decree passed and later set aside – Defendant filed written statement along with counter claim with a prayer to accept the same – Written statement whether can be accepted? – Held, No – Reasons indicated.

Case Laws Relied on and Referred to :-

1. 121 (2016) CLT 492 : State of Orissa & Ors..Vs. Smt.Sitanjali Jena.
2. 2019 SCC On Line SC 226 : M/s.SCG Contracts India Pvt. Ltd. .Vs. K.S.Chamankar Infrastructure Pvt. Ltd. & Ors.
3. (2018) 6 SCC 639 : Atcom Technologies Limited .Vs. Y.A. Chunawala & Company & Ors.

For Petitioner : Mr.Arun Kumar Mishra-2
For Opp party : Mr.Damodar Patra.

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

DR.A.K.RATH, J.

By this petition under Article 227 of the Constitution of India, challenge is made to the order dated 5.12.2016 passed by the learned Civil Judge (Jr.Division), Salipur in C.S.No.99 of 2014, whereby and whereunder, learned trial court has rejected the application of the defendant to accept the written statement-cumcounter claim.

2. The plaintiff-opposite party instituted the suit for partition. On 11.9.2014 the defendant-petitioner entered appearance and took time to file written statement. Time petition was allowed. Thereafter he took several adjournments to file written statement. Finally by order dated 21.3.2015 he was debarred from filing of the written statement, but allowed to contest the suit. The suit was decreed ex parte on 20.7.2015. Thereafter he filed CMA No.127 of 2015 under Order 9 Rule 13 CPC to set aside the ex-parte judgment. On 12.8.2016, ex-parte judgment was set aside. While matter stood thus, he filed an application under Order 8 Rule 1 CPC on 28.9.2016 to accept the written statement-cum-counter claim stating that he took several adjournments to file written statement. He was ill from 25.4.2015 to 12.7.2015 and 13.7.2015 to 4.8.2015. The suit was decreed ex-parte. After recovery from illness, he filed an application under Order 9 Rule 13 CPC to set aside the ex-parte judgment dated 20.7.2015. The same was allowed. There was no latches. Placing reliance on a decision of this Court in the case of State of Orissa and others v. Smt.Sitanjali Jena, 121 (2016) CLT 492, learned trial court held that the defendant can participate in hearing of the suit and cross-examine the plaintiff's witnesses. Held so, it rejected the petition.

3. Heard Mr.Arun Kumar Mishra-2, learned counsel for the petitioner and Mr.Damodar Patra, learned counsel for the opposite party.

4. Mr.Mishra-2, learned counsel for the petitioner submitted that the cause of action for filing of the counter claim arose after the date of presentation of the plaint. The defendant filed an application to file written

statement after ex-parte judgment was passed. Learned trial court observed that the same has become infructuous. After ex parte judgment was set aside, he filed the written statement-cum-counter claim along with an application to accept the same. The defendant assigned sufficient cause in not filing the written statement in time. The order suffers from vice of non-application mind.

5. Per contra, Mr.Patra, learned counsel for the opposite party submitted that the defendant took several adjournments to file written statement. He did not file the written statement. He was set ex-parte. He was debarred from filing of the written statement on 21.3.2015. The said order has attained finality. The ex-parte judgment was pronounced. Thereafter, he filed an application to set aside the ex-parte judgment. The application was allowed. Once the ex-parte judgment is set aside, the defendant is relegated back to the position when the suit was posted for ex-parte hearing. In the petition no reason has been assigned to accept the written statement filed at a belated stage.

6. Order 8 Rule 1 CPC, 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."

7. Order 8 Rule 1 CPC was the subject matter of interpretation in the case M/s.SCG Contracts India Pvt. Ltd. v. K.S.Chamankar Infrastructure Pvt. Ltd. and others, 2019 SCC On Line 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."

8. On the anvil of the decision cited supra, the instant case may be examined. The defendant appeared on 11.9.2014. He took several adjournments to file written statement. No written statement was filed. He was debarred from filing of the written statement on 21.3.2015. Learned trial court allowed him to participate in the hearing. The said order has attained finality. Thereafter the suit was posted for ex-parte hearing on several dates. Finally ex parte judgment was pronounced on 20.7.2015. On the application of the defendant under Order 9 Rule 13 CPC, the ex-parte judgment was set aside on 12.8.2016. The defendant rose from the deep slumber and filed written statement-cum-counter claim with an application to accept the same on jejune grounds. Merely stating that he was ill from 25.4.2015 to 12.7.2015 and 13.7.2015 to 4.8.2015 is not suffice in the absence of any documents to that effect. The written statement was filed after inordinate delay of two years.

9. True it is, provision contained in Order 8 Rule 10 CPC do not take away the power of the Court to accept the written statement beyond the prescribed period of time, but then the time can be extended only in exceptionally hard cases as held by the apex Court in the case of Atcom Technologies Limited vs. Y.A. Chunawala and Company and others, (2018) 6 SCC 639. An application under Order 9 Rule 13 CPC cannot be made for retrieving the lost opportunity to file the written statement.

10. In Smt.Sitanjali Jena, this Court held that when an ex-parte decree is set aside and the suit is restored to file, the defendants cannot be relegated back to the position prior to the date of hearing of the suit. He would be debarred from filing any written statement in the suit, but then he can participate in the hearing of the suit inasmuch cross-examine the witness of the plaintiff, adduce evidence and address argument.

11. In the wake of aforesaid, the petition, sans merit, deserves dismissal. Accordingly, the same is dismissed. No costs.

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2019 (II) ILR - CUT-754

DR. A.K. RATH, J.

R.S.A. NO. 569 OF 2005

BAIRAGI SAHOO & ANR. ………Appellants

.Vs.

STATE OF ORISSA & ANR. ………Respondents

ADVERSE POSSESSION – Whether a pure question of law? – Held, No – Plea of adverse possession is not a pure question of law but a blended one of fact and law – Ingredients to determine the factum of adverse possession – A person who claims adverse possession should show: (a) on what date he came into possession (b) what was the nature of his possession (c) whether the factum of possession was known to the other party (d) how long his possession has continued and (e) his possession was open and undisturbed – A person pleading adverse possession has no equities in his favour – Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

<u>Case Laws Relied on and Referred to</u> :-

1. AIR 1981 SC 707 : Kshitish Chandra Bose .Vs. Commissioner of Ranchi.
2. AIR 1974 Ori.166 : Debendranath Sarangi Vs. Kulamani Sarangi & Ors.
3. 1983 (II) OLR 475 : Cuttack Municipality .Vs. Sk. Khairati (and after him) Jaitan Bibi & Ors
4. AIR 2013 Ori.159 : A. Venkat Rao .Vs. State of Orissa & Anr.
5. (2004) 10 SCC 779 : Karnataka Board of Wakf .Vs. Govt. of India & Ors
6. (2014) 1 SCC 669 : Gurdwara Sahib .Vs.Gram Panchayat Village Sirthala & Anr.
7. (2009) 13 SCC 229 : L.N. Aswathama & Anr. .Vs. P. Prakash,
8. (1996) 1 SCC 639 : Mohan Lal (deceased) by LRs. Kachru & Ors .Vs. Mirza Abdul Gaffer & Anr.
9. AIR 1934 PC 23 : Secretary of State .Vs. Debendra Lal Khan.

For Appellants : Mr. N.K. Acharya.
For Respondents: Miss Samapika Mishra, A.S.C.

JUDGMENT Date of Hearing & Judgment:11.04.2019

DR. A.K. RATH, J.

Plaintiffs are the appellants against a reversing judgment in a suit for declaration of title by way of adverse possession, confirmation of possession and permanent injunction.

02. Case of the plaintiffs is that the suit land belonged to Krushna Chandra Sahoo, father of plaintiff no.1. He was the ex-Gountia of the suit village. He was in possession of Ac.22.47 dec. of land on the basis of rayati parcha dated 14.9.51. He sold an area Ac.15.09 dec. of land. After sale, he was in possession of rest land measuring area Ac.6.38 dec. (suit land). He became old and physically disabled. In the year 1957, he entrusted, plaintiff no.1, to cultivate the suit land. Thereafter, the plaintiffs are in possession of the suit land peacefully, continuously and with the hostile animus to the defendants for more than the statutory period and as such perfected title by way of adverse possession. It is further pleaded that during the settlement operation of the year 1955-56, an area Ac.3.70 dec. of land out of the suit land was recorded as rayati status. The rest Ac.2.68 dec. of land was wrongly recorded as Gochar, Pani Nala and road. The suit land is their rayati land. During settlement operation of the year 1986, the Amin submitted the report stating therein that they are in possession of the suit land and prepared yadast. But then, the A.S.O. passed the order that they are in possession of the land illegally. Their note of possession had been reflected in the remarks column of the ROR. The defendants have no semblance of right, title and interest over the same. While the matter stood thus, the defendants initiated encroachment case against them in the year 1990 and 1996 respectively. They have paid Rs.1024.80 to the defendants. With this factual scenario, they instituted the suit seeking the reliefs mentioned supra.

03. The defendants filed written statement pleading inter alia that during the Darbar administration, the Gountias were not entitled to possess any rayati land, nor any rayati parcha was issued in their name. There was no rayati land in the name of Krushna Chandra Sahoo. The suit land had been recorded in the name of the State in the ROR published in the year 1955-56 and 1988-89 respectively. A part of the suit land is used as road and the other part has been classified as Gochar. The suit land has been used as grazing field. The State is the paramount owner of the suit land. The alleged rayati parcha is a fraudulent one. Since the plaintiffs were in illegal possession of

the land, Encroachment Case Nos.1789/95 and 1790/95 had been initiated against them under the Orissa Prevention of Land Encroachment Act ("OPLE Act"). Plaintiffs had vacated the suit land on 11.6.1996. Again they encroached upon the suit land, for which, Encroachment Case Nos.89/90 and 90/90 had been initiated against them. Penalty was imposed. The plaintiffs had vacated the suit land.

04. Stemming on the pleadings of the parties, learned trial court struck seven issues. Parties led evidence, oral and documentary. Learned trial court decreed the suit holding that the plaintiffs are cultivating the suit land. The possession is open and hostile to the knowledge of the defendants. By the time encroachment case was initiated in the year 1990, the plaintiffs had perfected title by way of adverse possession. Felt aggrieved, the defendants filed T.A. No.12 of 2002 before learned District Judge, Kalahandi-Nuapada. Learned appellate court came to hold that simply because the note of possession of the plaintiffs had been reflected in the ROR of 1955-56 and the witness deposed that the plaintiffs were possessing the land, it is not suffice to hold that it is the starting point of adverse possession. In the encroachment case, they have paid the fine. They admitted the title of the State. Held so, it reversed the judgment and decree of learned trial court.

05. This appeal was admitted on the following substantial questions of law.

> "1. Whether the observation of the learned 1st appellate court that note of forcible possession of the suit land by the appellant in the R.O.R and the statement of the P.Ws that the appellant is in possession of the disputed land from a particular time does not amount to knowledge of the defendants about open and hostile possession of the appellant over the suit land is legally acceptable ?
>
> 2. Whether the plaintiffs can institute the suit for declaration of title by way of adverse possession ?"

06. Heard Mr. N.K. Acharya, learned Advocate for the appellants and Miss Samapika Mishra, learned A.S.C. for the respondents.

07. Mr. Acharya, learned Advocate for the appellants submits that Krushna Chandra Sahoo, father of plaintiff no.1, was the Gountia of the village. The suit land is the rayati land of Krushna Chandra Sahoo. In the settlement ROR, the same has been wrongly recorded in the name of the State. In the remarks column, the names of the plaintiffs had been reflected. By the time, the encroachment cases had been initiated against the plaintiffs, they had perfected title by way of adverse possession. He further contends that the possession of the plaintiffs was within the knowledge of the

defendants. Learned trial court decreed the suit, but then learned appellate court reversed the same on untenable and unsupportable grounds. Payment of fine in encroachment case does not take away the right of the plaintiffs. To buttress the submission, he places reliance on the decision of the apex Court in the case of *Kshitish Chandra Bose vs. Commissioner of Ranchi,* AIR 1981 SC 707 and this Court in the cases of *Debendranath Sarangi vs. Kulamani Sarangi and others,* AIR 1974 Ori.166, *Cuttack Municipality vs. Sk. Khairati (and after him) Jaitan Bibi and others,* 1983 (II) OLR—475 and *A. Venkat Rao vs. State of Orissa and another,* AIR 2013 Ori.159.

08. Per contra, Miss Mishra, learned A.S.C. for the respondents, submits that the date of entry into the suit land has not been mentioned. In encroachment cases, plaintiffs had paid penalty. There is no hostile animus. Plaintiffs have taken inconsistence plea.

09. In *Karnataka Board of Wakf vs. Govt. of India and others,* (2004) 10 SCC 779, the apex Court held:

> "In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.
>
> The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession." (emphasis laid)

10. Reverting to the facts of the case and keeping in view the enunciation of law laid down in the case of *Karnataka Board of Wakf*, this Court finds that Krushna Chandra Sahoo was the Gountia of the village. The Gounti system was abolished in the State. The land was not settled in favour of Gountia. Plaintiffs assert title by way of adverse possession. On a bare reading of the plaint, it is evident that no date of entry into the suit land has been mentioned. P.W.1, plaintiff no.1, in his deposition stated that in the

encroachment case, he has paid fine. Thus the element of hostile animus is absent. Learned appellate court on an anatomy of pleadings and evidence came to hold that plaintiffs have not perfected title by way of adverse possession. There is no perversity in the said finding.

11. Taking a cue from the decision of the apex Court in the case of *Gurdwara Sahib vs. Gram Panchayat Village Sirthala and another*, (2014) 1 SCC 669, this Court in the case of *Nabin Chandra Mohanta vs. State of Orissa* (R.S.A. No.396 of 2004 disposed of on 22.02.2019) held :

> "**10.** In *Gurdwara Sahib*, the plaintiff-appellant filed the suit for decree of declaration to the effect that it had become the owner of the suit property by adverse possession, correction of ROR and permanent injunction. The suit was partly decreed by the trial court granting relief of injunction. The first appeal against that part of the judgment, whereby relief of declaration was denied was dismissed by the Additional District Judge. In the second appeal, the relief of declaration by way of adverse possession was denied holding that such a suit is not maintainable. The second appeal was dismissed. The matter travelled to the Apex Court. The Apex Court held:
>
> "8.There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence." (emphasis laid)
>
> **11**. ……In no uncertain terms, the Apex Court held that even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence. The same is ratio decidendi. The High Court is bound under Article 141 of the Constitution of India….."

12. Though the plaintiffs claimed title on the basis of rayati parcha dated 14.9.51, simultaneously they claimed title by way of adverse possession. The plea is mutually inconsistent.

13. The claim of title to the property and adverse possession are in terms contradictory. The Apex Court in the case of *L.N. Aswathama and another v. P. Prakash,* (2009) 13 SCC 229 held :

> "To establish a claim of title by prescription, that is, adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. It is also well settled that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi. The pleas based on title and adverse possession are

> mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence." (Emphasis laid)

14. The apex Court in the case of *Mohan Lal (deceased) through his LRs. Kachru and others vs. Mirza Abdul Gaffer and another*, (1996) 1 SCC 639 held:

> "As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period of his title by prescription *nec vi nec clam nec precario*. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.

15. The judgments cited by Mr. Acharya, learned Advocate for the appellants are distinguishable on facts. In *Kshitsh Chandra Bose*, the apex Court held that all that the law requires is that the possession must be open and without any attempt at concealment. It is not necessary that the possession must be so effective so as to bring it to the specific knowledge of the owner.

16. Taking a cue from the decision of Privy Council in the case of *Secretary of State v. Debendra Lal Khan*, AIR 1934 PC 23, this Court in *Debendranath Sarangi* held that the classical requirement of adverse possession is that the possession should be nec vi nec clam nec precario.

17. In *Sk. Khairati (and after him) Jaitan Bibi and others,* this Court held that normally a Record-of-Rights does not confer any title, but where it is asserted that title inheres in a particular person and in support of such claim of title, old Record-of-Rights is produced, it would be prudent for the court to attach importance to such document and in certain cases courts have been treated such entry as the basis of title.

18. In *A. Venkata Rao,* this Court held that even the State by way of preparation of the 'Adangal' (Ext.1) has acknowledged the possession of the plaintiff. It further held that possession in order to be adverse to the true owner need not be specifically brought to the knowledge of the true owner. It is sufficient if it is open and without any attempt at concealment.

19. But in none of the decisions, the maintainability of the suit for declaration of title on the basis of adverse possession was an issue. In

Gurdwara Sahib, the apex Court in no uncertain terms held that even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence. The substantial questions of law are answered accordingly.

20. In the wake of aforesaid, the appeal, sans merit, deserves dismissal. Accordingly, the same is dismissed. There shall be no order as to costs.

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2019 (II) ILR - CUT-760

DR. A.K.RATH, J.

R.S.A. NO. 272 OF 2018

STATE OF ORISSA, (COLLECTOR, BALANGIR) & ANR. ….Appellants

.Vs.

BIPIN BIHARI TRIPATHY ….Respondent

LIMITATION ACT, 1963 – Section 5 – Condonation of delay – Suit decreed – First appeal filed after the delay of more than five years – First appeal dismissed on the ground of delay – Second appeal by State – Delay of five years – No sufficient cause shown – Delay cannot be condoned.

"Reverting to the facts of the case and keeping in view the law laid down in the decision cited supra, this Court finds that the reason assigned in the application for condonation of delay do not constitute sufficient cause. Merely stating that the delay was caused due to official procedure and there were no deliberate latches or wilful negligence on the part of the appellants in not filing appeal in time would not suffice. There was inordinate delay of more than five years in filing first appeal. No cause much less any sufficient cause had been shown in filing the application for condonation of delay of five years. The lackadaisical attitude exhibited by the State authorities in filing appeal cannot be countenanced. The State authorities cannot approach the Court as and when they desire. The reason is not difficult to fathom. The objective is to protect the incompetent officers and get a certificate of dismissal from the Court." (Para 8)

Case Laws Relied on and Referred to :-

1. (2012) 3 SCC 563: Postmaster General & Ors. .Vs. Living Media India Ltd. & Anr

For Appellants : Ms.Samapika Mishra, ASC.
For Respondent : Mr. Himanshu Sekhar Mishra

JUDGMENT Date of Hearing & Judgment : 16.05.2019

DR. A.K.RATH, J.

The defendants are appellants against an affirming judgment.

2. Since the dispute lies in a narrow compass, facts need not be recounted in detail. Suffice it to say that plaintiff-respondent instituted C.S. No.123 of 2006 in the court of learned Civil Judge (Senior Division), Balangir, for declaration of title, confirmation of possession and in the alternative for recovery of possession, if he is dispossessed from the suit property during pendency of the suit and other consequential reliefs. The suit was decreed. Aggrieved by the judgment and decree, the defendants filed RFA No.4 of 2016 before the learned District Judge, Balangir. Since there was a delay of five years, CMA No.1 of 2016 was filed for condonation of delay. The appellant assigned the following reasons:

> "3. That the appellants are public servants and discharging their public duties. After obtaining the certified copy of the judgment the same was sent to the concerned Department, i.e., Department of Revenue as well as Water Resources. Ultimately the file was placed before the Law Department as because the appellants themselves cannot unilaterally take a decision to prefer the appeal unless it is sanctioned by the Law Department, since financial implication is involved in the case.
>
> 4. That the Law Department vide its order dated 17.12.2015 after obtaining the Govt. approval intimated to the learned Advocate General to prefer appeal challenging the judgment and decree passed in the above suit. The said proposal was received by the Office of the learned Advocate General on 5.1.2016. On obtaining of such proposal of the Law Department the Office of the Advocate General opined that because of the amendment of Orissa Civil Court Act, 2015, the appeal is required to be filed before the learned District Judge, Balangir and accordingly suggested to file the appeal before this Hon'ble Court.
>
> 5. That after obtaining such intimation from the Office of the Advocate General, the file was placed before the learned Govt. Pleader for preparation of the appeal grounds but by then considerable time has been passed. Therefore, the appeal having been presented after the period of limitation an application under Section 5 of the Limitation Act, to condone the delay has been preferred along with the present appeal.
>
> 6. That as aforesaid, the case involves public money as well as the responsibility of the Public Officers to protect and preserve the public interest. In view of cumbersome procedure for preferring an appeal a considerable time has been spent for obtaining approval as a result of which the file has moved from one Office to another and during this period more than 5 years has been elapsed. The delay in filing the appeal was neither deliberate nor wilful negligence rather due to such circumstances as aforesaid which is beyond the control of the present appeal. Since the pubic interests as well as Exchequer are involved, it is permissible for the interest of justice that the delay caused more than 5 years in preferring the appeal be condoned and appeal may be considered for hearing on merit."

3. Learned appellate court dismissed the application for condonation of delay. Consequently, the appeal was dismissed.

4. Heard Ms.Samapika Mishra, learned ASC for the State and Mr.Himanshu Sekhar Mishra, learned Advocate for the respondent.

5. Ms.Mishra, learned ASC submits that after pronouncement of the judgment, the file was sent to the Law Department for approval. On 17.12.2015, Law Department accorded approval and intimated the learned Advocate General of the State to file appeal. After receipt of the same, learned Advocate General opined that because of amendment of Orissa Civil Courts Act, 2015, the appeal lies before the learned District Judge, Balangir. Thereafter, the appeal was filed. The appellant was prevented by sufficient cause in not filing appeal in time.

6. Per contra, Mr.Mishra, learned Advocate for the respondent submits that there is a delay of more than five years in filing the appeal. Learned District Judge has rightly dismissed the appeal.

7. In *Postmaster General and others Vrs. Living Media India Limited and another*, (2012) 3 SCC 563, the apex Court held:

> "27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.
>
> 28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.
>
> 29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should

> not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.
>
> 30. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay."

8. Reverting to the facts of the case and keeping in view the law laid down in the decision cited supra, this Court finds that the reason assigned in the application for condonation of delay do not constitute sufficient cause. Merely stating that the delay was caused due to official procedure and there were no deliberate latches or wilful negligence on the part of the appellants in not filing appeal in time would not suffice. There was inordinate delay of more than five years in filing first appeal. No cause much less any sufficient cause had been shown in filing the application for condonation of delay of five years. The lackadaisical attitude exhibited by the State authorities in filing appeal cannot be countenanced. The State authorities cannot approach the Court as and when they desire. The reason is not difficult to fathom. The objective is to protect the incompetent officers and get a certificate of dismissal from the Court.

9. In view of the foregoing discussions, the appeal is dismissed, since the same does not involve any substantial question of law.

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2019 (II) ILR - CUT- 763

DR. A.K. RATH, J.

C.M.P. NO. 331 OF 2019

DHOBA MOHARANA ……….Petitioner

.Vs.

SMT. LILI MOHARANA & ORS. ………Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 21 Rule 26 and 29 – Provisions under – Stay of execution proceeding – Suit filed in 2004 – Decreed – Judgment Debtor filed another suit in the year 2019 – Thereafter an application was filed in the execution case to stay the execution case till disposal of the suit – No sufficient cause shown – Application rejected – Held, proper.

"The words "upon sufficient cause being shown" appearing in Order 26 is material. Merely because another suit has been filed, the same is not per se a

ground to stay the execution case. The D.Hr. cannot be deprived of the fruits of litigation. On the anvil of decisions cited supra, the instant case may be examined. Plaintiffs-opposite party nos.1 to 4 instituted C.S. No.122 of 2004 seeking the relief mentioned supra. The suit was decreed. Petitioner was defendant no.1 in the suit. He had chosen not to contest the suit. He rose from deep slumber and filed C.S. No.54 of 2019 after lapse of fourteen years of passing of the judgment. The detail particulars of fraud have not been stated in the plaint. Mere allegation of fraud is not suffice. Order rejecting the application to stay the execution proceeding held to be legal." (Paras 4 and 5)

Case Laws Relied on and Referred to :-

1. AIR 1969 Ori. 233 : Judhistir Jena Vs. Surendra Mohanty & Anr.

For Petitioner : Mr. Subrat Panda

JUDGMENT Date of Hearing & Judgment : 10.04.2019

DR. A.K.RATH, J.

This petition challenges the order dated 08.03.2019, passed by the learned Civil Judge (Senior Division), Dhenkanal, in Execution Case No.38 of 2006, whereby and whereunder, learned executing court rejected the application of the J.Dr. no.1-petitioner under Order 21 Rule 29 CPC to stay the further proceeding in execution case till disposal of C.S. No.54 of 2019.

2. Since the dispute lies in a very narrow compass, facts need not be recounted in details. Suffice it to say that plaintiffs-opposite party nos.1 to 4 instituted C.S. No.122 of 2004 before the learned Civil Judge (Senior Division), Dhenkanal, for declaration of right, title and interest over the suit property, confirmation of possession and recovery possession. Petitioner was defendant no.1 in the suit. The suit was decreed ex parte against defendant no.1 to 7 and 9 to 12. Thereafter, they levied Execution Case No.38 of 2006. While matter stood thus, J.Dr. No.1-petitioner as plaintiff instituted C.S. No.54 of 2019 in the same court for declaration of title, declaration that judgment and decree passed in C.S. No.122 of 2004, Execution Case No.38 of 2006 and RSD No.4111 of 1948 and 290 of 1953 as null and void, confirmation of possession and permanent injunction. He filed an application under Order 21 Rule 29 CPC to stay Execution Case No.38 of 2006 till disposal of the suit. Learned executing court dismissed the same.

3. Mr. Subrat Panda, learned counsel for the petitioner submits that the D.Hr. by playing fraud on court obtained the decree. The decree is not executable. In the meantime, J.Dr. no.1-petitioner has instituted C.S. No.54 of 2019. In view of the same, further proceeding in execution case be stayed till disposal of the suit.

4. An identical question came up before this Court in CMP No.294 of 2019, disposed of on 27.3.2019. This Court held :

> "4. Before adverting into the contentions raised by the learned counsel for the petitioner, it will be necessary to set out Rules 26 & 29 of Order 21 CPC.
>
> "26. When Court may stay execution.-(1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the Judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto.
>
> (2) & (3) xxx xxx"
> xxx xxx xxx
>
> "29. Stay of execution pending suit between decree-holder and judgment-debtor-Where a suit is pending in any Court against the holder of a decree of such Court [or of a decree which is being executed by such Court], on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided."
>
> xxx xxx xxx

5. The words "upon sufficient cause being shown" appearing in Order 26 is material. Merely because another suit has been filed, the same is not per se a ground to stay the execution case. The D.Hr. cannot be deprived of the fruits of litigation.

6. In *Judhistir Jena Vrs. Surendra Mohanty and another*, AIR 1969 Ori. 233, this Court held :-

> "xxx xxx xxx
>
> The fundamental consideration is that the decree has been obtained by a party and he should not be deprived of the fruits of that decree except for good reasons. Until that decree is set aside, it stands good and it should not be lightly dealt with on the off-chance that another suit to set aside the decree might succeed. Such suits are also of a very precarious nature. The allegations therein ordinarily would be that the previous decree was obtained by fraud or collusion or that the decree was not binding on the present plaintiff as the transaction entered into by the judgment-debtor was tainted with immorality. These are all suits of un-certain and speculative character. Most of these cases are likely to fail the onus being very heavy on the plaintiff to establish fraud and similar charges. That being the position, a person should not be deprived of the fruits of his decree merely because suits of frivolous character are instituted and litigants are out after further series of litigations. The decree must be allowed to be executed and unless an extra-ordinary case is made out, no stay should be granted. Even if stay is granted, it must be on suitable terms so that the earlier decree is not stifled.

> No hard and fast rule can be laid down in what cases stay would be granted or refused. But as has already been stated, a rigorous test is to be applied and in most of the cases prayer for stay is bound to be refused.
>
> xxx xxx xxx"

5. On the anvil of decisions cited supra, the instant case may be examined. Plaintiffs-opposite party nos.1 to 4 instituted C.S. No.122 of 2004 seeking the relief mentioned supra. The suit was decreed. Petitioner was defendant no.1 in the suit. He had chosen not to contest the suit. He rose from deep slumber and filed C.S. No.54 of 2019 after lapse of fourteen years of passing of the judgment. The detail particulars of fraud have not been stated in the plaint. Mere allegation of fraud is not suffice.

6. Order VI Rule 4 CPC provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading. On a bare perusal of the plaint, it is evident that detail particulars of fraud have been mentioned. The suit has been instituted to deprive the plaintiff from enjoying fruits of decree. The petition under Order 21 Rule 29 CPC cannot come to the rescue of the J.Dr. no.1-petitioner, unless sufficient cause is shown to stay the execution case. No sufficient case has been shown. The suit is a ruse.

7. In the wake of the aforesaid, the petition sans merit, deserves dismissal. Accordingly, the same is dismissed .There shall no order as to cost.

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2019 (II) ILR - CUT- 766

DR. A.K. RATH, J.

W.P.(C) NO. 23334 OF 2017

PURNA CHANDRA PALAI ……..Petitioner

.Vs.

COLLECTOR & DISTRICT MAGISTRATE,
BHADRAK & ORS. ……..Opp. Parties

ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Sections 2(m) read with Sections 34 and 35 – Fragment and prevention of fragmentation – Provisions under – Restriction under the Act to alienate, partition of contiguous Chaka – Petitioner purchased an area of Ac.0.20 out of total

area of Ac.2.27 decimal in village Sabaranga under Bhadrak Tahasil of the undivided district of Balasore through registered sale deed – However, after 29 years the Collector, Bhadrak passed an order directing Tahsildar to evict the petitioner from the land on the ground that, no permission was accorded by the competent authority for alienation of part of chaka – Order of the Collector challenged – Held, on a conspectus of sec.2(m) of the OCH & PFL Act, it is manifestly clear that a compact parcel of agricultural land held by a land owner by himself or jointly with the comprising an area which is less than one Acre in the district of Cuttack, Puri, Balasore, Ganjam, Anandpur sub-division in the district of Keonjhar and two acres in other areas of the state cannot be construed as fragment – Court finds that the suit land situates in the district of Bhadrak – Nishakar Barik transferred an area of Ac.0.20 dec. out of Ac.2.27 dec. appertaining to Chaka No.304, Chaka Plot No.463 – If the same is deducted, the area comes to Ac.2.07 dec. – In view of the same, the Collector, Bhadrak dehors its jurisdiction in initiating proceeding under Sec.35 of the OCH & PFL Act – The proceeding is mis-conceived – Order set aside.

Case Laws Relied on and Referred to :-

1. 2016 (II) CLR-845 : Bhagaban Nath & Ors. Vs. Collector, Bhadrak & Ors.
2. 1997 (II) OLR-399 : Smt. Binapani Sethi & anr Vs. Sri Bijay Kumar Sahoo & Ors.

For Petitioner : Mr. Somadarsan Mohanty.
For Opp.Parties : Mr. Swayambhu Mishra, A.S.C.
Mr. Pradeep Kumar Das

JUDGMENT Date of Hearing & Judgment: 24.07.2019

DR. A.K. RATH, J.

This petition seeks to lacinate the order dated 28.07.2017 passed by the Collector, Bhadrak, opposite party no.1, in Misc. Case No.13 of 2016, whereby and whereunder, the opposite party no.1 directed the Tahasildar, Bhadrak to evict the petitioner from the disputed land in a proceeding under Sec.35 of the Odisha Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (OCH & PFL Act).

02. Shorn of unnecessary details, the short facts of the case is that the opposite party nos.3 and 4 as petitioners filed an application under Sec.35 of the OCH & PFL Act before the Collector, Bhadrak to declare the registered sale deed no.471 dated 13.02.1989 is illegal and void since no permission was accorded by the competent authority for alienation of a part of the chaka. It is stated that the consolidation khata no.575, Chaka No.304, Chaka Plot No.463, area Ac.2.27 dec. of village Sabaranga under Bhadrak Tahasil stands

recorded jointly in favour of Nishakar Barik, Bhaskar Barik, sons of Ratha Barik. After death of the recorded tenants, Nishakar Barik alienated an area Ac.0.20 dec. of land from eastern side of the Chaka to Purna Chandra Palai, petitioner herein, by means of a registered sale deed no.471, dt.13.02.1989 in contravention of the provisions of Secs.34 and 35 of the OCH & PFL Act. According to the petitioner, he is a bonafide purchaser for value. Nishakar Barik was the absolute owner of the case land. He has transferred Ac.0.20 dec. of land out of Ac.2.27 dec. appertaining to Chaka Plot No.463 to him by means of a registered sale deed and thereafter delivered possession. He is in possession of the land since 29 years. The Collector, Bhadrak has allowed the application holding that the transaction of fractioned Chaka made vide registered sale deed no.471 dated 13.02.1989 is void and accordingly directed the Tahasildar, Bhadrak, opposite party no.2, to evict the petitioner from the land in question.

03. Heard Mr. Somadarsan Mohanty, learned counsel for the petitioner, Mr. Swayambhu Mishra, learned A.S.C. for the State-opposite party nos.1 and 2 and Mr. Pradeep Kumar Das, learned counsel for the opposite party nos.3 to 5.

04. Mr. Mohanty, learned counsel for the petitioner, submits that the entire area consisting of Ac.2.27 dec. Out of the same, Ac.0.20 dec. was transferred by Nishakar Barik in favour of the petitioner by means of a registered sale deed no.471, dated 13.02.1989. After lapse of 27 years, a proceeding was initiated. He further submits that transfer of a part of the chaka cannot be construed as fraction so as to attract the provision of Sec.35 of the OCH & PFL Act. To buttress the submission, he places reliance on the decision of this Court in the case of (Sri) Bhagaban Nath & others vs. Collector, Bhadrak & others, 2016 (II) CLR-845.

05. Per contra, Mr. Mishra, learned A.S.C. for the State-opposite party nos.1 and 2, submits that no permission was accorded by the competent authority for alienation of a part of the chaka. The sale deed is void. Further the district Bhadrak has not been included in sub-clause (i) of clause (m) of Sec.2 of the OCH & PFL Act. There is no infirmity in the order passed by the Collector, Bhadrak, opposite party no.1.

06. Mr. Das, learned counsel for the opposite party nos.3 to 5 supports the impugned order. He places reliance on the decision of this Court in the case of Smt. Binapani Sethi and another vs. Sri Bijay Kumar Sahoo and others, 1997 (II) OLR-399.

07. Before adverting to the contentions raised by learned counsel for the parties, it will be necessary to set out some of the provisions of the OCH & PFL Act.

> 2. (m)‖fragment‖ means a compact parcel of agricultural land held by a land-owner by himself or jointly with others comprising an area which is less than-
>
> (i) one acre in the district of Cuttack, Puri, Balasore and Ganjam and in the Anandpur subdivision in the district of Keonjhar, and
>
> (ii) two acres in the other areas of the State;
>
> xxx xxx xxx
>
> 34. Prevention of fragmentation – (1) No agricultural land in a locality shall be transferred or partitioned so as to cerate a fragment.
>
> (2) No fragment shall be transferred except to a land-owner of a contiguous Chaka :
>
> Provided that a fragment may be mortgaged or transferred in favour of the State Government, a Cooperative Society, a scheduled bank within the meaning of the Reserve Bank of India Act, 1934 (2 of 1934) or such other financial institution as may be notified by the State Government in that behalf as security for the loan advanced by such Government, Society, Bank or Institution, as the case may be.
>
> (3) When a person, intending to transfer a fragment, is unable to do so owing to restrictions imposed under Subsection (2), he may apply in the prescribed manner to the Tahasildar of the locality for this purpose whereupon the Tahasildar shall, as far as practicable within forty-five days from the receipt of the application determine the market value of the fragment and sell it through an auction among the landowners of contiguous Chakas at a value not less than the market value so determined.
>
> xxx xxx xxx
>
> 35. Consequences of transfer or partition contrary to provisions of Section 34—(1) A transfer or partition in contravention of the provisions of Section 34 shall be void.
>
> (2) A person occupying or in possession of any land by virtue of a transfer or partition which is void under the provisions of this Act, may summarily evicted by the Collector.

08. On a conspectus of Sec.2(m) of the OCH & PFL Act, it is manifestly clear that a compact parcel of agricultural land held by a land owner by himself or jointly with others comprising an area which is less than one acre in the district of Cuttack, Puri, Balasore, Ganjam, Anandapur Sub-Division in the district of Keonjhar and two acres in the other areas of the State cannot be construed as fragment. OCH & PFL Act was enacted in the year 1972. Bhadrak was not a separate district. It was the SubDivision under the district of Balasore. Subsequently, Bhadrak district was created. For the purpose of interpretation of Sec.2(m) of the OCH & PFL Act, the restriction imposed in the State in respect of Balasore district shall mutatis mutandis apply to Bhadrak district.

09. In (Sri) Bhagaban Nath & others (supra), an area of Ac.0.36 dec. out of Ac.1.52 dec. situate in Bhadrak district was alienated without prior permission of the Tahasildar. This Court held that the land situates in the district of Bhadrak is carved out from undivided district of Balasore. The restriction in the Act does not apply.

10. Reverting to the facts of the case, this Court finds that the suit land situates in the district of Bhadrak. Nishakar Barik transferred an area of Ac.0.20 dec. out of Ac.2.27 dec. appertaining to Chaka No.304, Chaka Plot No.463. If the same is deducted, the area comes to Ac.2.07 dec. In view of the same, the Collector, Bhadrak dehors its jurisdiction in initiating proceeding under Sec.35 of the OCH & PFL Act. The proceeding is misconceived.

11. The decision cited by Mr. Das, learned counsel for the opposite party nos.3 to 5, is distinguishable on facts. Paragraph 6 of the report reveals that the parcels of land sold separately and collectively measure less than one acre, which is the minimum area prescribed for the district of Cuttack. This Court held that there was clear contravention of Section 34 of OCH & PFL Act. But in the instant case, the area is more than Ac.2.00 dec.

12. Before parting with the case, this Court observes that several such instances have been brought to the notice of the Court. After enactment of OCH & PFL Act, 1972, new districts have been created. But then, the statute has not been amended. Had the statute been amended, precious time of this Court would have saved.

13. In view of the foregoing discussions, the impugned order is quashed. The petition is allowed. There shall be no order as to costs.

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2019 (II) ILR - CUT- 770

DR. B.R. SARANGI, J.

W.P.(C) NO. 24091 OF 2013

PRANABANDHU PRADHAN & ORS. ....Petitioner

.Vs.

UNION OF INDIA & ANR. ....Opp. Parties

RAILWAYS ACT, 1989 – Section 18, 113,114,115,124 and 147 read with Rule 4 of the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990 – Provisions under – Writ petition claiming

compensation for death owing to an accident caused in an un-manned level crossing – Allegations of negligence and non compliance of statutory obligations as per the provisions of law and the victim lost her life in the said accident due to negligence on the part of the railway administration – Railways raised the question of maintainability of writ petition – Held, the writ petition maintainable and compensation awarded – Principles – Discussed.

"A claim for damages for negligence of the opposite parties falls in the arena of a civil wrong called a tort action. In relation to claims for railway accidents, the Railways Act provides for fixed compensation on predetermined scales. It also provides a forum for passengers to make claims in the form of Railway Claims Tribunals situated in different parts of India. But there is a limitation. Only a passenger on a train can make a claim before the Tribunal. Passengers of a bus or motor vehicle who may have been harmed after collision with a train can only approach the Motor Accidents Claims Tribunal. However, the tribunal can entertain the claim against the Railways also as a joint tortfeasor if the negligence of the Railways is established. Therefore, it can be held that the duty of care for the Railways extends not only to those who use the Railways' services but also to people who are "neighbours", namely, users of vehicles on roads and passerby that intersect with tracks. Consequentially, there is a common law liability for the railway administration for an accident at an unmanned level crossing, even in the absence of specific provisions in the Railways Act, where the Central Government can direct the administration to lay manned crossings. An action at common law can be filed for nonfeasance because the Railway was involved in what are recognized as dangerous operations and hence is bound to take care of road users. Therefore, it took up the issue of whether there could be any breach or a common law duty on the part of the Railways if it does not take notice of the increase in the volume of rail and motor traffic at the unmanned crossing, and it does not take adequate steps such as putting up gates with a watchman to prevent accidents at such a point. As such, the Railways should take all precautions that will reduce danger to the minimum."

Case Laws Relied on and Referred to :-

1.2013(I) OLR 674 : Prabir Kumar Das Vs. State of Odisha.
2.1980 ACJ 435(SC) : N.K.V. Bros.(P) Ltd. Vs. M. Karumai Ammal.
3.1958-65 ACJ 365 : Swarnalata Barua Vs. Union of India.
4. 2004 ACJ 1109 : K. Narasimha Murthy Vs. Manager, Oriental Insurance Co. Ltd.,
5. AIR 1983 SC 1086 : Rudul Sah Vs. State of Bihar.
6.1988 ACJ 780 (HP) : Kalawati Vs. State of Himachal Pradesh.
7.1994 ACJ 623 (HP) : Seemu Vs. Himachal Pradesh State Electricity Board.
8.1992 ACJ 283(SC) : Kumari Vs. State of Tamilnadu.
9.(2001) 8 SCC 151 : M.S. Grewal & Ors Vs. Deep Chand Sood & Ors.

For Petitioners : M/s. B.P. Satapathy, B.K. Nayak, A.K. Sahoo & S. Pradhan

For Opp. Parties : Mr. R.C. Praharaj, Standing Counsel East Coast Railway

JUDGMENT Date of Hearing & Judgment: 31.07.2019

DR. B.R. SARANGI, J.

The petitioners are the legal representatives of deceased Kishori Pradhan, who died in a train accident caused on 05.02.2013 in an un-manned level crossing in between Madhupur and Badabangiani Railway line. They have filed this writ petition seeking for direction to grant compensation of Rs.5,00,000/- (five lakhs), along with interest, due to negligence on the part of railway authority, from the date of death of deceased till the date of payment.

2. The fact of the case, in a nut shell, is that petitioner no.1 is the husband of the deceased-Kishori Pradhan, who died in a train accident, while passing through the railway line in an unmanned level crossing at Dangiani. Petitioner no.2 is the married daughter of the deceased whereas petitioners no.3 and 4 are her sons. While the deceased was coming from Nakchi Market towards her house at Madhupur on 05.02.2013 died in a train accident. Thereafter, one of the relations of the deceased reported the matter before the I.I.C. Handapa P.S. which resulted in Handapa P.S. U.D. Case No.2 of 2013. Thereafter, the case was registered as U.D. G.R. Case No.5 of 2013 in the court of learned S.D.J.M., Athmallik. After completion of investigation final report was submitted on 28.02.2013 indicating therein that the cause of death was due to ran over by running train in an unmanned level crossing at Dangiani and at the time of death the deceased was about 55 years. Due to her un-time death, petitioner no.1 while lost his wife, petitioners no.2 to 4 lost their mother.

2.1. By filing the present writ petition, the petitioners have claimed compensation of Rs.5,00,000/-, as the railway authorities have not taken reasonable precaution to reduce the damage to the public where a railway line crosses high way path. As such, the death occurred in an unmanned level crossing. Therefore, the petitioners are entitled to get compensation, as claimed in the writ petition. Hence, this application.

3. Mr. B.P. Satapathy, learned counsel for the petitioners contended that since the deceased died in a train accident in an unmanned level crossing, on account of the Railways Act, 1989 read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, which fixes the compensation of Rs.4,00,000/- in case of no fault liability, the petitioners are entitled to get compensation. He has relied upon the judgment in ***Prabir Kumar Das v. State of Odisha***, 2013(I) OLR 674.

4. Mr. R.C. Praharaj, learned counsel appearing for contesting the opposite party no.2, referring to counter affidavit, contended that the writ petition is not maintainable as the deceased has violated the statutory provision contained under Section 161 of Railways Act 1989. It is further contended that unmanned level crossing gates are protected areas and one has to cross the same with proper care and caution as per law. The authorities have taken sufficient protection by keeping sign boards like "Speed Breaker Board, Whistle Board etc" on both sides of an unmanned level crossing. The death of the deceased was caused due to encroaching upon the protected area without taking sufficient care and precaution, while crossing an unmanned level crossing gate. The entire family has failed to discharge their moral responsibility by allowing an old woman to move unprotected. Consequence thereof, the petitioners are not entitled to get compensation, as claimed in the writ petition. The sign boards like "Speed Breaker Board, Stop Board, Whistle Board etc" are available on both sides of an unmanned level crossing. In spite of all the safety measures taken, if the death has been occurred due to carelessness of the pedestrians/road users, in that case, the railway authorities are not liable to pay any compensation, as claimed in the writ petition. He further contended that the deceased, being the trespasser, has violated the statutory provision as contained under Section 161 of the Railways Act, 1989. Therefore, the burden of proof lies on the petitioner to establish that there is negligence on the part of the railway authorities so as to claim the benefit of compensation. In Railway Board's letter dated 26.07.2012 at paragraphs 4 and 5, it is specifically mentioned that no ex-gratia relief is admissible in case of accident at un-manned level crossing gate. Therefore, he seeks for dismissal of the writ petition.

5. This Court heard Mr. B.P. Satapathy, learned counsel for the petitioners and Mr. R.C. Praharaj, learned counsel for opposite parties. Pleadings have been exchanged between the parties and with their consent the writ petition has been disposed of at the stage of admission.

6. On the basis of the factual matrix discussed above and after considering rival legal contentions raised at the Bar, the following questions fall for consideration by this Court:-

> (1) Whether the writ petition is maintainable in law ?
>
> (2) Whether the accident occurred on account of negligence on the part of the railway administration by not providing sufficient protection at the level crossing in deploying guard or putting check gate as required under section 18 of the Railways Act, 1989?
>
> (3) Whether on account of not providing safeguard to the level crossing by the railway administration, the petitioners are entitled to compensation as claimed?

7. To answer the above questions, this Court examined the facts and rival legal contentions as made before this Court in the present case. For just and proper adjudication of the case, relevant provisions of the Railways Act, 1989 are referred hereunder.

"18. ***Fences, gates and bars****.- The Central Government may, within such time as may be specified by it or within such further time, as it may grant, require that-*

(a) boundary marks or fences be provided or renewed by a railway administration for a railway on any part thereof and for roads constructed in connection therewith;

(b) suitable gates, chains, bars, stiles or hand-rails be erected or renewed by a railway administration at level crossings;

(c) persons be employed by a railway administration to open and shut gates, chains or bars.

113. ***Notice of railway accident****.- (1) Where, in the course of working a railway,-*
(a) any accident attended with loss of any human life, or with grievous hurt, as defined in the Indian Penal Code, or with such serious injury to property as may be prescribed; or

(b) any collision between trains of which one is a train carrying passengers; or

(c) the derailment of any train carrying passengers, or of any part of such train; or

(d) any accident of a description usually attended with loss of human life or with such grievous hurt as aforesaid or with serious injury to property; or

(e) any accident or any other description which the Central Government may notify in this behalf in the Official Gazette.
Occurs, the station master of the station nearest to the place at which the accident occurs or where there is no station master, the railway servant in charge of the section of the railway on which the accident occurs, shall, without, delay, give notice of the accident to the District Magistrate and Superintendent of Police, within whose jurisdiction the accident occurs, the officer in charge of the police station within the local limits of which the accident occurs and to such other Magistrate or police officer as may be appointed in this behalf by the Central Government.

(2) The railway administration within whose jurisdiction the accident occurs, as also the railway administration to whom the train involved in the accident belongs shall without delay, give notice of the accident to the State Government and the Commissioner having jurisdiction over the place of the accident.

114. ***Inquiry by Commissioner****.- (1) On the receipt of a notice under section 113 of the occurrence of an accident to a train carrying passengers resulting in loss of human life or grievous hurt causing total or partial disablement of permanent nature to a passenger or serious damage to railway property, the Commissioner shall, as soon as may be, notify the railway administration in whose jurisdiction the accident occurred of his intention to hold an inquiry into the causes that led to the accident and shall at the same time fix and communicate the date, time and place of inquiry.*

Provided that it shall be open to the Commissioner to hold an inquiry into any other accident which, in his opinion, requires the holding of such an inquiry.

(2) If for any reason, the Commissioner is not able to hold an inquiry as soon as may be after the occurrence of the accident, he shall notify the railway administration accordingly.

115. ***Inquiry by railway administration****.- Whether no inquiry is held by the Commissioner under sub-section (1) of section 114 or where the Commissioner has informed the railway administration under sub-section (2) of that section that he is not able to hold an inquiry, the railway administration within whose jurisdiction the accident occurs, shall cause an inquiry to be made in accordance with the prescribed procedure.*

124. ***Extent of liability.****- When in the course of working a railway, an accident occurs, being either a collision between trains of which one is a train carrying passengers or the derailment of or other accident to a train or any part of a train carrying passengers, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or has suffered a loss to maintain an action and recover damages in respect thereof, the railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and to that extent only for loss occasioned by the death of a passenger dying as a result of such accident, and for personal injury and loss, destruction, damage or deterioration of goods owned by the passenger and accompanying him in his compartment or on the train, sustained as a result of such accident.*

147. ***Trespass and refusal to desist from trespass****.- (1) If any person enters upon or into any part of railway without lawful authority, or having lawfully entered upon or into such part misuses such property or refuses to leave, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both:*

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such punishment shall not be less than a fine of five hundred rupees;

(2) Any person referred to in sub-section (I) may be removed from the railway by any railway servant or by any other person whom such railway servant may call to his aid.

Rule 4 of the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990 states as follows:

"4. Limit of compensation- Notwithstanding anything contained in the rule 3, the total compensation payable under that rule shall in no case exceed (rupees four lakhs) in respect of any one person."

8. In view of statutory provisions, more particularly, Section 18 of the Railways Act, 1989, the railway administration has the statutory obligation to

provide sufficient safeguards to the level crossing by putting railway check gate and keeping it closed at the time when train is due to pass at the level crossing area. In the case in hand, the railway administration had not taken any precautionary measure either by putting a railway check gate or keeping it closed at the time when the train was due to pass, or put up some other obstruction, which could prevent the public from passing over the level crossing giving them information and notice of the approaching train, and the accident of the kind that had happened in this case could have been avoided. After receiving notice under Section 113 from the petitioners, as per the Railways Act, 1989, an inquiry must have been conducted by the railway authorities under Sections 114 and 115 of the Act. If such report would have been produced, then it could have disclosed whether there is negligence on the part of the railway administration on account of which the accident took place resulting in death of the deceased. Therefore, the said inquiry report, as required under Section 115 of the Act, having not been produced, this Court draws an adverse inference against the Railways that there was negligence on the part of the railway administration in not taking sufficient precautionary measures by posting guard or keeping the railway gate closed at the time while the train was due to pass through that level crossing. Non-compliance of the aforesaid statutory obligations by the railway administration, this Court rejects the contentions raised by learned counsel for the Railways that there are serious disputed questions of facts and due to carelessness on the part of the deceased, the claim made in the writ petition cannot sustain. Further, in view of provisions contained under Article 21 of the Constitution, "Right to Life" is a fundamental right as enshrined in Chapter-III of the Constitution of India. "Right to Life" does not mean an animal existence, it requires a meaningful life to be led by citizen of India.

9. In ***N.K.V. Bros.(P) Ltd. v. M. Karumai Ammal***, 1980 ACJ 435(SC), the apex Court held as follows:

> *"(3) Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. The Motor Accidents Claims Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasizing this aspect because we are often distressed by the transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient*

> *disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their neighbor. Indeed, the State must seriously consider no fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parsimony practiced by Tribunals. We must remember that judicial Tribunals are State organs and Article 41 of the Constitution lays the jurisprudential foundation for State relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in the disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of Tribunals and the High Courts should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard."*

10. In ***Swarnalata Barua v. Union of India***, 1958-65 ACJ 365 (Assam), the High Court of Assam held that there is an obligation on the part of the railway administration to ensure that whenever a railway passes over a thoroughfare adequate warning should be given to the public about passing of the train at the time they pass so that accidents may be avoided. This duty need not necessarily be a statutory duty. It is implied and inherent in the functions to be discharged by the railway administration in the matter of running their railways. It is not disputed that had the railway administration taken the precaution of either putting up of a railway gate and keeping it closed at the time the train was due to pass or put up some other obstruction which could prevent the public from passing over the level crossing giving them information and notice of the approaching train, the accident of the kind that happened in this case could not have happened.

11. This Court is of the considered view that the writ petition is maintainable under Article 227 of the Constitution of India. As such, question no.2 is also answered in favour of the petitioners as the accident occurred on account of negligence on the part of railway administration in not providing sufficient protection at the level crossing and without deploying guards or putting the check gate closed at the time while the train was due to pass through that level crossing as required under Section 18 of the Railways Act, 1989.

12. Question nos.1 and 2 having been answered in favour of the petitioners, now remains question no.3 to be considered. It is worthwhile to extract the relevant paragraphs from the judgment of Karnataka High Court in the case of ***K. Narasimha Murthy v. Manager, Oriental Insurance Co. Ltd***., 2004 ACJ 1109 (Karnataka), wherein the Division Bench in an appeal

preferred by the claimant under Section 173 of Motor Vehicles Act, 1988 succinctly laid down the legal principle after extracting the relevant paras from the decision of the cases in ***Admiralty Comrs. V. S.S. Valeria***, (1922) 2 AC 242; ***Livingstone v. Rawyards Coal Co***., (1880) 5 AC 25; ***H. West & Son Ltd. V. Shephard***, 1958-65 ACJ 504 (HL, England); ***Ward v. James***, (1965) 1 AII ER 563; ***Basavaraj v. Shekhar***, 1987 ACJ 1022 (Karnataka); ***Perry v. Cleaver***, 1969 ACJ 363 (HL, England); ***Phgillips v. South Western Railway Co***., (1874) 4 QBD 406; ***Fowler v. Grace***, (1970) 114 Sol Jo 193; and (1969) 3 AII ER 1528; and referring to ***McGregor on Damages***, 14th Edn. in support of our conclusion for determination of the compensation for personal injury both for pecuniary and non-pecuniary losses in favour of the injured petitioners, which reads as under:

> *"(18)* ***Viscount Dunedin in Admiralty Comrs v. S.S. Valeria****, (1922) 2 AC 242, has observed thus:*
>
> *'The true method of expression, I think, is that in calculating damages you are to consider what is the pecuniary consideration which will make good to the sufferer, as far as money can do so, the loss which he has suffered as the natural result of the wrong done to him.'*
>
> *(19)* ***Lord Blackburn in Livingstone v. Rawyards Coal Co****., (1880) 5 AC 25, has observed thus:*
>
> *'Where any injury is to be compensated by damages, in settling the sum of money to be given … you should as nearly as possible get at that sum of money which will put the person who has been injured…in the same position as he would have been in if he had not sustained the wrong.'*
>
> *(21) Lord Morris in his memorable speech in* ***H. West & Son Ltd. V. Shephard****, 1958-65 ACJ 504 (HL, England), pointed out this aspect in the following words:*
>
> *'Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But the money cannot renew a physical frame that has been battered and shattered. All the Judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.'*
>
> *(22) In the above case, their Lordships of the House of Lords observed that the bodily injury is to be treated as a deprivation which entitles plaintiff to the damage and that the amount of damages varies according to the gravity of the injury. Their Lordships emphasized that in personal injury cases the courts should not award merely token damages but they should grant substantial amount which could be regarded as adequate compensation.*

*(23) In **Wards v. James**, (1965) 1 AII ER 563, speaking for the Court of Appeal in England, Lord Denning while dealing with the question of awarding compensation for personal injury laid down three basic principles:*

'Firstly, assessability: In cases of grave injury, where the body is wrecked or brain destroyed, it is very difficult to assess a fair compensation in money, so difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, uniformity: There should be some measure of uniformity in awards so that similar decisions may be given in similar cases, otherwise, there will be great dissatisfaction in the community and much criticism of the administration of justice. Thirdly, predictability: Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceably and not brought to court, a thing very much to the pubic good.'

*(25) In **Basavaraj v. Shekhar**, 1987 ACJ 1022 (Karnataka), a Division Bench of this Court held:*

'If the original position cannot be restored-as indeed in personal injury or fatal accident cases it cannot obviously be-the law must endeavour to give a fair equivalent in money, so far as money can be an equivalent and so 'make good' the damage.'

(26) Therefore, the general principle which should govern the assessment of damages in personal injury cases is that the court should award to injured person such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries. But, it is manifest that no award of money can possibly compensate an injured man and renew a shattered human frame.

*(27) **Lord Morris of Borth-y-Gest** in **Perry v. Cleaver**, 1969 ACJ 363 (HL, England), said:*

'To compensate in money for pain and for physical consequences is invariably difficult but … no other process can be devised than that of making a monetary assessment.'

*(28) The necessity that the damages should be full and adequate was stressed by the Court of Queen's Bench in **Fair v. London and North Western Rly. Co**., (1869 21 LT 326. In **Ruston v. National Coal Board**, (1953) 1 AII ER 314, Singleton, L.J. said;*

'Every member of this court is anxious to do all he can to ensure that the damages are adequate for the injury suffered, so far as there can be compensation for an injury, and to help the parties and others to arrive at a fair and just figure.'

*(29) Field, J. in **Phillips v. South Western Railway Co**., (1874) 4 QBD 406, held:*

'You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. The plaintiff can never sue again for it. You have, therefore, now to give him compensation, once

and for all. He has done no wrong; he has suffered a wrong at the hands of the defendants and you must take care to give him full fair compensation for that which he has suffered.'

13. Under Section 124 of the Railways Act, 1989 read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, no fault liability of the passenger who expires in a railway accident has been fixed at Rs.2,00,000/-. In the instant case, the victim lost her life in the said accident due to negligence on the part of the railway administration in putting gates at the level crossing or public are allowed to cross the railway line without providing precautionary measures, as indicated above. Further, the apex Court in ***Rudul Sah v. State of Bihar***, AIR 1983 SC 1086, observed that in appropriate cases, the court discharging constitutional duties can pass orders for payment of money in the nature of compensation. Consequent upon deprivation of the fundamental right to life and liberty of a petitioner the State must repair the damage done by its officers to the petitioner's right.

Further, in ***Kalawati v. State of Himachal Pradesh***, 1988 ACJ 780 (HP) and in ***Seemu v. Himachal Pradesh State Electricity Board***, 1994 ACJ 623 (HP), the High Court of Himachal Pradesh ruled that writ court can grant relief to the petitioners claiming damages for the injuries arising out of negligence of the State authorities like Electricity Board.

In ***Kumari v. State of Tamilnadu***, 1992 ACJ 283(SC), the apex Court overruling the decision of the High Court of Tamil Nadu observed that the writ jurisdiction under Article 226 of the Constitution can be invoked for awarding compensation to a victim, who suffered due to negligence of the State or its functionaries. The same principle has been reiterated in various judgments of the different High Courts including this Court and also the apex Court observed that under Articles 226 and 227 of the Constitution, the High Court can issue a direction for payment of compensation if there is deliberate act of negligence on the part of the railway administration.

14. Applying the above principles to the undisputed facts of the case, it can safely be said that the death has been caused to the deceased due to unmanned level crossing and due to negligence on the part of railway administration. Under Section 124 of the Railways Act read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, no fault liability of the passenger who expires in a railway accident has been fixed at Rs.4,00,000/-.

15. In ***Prabir Kumar Das*** (supra), this Court awarded a compensation of Rs.5,00,000/- to each of the persons who have lost their life with interest at the rate of 6% per annum in the accident. So far as quantum of damages is concerned, the apex Court in the case of ***M.S. Grewal and others v. Deep Chand Sood & others***, (2001) 8 SCC 151, held that the placement in the society or the financial status of the victim can be good guide for determining the quantum of compensation. Under Section 124 of the Railways Act read with the Railway Accidents and Untowards Incidents (Compensation) Rules, 1990, no fault liability of the passenger who died in a railway accident has been fixed at Rs.4,00,000/-. A claim for damages for negligence of the opposite parties falls in the arena of a civil wrong called a tort action. In relation to claims for railway accidents, the Railways Act provides for fixed compensation on predetermined scales. It also provides a forum for passengers to make claims in the form of Railway Claims Tribunals situated in different parts of India. But there is a limitation. Only a passenger on a train can make a claim before the Tribunal. Passengers of a bus or motor vehicle who may have been harmed after collision with a train can only approach the Motor Accidents Claims Tribunal. However, the tribunal can entertain the claim against the Railways also as a joint tortfeasor if the negligence of the Railways is established. Therefore, it can be held that the duty of care for the Railways extends not only to those who use the Railways' services but also to people who are "neighbours", namely, users of vehicles on roads and passerby that intersect with tracks. Consequentially, there is a common law liability for the railway administration for an accident at an unmanned level crossing, even in the absence of specific provisions in the Railways Act, where the Central Government can direct the administration to lay manned crossings. An action at common law can be filed for nonfeasance because the Railway was involved in what are recognized as dangerous operations and hence is bound to take care of road users. Therefore, it took up the issue of whether there could be any breach or a common law duty on the part of the Railways if it does not take notice of the increase in the volume of rail and motor traffic at the unmanned crossing, and it does not take adequate steps such as putting up gates with a watchman to prevent accidents at such a point. As such, the Railways should take all precautions that will reduce danger to the minimum.

16. In view of aforesaid fact and circumstances, this Court, applying the doctrine of neighbourhood passengers, and in view of negligence caused by the Railway authority in providing proper safeguard in unmanned level crossing, is of the considered view that it would be just and proper if a

compensation of Rs.4,00,000/- (four lakhs) in lump sum is paid to the petitioners towards death caused to the deceased in a railway accident. The opposite parties are directed to pay the above compensation amount within a period of four months from the date of communication of this judgment, failing which it will carry interest at the rate of 6% from the date of accident, i.e., 05.02.2013 till actual payment is made.

17. The writ petition is allowed to the extent indicated above. No order as to cost.

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2019 (II) ILR - CUT-782

DR. B.R. SARANGI,J.

W.P.(C) NO. 15897 OF 2005

M/S. BALLARPUR INDUSTRIES LTD. ………Petitioner

.Vs.

EMPLOYEES PROVIDENT FUND APPELLATE TRIBUNAL & ORS. ………Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the order passed in an appeal by the Provident Fund Appellate Tribunal – Writ of certiorari – When can be issued? – Indicated.

"The supervision of the superior Court exercised through writs or certiorari goes on two points. One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of certiorari could be demanded."

(B) EMPLOYEES PROVIDENT FUND AND MISCLLANEOUS PROVISIONS ACT, 1952 – Section 7-A – Complaint by Union claiming provident fund dues for closure period – Admitted fact is that the industry was closed for the period from 1987 to 1991 – Whether the closure period is good or bad that was not the subject matter of dispute – During closure period from 1987 to 1991 no wages were paid to the workmen – Settlement arrived at between the parties not to make any claim before reopening on being taken over by another entity – Whether any deduction can be made for payment of provident fund dues? – Held, No – Reasons discussed. (Paras 13 to 15)

(C) INTERPRETATION OF STATUTE – Non obstante Clause – Use of the word 'notwithstanding' – Effect of – Held, by using word

"notwithstanding", which is a *non-obstante* clause, that has to be interpreted taking help of the provisions of the Interpretation of Statute - *Non obstante* is a Latin term, i.e., notwithstanding or not opposing – *Non obstante* clause means a clause in a statute which overrides all provisions of the statue – It is usually worded "notwithstanding anything in" – A non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment that is to say, to avoid the operation and defect of all contrary provisions. (Paras 18 to19)

Case Laws Relied on and Referred to :-

1. AIR 1955 SC 223 : Hari Vishnu .Vs. Ahmad Ishaque.
2. AIR 1958 SC 398 : Nagendra Nath Bora .Vs. Commr. of Hills Division.
3. AIR 1984 SC 1022 at page 1026 : Sebastian M. Hongrary .Vs. Union of India.
4. AIR 1996 SC 1023: (1996) 2 SCC 498 : Pannalal Bansilal Patil .Vs. State of Andhra Pradesh.
5. AIR 1952 SC 369 : Aswini Kumar Ghosh .Vs. Arabinda Bose.
6. AIR 1977 SC 265 : Sarwan Singh .Vs. Kasturilal.
7. AIR 1966 SC 785 : (1966) 2 SCR 121 : Kumoon Motor Owner's Union .Vs. State of Uttar Pradesh.
8. AIR 1991 SC 855 : Ashoka marketing Ltd. .Vs. Punjab National Bank.

For Petitioner : Mr. Jayanta Das, Sr. Adv.
M/s. A.N. Das, A.N. Pattnaik, N. Sarkar, & E.A. Das.

For Opp. Parties : M/s. P.K. Mishra, S.S. Mishra
M/s. P.K. Das, S. Mohanty & S.N. Nayak

JUDGMENT Date of Hearing: 22.07.2019 : Date of Judgment : 01.08.2019

DR. B.R. SARANGI,J.

M/s. Ballarpur Industries Ltd., a company registered under the Indian Companies Act, 1913, has preferred this writ application challenging the legality and propriety of order dated 29.07.2005 in Annexure-1 passed by the Provident Fund Appellate Tribunal, New Delhi in ATA No. 299 (10)/ 2010 dismissing the appeal and confirming the order dated 03.05.2000 in Annexure-2 passed by the Asst. Provident Fund Commissioner & Officer-in-Charge, S.R.O., Berhampur directing to pay Rs.32,90,401.00 under Section 7A of the Employees' Provident Funds And Miscellaneous Provisions Act, 1952 (for short "EPF & MP Act, 1952").

2. The factual matrix of the case, in hand, is that M/s. Ballarpur Industries Limited (hereinafter referred to "BILT"), is a public limited company incorporated under the Indian Companies Act, 1913, having its registered office at Chandrapur, Maharastra, which owned an industrial

establishment/unit, namely, Sewa, situated at Gangapur, Jeypore, District-Koraput, Orissa. The unit was previously owned by M/s. Sewa Paper Mills Ltd. and was lying closed since November, 1987. The company was declared sick and a scheme of rehabilitation was sanctioned by the Board of Industrial Finance Reconstruction (BIFR) on 20.06.1991 under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985.The unit was taken over by BILT on the terms and conditions mentioned in the sanctioned scheme.

2.1 The BILT, before taking over the sick unit, had entered into a settlement on 09.08.1990 with the workmen through their union, namely, M/s. Sewa Paper Mills Employees Union. In the said settlement it was inter alia agreed that all efforts would be made to reopen the mill at the earliest. All the willing permanent mill workmen, who intended to join, will be offered employment in a phased manner. Approximate date of reopening of the mill will be notified through publication in newspaper media for the information of workmen and a period of 20 days will be given for applying in writing by registered post with A.D. of their willingness to join with the proposed new management. It was agreed and confirmed that in no case applications received after 20 days of publication of the notice be entertained by the management. Appointment orders will be issued to all the willing workmen at a time i.e. at the time of reopening of the mill specifying the data on which he is to join during the period of 10 months. All workmen, on rejoining of the company, will be given continuity of service from the original data of joining Sewa Paper Mills Limited for the purpose of only gratuity entitlement, including the period of stoppage, as per the Payment of Gratuity Act. The workmen, who do not apply for rejoining within the specified period, will only be entitled to compensation for the period of their services ending on 31st October, 1987 with Sewa Paper Mills Limited as per the provisions of the Industrial Disputes Act. All willing workmen, rejoining the services of the company under the terms and conditions, shall be paid an ex-gratia amount equivalent to 4 months basic salary drawn in the month of October, 1987 for the closure period of the mill in full and final payment of all dues and demands and no further dispute shall be entertained on the issue in future. The workmen assured the management of their full co-operation and of not submitting any other demands, financial or otherwise, for the next 3 years period from the date of reopening of the mill.

2.2 The memorandum of understanding was to be viewed and treated as a package deal vis-à-vis the memorandum of the union and joint application of

the mills workmen and it was expressly understood and agreed by the parties that the memorandum was in full and final settlement of all their demands contained in the memorandum and joint application and grievances/ demands, which have not been specifically dealt with, shall be treated as dropped. The petitioner-BILT complied with all the terms and conditions of the memorandum of understanding and the mill was reopened in the year 1991. The four months salary as ex-gratia for the closure period of the mill was paid to the willing workmen on rejoining the services of the company in full and final payment of all their dues and demands raised by the union and the workmen, even those which had not been specifically dealt with were treated as settled/withdrawn /dropped.

2.3. Accordingly, since the workmen had given up their claim for wages during the period of closure of the mill from November, 1987 to 1991, prior to taking over by the BILT, petitioner herein, under the terms of the settlement, which became a part of their contract of employment, and no wages had accordingly been earned or paid or were payable to them in cash, no provident fund dues were liable to be deducted and/or deposited for the said period. The provident fund authority was regularly inspecting the records of the unit and never raised any demand for payment of any provident fund dues for the period of closure i.e. from November, 1987 to 1991 for nearly 10 years.

2.4. At a belated stage, a complaint was made by the General Secretary of BILT Sewa Paper Mills Union to the Provident Fund Department in the year 2000 claiming that provident fund dues in respect of the employees of erstwhile Sewa Paper Mills Limited taken over by the petitioner in 1991 were payable for the period from 1987 to 1991 but were not paid.

2.5 The provident fund authority acting upon such complaint, issued a notice on 08.02.2000 to the petitioner establishment under Section 7-A of the EPF and MP Act, 1952 claiming that provident fund dues for the period 1987-88 to 1991-92 in respect of 734 employees had not been paid by the employer for which reasons an enquiry under Section 7-A was to be held. On receipt of such notice, the petitioner submitted various representations, inter alia pointing out that since the workmen had themselves given up their claim for wages during the closure period and under the settlement dated 09.08.1990, the willing workmen, who had rejoined services of the company, had voluntarily received an ex-gratia amount equivalent to 4 months basic pay salary drawn in the month of October, 1987 for the closure period of the mill in full and final payment of all their dues and demands as a package

deal, no wages had actually been paid or were payable to the workmen for the relevant period. Accordingly the question of deducting and/or paying any provident fund dues for the closure period did not arise. Further the demand of the union was highly belated and the issuance of the show cause notice, after a gap of nearly 10 years, has caused irretrievable prejudice to the employer, as due to long passage of time, the records on the basis of which the demand could have been challenged, were no longer available, therefore, requested for dropping of the proceeding.

2.6. Instead of dropping of the proceedings, the provident fund authority passed an order on 03.05.2000 observing that the employer's representative could not submit any supporting documents from their side and erroneously held that the employees, under the services of Sewa Paper Mills Ltd. during 1987 to 1991, prior to taking over by the BILT, have earned wages during the period of stated closure and scarified the wages for the running of the establishment and that the provident fund dues are payable on wages paid or payable to the employees as per the EPF and MP Act, 1952 and that there cannot be any agreement between any parties to prevent Provident Fund Act from prevailing over them and accordingly determined a sum of Rs.32,90,401/- as provident fund dues payable by the employer for the period in question on the basis of the list of the employees and their wages earned in October, 1987. Accordingly, the petitioner was directed to pay the dues immediately and in any case within 15 days of receipt of the order, failing which further action would be initiated as per the rules.

2.7 Thereafter, even without waiting for the petitioner to exercise its statutory right of appeal under Section 7-I of the EPF and MP Act, 1952 within the stipulated period of 60 days, the provident fund authority started taking coercive action of recovery proceedings by seeking to attach the bank accounts and threatening to issue warrants of arrest for recovery of the amount and immediately the petitioner preferred an appeal under Section 7(I) of the of EPF and MP Act,1952 before the Provident Fund Appellate Tribunal in ATA No. 299(10)/2000 challenging the order dated 03.05.2000 determining the liability to pay the total dues amount of Rs.32,90,401.00 passed by the Asst. Provident Fund Commissioner, Berhampur. But the appellate tribunal, by order dated 29.07.2005, dismissed the appeal. Hence this application.

3. Mr. Jayanta Das, learned Senior Counsel appearing along with Mr. N. Sarkar, learned counsel for the petitioner contended that the petitioner is not liable to pay the provident fund dues, in view of the fact that during the

closure period, the employees were not entitled to any wages and in fact were not paid any wages, therefore, question of deducting provident fund dues and remitting the same to the EPF authority does not arise. Further, the petitioner was not even the employer of the workers during the relevant period. The provident fund contribution has to be deducted at the time of payment of wages to the workers and thereafter the same has to be remitted to the provident fund authorities by 15th day of next month in view of Para 38 of the Employees Provident Fund Scheme, 1952. As the workers had not rendered any work during the closure period, they had not earned any wages. During the arrival of settlement between the petitioner management and the union, it was agreed that no wages would be paid to the workers for the closure period, except ex-gratia equivalent to four months wages. In terms of such settlement, the petitioner had paid ex-gratia equivalent to four months wages to the employees and they had given up their claim of provident fund dues. Whether the closure is good or bad, none of the employees has challenged the same before the Industrial Forum. Had the closure been declared as illegal by the Labour Court, in such an eventuality employees would have been reinstated with back wages and provident fund would have been attracted.

It is further contended that the scheme was approved by the BIFR, which includes the agreement/settlement arrived at between the petitioner management and the union, wherein it had been categorically agreed that the workers would not paid wages for the closure period. Therefore, it cannot be said that the workmen were entitled to wages, particularly when during closure period they had sacrificed the same. Relying on Section 32 of the Sick Industrial Companies (Special Provision) Act, 1985 (SICA), it is also contended that once the scheme was approved, no action under any law can be taken contrary to the scheme. Meaning thereby, the provisions contained under the EPF and MP Act, 1952 are not applicable calling upon the petitioner to pay the provident fund dues during the closure period, and admittedly the petitioner was not the employer at the relevant point of time. Therefore, the petitioner is not liable to pay the amount as claimed under Section 7-A of the EPF and MP Act, 1952, vide order dated 03.05.2000 in Annexure-2, which has been confirmed under Section 7-I of the EPF and MP Act, 1952 by the Employees Provident Fund Appellate Tribunal under Annexure-1 dated 29.07.2005.

4. Mr. P.K. Mishra, learned counsel appearing for the Provident Fund Commissioner contended that the closure was not approved by the Labour Commissioner and/or the Labour Court and, more so, the workers were not retrenched nor prevented nor their dues were settled at any stage during the

closure period. As the closure was illegal and had no sanction of any law, the petitioner is liable to deposit the provident fund dues as per the order passed by the Asst. Provident Fund Commissioner, which has been confirmed in appeal by the Employees Provident Fund Appellate Tribunal.

5. Mr. P.K. Das, learned counsel for the workers' union also contended that since there was illegal closure, the employees are entitled to get their wages and consequentially the provident fund dues, as has been determined by the provident fund authority in Annexure-2, and confirmed in appeal by the EPF appellate tribunal in Annexure-1. It is further contended that during closure period, the employees had neither been retrenched nor terminated in compliance of the provisions contained under Section 25N of the Industrial Disputes Act, 1947, therefore, they are deemed to have been remained in duty. Since the employees are deemed to be continuing in service, the wages are payable to them during the closure period and accordingly provident fund dues are payable by the petitioner establishment. Under Section 6 of the EPF and MP Act, 1952 the contribution has to be paid on the basic wages payable to each employee.

It is further contended that in view of Para-29 of the Scheme, the contribution is payable by the employer of the wages payable to each employee to whom the scheme applies. Therefore, if the wages are payable to an employee, then provident fund dues have to be remitted, even if the wages are not actually paid to the employees. Since the workers are deemed to be on duty during the closure period and are entitled to wages, therefore provident fund dues are liable to be deducted during the closure period. Further, statutory dues cannot be curtailed by virtue of an agreement, since there cannot be any agreement against the statute.

6. This Court heard Mr. J. Das, learned Senior Counsel appearing along with Mr. N. Sarkar, learned counsel for the petitioner; Mr. P.K. Mishra, learned counsel for the Provident Fund Commissioner; and Mr. P.K. Das, learned counsel for the workers' union, and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. On the basis of the facts delineated above this Court has to now consider whether the order dated 03.05.2000 in Annexure-2 passed by the Asst. Provident Fund Commissioner under Section 7-A of the EPF and MP Act, 1952 and the confirmation thereof made by the Employees Provident

Fund Appellate Tribunal in ATA No. 299(10) /2000 vide order dated 29.07.2005 in Annexure-1 need any interference of this Court in exercise of jurisdiction of writ of certiorari under Article 226 of the Constitution of India.

8. ***Halsbury's Laws of England***, (Fourth Edition) (2001 Re-issue) Vol.1(1) Para-123 have explained Certiorari (quashing order) is an order of the superior Court by which decisions of an inferior Court, tribunal, public authority or any other body of persons who are susceptible to judicial review may be quashed.

The supervision of the superior Court exercised through writs or certiorari goes on two points. One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of certiorari could be demanded.

9. A Constitution Bench of seven learned judges in ***Hari Vishnu v. Ahmad Ishaque,*** AIR 1955 SC 223, laid down the following propositions as well settled and beyond dispute:

> *"(1) Certiorari will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it.*
>
> *(2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice.*
>
> *(3) The Court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or tribunal, even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well a right, and when the legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior Court were to rehear the case on the evidence, and substitute its own findings in certiorari."*

10. In ***Nagendra Nath Bora v. Commr. of Hills Division,*** AIR 1958 SC 398, the apex Court held as follows:

> *"The jurisdiction under Article 226 of the Constitution is limited to seeing that the judicial or quasi-judicial tribunals or administrative bodies exercising quasi judicial powers do not exercise their powers in excess of their statutory jurisdiction, but correctly administer the law within the ambit of the statute creating them or entrusting those functions to them. In other words, its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. Mere formal or technical errors, even through of law, will not be sufficient to attract this extraordinary jurisdiction.*

11. Keeping in view the above parameters of law, it is to be seen whether the BILT is liable to deposit the provident fund dues of the employees. The Asst. Provident Fund Commissioner, while considering the proceeding under Section 7-A of the EPF and MP Act, 1952, on 03.05.2000 in Annexure-2 took note of the following facts:

> *"The complainant submitted the copies of various agreements entered into between the BILT/SEWA and Employees Union, in the presence of BIFR/Labour Commissioner. It is emphasized that as peer the tripartite agreement entered into, the employees had foregone the wages for the period of closure of the establishment pending taking over by the new management. The complainant also brought out the fact that the sacrifice was given as a good-will gesture to run the establishment in spite of hardship faced by the employees."*

The findings arrived at in the above context, have been mentioned in the order impugned (at page 20 of the writ application), which read thus:

> *"Having observed as detailedly stated above, I find that the employees under the service of Sewa Paper Mills during 1987 to 1991 prior to taking over by the BILT have earned wages during the period of stated closure and sacrificed the wages for the cause of running of establishment. The PF dues are payable on wages paid or payable to the employees as per the Act. Sec.6 of the Act clearly states that "The contribution which shall be paid by the Employer to the Fund shall be 10% of the basic wages, D.A. & Retaining Allowance (if any) for the time being payable to each of the Employees……….."*
>
> *There cannot be any agreement between any parties to prevent PF Act from prevailing over them and enforcing the statutory provisions for the benefits of eligible labour. I also decide in the interest of justice that all the labour who have rejoined consequent upon opening of the establishment and offer of appointment to be treated as employees counting in the service of the management for the purpose of PF Act and be extended all the benefits of PF for the period of stated closure from the date of closure to the date of their rejoining. The employer has already given a detailed list of employees with date of joining and wages earned in Oct' 1987 based on which the dues can be arrived at. The basic of wages for the period of closure is taken at the last wages drawn prior to the closure of the establishment i.e. October, 87. The period of closure is determined from November, 87 to the date of joining by each employee. The employees who have not joined the service consequent upon offer of appointment are not considered for the extension of benefits since their date of exit cannot be decided otherwise. The same is taken as from date of closure of the establishment i.e. November, 1987.*
>
> *Accordingly a statement has been made and shown in Annexure-A. The details of dues payable for each employee for the period of entitlement, (a/c wise) is given in Annexure. The total dues payable by the employer is as under:*
>
> *A/c –I (to be transferred to*
> *BILT PF Trust) :- Rs.26,49,169.00*
> *A/C-10 :- Rs. 4,28,596.00*

A/C-11	*:- Rs. 1,20,081.00*
A/C-11	*:- Rs. 92,370.00*
A/C-22	*:- Rs. 185.00*
	Total :- Rs.32,90,401.00

Since the status of exemption is available to the establishment only after taking over by the new management and the employees during the stated closure continued to be the employees of earlier un-exempted establishment, for dues in A/c 2 and 22 are determined at the rates prescribed for un-exempted establishment.

I, Shri V. Shyam Sundei, APFC & OIC, SRO, Berhampur, Orissa, now therefore, decide by virtue of powers conferred on me U/S-7A of the Act that the employer in relation to the management of BILT is required to pay the dues as above and shall pay the dues immediately and in any case within 15 days of receipt of the order, failing which further action will be initiated as per the rules.

While preferring appeal, the petitioner has reiterated the same in appeal memo to the following effect:

"As per the agreement all the workers, on their re-joining the appellant, were to be given continuity of service for the purpose of gratuity only. It was further agreed that such workers on rejoining the service of the company shall also be paid an ex-gratia amount equivalent to four months basic salary for the closure period of the mill towards the full and final payment of all their dues and demands and no further dispute shall be entertained on this issue."

Thereafter, the petitioner in the appeal memo raised the following contention:

"He has further contended that since scheme was approved by BIFR, therefore, it cannot be said that the workers had sacrificed the wages. Agreement was placed before the BIFR, hence it is clear that the workers were not paid wages for the closure period pursuant to the scheme approved by the BIFR, thus, it cannot be said that the workers were entitled to wages during the closure period but they had sacrificed the same. Relying on Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) he has contended that once the scheme was approved, no other action under any law can be taken contrary to the scheme. In nutshell, his contention is that PF dues were not payable for the closure period."

In response to the same, the workers' union contended as follows:

"As against this, learned counsel for the respondent and the Secretary of the Union have contended that the closure was illegal. The lock out/closure was not approved by the Labour Commissioner and/or Labour Court. Workers were not retrenched or terminated, nor their dues were settled at any stage during the closure period. Closure was illegal as it was not having sanctioned of any law. Rather BIFR in its order dated 21.05.1990 in case No. 183/89 has categorically held in para 9 that retrenchment had not taken place for non-compliance of Section 25N of the Industrial Disputes Act, 1947 the closure was illegal and workers were not retrenched/terminated in accordance with law, therefore, they are deemed to have remained on duty. They have further contended that since the wages were payable

> *during the closure period, the PF dues were payable by the appellant establishment. Under Section 6 of the Act the contribution has to be paid on the basic wages payable on each employee. Similarly para 29 of the Scheme stipulates that the contribution is payable by the employer on the wages payable to each employee to whom the scheme applies. Thus, if the wages are payable to an employee then PF dues have to be remitted even if the wages are not actually paid to the workers. Since workers are deemed to be on duty during the closure period and were entitled to the wages, therefore, PF dues were liable to be deducted during the closure period as well and the APFC has not committed any error in holding so."*

But the appellate authority came to a definite finding, which reads as follows:

> *"The plea that appellant would not be liable to pay PF dues during the closure period since SPM was the employer also cannot be considered in this appeal since no such plea was raised before the 7A authority nor was adjudicated upon. Even otherwise, as per the appellant employees were treated in continuous service for the purpose of gratuity and were even paid four months salary by the appellant for the closure period. So far as contention of the learned counsel that since the agreement entered into between the workers and the management was placed before the BIFR and the scheme was approved, thus, the same would form part of BIFR order and since it says that no wages were payable to the workers during the closure period except an ex-gratia payment for four months, therefore, PF dues would not be attracted in view of Section 32 of the SICA, in my view, is also no help to the appellant. First of all, in the scheme BIFR has not given any categorical finding that PF dues would not be payable by the appellant for the closure period. Merely because agreement was placed before the BIFR would not mean that same would form part of BIFR order. Learned counsel for the appellant further contends that the judgment rendered by Hon'ble Bombay High Court, referred by the respondents, has been over-ruled by the judgment of the Hon'ble Apex Court in Shree Changdeo Sugar Mills Case, judgment cited supra."*

Consequentially, the appeal preferred by the petitioner was dismissed.

12. The admitted fact is that the industry was closed for the period from 1987 to 1991. Whether the closure period is good or bad that is not the subject matter of dispute before this Court in the present case, nor has anybody challenged such closure proceeding before any other forum to declare the said closure as bad and to that extent nothing has been placed on record for consideration by this Court. In absence of such materials, since during the closure period from 1987 to 1991 no wages were paid to the workmen, whether any deduction can be made for payment of provident fund dues in accordance with the provisions contained in the EPF and MP Act,1952.

13. For just and proper adjudication of the case, the relevant provisions of the EPF and MP Act, 1952 is quoted below:

> *"**6. Contributions and matters which may be provided for in Scheme**. - The contribution which shall be paid by the employer to the fund shall be Eight and one third per cent, of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable to each of the employees whether employed by him directly or by or through a contactor and the employee's contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding eight and one-third per cent of his basic wages, dearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section:*
>
> *Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words "eight and one-third", at both the places where they occur, the words "ten per cent" shall be substituted:*
>
> *Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for rounding off of such fraction to the nearest rupee, half of a rupee, or quarter of a rupee.*

To give effect to Section-6, as mentioned above, Employees' Provident Funds Scheme, 1952 has been framed. Chapter-V of the scheme deals with contributions. Scheme-29 reads as follows:-

> *"29. **Contributions :-** (1) The contributions payable by the employer under the Scheme shall be at the rate of 8 1/3 per cent of the basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any) payable to each employee to whom the Scheme applies:*
>
> *Provided that the above rate of contribution shall be ten per cent in respect of any establishment or class of establishments which the Central Government may specify in the Official Gazette from time to time under the first proviso to sub-section (1) of section 6 of the Act.*
>
> *(2) The contribution payable by the employee under the Scheme, shall be equal to the contribution payable by the employer in respect of such employee: :*
>
> *Provided that in respect of any employee to whom the Scheme applies, the contribution payable by him may, if he so desires, be an amount exceeding eight and one-third or ten per cent, as the case may be, of his basic wages, dearness allowance and retaining allowance (if any) subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Act;*
>
> *(3) The contributions shall be calculated on the basis of [basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any)] actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis.*

(4) Each contribution shall be calculated to [the nearest rupee, 50 paise or more to be counted as the next higher rupee and fraction of a rupee less than 50 paise to be ignored."

Scheme-30 deals with payment of contribution, Scheme-31 deals with Employer's share not to be deducted from the members, Scheme-32 deals with recovery of a member's share of contribution, Scheme-32-A deals with recovery of damages for default in payment of any contribution, Scheme-32-B deals with terms and conditions for reduction of waiver of damages. Chapter-VI deals with declaration, contribution cards and returns. Scheme 38 deals with mode of payment of contribution, which reads as follows:-

"38. ***Mode of payment of contributions :-*** *(1) The employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable, deduct the employee's contribution from his wages which together with his own contribution as well as an administrative charge of such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than excluded employee, and in respect of which provident fund contributions are payable as the Central Government may fix. He shall within fifteen days of the close of every month pay the same to the Fund by separate bank drafts or cheques on account of contribution and administrative charge:*

Provided that if the payment is made by a cheque, it should be drawn only on the local bank of the place in which deposits are made;

Provided further that where thee is no branch of the Reserve Bank or the State bank of India at the station where the factory or other establishment is situated, the employer shall pay to the Fund the amount mentioned above by means of Reserve Bank of India Government Drafts as per separately on account of contributions and administrative charge.

(2) The employer shall forward to the Commissioner, within twenty-five days of close of the month, a monthly abstract in such form as the Commissioner may specify showing the aggregate amount of recoveries made from the wages of all the members and the aggregate amount contributed by the employer in respect of all such members for the month:

Provided that an employer shall send a Nil return, if no such recoveries have been made from the employees :

Provided further that in the case of any such employee who has become a member of the Pension Fund under the Employees' Pension Scheme, 1995, the aforesaid Form shall also contain such particulars as are necessary to comply with the requirements of that Scheme.

(3) The employer shall send to the Commissioner within one month of the close of the period of currency, a consolidated Annual Contribution Statement in Form 6-A, showing the total amount of recoveries made during the period of currency from

> *the wages of each member and the total amount contributed by the employer in respect of each such member for the said period. The employer shall maintain on his record duplicate copies of the aforesaid monthly abstract and consolidated annual contribution statement for production at the time of inspection by the Inspector."*

14. A conjoint reading of Schemes 29 and 38 of Employees' Provident Funds Scheme, 1952 would go to show that on payment of wages the deduction of employees contribution of wages has to be made and whatever deduction is made from the wages of the employees, the similar contribution has to be made by the employer so as to enable the employee to get his provident fund dues from the provident fund authority. During the closure period from 1987 to 1991, there was no payment of wages to the workers/employees. Therefore, the employees' share has not been deducted from the wages of the workers/employees. In view of the statutory provision discussed above, once the employees' share is not deducted, consequentially, no deposit will be made by the employer of its share towards provident fund dues and more so, the petitioner having taken over the old unit of Sewa Paper Mill in the year 1991, pursuant to memorandum of understanding made by the employees union with that of the petitioner, it was agreed upon between the parties that during closure period, the employees will get only ex-gratia wages for a period of four months.

15. It reveals from the record that a memorandum of understanding was executed on 09.08.1990, a copy of which has been annexed as Anneure-5 to the writ application, pursuant to the memorandum dated 12.07.1990 submitted by the Sewa Papers Employees Union and a joint petition submitted by about 100 workmen to the proposed management of BILT specifying 8 points for the re-opening of the mill. After a detailed discussion between the management and workers' union, a bilateral memorandum of understanding was arrived at with the workers as well as their representatives and the proposed management of BILT, the petitioner herein, with regard to various problems. Some of the relevant terms of settlement arrived at in the memorandum of understanding are quoted below:-

> *"3. All workmen re-joining the company will be given continuity of service from the original date of joining SPL for the purpose of only gratuity entitlement including the period of stoppage as per the payment of Gratuity Act.*
>
> *xx xx xx*
>
> *7. All willing workmen re-joining the Company under the terms and conditions detailed above shall be paid on ex-gratia amount equivalent to ……. months basic salary drawn in the month of October, 87 for the closure period of the mill in full and final payment of all dues and demands and no further disputes shall be entertained on the issue in future.*

xx xx xx

10. It is clarified, confirmed and reiterated that the parties to the memorandum of understanding shall be bound by the terms of the memorandum of understanding both in letter and spirit."

16. By the time the settlement was arrived on 09.08.1990, the matter was pending before the BIFR in Case No.183/89. As per the sanctioned scheme of the BIFR, clause-3 deals with rehabilitation scheme. Clause-3.9 thereof, which deals with merger with BILT, being relevant, is extracted hereunder:-

"3.9 Merger with BILT:-

3.9.1. The salient features of the proposed merger of SPL with BILT are as under:-

i) The Transfer Date of Merger shall be 1-1-1990.

ii) The existing shareholders of SPL shall be issued equal shares of BILT as per the share exchange ratio approved under the scheme.

iii) BILT shall deploy funds from its own resources equivalent to not less than the estimated tax benefits excepted to accrue to it under the proposed merger towards revival of SPL's operations

iv) Other terms and conditions have been given in the scheme of merger forming an Annexure to the scheme of revival (Annexure "A")."

Clause-5.6 deals with workers of SPL (Sewa Paper Limited), which reads as follows:-

"Workers of SPL:-
Shall abide by the terms of settlement as per the Memorandum of Understanding proposed by BILT."

It has also been clarified under clause-8 that the provisions of this scheme shall have effect notwithstanding anything inconsistent therewith contained in any other law (except the provisions of the Foreign Exchange Regulation Act, 1963 and the Urban Land (Ceiling & Regulations) Act, 1976) for the time being in force or in the Memorandum and Articles of Association of the sick industrial company i.e., Sewa Paper Ltd. (SPL), or any other instrument having effect by virtue of any law other than the Sick Industrial Companies (Special Provisions) Act, 1985. The memorandum of understanding between the workers' union and the petitioner dated 09.08.1990 also formed part of the BIFR Scheme, as discussed above. The award was passed by the BIFR on 20.06.1991. Therefore, the BIFR award read with memorandum of settlement dated 09.08.1990, as discussed above, has gone in favour of the employees of the SPL.

17. The memorandum of settlement executed on 09.08.1990 and conditions stipulated therein is binding on the petitioner vis-à-vis the

employees/workmen, who were members of the union itself, in view of the provision contained under Section 18 of the Industrial Disputes Act, 1947. Sub-Section (1) of Section-18 of the Industrial Disputes Act, 1947 reads as follows:

> *"**18. Persons on whom settlements and awards are binding –** (1) A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement."*

The aforementioned provision clearly stipulates that the settlement arrived at by agreement between the employer and workman shall be binding on the parties to the agreement. As is evident from the record, it is the union or representatives of the employees who entered into agreement with the employer. As such, the settlement signed by such representatives is binding on those whom they represent. Consequentially, the terms of settlement became part of the contract of the employment of each individual workmen represented by such representatives. Therefore, the settlement dated 09.08.1990 arrived at between the petitioner and the workers' union is binding on the parties. In terms of the settlement, all willing workmen rejoining the services of the company were to be paid an ex-gratia amount equivalent to 4 months' basic salary drawn in the month of October, 1987 for the closure period of the mill in full and final payment of all dues and demands and no further dispute shall be entertained on the issue in future. More particularly, under clause-10 it was clarified, confirmed and reiterated that the parties to the memorandum of understanding shall be bound by the terms of the memorandum of understanding both in letter and spirit. In terms of memorandum of settlement dated 09.08.1990, which has formed part of the BIFR award dated 21.06.1991, the workmen, who have joined in the new company, namely, the petitioner herein, will not be entitled to get any provident fund dues as claimed by them during the closure period from 1987 to 1991, because no deduction was made from their wages as they were not working during such period due to closure. Had the closure been declared as illegal by the competent Court of law, what would have been its consequence that would have been considered? In the instant, no order indicting that closure is illegal has been placed before this Court for consideration. Apart from the above, since the SPL was declared sick, accordingly the Sick Industrial Companies (Special Provisions) Act, 1985 has come into play. The provisions contained under Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985 are as follows:-

> *"32. **Effect of the Act on other laws.**—(1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.*
>
> *(2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of section 72A of the Income-tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without any recommendation by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company."*

In the above provisions, it is made clear that the provisions of the SICA and of the Rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 and the Urban Land (Ceiling and Regulation) Act, 1976 for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.

18. By using word "notwithstanding", which is a *non-obstante* clause, that has to be interpreted taking help of the provisions of the Interpretation of Statute. *Non obstante* is a Latin term, i.e., notwithstanding or not opposing. *Non obstante* clause means a clause in a statute which overrides all provisions of the statue. It is usually warded "notwithstanding anything in".

19. In ***Sebastian M. Hongrary v. Union of India,*** AIR 1984 SC 1022 at page 1026, while considering Section 70 of the Bombay Shops and Establishments Act, the apex Court held as follows:

> *"A non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment that is to say, to avoid the operation and defect of all contrary provisions."*

20. In ***Pannalal Bansilal Patil v. State of Andhra Pradesh***, AIR 1996 SC 1023: (1996) 2 SCC 498, the apex Court held that a *non obstante* clause may be used as a legislative device to modify the ambit of the provision of law mentioned in the *non obstante* clause.

21. In ***Aswini Kumar Ghosh v. Arabinda Bose,*** AIR 1952 SC 369, the apex Court considered Section-2 of the Supreme Court Advocates (Practice

in High Courts) Act, 1951, which contained a *non obstante* clause in the Indian Bar Councils Act, 1962, or in any other law regulating the conditions subject to which a person not entered in the roll of Advocates of a High Court may be permitted to practice in that High Court'. The Calcutta High Court in construing section 2 of the Act held that an advocate of the Supreme Court was not entitled to act on the original side of that High Court. This result was reached by limiting the enacting part of the section by the *non obstante* clause. In overruling the said decision of the High Court, PATANJALI SHASTRI, C.J., observed:

> *"This is not, in our judgment, a correct approach to the construction of section 2. It should first be ascertained what the enacting part of the section provides on a fair construction of the words used according to their natural and ordinary meaning, and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment."*

Proceeding further, the Chief Justice said:-

> *"The enacting part of the statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously."*

22. In ***Sarwan Singh v. Kasturilal,*** AIR 1977 SC 265, the apex Court held as follows:

> *"Sometimes one finds two or more enactments operating in the same field and each containing a non obstante clause stating that its provisions will have effect 'notwithstanding anything inconsistent therewith contained in any other law for the time being in force'. The conflict in such cases is resolved on consideration of purpose and policy underlying the enactments and the language used in them."*

Similar view has also been taken by the apex Court in ***Kumoon Motor Owner's Union v. State of Uttar Pradesh,*** AIR 1966 SC 785 : (1966) 2 SCR 121; ***Ashoka marketing Ltd. v. Punjab National Bank,*** AIR 1991 SC 855.

23. Therefore, the provisions contained under the Sick Industrial Companies (Special Provisions Act, 1985 have got overriding effect of other law, which includes EPF and MP Act, 1952 and Schemes framed thereunder. Though this question was raised before the appellate authority, but the same has not been considered in proper perspective. The finding, as had been arrived at in the Scheme of BIFR, does clearly specify that provident fund dues are not payable by the petitioner for the closure period. Merely because an agreement was placed before the BIFR, it does not mean that same would form part of BIFR award. This finding of the appellate authority is absolutely misconceived one, in view of the fact that law prescribes under Section 32 of

the Sick Industrial Companies (Special Provisions) Act, 1985 that the provisions therein have got overriding effect of any other law including EPF and MP Act, 1952 and Scheme framed thereunder, even the Scheme of BIFR does not record so with regard to payment of dues, that finding of appellate authority is contrary to the provisions of law. Furthermore, the appellate authority has failed to take into consideration the fact that the memorandum of settlement has formed part of the BIFR. As such, the memorandum of settlement is binding in view of Section 18 of the Industrial Disputes Act, 1947 between the parties and effectively during that period. Since no deduction has been made from wages of the employees from 1987 to 1991, question of proportionate deduction of provident fund dues in accordance with the EPF and MP Act, 1952 does not arise and more particularly, when parties had agreed for revival of the unit by sacrificing their wages admitting ex-gratia amount equivalent to four months wages, which has been paid, the authority cannot compel the employer, the petitioner herein, to deposit the provident fund dues for wages having not been paid to the employees. Thereby, the finding of the appellate authority is absolutely contrary to the provisions of law, which cannot sustain.

24. The finding that the petitioner seeks for waiver of the provident fund dues is based on misconstruction of fact, meaning thereby, in view of the provisions contained under EPF and MP Act, 1952 if the deduction from the wages of the employees has been made towards employees' share, then question of deduction of the employer share will come, and as such, since no wages have been deducted during closure period from 1987 to 1991 from the employees, question of payment of EPF dues by the employer does not arise. The further finding that the agreement, i.e., memorandum of understanding cannot have any overriding effect of any other law, i.e., EPF and MP Act, 1952, such question does not arise for consideration at this stage. More particularly, even if the agreement also has a statutory effect, it is binding on the parties in view of the provisions contained under Section 18 of the Industrial Disputes Act, 1947 which has formed part of the BIFR Scheme prepared by the authority for the sick industries. As a consequence thereof, the order dated 03.05.2000 in Annexure-2 passed by the Assistant Provident Fund Commissioner under Section 7-A of the EPF and MP Act, 1952 cannot sustain in the eye of law, and as such, the consequential order passed by the appellate authority under Annexure-1 dated 29.07.2005 also cannot sustain.

25. In view of the discussions made above, the order dated 03.05.2002 passed by the Asst. Provident Fund Commissioner in Annexure-2 and

consequential order dated 29.07.2005 passed by the Employees Provident Fund Appellate Tribunal in ATA No. 299(10)/2000 in Annexure-1 are liable to be quashed and are hereby quashed.

26. The writ application is accordingly allowed. No order to costs.

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2019 (II) ILR - CUT- 801

DR. B.R. SARANGI,J.

W.P.(C) NO. 11900 OF 2019

RAKESH MAHALLICK, REPRESENTED BY HIS FATHER GUARDIAN ………Petitioner

.Vs.

DEPUTY COMMISSIONER, KENDRIYA VIDYALAYA SANGATHAN, BHUBANESWAR & ANR. ………Opp. Parties

(A) ADMISSION – Admission in class-1 of Kendriya Vidyalaya under the Right to Education(RTE) category – Admission denied on the ground of distance – As per the admission guideline the distance from School to the residence of children must be within the 5 Kms radius – Authority pleaded that, petitioner's house is not situated within 5 Kms radius – Petitioner pleaded that, his house is situated within the distance of 4.63 Kms as per Google Search – School authority measured the distance through motorbike & found the distance is 7.3 Kms. – The word 'radius' interpreted – Held, it is a straight line drawn from the centre of a circle to any point of the circumference – Applying the above meaning of the word, the distance between school to petitioner's house is 4.63 Kms as per the Google search, which is within the 5 kms radius – Therefore the distance calculated by going through motorbike, ascertaining as 7.3 Kms, cannot have any justification.

(B) THE RIGHT OF CHILDREN TO FREE & COMPULSORY EDUCATION RULES, 2010 – Rule 14 – Extended period of admission – Admission of petitioner denied on the ground of distance – Petitioner challenged the same & succeeded – Meantime 5 months elapsed – Admission process over & academic session already begun – School authority denied admission on the above plea – Action of the authority challenged – Provisions under Rule 14 of the Rules,2010 – Held, in the view of the aforesaid Rules, if the admission would be given to a child after extended period of six months from the commencement of academic year of the school, obligation will be on the part of the school

to make him/her eligible to complete studies with the help of special training, as determined by the head teacher of the school. In the present case, the said six months period has not been elapsed – Therefore, if the petitioner is admitted into standad-1, then in view of Rule-14, he can be able to complete the study with the help of special training given by the head teacher of the school – Thereby, no prejudiced would be caused either to the petitioner or to the institution.

Case Laws Relied on and Referred to :-

1. AIR 1978 SC 851: Mohinder Singh Gill .Vs. The Chief Election Commissioner, New Delhi.
2. 2016 (II) OLR 393 : Chitta Ranjan Behera Vs. State of Odisha.
3. 2017 (II) OLR 1 : Subhadra Girl's High School .Vs. State of Odisha.
4. AIR 1978 SC 851 : Mohinder Singh Gill .Vs. The Chief Election Commissioner, New Delhi.
5. (1948) 2 All ER 995 : Re. Bidie (deceased) .Vs. General Accident Fire and Life Assurance Corporation Ltd.
6. AIR 1991 SC 1632 : 1991 (2) SCC 449: Captain Subash Kumar Vs. Principal Officer, Mercantile Marine Deptt.
7. AIR 1952 SC 16 : Commissioner of Police, Bombay .Vs. Gordhandas Bhanji.
8. AIR 1968 SC 718 : Union of India & Ors. .Vs. M/s.Anglo Afghan Agencies etc.
9. AIR 1971 SC 2021 : Chowgule & Company (Hind) Pvt. Ltd. .Vs. Union of India & Ors.
10. AIR 1979 SC 621 : M/s.Motilal Padampat Sugar Mills Co. Ltd. .Vs. The State of Uttar Pradesh & Ors.
11. AIR 1986 SC 806 : Union of India & Ors. .Vs. Godfrey Philips India Ltd.
12. AIR 1987 SC 2414 : Delhi Cloth & General Mills Ltd. .Vs. Union of India & Ors.
13. AIR 1988 SC 2181 : Bharat Singh & Ors. .Vs. State of Haryana & Ors.
14. 2014 (I) OLR 226 : Dr. (Smt.) Pranaya Ballari Mohanty .Vs. Utkal University.
15. 2015 (I) OLR 212 : Rajanikanta Priyadarshy .Vs. Utkal University.

For Petitioner : Mr. S.K. Rath
For Opp.Parties : Mr. H.K. Tripathy

JUDGMENT Date of Hearing: 07.08.2019 : Date of Judgment : 09.08.2019

DR. B.R.SARANGI, J.

The petitioner, being a minor, represented through his father guardian has filed this application seeking direction to the opposite parties to admit him in Standard-I in Kendriya Vidyalaya No.2, CRPF Campus, Bhubaneswar from the academic session 2019-20, by quashing the order of rejection, as endorsed in Annexure-5, wherein reasons have been assigned for denial of admission that "(3) the distance found more than 5 Km (Google Search)" and "(4) More than 5 Km distance is one of the reason for denying admission under RTE category".

2. The factual matrix of the case, in hand, is that pursuant to notification issued by Kendriya Vidyalaya Sangathan (KVS), Bhubaneswar in the website inviting applications for admission in "KV Bhuabaneswar No.2" in Standard-I for the academic year 2019-20, the petitioner submitted his application through online along with testimonials on 17.03.2019 at 2.17 PM. Accordingly, he was provided with an Application Submission Code bearing No.1901051406531333032. In the said application form, the date of birth has been indicated as 21.04.2013, gender-male, caste category-OBC (Non-Creamy Layer). Under the heading income group, it has been mentioned that "Do not belong to low income group" and under the heading of school details, it has been mentioned "KV Bhubaneswar No.2", Region-Bhubaneswar. It has been mentioned under the headings sponsoring agency-CRPF, distance of the school from residence- less than or equal to 5 kms., and eligible for admission under RTE- 'Yes'. The said application was duly scrutinized by the authority and a provisional list of shortlisted candidate for admission to Standard-I (RTE candidates) for the session 2019-20 subject to verification of documents was published, in which the name of the petitioner was found place at sl.no.36.

2.1 The first admission list for different categories was notified in the website of KV Bhuabaneswar No.2 on 09.04.2019. The petitioner appeared with his father on the date fixed for verification of documents and for admission. Pursuant to the first list dated 09.04.2019, the petitioner could not take admission, as the list was restricted up to sl.no.30. Thereafter, second list was notified on 26.04.2019, wherein the name of the petitioner was found place at sl.no.6, and the petitioner's father was telephonically intimated to appear before the Authorized Officer on the scheduled date for verification and admission of the petitioner in Standard-I. The petitioner's father appeared before the concerned officer and produced the original documents and also the "Google map" showing distance of the school from his residence as 4.63 km., but no admission was given to the petitioner by the school authority. On 01.05.2019, the petitioner's father approached the Principal to know the reasons for refusing admission in writing. On receipt of the application of the petitioner, the Principal sent the same to one Mr. A.K. Samal, I/c Admission stating therein to put up with details. In response to the same, Mr. A.K. Samal, I/c Admission stated that the application of the petitioner was rejected on the grounds that "(3) the distance found more than 5 Km (Google Search)" and "(4) more than 5 Km distance is one of the reason for denying admission under RTE category". Hence this application.

3. Mr. S.K. Rath, learned counsel for the petitioner contended that denial of admission to the petitioner on the basis of wrong assessment of "5 kms Radius" is absolutely misconceived one. The calculation made taking into consideration the distance of main road from CRPF campus to BDA colony, Chandrashekharpur, where the petitioner resides, is contrary to the advertisement/guidelines issued. Thereby, the reason for rejection is nothing but colourable exercise of power and to accommodate another candidate below the rank of the petitioner, as drawn on lottery for SEBC students under RTE category. Therefore, the process which has been adopted by the authority is arbitrary, unreasonable and contrary to the provisions of law. It is further contended that "5 kms Radius" distance, so far as other States are concerned, they adopt the Google search as a method, in absence of any specification as to how distance is to be calculated. Therefore, resorting to any other mode, except Google search, cannot have any justification. Thereby, the reasons endorsed in Annexure-5 dated 01.05.2019 cannot sustain in the eye of law. It is further contended that after the commencement of the Right of Children to Free and Compulsory Education Act, 2009 and in view of insertion of Article-21A of Constitution of India, the petitioner has every right to continue his study in the school in question because the Act itself is beneficial legislation which goes in favour of the students, which cannot be taken away on a frivolous plea of distance, which is contrary to the advertisement/ guidelines issued.

To substantiate his contention, he has relied upon the judgment of the apex Court in ***Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi***, AIR 1978 SC 851.

4. Per contra, Mr. H.K. Tripathy, learned counsel appearing for opposite parties, specifically contended that the petitioner has obtained caste certificate from the competent authority on 07.03.2019 showing to be belonging to Socially and Educationally Backward Classes (SEBC) and on receipt of the said certificate, he submitted online application on 17.03.2019 indicating caste category as OBC (Non-Creamy layer), which is contrary to the caste certificate issued in his favour, therefore, admission has been denied to him. It is further contended that the petitioner's residence is situated at an actual distance of 7.3 km., which is beyond 5 km. Therefore, the authorities are well justified in rejecting the application of the petitioner to get admission into Standard-I for the session 2019-20. It is further contended that rejection of the application of the petitioner has been done in view of the fact that distance is found to be more than 5 kms (Google search), which is one of the reasons for denying admission under RTE

category. Further, the petitioner described himself as OBC (Non-Creamy layer), though he has received the certificate under SEBC category, thereby the authorities are justified in rejecting the application of the petitioner for getting admission in Standard-I in KV Bhubaneswar No.2 for the session 2019-20. Furthermore, the petitioner has not approached this Court with a clean hand, for which the writ application is liable to be dismissed in limine.

To substantiate his contention, he has relied upon the judgments of this Court rendered in the cases of ***Chitta Ranjan Behera v. State of Odisha,*** 2016 (II) OLR 393, ***Subhadra Girl's High School v. State of Odisha***, 2017 (II) OLR 1, and the judgment of the Madurai Bench of Madras High Court in the case of ***M. Mohan v. The Principal, KV, Thirupparankudam, Madurai***, (W.P.(C) (MD) No.4069 of 2015, disposed of on 30.03.2015.

5. This Court heard Mr. S.K. Rath, learned counsel for the petitioner; and Mr. H.K. Tripathy, learned counsel for opposite parties and perused the record. Pleadings having been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. The facts as delineated above are not disputed. The KVS issued guidelines for admission in Kendriya Vidyalayas for the session 2019-20 and onwards. In part-C thereof, the details of procedure for admission have been indicated, wherein clause-1 deals with publicity, clause-2-registration, clause-3-documents and clause-4 of the guidelines, which deals with method of admission in Class-I, being relevant is extracted hereunder:

*"4. **METHOD OF ADMISSION IN CLASS- I***

Out of the available seats of fresh admission 15% will be reserved for SC and 7.5% will be reserved for ST. The short fall in the number of seats reserved for SC and ST, will be worked out after considering number of SC/ST children admitted under RTE quota.

*(1) **<u>In first phase</u>**, 10 seats (out of 40 seats) in Class I per section are to be filled as per RTE Provisions (25% of seats) and these 10 seats will be filled by draw of lots from all applications of SC/ST/EWS/BPL/OBC (Non-Creamy Layer) who are the resident of Neighborhood/Differently abled taken together.*

*(2) **<u>In second phase</u>**, remaining seats are to be filled as per existing Priority category system. The short fall in the seats reserved for SC/ST, if any shall be made good by admitting SC/ST applicants.*

***<u>For example</u>**: In a single Section School 6 seats are reserved for SC and 3 Seats for ST (15% for SC and 7.5% for ST). Assuming that, 2 SC candidates, 1 ST candidate and 1 Differently Abled candidate are admitted under RTE in the lottery system in first phase, then available SC seats will be considered as 6-2 = 4 and ST seats will be 3-1 =*

2. The left out registered candidates from SC and ST category will be considered as per order of Priority categories for admission. In this case the remaining 24 seats will be available for admission under order of Priority of Category.

Note:-1

a) In no case the seats reserved as per RTE will be de-reserved.

b) The seats reserved for SC/ST may be interchanged, by interchanging SC seats to ST and vice- versa after 20th April.

c) If required numbers of candidates covered under RTE do not register in 1st spell of registration then a second notification may be given in the month of April.

d) The definition/eligibility criteria of Disadvantaged Group/Weaker Section/BPL/OBC (Non-creamy layer) will be as per the notification of the concerned State Governments.(The DC KVS RO Concerned may issue guidelines regarding BPL/EWS as per the latest notification of the concerned State Governments).

e) Admission test will not be conducted for Class I.

Note:-2

A. DEFINITION OF DISADVANTAGED GROUP

1. Child belonging to disadvantaged group means a child belonging to the Scheduled Caste, Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economic, geographical, linguistic, gender or such other factor as may be specified by the appropriate government, by notification (Section 2(d) of RTE Act).

2. Child with special needs and suffering from disability will be determined as per the provision mentioned in RTE Act 2009 or as defined by the concerned State Govt.

B. DEFINITION OF WEAKER SECTION

** Child belonging to weaker section means a child belonging to} such a parent or guardian (declared by a Court or a Statute) whose annual income is lower than the minimum limit specified by the appropriate government, by notification (Section 2(e)).*

** The income limit regarding economically weaker sections will be applicable as notified by the State Govt. concerned.*

B. DEFINITION OF NEIGHBOURHOOD & PROOF OF RESIDENCE (APPLICABLE FOR ADMISSION UNDER RTE ONLY)

Since Kendriya Vidyalayas are located at places with varied density of population, they have been categorized as follows for determining the limits of neighbourhood:-

1	Major cities and Urban area (All District Hqrs. & Metros)	5 kms. Radius
2	Places and areas other than included in 1 above	8 kms Radius

Note:-3

1. Proof of residence shall have to be produced by all applicants.

2. A self-declaration in writing from the parent about distance may also be accepted to this effect, subject to verification."

7. The petitioner, having satisfied the requirements under clause-4, submitted his application form through online wherein it has been specifically indicated that distance of the school from his residence is less than or equal to 5 km, and the guidelines require that it should be "5 kms Radius". In any case, the petitioner's name found place at sl.no.36 in the first admission list notified on 09.03.2019. The petitioner could not take admission, as the list was restricted up to sl.no.30. Therefore, when the second list was notified on 26.04.2019, the petitioner's name, having been found place at sl.no.6, he had every likelihood to get himself admitted into Standard-I. But when admission was not given to him, on query being made on 01.05.2019, it was communicated to him that distance of his residence is more than 5 kms (Google search) and more than 5 kms is not the only reason for denying admission under RTE category. But what are other reasons for denial of admission have not been reflected in Annexure-5 dated 01.05.2019. Therefore, the sole question for consideration is whether the petitioner has been denied admission because of the reason that distance of his residence was found to be more than 5 kms (Google search) and if so whether the same is tenable in the eye of law.

8. Under Sub-clause-B of Clause-4, the distance in major cities and urban area has been indicated "5 kms Radius" not "only 5 kms". The contention raised by Mr. S.K. Rath, learned counsel for the petitioner that "5 kms Radius" if taken into consideration, which is well within the limitation of distance prescribed under the guidelines, and by misconstruing such provision, the rejection on the ground of more than 5 kms, the authorities have committed illegality and irregularity in not giving admission to the petitioner in Standard-I in KV Bhubaneswar No.2. The distance of 4.63 kms has been determined on the basis of (Google search) and on the basis of the map attached to the writ petition as Annexure-4. If that would be taken into consideration, then it would be within "5 kms Radius" as per the guidelines issued by the opposite parties. But Mr. H.K. Tripathy, learned counsel for the opposite parties contended that on request of the parents, two of the persons, namely, B.S. Behera and S.K. Biswal went to the residence of the petitioner from KV Bhubaneswar No.2, CRPF Campus to LIG, BDA colony, Chandrashekharpur, to assess the distance by shortest route through a motor bike and found that to and fro distance is 14.6 kms (one way 7.3 kms). Thereby, the distance is more than 5 kms.

9. In view of the anomalies with regard to measurement of distance available on record, this Court took into consideration Sub-clause-B of Clause-4 of the guidelines issued by the KVS where the distance factor has

been considered on the basis of "5 km Radius". There is no ambiguity that the distance has to be measured on the basis of "5 km Radius".

10. ***BREET, M.R.*** while considering the "cardinal rule" in ***Lion Insurance Association v. Tucker***, (1883-84) 12 QBD 176, p.186 held that "whenever you have to construe a statute or document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject matter with regard to which they are used".

Similar view has also taken in ***Re. Bidie (deceased) v. General Accident Fire and Life Assurance Corporation Ltd.***, (1948) 2 All ER 995, page-998, ***Captain Subash Kumar v. Principal Officer, Mercantile Marine Deptt***., AIR 1991 SC 1632 : 1991 (2) SCC 449.

Therefore, when it is said that words are to be understood first in their natural, ordinary or popular sense, what is meant is that the words must be ascribed that natural, ordinary or popular meaning which they have in relation to the subject matter with reference to which and the context in which they have been used in the statute.

11. The words of common use are generally to be construed according to their natural, plain and ordinary signification. Therefore, the word used in Sub-clause-B of Clause-4 with regard to the factum that the KVS established Kendriya Vidyalayas located at places with varied density of population and as such they have been categorized for determining the limits of neighborhood, so far as headquarters is concerned, "5 kms Radius" has been specified. In order to have a better understanding and clarity of the word "Radius", this Court has taken into consideration and help of dictionaries to ascertain the plain and ordinary meaning attached to the said word.

In ***Cambridge English Dictionary***, it has been defined as:-

"(the length of) a straight line joining the centre of a circle to its edge of the centre of a sphere to its surface."

In ***Oxford Advance Learner's Dictionary***, Radius means:-

"a straight line between the centre of a circle and any point on its outer edge; the length of this line."

As per ***Collins Dictionary***, the word "Radius" means-

"1. The radius around a particular point is the distance from it in any direction.
2. The radius of a circle is the distance from its centre to its outside edge."

According to ***Merriam Webster Dictionary***, "Radius" means:-

*“**1:** a line segment extending from the center of a circle or sphere to the circumference or bounding surface.*

***2a:** the bone on the thumb side of the human forearmalso **:** a corresponding part of vertebrates above fishes.*

***b:** the third and usually largest vein of an insect's wing*

***3a:** the length of a radiusa truck with a short turning radius*

***b:** the circular area defined by a stated radius*

***c:** a bounded or circumscribed area*

***4:** a radial part*

***5:** the distance from a center line or point to an axis of rotation”*

In ***Free Dictionary***, “radius” has been defined to mean:-

*“**1.** Abbr. **r** or **rad.** Mathematics*

***a.** A line segment that joins the center of a circle with any point on its circumference.*

***b.** A line segment that joins the center of a sphere with any point on its surface.*

***c.** A line segment that joins the center of a regular polygon with any of its vertices.*

***d.** The length of any such line segment.*

***2.** A circular area measured by a given radius: every family within a radius of 25 miles of the city center.*

***3.** A bounded range of effective activity or influence: the operating radius of a helico pter.*

***4.** A radial part or structure, such as a mechanically pivoted arm or the spoke of a wheel.*

***5.** Anatomy*

***a.** A long, prismatic, slightly curved bone in humans, the shorter and thicker of the two forearm bones, locatedon the lateral side of the ulna.*

***b.** A similar bone in many other vertebrates.”*

12. On considering the meaning of the word “Radius”, as defined in different dictionaries indicated above, would go to show that Radius is a straight line drawn from the centre of a circle to any point of the circumference. Its length is half of the diameter of that circle, or is the space between the centre and the circumference. The centre for measurement from which the Radius would shoot was not required to be located in the middle of the space occupied by a public market, which is usually not a square but some other geometrical figure, as a parallelogram or triangle; for the space between the centre and the external boundaries would have to be included in the length of the distance, and this would shorten that length.

The term “Radius” means a “Straight line drawn or extended from the centre of a circle to its periphery”, for example an agreement not to practice dentistry within a Radius of ten miles of the town means from the

centre of the town; the town as a whole not being suitable as the centre implied by the term "Radius".

13. Applying the above meaning of the word "Radius" to the present context, distance between the school and residence of the petitioner has to be within 5 kms Radius from the centre, i.e., KV Bhubaneswar No.2, would be taken into as center, which a straight line drawn or extended from that place of the circle to its periphery. Therefore, the distance between the school and the petitioner's residence should be within the "5 kms Radius", in fact it is 4.63 km, as per Google search, which is within the 5 Km Radius. Therefore, any other mode of measurement of distance is prohibited, meaning thereby, the distance calculated, by going through motorbike, ascertaining as 7.3 kms, cannot have any justification. Thereby, this Court rejects such measurement, as the guidelines specifically make it clear that distance would be "5 kms Radius". If "Radius" would be taken into consideration, then in that case, the measurement made by the Google search, which has been furnished in Annexure-4 making it 4.63 kms, is well within the Radius of 5 kms. Apart from the same, the petitioner's assertion at para 9 of the writ application that the measurement has to be done on the basis of "Google Search" which has been followed in other States, there is no specific denial in the counter affidavit to that extent. In absence of denial, the pleadings made by the petitioner are to be treated uncontroverted and admitted. In view of such admitted fact, the reason assigned for rejecting the application of the petitioner cannot have any justification.

14. Mr. H.K. Tripathy, learned counsel for opposite parties contended that rejection of the application of the petitioner on the ground of distance of more than 5 kms is one of the reason under the RTE category and other reasons, for which the admission has been denied, have not been explained in Annexure-5, but have been reflected in the counter affidavit. The other reasons denying admission, which have been assigned in the counter affidavit, cannot be taken into consideration, reason being Annexure-5, in which reasons of rejection have been endorsed, does not disclose such reasons, save and except the distance of residence of the petitioner was found to be more than 5 kms (Google search).

15. In ***Commissioner of Police, Bombay v. Gordhandas Bhanji,*** AIR 1952 SC 16 the apex Court held as follows:

> *"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do.*

Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow old."

16. Relying upon the aforesaid judgment, the apex Court in ***Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi,*** AIR 1978 SC 851, held as follows:

" …… when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.

Similar view has also been taken by this Court in various judgments.

17. The contention raised by learned counsel appearing for the opposite parties that the petitioner was not selected, cannot have any justification, in view of the fact that considering the materials available on record and produced before the authority through online application, the merit list was drawn up in which the petitioner's name found place at sl.no.36 and in first phase, 30 students were admitted and in second phase, the petitioner was called upon for verification of documents and admission, and after that his application was rejected on the ground that the distance of his residence was found to be more than 5 kms (Google search). Therefore, any other ground which has been taken in the counter affidavit and also in course of argument, cannot sustain in the eye of law and, as such, the same is hit by principle of estoppels.

18. The opposite parties, having selected the petitioner and called upon him to appear for verification of documents and admission, should not have rejected his candidature on the basis of distance factor, as they are estopped from making any further ground to justify their action reflected in the counter affidavit in this proceeding.

19. The principle of promissory estoppels has been considered by the apex Court in **Union of India and others v. M/s.Anglo Afghan Agencies etc.**, AIR 1968 SC 718, **Chowgule & Company (Hind) Pvt. Ltd. v. Union of India and others,** AIR 1971 SC 2021, **M/s.Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh and others,** AIR 1979 SC 621, **Union of India and others v. Godfrey Philips India Ltd.,** AIR 1986 SC 806, **Delhi Cloth & General Mills Ltd. v. Union of India and others,**

AIR 1987 SC 2414, **Bharat Singh and others v. State of Haryana and others,** AIR 1988 SC 2181 and many other subsequent decisions also.

Similar view has also been taken by this Court in ***Dr. (Smt.) Pranaya Ballari Mohanty v. Utkal University***, 2014 (I) OLR 226 and in ***Rajanikanta Priyadarshy v. Utkal University***, 2015 (I) OLR 212.

20. The reliance has been placed by learned counsel for the opposite parties on the decisions of this Court rendered in ***Chitta Ranjan Behera*** and ***Subhadra Girl's High School*** (supra) wherein this Court held that person seeking equity must do equity and that it is not just the clean hands, but also clean mind, clean heart and clean objectives that are the equi-fundamentals of judicious litigations. Both the judgments relied upon by learned counsel for opposite parties, have no application to the present context as the same are distinguishable.

21. Much reliance has been placed on the judgment of the Madurai Bench of Madras High Court in ***M. Mohan*** (supra), but the said case was decided only on the distance factor as has been specified as 03 kms. But on measurement made by the school authority with the petitioner's motor cycle, it came to know that distance was 6.4 kms and not 03 kms, therefore rejected the claim of the petitioner therein. The fact of the said case is distinguishable to the present one because here the factum of distance has been specifically mentioned in the guidelines issued by the KVS as "5 kms Radius". As a matter of fact, it is not the distance of 5 kms simplicitor, rather it is distance of "5 kms Radius". Therefore, in view of the law discussed above, the judgment in ***M. Mohan*** mentioned supra is also distinguishable from the present context.

22. Mr. H.K. Tripathy, learned counsel for the opposite parties contended that since the academic session has already begun, in the event the petitioner succeeds in the writ petition, it may not be possible to get him admitted into the course. But this contention cannot be sustained in the eye of law, in view of the fact that if wrong has been committed by the authority, for that purpose the petitioner cannot be denied to get admission into the course, particularly when the course has begun only in the month of April, 2019, and only five months have lapsed with the intervening period of one month of summer vacation.

23. Mr. S.K. Rath, learned counsel for the petitioner brings to the notice of the Court that in exercise of powers conferred by Section 38 of the Right of Children to Free and Compulsory Education Act, 2009, the Central

Government framed Rules called "***The Right of Children to Free and Compulsory Education Rules, 2010***". Rule-14 of the said Rule, reads as follows:-

> *"14. Extended period for admission – (1) Extended period of admission be six months from the date of commencement of the academic year of a school.*
>
> *(2) Where a child is admitted in a school after the extended period, he shall be eligible to complete studies with the help of special training, as determined by the head teacher of the school."*

24. In view of the aforesaid Rules, if the admission would be given to a child after extended period of six months from the commencement of academic year of the school, obligation will be on the part of the school to make him/her eligible to complete studies with the help of special training, as determined by the head teacher of the school. In the present case, the said six months period has not been elapsed. Therefore, if the petitioner is admitted into Standard-I, then in view of Rule-14, as referred above, he can be able to complete the study with the help of special training given by the head teacher of the school. Thereby, no prejudice would be caused either to the petitioner or to the institution.

25. In view of the aforesaid facts and circumstances, as well as the settled position of law discussed above, the reason as endorsed in Annexure-5 dated 01.05.2019 rejecting the candidature of the petitioner on the ground of distance found more than 5 kms (Google search), cannot sustain in the eye of law, and further reason assigned that more than 5 kms is one of the reasons for denying admission under RTE category also cannot sustain, and the same are hereby quashed. The opposite parties are directed to give admission to the petitioner in KV Bhubaneswar No.2 in Standard-I for the academic sessions 2019-20 within a period of 10 days from the date of passing of this judgment. It is made clear that if the seats are filled up, necessary steps shall be taken for creation of one seat for the petitioner and he shall be allowed to continue in KV Bhubaneswar No.2 in Standard-I for the academic session 2019-20 by providing all assistance to him in compliance of Rule-14 of the Right of Children to Free and Compulsory Education Rules, 2010.

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

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2019 (II) ILR - CUT- 814

D. DASH, J.

W.P.(C) NO. 21619 OF 2016

S. BALAKRUSHNA & ORS. ……….Petitioners

.Vs.

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

ORISSA GRAMA PANCHAYAT ACT, 1964 – Section 8 read with Section 148 – Provisions under – Reorganization and delimitation of Grama – Writ petition challenging the notification bifurcating a Gramapanchayat – Scope of interference by writ court – Discussed.

"The position has been settled that in such matters, the Court is not entitled to interfere with such decisions except when it comes to the conclusion that the decision has been so taken on extraneous considerations or has been done by ignoring the relevant materials and the power has been so exercised colourably.Indisputably, the village Kalarapadar is the highest populated village among those, which constitute the newly created Grama Panchayat. All the villages constituting the Grama Panchayats are within a distance of 3 kms from village Kalarapadar.Excepting the fact that village Bhuduki is situation almost at the mid of the other villages neither on population count nor of any other count, the creation of Bhuduki Grama Panchayat having its headquarter at Bhuduki satisfies the norms. Authorities have reported that it is administratively convenient from all angles as also the constituent villages to have Kalarapadar Grama Panchayat with its headquarter there and its for better administrative convenience serving larger public interest. No such extraneous considerations are seen to have weighed in the mind while taking that decision. The DLC have considered the representations in that regard and so also on the second round, the Commissioner-cum-Secretary has heard all concerned and agreed with the view in support of the creation of Kalarapadar Grama Panchayat with headquarter at Kalarapadar. The suggestion of the Local Member of the Legislative Assembly had in fact been given after recommendation of the DLC. It is also not seen to have been give any such weightage in considering the matter for final notification. The decision is found to have been taken upon a cumulative view of all those factors as indicated in the guidelines by striking balance whereby the pan has tilted in favour of creation of Kalarapadar Grama Panchayat with headquarter at Kalarapadar."

For Petitioners : M/s. Deepali Mohapatra & S. Parida.
For Opp. Parties : Additional Standing Counsel
Mr. Prasant Kumar Panda.

JUDGMENT Date of Hearing : 22.04.2019 : Date of Judgment : 01.05.2019

D.DASH, J.

The petitioners, being the villagers of Bhuduki, have filed this writ application invoking the jurisdiction of this Court under Articles 226 and 227 of the Constitution, with the prayer to direct the State and its other functionaries to create the new Grama Panchayat as Bhuduki Grama Panchayat with its headquarter at Village Bhuduki instead of Kalarapadar

Grama Panchayat with the headquarter at village Kalarapadar with further prayer to quash the notification dated 4.7.2016 under Annexure-10 in relation to bifurcation of Goutami Grama Panchayat and consequentially the order dated 22.11.2016 passed by the Government in the Department of Panchayat Raj under Annexure-11 pursuant to the order dated 4.10.2016 passed by this Court in W.P.(C) No. 17208 of 2016.

2. Facts necessary for the purpose of the present proceeding are as under :-

The petitioners are permanent residents of village Bhuduki, which was initially under Goutami Grama Panchayat.

On 1.7.2015, the Government, in adherence to the provision contained in section 8 read with section 148 of the Grama Panchayat Act, 1964 (in short, 'the Act') and the rules framed thereunder coming into force with effect from 12.12.1995, issued notification of reorganization and delimitation of the Gramas within the State, division of Grama into wards, constitution of Grama Panchayats for such Gramas and constitution of Zilla Parishad constituency, if so required after reorganization of Grama Panchayats within the Panchayat Samiti.

Pursuant to the provisions contained in the Act, the State Government having issued said notification on 1.7.2015; accordingly asked all the Collectors and District Magistrates of all the Districts of the State to submit necessary informations by 15.9.2015 for reorganization of Grama Panchayat.

3. Coming to the case on hand, the Collector, Ganjam (opposite party No.2) called for a meeting for reorganization and delimitation of Gramas in the District. The Block Level Committee (BLC) consisting of the opposite party No. 3 to 6 as members was constituted and assigned with the task of preparing data sheets and propose reorganization of Grama Panchayats by bifurcation and amalgamation of the villages adjoining to the Grama as per law in the block of Sanakhemundi under notification dated 7.7.2015.

The Block Level Committee (BLC), after preparation of the data sheets, submitted the proposal to the Collector and District Magistrate on 22.7.2015 vide Annexure-2 dividing the Goutami Grama Panchayat into two, i.e, Goutami Grama Panchayat and with the creation of new one as Bhuduki, B.Dharmpur and Matia Bourie having population of 1665, 1191, 643 and 978 respectively as per census of 2011, in total coming to 4777. Objections were invited by the opposite party No.2 vide letter dated 7.8.2015 and in pursuance of the same, in so far as this case is concerned, villagers of village Bhuduki submitted their representation under Annexure-4 and also the villagers of

Village Kalarapadar raised their grievance against creation of new Bhuduki Grama Panchayat with headquarter at Bhuduki. The same being placed before the District Level Committee (DLC) on 15.9.2015, the representation was rejected and it was resolved for creation of a new Grama Panchayat, namely, Kalarapadar bifurcating the original Goutami Grama Panchayat under Annexure-5. Accordingly, the proposal was sent to the Government.

After submission of the proposal by the DLC, the Member of the Legislative Assembly of the area wrote a letter on 22.3.2016 to the Hon'ble Minister, Panchayat Raj Department suggesting that instead of Bhuduki Grama Panchayat being created, Kalarapadar Grama Panchayat be created. The same was sent to the Collector and then to the BLC. The view of BLC being sought for, the earlier view was reiterated which came to be placed and finally the recommendation/proposal of DLC was accepted.

It is alleged that the opposite party No.1, being influenced by the suggestions of the local member of the Legislative Assembly and surrendering to the political pressure, made the bifurcation of Goutami Grama Panchayat into two, namely, Goutami and Kalarapadar, which has been published on 4.7.2016 under Annexure-10.

4. The petitioners then had approached this Court by filing W.P.(C) No. 17208 of 2016. While disposing the said writ petition on 4.10.2016, this Court has passed the following order :

> "Heard learned counsel for the petitioners and learned Additional Government Advocate.
>
> The petitioners are the villagers of three villages namely Bhuduki, D.Dharampur and Matia Bourie, which were under the jurisdiction of Goutami Grama Panchayat. The Block Level Committee had proposed for creation of Bhuduki Grama Panchayat on bifurcation of Goutami Grama Panchayat.
>
> The appropriate authorities have however created a new Grama Panchayat named Kalarapada on bifurcation of Goutami Grama Panchayat. All the aforesaid three villages have been brought under the Kalarapada Grama Panchayat. Bhuduki is a village with the second highest population in Kalarapade Grama Panchayat and it is situated at equi distance from all the villages of the Grama Panchayat.
>
> In view of such facts, the petitioners want that the new Grama Panchayat should be named after Bhuduki and the headquarter of the same should also be fixed at village Bhuduki.
>
> Taking into consideration the limited grievance of the petitioners and without going into merit of the case, this writ petition is disposed of with a direction that the petitioner shall file a detailed representation alongwith a certified copy of this order and copy of the writ petition containing all the Annexures, before the

> Commissioner-cum-Secretary to the Government. In Panchayati Raj Department, within 15 (fifteen) days from today.
>
> Learned Commissioner-cum-Secretary to the Government in Panchayati Raj Department is directed to consider the grievance of the petitioners within six weeks from the date of receipt of a certified copy of this order. If necessary, the petitioners and other concerned parties may be given opportunity of hearing in the matter, and a reasoned order in consonance with the guidelines of the Government be passed by the learned Commissioner-cum-Secretary, Panchayati Raj Department.
>
> It is made clear that the Commissioner-cum-Secretary, to the Government in Panchayati Raj Department shall not be influenced by any political consideration in disposing of the representation filed by the petitioners and he shall act strictly according to the Governments guidelines and Rule governing the field.
>
> The writ petition is accordingly disposed of.
>
> xx xx xx xx"

However, the Government, opposite party No.1, has finally passed the order on 22.11.2016 as at Annexure-11 rejecting the representation of the petitioners and thus giving further seal of approval to the notification under Annexure-10.

5. Counter affidavits have been filed by the opposite party No.1 and 7.

The opposite party No.1, while traversing the averments made in the writ application, has asserted that for administrative convenience and better delivery of service to the citizen, the notification of reorganization/delimitation of Gramas, in exercise of powers conferred under section 149 of the Act has been made vide notification No. 10729/PR dated 1.7.2015. As per the said guidelines, the Panchayat having population around 10000 or more can be reorganized and a new Grama Panchayat can be constituted basing on the geographical location/natural barrier and for administrative convenience. The guidelines contain that the distance factor from the farthest village to the proposed Grama Panchayat Headquarter should be around 2 to 5 Kms. It also mandates that while selecting the Grama Panchayat Headquarter, proper care should be taken that the proposed Headquarter is approachable from the tagged villages, centrally location and administratively convenient to the people. With regard to the priority being given to cover the villages of Grama Panchayat Headquarter, three categories have been made, i.e, (i) population of 2000 and above as 1st priority; (ii) population of 1500 and above as 2nd priority; and (iii) population of 1000 and above as 3rd priority.

It has been further clarified that in case two or more villages come under the same category, then higher population, locational advantage and

administrative convenience should be given preference for constitution of new Grama Panchayat Headquarter.

Reverting to the facts of the case as obtained in this proceedings, it is started that BLC though had recommended Bhuduki to be the new Grama Panchayat by way of bifurcation of Goutami Grama Panchayat, the DLC did not agree with the same and modified the proposal which is within its domain. The DLC recommended for creation of Kalarapadar Grama Panchayat taking into account its highest population with prevalence of very good communication facilities to all the constituent villages with all the villages situated within three kms from the said headquarter. So, it is asserted that the creation of the new Grama Panchayat with the fixation of its headquarter, as has been done causes, no inconvenience for villagers of all the three villages in any manner whatsoever.

In so far as the political pressure through the suggestion/recommendation of the local Member of the Legislative Assembly is concerned, the same has been denied. It has been asserted that the action as regards the creation of new Grama Panchayat, i.e, Kalarapadar Grama Panchayat by bifurcation of Goutami Gram Panchayat fixing its headquarter at village Kalarapadar is quite in consonance with the provisions of the Act and rules and also the guidelines made in that behalf. It has next been stated that after creation of the Kalarapadar Grama Panchayat, one Panchayat Raj Institution Election has already been held in the year 2017 and all the office bearers of the newly created Kalarapadar Grama Panchayat have assumed the office, which is running at the Headquarter at Kalarapadar.

The opposite party No.7, the elected Sarpanch of the newly created Kalarapadar Grama Panchayat in his counter, has also taken the same stands all in favour of creation of new Grama Panchayat, i.e, Kalarapadar Grama Panchayat after bifurcation of Goutami Grama Panchayat with fixation of headquarter at village Kalarapadar.

6. Learned counsel for the petitioners submitted that while issuing the notification under Annexure-10 dated 4.7.2016, there was no recommendation from the BLC and the notification has been issued purely on political consideration. She, therefore, urged that the notification dated 4.7.2016 and order dated 22.11.2016 as at Annexure-10 and 11 respectively are bad in the eye of law and liable to be quashed.

It was her submission that in order to go to Kalarapadar Grama Panchayat office, which situates on the extreme end of the villages, the

residents of all the three villagers would suffer a lot especially the marginalized, senior citizen and other categories in deriving the real benefit of all the welfare schemes and measures of the State as also the Center. According to her, village Bhuduki is centrally located and is convenient and ideal location vis-à-vis all the villages and if the headquarter of the newly created Grama Panchayat is fixed at village Bhuduki, it would be ideal and convenient for the inhabitants of those three villages. It was submitted the DLC has overturned the recommendation of the BLC in an arbitrary manner in the absence of any such justification. In view of all the above, she argued that this Court, in exercise of the writ jurisdiction, should quash the notification under Annexure-10 and the consequential order under Annexure-11 and accordingly issue directions.

In support of her contentions, she relied upon the decisions of theis Court in the cases of "Promod Kumar Bahidar and others -V- State of Orissa and othes", 1992 (I) OLR 392; "M.Narasimlulu Reddy and others -V- State of Orissa and others"; 2006 (Supp-II) OLR 845 and "Prabhasini Nayak and others -V- State of Orissa and others"; 2009 (Supp-I) OLR 623.

7. Learned Additional Standing Counsel reiterating the averments taken in the counter affidavit of opposite party No. 1 submits that all such actions having been taken in consonance with the provisions of the Act and Rules as also the guidelines famed thereunder, the writ application is devoid of merit.

8. In view of the rival case as also the submissions noted above, the question stands for consideration is as to whether the order of the State Government deciding the bifurcation of Goutami Grama Panchayat in creating the new Grama Panchayat, i.e, Kalarapadar Grama Panchayat with fixation of its headquarter at village Kalarapadar is a bone fide one taking into consideration all the factors so as to subserve the interest of all the inhabitants of all the villages at large, or it is merely a colourable exercise of power not supported by any materials and has been arbitrarily passed by the State Government.

Provision of section 149 of the Act empowers the State Government to pass order for reorganization and delimitation of the Gramas within the State. Accordingly, vide notification dated 1.7.2015 under Annexure-1, the Government, in the Department of Panchayati Raj have published the order laying down the norms procedure and time table under Annexure-I, II and III. The norms to be adopted for reorganization of the Grama Panchayats are at under Annexure-1 whereas the procedure for working out the proposal and

disposal of suggestions for the proposed reorganization of Grama Panchayats are at Annexure-II and Annexure-III concerns with the maintenance of uniformity in the progress of work on reorganization of the Grama Pancayat.

9. The petitioners are the residents of village Bhuduki. Although at the earlier stage, in filing W.P.(C) No. 17208 of 2016, some residents of village Matia Bourie and B. Dharmpur had joined with these petitioners; in the present proceeding, they have not come forward. Admittedly, this village Bhuduki was under the original Grama Panchayat Goutami. This Court on the earlier occasion had directed the Commissioner-cum-Secretary to Government, in the Department of Panchayat Raj to consider the grievance of the petitioners therein; the claim therein was as the present one, i.e, the headquarter of the newly created Grama Panchayat should be at Bhuduki. The petitioners of that writ petition, i.e, the villagers of the three villages, namely, Bhuduki, B.Dharmpur and Matia Bourie were heard and the Block Development Officer as well as District Panchayat Officer placed the facts. The reason in support of the same is that Kalarapadar is the highest populated village administratively convenient than other three villages having no such disadvantage as to the inhabitants of other village.

10. In case of Promod Kumar Bahidar (Suptra), in the matter of change of name of the Grama Panchayat and its headquarter, this Court found from the materials placed that the discretionary power exercised by the Hon'ble Minister in ignoring the earlier positive affidavit against such change as well as that of the enquiry report of the Collector against the change, as based on extraneous consideration and arbitrary.

This Court in M.NBrasimhulu (Supra), dealing with a matter of delinking of a village from one Grama Panchayat and linking it with another finding that the decision had been so taken without due application of mind to the relevant materials had been so taken without due application of mind to the relevant materials had remitted the matter for reconsideration.

In case of Prabhasini Nayak (Supra) in the matter of creation of new Grama Panchayat, the decision of the Government overturning the positive report of the Collector as to fixation of headquarter based on due consideration of all aspects was found to be arbitrary, based on extraneous consideration and not supported by reason.

The position has been settled that in such matters, the Court is not entitled to interfere with such decisions except when it comes to the conclusion that the decision has been so taken on extraneous considerations

or has been done by ignoring the relevant materials and the power has been so exercised colourably. Indisputably, the village Kalarapadar is the highest populated village among those, which constitute the newly created Grama Panchayat. All the villages constituting the Grama Panchayats are within a distance of 3 kms from village Kalarapadar. Excepting the fact that village Bhuduki is situation almost at the mid of the other villages neither on population count nor of any other count, the creation of Bhuduki Grama Panchayat having its headquarter at Bhuduki satisfies the norms. Authorities have reported that it is administratively convenient from all angles as also the constituent villages to have Kalarapadar Grama Panchayat with its headquarter there and its for better administrative convenience serving larger public interest. No such extraneous considerations are seen to have weighed in the mind while taking that decision. The DLC have considered the representations in that regard and so also on the second round, the Commissioner-cum-Secretary has heard all concerned and agreed with the view in support of the creation of Kalarapadar Grama Panchayat with headquarter at Kalarapadar. The suggestion of the Local Member of the Legislative Assembly had in fact been given after recommendation of the DLC. It is also not seen to have been give any such weightage in considering the matter for final notification. The decision is found to have been taken upon a cumulative view of all those factors as indicated in the guidelines by striking balance whereby the pan has tilted in favour of creation of Kalarapadar Grama Panchayat with headquarter at Kalarapadar.

11. For all the aforesaid, this Court finds the notification under Annexure-10 and the subsequent order passed by the opposite party No.1 and under Annexure-11 to be bonafide one after taking into consideration all the relevant factors and being of the opinion that the same would subserve the interest of the inhabitants of all the villages constituting that newly created Grama Panchayat and that they would face no such inconvenience, which does not suffer from the vice of arbitrariness.

12. The writ application is accordingly dismissed. There will be, however, no order as to cost.

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2019 (II) ILR - CUT- 822

D. DASH, J.

GOVERNMENT APPEAL NO. 24 OF 1992

STATE OF ORISSA ……….Appellant

.Vs.

BANKA JAYASINGH ……….Respondent

CODE OF CRIMINAL PROCEDURE, 1973 – Section 378 (1) (3) – Appeal by State against the order of acquittal – Offence under section 376 of Indian Penal Code – Interference by High court in appeal – Scope of – Discussed.

*"**it** has been held in case of **Basappa Vrs. State of Karnataka**; (2014) 57 OCR 1044 that the High Court in an appeal under section 378 Cr.P.C. is entitled to reappraise the evidence and put the conclusions drawn by the trial court to test but the same is permissible only if the judgment of the trial court is perverse. Relying the case of **Gamini Bala Koteswara Rao and others – Vrs. State of Andhra Pradesh**; (2009) 10 SCC 639, it has been held that the word "perverse" in terms as understood in law has been defined to mean 'against weight of evidence'. In '**K. Prakashan Vrs. P.K. Survenderan**; (2008) 1 SCC 258, it has also been held that the Appellate Court should not reverse the acquittal merely because another view is possible on evidence. It has been clarified that if two views are reasonably possible on the very same evidence, it cannot be said that prosecution has proved the case beyond reasonable doubt (Ref.:- **T. Subramaniam Vrs. State of Tamil Nadu**; (2006) 1 SCC 401). Further, the interference by appellate Court against an order of acquittal is held to be justified only if the view taken by the trial court is one which no reasonable person would in the given circumstances, take (Ref.:- **Bhima Singh Vrs. State of Haryana;** (2002) 10 SCC 461)".* *(Para 5)*

Case Laws Relied on and Referred to :-

1. (2014) 57 OCR 1044 : Basappa .Vs. State of Karnataka.
2. (2009) 10 SCC 639 : Gamini Bala Koteswara Rao & Ors .Vs. State of Andhra Pradesh
3. (2008) 1 SCC 258 : K. Prakashan .Vs. P.K. Survenderan.

For Appellant : Mr.P.C.Das, Additional Standing Counsel
For Respondent :

JUDGMENT Date of Hearing & Judgment : 31.07.2019

D.DASH,J.

The State, by filing this appeal, has called in question, the judgment dated 6.1.1992, passed by the learned Assistant Sessions Judge, Jeypore in Sessions Case No.44 of 1990. By the said judgment, the respondent (accused) having faced the trial being charged for offence under section 376 of the Indian Penal Code (in short, 'the IPC'), has been acquitted.

2. The prosecution case, in short, is that on 7.7.1990, the victim (P.W.1) and her friend (P.W.2) had been to Podala Laxmi weekly market. After

purchasing bangles in the said market, they went to one shop where they took liquor and around 5 pm, leaving that place, they and started their journey to the village. It is stated that on the way near the Primary Health Centre, one Podlam Domb caught hold of P.w.2 and this accused caught hold of P.W.1. P.W.2 somehow managed to escape from the clutch of that Podlam. The accused further dragged P.W.1 (victim) near the bushes by the side of the road and there having forcibly made her lie on the ground, by removing her wearing apparels, despite protest and resistance, committed rape on her. It is stated that during the period, one Maleswar and Endana who happen to be the brother of the victim (P.W.1), arrived and having seen them, the accused left the victim and fled away. The victim was then slapped by her brother and seeing that, P.W.2, who was hiding her presence nearby fled away. The peon of the Health Centre came to the spot and before him the victim narrated the incident of rape upon her by the accused. They all returned to the village and on 8.7.1990, the matter was orally reported by the victim at the police station, which was reduced into writing vide Ext.8. This led to the registration of the case at the Police Station. The investigation commenced. Finally, charge-sheet having been submitted, the accused faced the trial, as aforesaid.

The defence plea is one of complete denial and false implication.

3. The prosecution, in order to establish its case, has altogether examined 12 witnesses when the defence has examined one witness. The prosecution has also proved the FIR (Ext.8), seizure lists and other contemporaneous documents prepared and collected in course of the investigation.

The trial court, on evaluation of evidence and upon examination of the documents admitted in evidence from the side of the prosecution, has come to conclude that the sexual intercourse was with the consent of P.W.1

4. Learned Additional Standing Counsel for the State submits that the appreciation of evidence, as has been made by the trial court, is wholly perverse and when no such basic infirmity appears in the evidence of P.W.1, her solitary testimony ought to have been accepted to hold that such sexual intercourse was against her will and consent. In view of all the above, he urges that it is a fit case for setting aside the order of acquittal.

None appears on behalf of the respondent (accused) when the matter is called.

5. This Court is now called upon to examine the evidence laid by the prosecution in order to judge the sustainability of the finding of the trial court

to as to if the same is the outcome of the perverse appreciation of proper evidence. But before that, it is felt apposite to take note of the settled position of law as regards the scope of this appeal and power of this Court to interfere with the order of acquittal.

It has been held in case of ***Basappa Vrs. State of Karnataka***; (2014) 57 OCR 1044 that the High Court in an appeal under section 378 Cr.P.C. is entitled to reappraise the evidence and put the conclusions drawn by the trial court to test but the same is permissible only if the judgment of the trial court is perverse. Relying the case of ***Gamini Bala Koteswara Rao and others –Vrs. State of Andhra Pradesh***; (2009) 10 SCC 639, it has been held that the word "perverse" in terms as understood in law has been defined to mean 'against weight of evidence'. In '***K. Prakashan Vrs. P.K. Survenderan***; (2008) 1 SCC 258, it has also been held that the Appellate Court should not reverse the acquittal merely because another view is possible on evidence. It has been clarified that if two views are reasonably possible on the very same evidence, it cannot be said that prosecution has proved the case beyond reasonable doubt (Ref.:- ***T. Subramaniam Vrs. State of Tamil Nadu***; (2006) 1 SCC 401). Further, the interference by appellate Court against an order of acquittal is held to be justified only if the view taken by the trial court is one which no reasonable person would in the given circumstances, take (Ref.:- ***Bhima Singh Vrs. State of Haryana;*** (2002) 10 SCC 461).

6. In the backdrop of the settled position of law, let us first have a glance at the evidence of P.W.1 (victim) who is 18 years old. She has stated that at the time of commission of rape, she was struggling to escape and was very much protesting by giving pushes to the accused by her four limbs. P.W.2 is a friend of P.W.1, claims to have been watching the incident with her presence in the nearby place within the visibility range. She does not support that P.W.3 has stated to have seen the accused committing rape on P.W.1. She is silent on the score that P.W.1 was then during the period was protesting or struggling to escape from the clutch of the accused when she was being sexually assaulted. It is not the case of the prosecution that the accused was armed with any weapon or had given any threat to P.W.1. The conduct of P.W.2 is worth noting. She having escaped from the clutch of another and having seen P.W.1 to have been dragged to a distance by the accused has not left the place nor has come to the rescue of P.W.1 in any manner even by raising cry to attract the attention of others. It appears from her evidence, as if she was waiting for P.W.1 to come back so as to again proceed to the village together. P.W.1 does not say to have raised any cry to attract the attraction of

any passersby and P.W.2 has clearly stated that P.W.1 had not shouted at any time. It is the evidence of P.W.2 that P.W.1 has not told anything to her brothers and so also P.W.2 herself has admitted to have not disclosed the incident before anybody in the village. It has been stated in the FIR (Ext.8) that the brother of P.W.1 gave slap to P.W.1 and seeing that P.W.2 fled away from the spot. The case of the prosecution is that on arrival of the two, namely, Maleswar and Endana, the accused left the place. That Maleswar has been examined as P.W.3 and Endana has been examined as P.W.4.. It has been stated by P.W.3 that when they went for search of P.W.1, they found the accused was committing rape upon P.W.1. This user of word 'rape' appears to be of his own inference. He has next stated that they caught hold of him and while they were taking him to the hospital, he escaped from his clutch. He has further stated that P.W.1 then told that accused rapped her against her will and consent. Endana having been examined as P.W.4, has not supported the case of the prosecution.

The evidence of P.W.1 is to the effect that she had taken liquor and the incident took place one mile away from that liquor shop. Although, she has stated to have resisted like anything when the accused was forcibly committing rape upon her, it is her evidence that she had sustained no pain for the said incident and there was no bleeding from her private part. Surprisingly, this witness has gone to state that even at that moment, she had seen P.W.2 witnessing the incident. This appears to be absurd but as it is seen, such version of P.W.1 is to provide support to her evidence from the evidence of P.W.2. Now, the evidence of P.W.2 need again to be looked at. She is a married lady. It has been stated by her that her husband and his brother caught hold of the accused and took P.W.1 and the accused to the village whereas she did not go with them. She has further stated that she was witnessing the incident by standing on a rock and that is to the visibility of all and her role was as if a watcher. All these evidence being given a cumulative look, leads to a probable conclusion that the sexual activity of the accused and P.W.1 then at the time was consensual and there has been an attempt to give it a colour of rape by P.W.1 in view of sudden appearance of P.W.3, coming as an instinct of self preservation.

Above being the such state of affairs in the evidence, this Court is not in a position to accept the submission of learned counsel for the State that the conclusion of the trial court in holding that the prosecution has failed to establish its case beyond reasonable doubt for commission of offence under

section 376 of the IPC is perverse. Therefore, the judgment of acquittal is not liable to be inferred in this appeal.

7. In the result, the appeal stands dismissed. The LCR be sent back immediately.

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2019 (II) ILR - CUT- 826

D. DASH, J.

CRLREV NO. 82 OF 2016
CRLREV NO. 83 OF 2016
AND
CRLREV NO. 152 OF 2016

AKHAYA KU. BEHERA (CRLREV NO.82 OF 2016) ……….Petitioners
DILLIP KUMAR SAMAL (CRLREV NO.83 OF 2016)
PRAFULLA KUMAR DAS(CRLREV NO.152 OF 2016)

.Vs.

STATE OF ORISSA & ANR. ……….Respondents
(CRLREV NOS. 82, 83 & 215 OF 2016)

CODE OF CRIMINAL PROCEDURE, 1973 – Section 401 – Revision – Challenge is made to the order taking cognizance of the offence under section 13(1) (d) of the Prevention of Corruption Act and under sections 468/420/120-B Indian Penal Code – First FIR quashed and was confirmed by Apex Court – Second FIR involving the same event, Charge sheet filed and order taking cognizance was passed – Effect of – Held, there cannot be a second FIR in respect of the same offence/event and whenever any further information is received by the Investigating Agency, it is always to be taken in furtherance to the FIR already in hand which course is no more available in the present case in view of quashment of the first FIR.

Case Laws Relied on and Referred to :-

1. (2001) 6 SCC 181 : T.T. Antony .Vs. State of Kerala & Ors.
2. AIR 1938 PC 130 : Babulal Chaukhani .Vs. King Emperor.
3. (2009) 1 SCC 441 : Nirmal Singh Kahlon .Vs. State of Punjab
4. (2004) 13 SCC 292 : Upkar Singh .Vs. Ved Prakash & Ors.
5. (2010) 12 SCC 254 : Babubhai .Vs. State of Gujarat & Ors.
6. (2010) 14 SCC 444 : Chirra Shivraj .Vs. State of Andra Pradesh.
7. (2010) 9 SCC 567 : Muniappan .Vs. State of Tamil Nadu.

For Petitioners : Mr.Asok Mohanty, Sr. Adv
Mr.Rajat Kumar Rath, Sr.Adv

M/s.G.M.Rath, S.S.Padhy, B.B.Choudhury, S.S.Satapathy,T.Biswal & S.Dwibedi
(In CRLREV Nos.82 and 152 of 2016)

M/s.B.B.Choudhury, S.Satpathy & S.Dwibedy
(In CRLREV No.83 of 2016)

For Opp. Parties : Mr.Sangram Das, Standing Counsel Vigilance
(For O.P.1 in all CRLREVs)

JUDGMENT Date of Hearing : 25.06.2019: Date of Judgment :05.08.2019

D.DASH,J.

The above noted revisions have been filed questioning the legality and propriety of the order dated 24.8.2015 passed by the learned Special Judge Vigilance, Cuttack in T.R. Case No.28 of 2015 arising from Cuttack Vigilance P.S. Case No.57 of 2008 as at Annexure-10. By the said order, the court below has taken cognizance of the offence under section 13(1)(d) of the Prevention of Corruption Act, 1947 (in short, 'the P.C.Act') punishable under section 13 (2) of the said Act and under section 468/420/120-B Indian Penal Code (for short, 'the IPC'), and issued the process against these petitioners including the other accused, namely, Ramesh Kumar Mohanty.

2. The background facts relating to the case are as follows:

A news item being published on 29.6.2007 in Oriya daily, "*The Samaj"* about the corruption concerning the works undertaken by the Cuttack Development Authority (CDA) and the silence in the matter, it came to be placed before this Court in OJC No.6721 of 1999 seeking a direction for investigation by the Vigilance Department. This Court, having taken up that application, took cognizance of the allegations made therein. Having called for necessary response from different quarters, finally, on 02.01.2008, passed the following order:

> "14. Pursuant to the direction contained in order no.209 dated 29.6.2007, the Vice-Chairman of the CDA has filed an affidavit stating in paragraphs 6 and 7 thus:
>
> "6. That it is apt to state here that the agency was given escalation due to enhancement of labour component only in order to ensure compliance of the provision of Minimum Wages Act, fair wages clauses in the agreement and various circulars issued by Government time to time. In view of the withdrawal of the escalation clause the Contractor was not entitled to get the escalation on any other reasons or ground including cost of material, POL and etc. Any apprehension contrary to the same as has been published in the newspapers seems to have been based on mere surmises and bears no semblance of truthfulness.
>
> 7. That the agency was awarded execution of Sector 11 at a value of Rs.7,37,15,451/-. Work order was issued on 6.5.98 with completion period of 18 months. Subsequently

> the Contractor was asked to execute extra quantity of work in view of the conversion of the group housing areas the residential one which delayed the period of execution. The Super Cyclone also intervened for which the period was extended. But, however, the agency was not paid any escalation on the materials for the extended period. Government enhanced the minimum labour wages with effect from 1.5.99. In view of the statutory provisions and the fair wages clause in the agreement as well as the different circulars issued time to time the agency was extended the escalation over the labour component only for the portion of the works executed on and from the date of notification."
>
> From the aforesaid, it transpires that the agency which was executing the developmental work entrusted by the CDA, was given the escalation which was due to the enhancement of the minimum labour rates by the State Govt. and the CDA being the principal was liable to shoulder such escalated price and the payment has been made as per the entitlement. The affidavit of the CDA is accepted.
>
> In view of the aforesaid statements made on affidavit by the VC, CDA, we find no irregularity in the same calling for any investigation. The matter is closed."

After this, on 17.11.2008, the Deputy Superintendent of Police, Vigilance lodged one FIR in relation to those allegations which stood numbered as Cuttack Vigilance P.S. Case No.47 of 2008 and the then Ex Vice-Chairmans and other officials of CDA as also the concerned contractor were arraigned therein as accused persons. The allegations stood regarding excess payment towards escalation for enhancement of labour rates during the period from 2000 to 2003 and sub-standard work etc being done and accepted as such as well as receipt of pecuniary advantage/benefit by all of them at the cost of the Government exchequer in relation to execution of the plotted development scheme for Sector-8, 10 and 11 of CDA.

Three accused persons named in that Vigilance P.S. Case No.47 of 2008 registered for offence under section 13(1)(d) of the P.C. Act and section 468/420/130-B of the IPC, are the two Vice-Chairmans of the CDA, the Executive Engineer and the Contractor. They approached this Court by filing applications under section 482 Cr.P.C. seeking quashment of FIR and the investigation, corresponding to VGR Case No.48 of 2008 on the file of the learned CJM, Cuttack. This Court, by the judgment dated 19.2.2010 passed in CRLMC No.2815 and 2826 of 2008 and CRLMC No.317 of 2009, allowed those applications and the said FIR and the investigation have been quashed. The operative part of the order is as follows:

> "11. So, for the foregoing reasons, all these Criminal Misc. cases deserve to be allowed and the registration of the F.I.R. and subsequent investigation deserve to be quashed. Hence, all the Criminal Misc. Cases filed by the petitioners are allowed. Consequentially, the Vigilance case instituted against the petitioners and the investigation thereof are quashed."

The State thereafter challenged the above order passed on 19.2.2010 in CRLMCs by filing petition for Special Leave to Appeal numbered as SLP (Crl) No.6281 of 2010 before the Hon'ble Apex Court. On 3.5.2011, the Hon'ble Apex Court passed the following order:

> "Heard learned counsel for the parties.
> We find no merit in these petitions for special leave. Those are dismissed."

3. In the meantime, on 30.12.2008 when those proceedings under section 482 Cr.P.C. vide CRLMC Nos.2815, 2826 of 2008 and CRLMC No.317 of 2009 were pending before this Court, the Inspector of Police Vigilance, Cuttack lodged another FIR giving rise to Cuttack Vigilance P.S. Case No.57 of 2008 against these petitioners and another, namely, Ramesh Kumar Mohanty, the then Executive Engineer attached to CDA, who had been arraigned as an accused in the earlier Vigilance P.S. Case No.47 of 2008 and had filed CRLMC No.2815 of 2008. The subject matter concerns with the corruption in execution of the work in relation to plotted development scheme in Sector-10, Bidanasi with the allegation that the officials of CDA, by abusing their official position so as to derive pecuniary advantages, have caused loss to the Government exchequer by recording inflated measurement and accepting the execution of sub-standard work leading to payment of a sum of Rs.16,12,298/- to the contractor. It may be stated here that the Deputy Superintendent of Police, Vigilance, who is none other than Investigating Officer of the subsequent case, i.e, Cuttack Vigilance P.S. Case No.57 of 2008 had filed an affidavit on 2.9.2009 before this Court in CRLMC No.2826 of 2008 alleging sub-standard work and illegal payment of labour escalation. But that affidavit dated 2.9.2009, did not find mention of the factum of lodging of subsequent FIR giving rise to registration of Vigilance P.S. Case No.57 of 2008 and the progress of its investigation nor there was any such hint or indication to that even though one accused, namely, Ramesh Kumar Mohanty was arraigned in the subsequent FIR.

4. Be that as it may, after closure of the matter in relation to Vigilance P.S. Case No.47 of 2008, in becoming unsuccessful before the Hon'ble Apex Court in setting aside the order of this Court in quashing that FIR and investigation, the Superintendent of Police, Vigilance, by letter dated 21.5.2013, on completion of the investigation of that Vigilance P.S. Case No.57 of 2008, requested the Government for according sanction for prosecution against Sri Ramesh Kumar Mohanty, the then the Executive Engineer of the CDA for launching prosecution against him in the Court of law for commission of offence under section 13(2) read with section 13(1)(d) of the PC Act and section 420/468/120-B of the IPC for committing criminal

misconduct, abusing official position showing undue official favour to the contractor by way of excess payment of Rs.16,12,298/-.

5. At this stage, it is pertinent to mention that after receiving the letter dated 21.5.2013, the Government in the Department of Housing and Urban Development Department by order dated 21.12.2013 constituted a Committee comprising of Chief-Engineer, (PH/Urban)-cum-Additional Secretary to Government, in the Housing and Urban Development Department and PD-cum-Joint Secretary to Government in the Housing and Urban Development Department to undertake a detailed site inspection along with verification of records regarding execution of sub-standard work in Sector-10 of CDA as well as the acceptance of the same and the inflated measurements alleged to have been done in respect of those in terms of the works undertaken.

6. The Committee, after examining the relevant records and visiting sites, finally submitted its report on 8.7.2014. The relevant parts of the report touching the allegations in so far as sub-standard work, manipulation in measurement leading to excess payment of Rs.16,12,298/- with which present case is concerned run as under:-

> "In consideration of the above, it is opined that:-
>
> The work was executed during 1999-2003, but the inspection by the Vigilance Department was done in the year 2007 after a lapse of 4 to 5 years;
>
> There is every possibility of varying measurement after a period of 4 to 5 years. As ascertained there was a high flood during 2003 and there has been substantial damage in some roads in the Sector-10 also as revealed from the report of the technical committee Flag-B
>
> There is every possibility of varying in thickness of the road crust due to prolonged traffic movement and weathering condition. There will be benefit of doubt regarding the discrepancy.
>
> In one of the case in Road No.AR-1, the vigilance team have arrived at by way of calculation the thickness of Grade-I mettaling is 20mm where as in the PWD specification, the thickness of Grade-I mettaling varies form 45-90 mm which seems to be unrealistic.
>
> After construction of road, there has been damage during the laying/crossing of water supply pipe line, storm water drainage system and laying of sewerage line in many occasion.
>
> After a long gap of time, the field verification has been made and the marginal discrepancy that have occurred may not firmly establish as an inflated measurement.
>
> The said excess payment of Rs.16,12,298/- contributes only 1% of the total cost of the work which is negligible as there is a difference of 4 to 5 years between the execution of work and measurement by Vigilance Technical Team.

> In this regard, the Commissioner-cum-DMA had a detailed discussion with M.Radhakrishnan, DSP, Vigilance and the observation of Commissioner-cum-DMA may kindly be perused at Page-29/N to 30/N. In view of the above facts, sanction of prosecution may not be considered.
>
> If considered, Govt. approval may kindly be obtained."

Considering all the materials produced by the investigating agency and keeping in view the report as above, the Government then refused to accord sanction of prosecution against Sri Ramesh Kumar Mohanty in this Cuttack Vigilance P.S. Case No.57 of 2008 and that was communicated to the Superintendent of Police, Vigilance, Cuttack by letter dated 6.1.2015.

7. Despite the above, the charge-sheet showing said Ramesh Kumar Mohanty, the then Executive Engineer, Prafulla Kumar Das, the then Assistant Engineer, Akshay Kumar Behera, Dillip Kumar Samal, the then Junior Engineers and Kishore Chandra Sahoo, the then Junior Engineer being filed in court, by order dated 24.8.2015, which has been impugned in these revisions, the court below has taken cognizance of the offences under section 13(1)(d)/13(2) of the P.C. Act and section 468/420/120-B of the IPC and issued process to all.

Said Ramesh Kumar Mohanty then questioned the launching of the prosecution followed by the order of cognizance and issuance of process as against him by filing CRLMC No.597 of 2016. In disposing that proceeding under section 482 Cr.P.C filed by said Ramesh Kumar Mohanty., on 8.5.2018, this Court has passed the following order:

> "Accordingly, it is directed that the impugned order dated 24.8.2015 passed by the learned Special Judge Vigilance, Cuttack in T.R. Case No.28 of 2015 taking cognizance as aforesaid so far as the present petitioner is concerned stands quashed."

So, by this order, said Ramesh Kumar Mohanty the then Executive Engineer, CDA is no more within the arena of the case. Akhaya Kumar Behera, Dillip Kumar Samal and Prafulla Kumar Das, who were serving as Assistant Engineer and Junior Engineers during the relevant period of said work and out of them, Prafulla Kumar Das, has by now retired from service are in the arena.

8. Mr.R.K.Rath, learned Senior counsel for the petitioners submitted that in the first FIR giving rise to Cuttack Vigilance P.S. Case No.47 of 2008, all the allegations were concerned with the plotted developmental scheme in Sector-8, 10 and 11 of the CDA that there has been indulgement of the officials of CDA in corruption not only by way of making the payment to the

contractor in view of the escalation in the wage rate under the statute as against the prohibition contained in the agreement but also relating to the sub-standard work being accepted; and the inflated measurement being made for payment in excess of the work actually done in the field. He further submitted that these petitioners in that FIR had not been named as accused persons. However, said Ramesh Mohanty, the then Executive Engineer of CDA had been arraigned therein as an accused being the head of the field Engineers. According to him, when the said FIR and consequent investigation has been quashed by order of this Court in the proceedings under section 482 Cr.P.C. and it has reached its finality by the order of Hon'ble Apex Court, the subsequent FIR giving rise to Cuttack Vigilance P.S. Case No.57 of 2008, has absolutely no foundation in the eye of law and so also the consequential investigation. He submitted that despite the fact that said Ramesh Mohanty was arraigned as an accused in the first FIR, he had again been arraigned in the present FIR but for Government's refusal to grant sanction, he is no more in the picture and let off. It was, therefore, submitted that for the self-same allegations, once the FIR having been lodged and the same has met its logical culmination as per law, another FIR on those allegations or on any part allegation form out of the earlier allegations leading to the lodging of first FIR is not tenable in the eye of law. It was next submitted that the investigating agency, in the present case, has sought for grant of sanction as against said Ramesh Kumar Mohanty from the Government and against these petitioners from the concerned Chief Engineer. He submitted that the Government upon consideration of the materials placed by the Investigating Agency and the report of the Committee constituted for the purpose given after holding the fact finding inquiry covering all these allegations relating to sub-standard work being accepted and inflated measurement being done, thereby causing loss to the Government exchequer to the tune of Rs.16,12,298/- by the indulgement of all these petitioners as also Ramesh Kumar Mohanty and the contractor, has refused to accord sanction for launching the prosecution against said Ramesh Kumar Mohanty, which has been accepted by this Court in passing order for quashment of the order of cognizance and issuance of process in so far as Ramesh Kumar Mohanty is concerned. So, the prosecution launched against these petitioners who stand in the same footing allegedly shouldering same liability in the matter even though is backed by a sanction granted by the Chief Engineer being the authority of the petitioners, has no legal base. Therefore, the court below ought not to have taken cognizance of the offences and issued process against these petitioners. He submitted that the Investigating Authority in this

case is guilty of resorting to double standard in the matter of launching of the prosecution; in one manner as against one accused without sanction who had escaped from the arena of the earlier case from the very beginning and has been let off in this case by the orders of this Court on the ground of lack of sanction which has attained finality and in so far as these petitioners-accused persons are concerned with the sanction of an authority subordinate to the authority refusing to accord sanction for said Ramesh, the prosecution being launched, they are now put to trial. It was submitted that the prosecution here is seriously guilty of suppression that during pendency of CRLMC No.2826 of 2008, the DSP, Vigilance, in his affidavit dated 2.9.2009, when even did not indicate as to the initiation of Vigilance P.S. Case No.57 of 2008 although the case had been registered long prior to it, i.e, on 30.12.2008 on the basis of the FIR of Inspector of Police, Vigilance. He submitted that the subsequent FIR giving rise to the case in hand, when are not based on any such discovery of new facts, the order of cognizance of offence and issuance of process in so far as these petitioners are concerned that too on the face of quashment of that very order of issuance of process against the other co-accused, namely, Ramesh Kumar Mohanty, who is alleged to have also the involvement and similar liability in the matter as has been alleged against these petitioners is vulnerable and cannot be sustained in the eye of law. It was also submitted that admittedly, the road construction work in relation to which the present case runs was executed during the period 1999-2004 and the test check measurement was done during 2007 and now the allegations are levelled that there has been excess payment towards procurement of sand, morum, grade-I metal by inflated measurements being noted in the Measurement Book, Bills have been raised and passed. He submitted that when it is plainly seen that the roads being kept open for user for more than five years, cannot give the same measurement and quantity and taking note of all the relevant factors, the Committee has reported that these allegations are unrealistic when even the discrepancy comes to only 1% of the contract cost. He submitted that the allegations on their face value are absurd. He further submitted that the allegations when remain that there was acceptance of substandard work done by the Contractor to have been made in the year 2003 and the vigilance personnels having test measured those works after 4 to 5 years, no fault can be seen with the view taken by the Committee that in view of some supervening events, the same is not prima facie acceptable moreso as said excess payment contributes only 1% of the total cost of the work.

In this connection, he has relied upon the decision of this Court in case of Birabara Sethi –V- State; 2012 (2) ILR Cut 1031 wherein the Court

has taken judicial notice of the fact that road being constructed over four years back and under use, the measurement and quality as it had on the date when continued cannot remain the same.

9. Mr.Sangarm Das, learned Standing Counsel for the Vigilance Department does not dispute the position with regard to the quashment of the FIR giving rise to Vigilance P.S. Case No.47 of 2008 initiated against the then Vice-Chairmans, namely, Sanjib Kumar Roy, IAS, Sanjay Rastogi, IAS and Fani Bhusan Rout, Superintendent Engineer, Ramesh Kumar Mohanty, Superintendent Engineer and M/s.K.C.Sahoo, Engineer and Contractor Private Limited. He did not dispute the fact that said Ramesh Kumar Mohanty being the accused in the first and the present case, Government in his case had refused to accord sanction and the court still having taken cognizance of offences and issued process against him, the same has been quashed by judgment of this Court passed in CRLMC No.597 of 2016. He submitted that the attainment of finality of the order of quashment of the FIR giving rise to Cuttack Vigilance P.S. Case No.47 of 2008 and its investigation pursuant to the same by the order of dismissal of the SLP by the Hon'ble Apex Court has no such negative impact over the present case, in the eye of law. He next submitted that the first FIR was not so concerned with the allegation as to abuse of the official position by these petitioners and the other accused Ramesh Kumar Mohanty by making illegal payment of Government money to contractor in connivance with him by accepting sub-standard work and causing inflated measurements whereas the subsequent FIR with which we are presently concerned is on pinpointed allegations and thus its lodging and the investigation cannot be found fault with. In view of above, he refuted the submission of the learned Senior counsel for the petitioners that the second FIR has no leg to stand in the eye of law. He also submitted that the Sanctioning Authority in so far as these petitioners are concerned, had no occasion to take note of the factum of the refusal of the Government to accord sanction in so far as the accused Ramesh Kumar Mohanty is concerned as that has been done much later. According to him, this is not the stage to examine the legal acceptability of the sanction as against these petitioners in view of the subsequent refusal of Government to accord sanction for prosecution against Ramesh Kumar Mohanty. In view of all the above, he submitted that the revisions are devoid of merit and as such are liable to be dismissed.

10. Proceeding to address the rival submission in the backdrop of the facts and circumstances of the case in hand and judge the sustainability of

the impugned order of taking cognizance and issuance of process against these petitioners on the face of the quashment of that very order so far as the other accused who was then the Executive Engineer of the organization is concerned, it would be proper to have a look at the first FIR leading to registration of Cuttack Vigilance P.S. Case No. 47 of 2008 is concerned.

It may be stated that when in the first FIR, the allegations were in respect of the works done in sectors 8,10 and 11 of the CDA, the second FIR registered as Cuttack Vigilance P.S. Case No.57 of 2008 concerns with the allegations as to the works only in Sector -10.

The allegations as regards the work in those three sectors as stated in the first FIR were the followings:-

> **"........** The above fact leads to believe that the officials of CDA have connived with the contractor, fabricated the records, executed sub-standard work and derived pecuniary advantage at the cost of the Government exchequer."

11. These allegations in the first FIR appear to be covering within its fold the allegations made in this second FIR which of course is with some more details as regards the specific works. However, the name of one accused that is Ramesh Kumar Mohanty, the then Executive Engineer, CDA finds mention in common whereas in the second FIR the names of these petitioners who are the subordinate of said Ramesh Kumar Mohanty have been shown in the relevant column and in the narration their roles have been described. The fact remains that had that investigation in respect of the allegations made in the first FIR i.e. Cuttack Vigilance P.S. Case No. 47 of 2008 would have proceeded for its logical end, the allegations as levelled in the second FIR i.e. Cuttack Vigilance P.S. Case No.57 of 2008 would have been investigated and notwithstanding the mention of the names of these petitioners, they might have been so arraigned in case of availability/surfacing of the materials against them. But that has not so happened in view of the quashment of the first FIR (Cuttack Vigilance P.S. Case No. 47 of 2008) before charge sheet filing stage by order of this Court in exercise of power under section 482 Cr.P.C. subsequently refused to be interfered by Apex Court, which in simplest term would mean ceasing the legal machinery which had been set in motion.

12. So far as the submission as also the factum of filing of the second FIR is concerned, the settled position of law is that First Information Report is a report which gives first information with regard to commission of any offence and that sets the criminal law into motion. The information so as to be registered for investigation must contain such allegations constituting

commission of cognizable offence/s for being investigated to find out not only the complicity of the culprits named or hinted at therein but also all others coming to the picture in the matter of commission of offence in course of investigation.

There cannot be a second FIR in respect of the same offence/event and whenever any further information is received by the Investigating Agency, it is always to be taken in furtherance to the FIR already in hand which course is no more available in the present case in view of quashment of the first FIR.

13. The Apex Court has consistently laid down the law on the issue that a second FIR in respect of an offence or different offences committed in course of the same transaction is impermissible in the eye of law. In *T.T. Antony –V- State of Kerala and others; (2001) 6 SCC 181,* the Hon'ble Court has categorically held that a second FIR (which is not a cross-case) is in violation of the legal provision. Paragraphs 19, 20 and 27 of the judgment read as under:

> "19. The scheme of CrPC is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 CrPC on the basis of entry of the first information report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 CrPC, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) CrPC. However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 CrPC.
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> 20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC.
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> 27. A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. There cannot be any controversy that sub-section (8) of Section 173 CrPC empowers the police to make further

> investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. In Narang case it was, however, observed that it would be appropriate to conduct further investigation with the permission of the court. However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) CrPC. It would clearly be beyond the purview of Sections 154 and 156 CrPC, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 CrPC or under Articles 226/227 of the Constitution."

The position has remained undiluted. In fact, the aforesaid proposition of law making the registration of fresh FIR impermissible has been reiterated and reaffirmed in the case of (a) Upkar Singh –V- Ved Prakash and others; (2004) 13 SCC 292, (b) Babubhai –V- State of Gujarat and others; (2010) 12 SCC 254, (c) Chirra Shivraj –V- State of Andra Pradesh; (2010) 14 SCC 444 and (d) C. Muniappan –V- State of Tamil Nadu; (2010) 9 SCC 567.

The Hon'ble Apex Court, in the case of C. Muniappan (Supra), has explained the "consequence test", i.e, if an offence forming part of the second FIR arises as a consequence of the offence alleged in the first FIR, then the offences covered by both the FIRs are the same and accordingly, the second FIR will be impermissible in law. The offence covering both the FIRs naturally containing the allegations/informations in both shall have to be treated as one, i.e, second one has to merge with the first and that be treated as the FIR.

In the case of *Babulal Chaukhani –V- King Emperor; AIR 1938 PC 130,* the Privy Council has held as under:

> "......that if several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators), these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it. The common concert and agreement which constitute the conspiracy, serve to unify the acts done in pursuance of it."

In the case of *Babubhai (Supra),* the Hon'ble Court has considered the permissibility of more than one FIR and the test of sameness has been explained; what it means by FIR under section 154 of the Cr.P.C., commencement of investigation, formation of opinion under section 169 or 170 of the Cr.P.C., police report under section 173 of the Cr.P.C. and the statements under section 162 of the Cr.P.C. It has been held that:

> "......the Court has to examine the facts and circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents, which are two more parts of the same transaction."

It has been further held that if the answer is in affirmative, the second FIR is liable to be quashed. It was further held that in case the contrary is proved, where the version in the second FIR is different and is in respect of the two different incidents/crimes, the second FIR is permissible. It is clear therefrom that if two FIRs pertain to two different incidents/crimes, then only the second FIR is permissible.

The Hon'ble Court, again in the case of *Nirmal Singh Kahlon –V- State of Punjab; (2009) 1 SCC 441,* has carved out an exception for filing a second FIR. As per that the second FIR lies in a case where the first FIR does not contain any allegation of criminal conspiracy. It is thus deduced therefrom that if the first FIR itself discloses an offence of alleged criminal conspiracy and it was that conspiracy which the Investigating Agency was obliged to investigate and unearth all the connected facts and circumstances, the Investigating Agency cannot justify the filing of the second FIR and a fresh charge-sheet.

14. Adverting to the case in hand, some striking features appear which cannot be lost sight of. That when the proceeding for quashment of the first FIR giving rise to Cuttack Vigilance P.S. Case No.47 of 2008 was pending and the second FIR had also been registered thereafter; in the affidavit filed by the Investigating Officer in those proceedings, said fact was not disclosed nor the stage of the investigation of that case had been indicated. It was also not stated that there being subsequent information relating to the said works against which all these allegations constituting the commission of the offence by the officials of the CDA and the contractor have been made are being looked into. With such non-disclosure/suppression whatever, we may say, for the reasons known to the Investigating Agency before this Court in the proceeding, where the order of quashment of the first FIR and the investigation of the case registered on the basis of that FIR was passed and then the order being challenged by carrying the matter to the Hon'ble Apex Court, the very fact had also not been placed there and moreso in the subsequent FIR, no such reference even has also been made to the first FIR. Added to it, one of those accused persons named in the first FIR being again arraigned in the second FIR as such because of the refusal of the Government to accord sanction for prosecution on the basis of a report of the fact finding Committee ignoring the materials collected in course of the investigation; he

is no more in the arena of the case after order has been passed by this Court in CRLMC No.597 of 2016.

Both the FIRs being read together, it appears that subsequent FIR dated 30.12.2008 (Cuttack Vigilance P.S. Case No.57 of 2008) after the lodging of the first FIR dated 17.11.2008 (Cuttack Vigilance P.S. Case No.47 of 2008) is not thrust upon discovery of new facts. It has all the concern with the set of facts as pointed out in the first FIR, which was in respect of the developmental works under three sectors, i.e, 8, 10 and 11, as against one, i.e, sector 10 in so far as the subsequent FIR is concerned. It is further seen that though there has been narration of the facts leading to commission of offence by the petitioners and the other, who have in the meantime been absolved, is backed by some other details but those are not such as having no linkage with the allegations made in the first FIR. Here the first FIR itself had disclosed an offence of criminal conspiracy in relation to illegal payment being made to the Contractor pertaining to all said works and that the Vigilance was called upon to unearth, which stood quashed reaching finality. In that view of the matter, the present FIR, the present FIR loses its legal foundation and consequentially, the investigation carried out in pursuance of the same.

In that view of the matter, it is found that said contention raised from the side of the petitioners has force and this Court is not in a position to accept the submission of the learned Standing Counsel Vigilance that the allegations arising from the facts as given in the subsequent FIR leading to registration of Cuttack Vigilance P.S. Case No.57 of 2008 are different from the facts narrated in the first FIR leading to registration of Cuttack Vigilance P.S. Case No.47 of 2008, which has been quashed along with the investigation made thereunder.

15. For all the aforesaid, the order dated 24.08.2015 passed by the learned Special Judge, Vigilance, Cuttack upon consideration of the materials collected pursuant to the investigation based upon the subsequent FIR dated 30.12.2008 giving rise to Cuttack Vigilance P.S. Case No.57 of 2008, is held bad in law and liable to be set aside. In the result, the impugned order dated 24.08.2015, so far as these petitioners are concerned, is hereby set aside.

The Criminal Revisions stand allowed.

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2019 (II) ILR - CUT- 840

BISWANATH RATH, J.

W.P.(C) NO. 7445 OF 2019
AND
W.P.(C) NO. 7537 OF 2019

THE ORISSA MANGANESE & MINERALS LTD. ………Petitioner

.Vs.

BIRAT CHANDRA DAGARA ……….Opp. Party

(A) ARBITRATION & CONCILIATION ACT, 1996 – Section 9(d) – Grant of interim injunction before enforcement of the arbitral award – Disputes between the parties with regard to operation of mining – Opp.party/Judgment debtor is the lease holder & Petitioner/D.Hr. is the raising contractor – Hon'ble Apex Court appointed Sole Arbitrator – Both the parties mutually consented to each other & resolved to settled their disputes in accordance with the terms & conditions of existing joint venture agreement – Accordingly the arbitrator passed compromise decree – Application filed before the District Court for execution/enforcement of such award – An interim application also filed alleging therein that the judgment debtor is misappropriating the minerals as well as entering the raising contracts with the 3rd parties – On the first hearing of the interim application, the executing Court/ District Court directed the Judgment Debtor not to perform any mining operation while issuing summon against him – The Judgment debtor/ Opp.party appeared & filed an application for recall/to vacate the above order – The District Court hearing both the parties while vacating the above order observed that, the mining operation will boost the economic development of the state & stopping the same may cause a greater inconvenience to the state & held though prima faice case exist in favour of the petitioner/D.H.R but other two ingredients do not lean in his favour – The petitioner pleads that, as per the J.V agreement between the parties, their relationship shall be exclusively governed by the terms & conditions of agreements & will be binding on them. And all other documents, understanding, disputes shall deemed not to be in existence & shall become inoperative in view of the settlement – The Order of the District Court is challenged in the present Writ petition – Held, this court observes that in deciding the question of balance of convenience & irreparable loss the District Judge has totally lost the sight of existence of a settlement award pending for execution as well as clandestine conduct of judgment debtor in misappropriating the minerals leased as well as entering into new raising contracts with 3rd parties – Accordingly the findings of the District Judge on balance of

convenience and the part of irreparable loss, answers both in favour of the decree holder.

(B) ARBITRAL AWARD – ENFORCEMENT / EXECUTION – Interim application before execution of such award – Application filed under section 151 of C.P.C – Maintainability of such application questioned in view of section 9 of the Arbitration & Conciliation Act, 1996 – Mentioning of wrong nomenclature pleaded – Whether it affects the merit of the case? – Held, No.

For Petitioner : M/s. Rajat Kumar Rath (Sr. Adv.), A.K.Kanungo.

For Opp. Party : M/s. Jagannath Patnaik (Sr. Adv.), A.Patnaik, B. Mohanty, S.S. Kanungo, S. Mohapatra, S.Patnaik.

JUDGMENT Date of Hearing :18.06.2019 : Date of Judgment : 09.07.2019

BISWANATH RATH, J.

W.P.(C) No.7445 of 2019 has been filed by the Orissa Manganese & Minerals Ltd. whereas W.P.(C) No.7537 of 2019 has been filed by Shri Birat Chandra Dagara involving a common impugned order but on different context.

W.P.(C) No.7445 of 2019 has been filed assailing the order dated 02.04.2019 at Annexure-22 passed by the District Judge, Mayurbhanj at Baripada involving a miscellaneous application vide Execution Petition No.1 of 2019 arising out of an Arbitration award involving the petitioner and the opposite party herein in disposal of an application U/s.151 of C.P.C. dated 25.1.2019 alongwith disposal of a petition dated 7.02.2019 on behalf of the present opposite party-judgment debtor for recalling of an interim order, which were decided analogously and in disposal thereby modifying the interim order dated 7.02.2019 but however with imposition of condition on the judgment debtor for furnishing a bank gurantee worth rupees five crores within a month also prohibiting the judgment debtor not to dispose of or cause destruction to the schedule-B property appended to the execution petition till disposal of the execution proceeding. It is also directed therein that mining operation shall be intimated to the District Court in shape of affidavit. Whereas W.P.(C) No.7537 of 2019 has been filed by Shri Birat Chandra Dagara the Judgment debtor also assailing the same order dated 02.04.2019 again available at Annexure-1 herein involving Execution Petition No.1 of 2019 but however, involving the condition attached by the District judge so far it relates to the petitioner involving W.P.(C) No.7537 of 2019 the judgment debtor involved herein.

2. On consent of parties, since both the writ petitions involve challenge to the same order and since the parties have common set of submissions, this Court takes up both the matters together and decides both the matters by this common judgment. For the background involved herein, further as it appears, the dispute has a long history, to avoid any doubt in the facts and developments therein, this Court feels it appropriate to bring the history involving the disputes between the parties before proceeding to decide the actual dispute involving the writ petitions.

3. A mining lease for Iron Ore for over an area admeasuring 618 hectares at Suleipat Iron Ore Mines in the District of Mayurbhanj was originally held by one Sri Bajrang Lal Padia for a term of 30 years w.e.f.25.10.1975. This lease area was transferred by Shri Bajrang Lal Padia to the petitioner with prior consent of the State Government w.e.f. 24.10.1984. For the unexpired period of lease Birat Chandra Dagra applied for renewal on 18.10.2004 i.e. twelve months prior to expiry of lease of 25.10.2005. Following the provision under Rule 24(a)(i) of the Mineral Concession Rules, 1960 hereinafter in short be called as "the Rules, 1960" Sri Dagara was undertaking mining operation involving the lease hold area through the raising contractor M/s. Orissa Manganese & Minerals Ltd. hereinafter in short be called as "O.M.M Ltd.". Copy of agreement between Shri Dagara and M/s. Orissa Manganese & Minerals Ltd. appears at Annexure-1 in W.P.(C) No.7445 of 2019. Facts further disclose that while the O.M.M. Ltd. was continuing as the raising contractor on the allegation of clandestine mine raising by the lease holder and involving of financial irregularities at the instance of the several mining lease holders in the State of Orissa, based on a decision to have an inquiry Hon'ble Mr. Justice M.B Shah was appointed as Judge Commission of Inquiry to enquire into illegal mining of Iron and Manganese ore in the State of Orissa commonly known as "Shah Commission". The Hon'ble Commission while submitting his final report made certain recommendations in the matter of prohibition of industrial activity in certain part of Mayurbhanj District. Knowing fully well the aforesaid development and constraints came through the Hon'ble Shah Commission report Shri Dagara insisted the petitioner to set up a Steel Plant in the district of Mayurbhanj as per the terms and conditions of the JV Agreement. There was difficulty in the location for establishment of the steel industry. Finally Shri Dagara showed extreme unwillingness to set up the industry as per the terms of the J.V Agreement, in spite of the fact that the O.M.M Ltd was ready and willing to set up the plant in terms of the J.V. Agreement at a different location or even in the district of Mayurbhanj.

Attempt of O.M.M. Ltd. also failed in spite of O.M.M Ltd. obtaining several statutory clearances in order to make Suleipat Iron Ore Mines operational at a substantial physical and financial cost. Ultimately on 10.12.2011 the Suleipat Iron Ore Mines became operational for the sole efforts of the O.M.M. Ltd. and in accordance with the terms and conditions of the J.V. Agreement dated 12.04.2010. In the meantime on 3.02.2012 the Government of Odisha issued a show cause-cum-closure notice under Rule 37 of the Mineral Concession Rules, 1960 to Shri Dagara on the premises that he has granted general power of Attorney in favour of M/s.Taurian Exim Pvt. Ltd. in 2002 assigning its lease hold right and thereby squarely violating all the provisions of Rule 37 of Mineral Concession Rules, 1960 landing Shri Dagara liable for cancellation of the lease. Simultaneously the State Government directed Shri Dagara to stop mining operation forthwith due to these violations and pending reply to the show cause notice. The mining operation was resumed in the month of July 2012 pursuant to the order dated 25.06.2012 passed by the High Court of Orissa in F.A.O. No.278 of 2012. However, the O.M.M Ltd. was prevented from carrying out the mining operation in spite of the J.V. Agreement remained in operation. In the meantime, there was also intervention by the Forest Officials resulting closure of Sulaipat Iron Ore Mines after expiry of Temporary Working Permission on 8.03.2013. While the matter stood thus, the Hon'ble Apex Court by order dated 10.02.2014 in I.A. No.3692 arising out of W.P.(C) No.202 of 1995 granted working permission to the Sulaipat Iron Ore Mines, thereby further directing the State Government as well as the Central Government to process the Forest Diversion Proposal in a time bound manner. It is for the intervention of the Hon'ble Apex Court the mining operation was again resumed on 7.03.2014 and Stage-I Forest Clearance was accorded on 23.05.2014 by the Ministry of Environment and Forests, Government of India. The mining operation was once again suspended on 12.06.2014 as the State Government had included the said mine in the list meant for non-working mines by way of an affidavit filed before the Hon'ble Apex Court and for the prohibition granted by the Hon'ble Apex Court under a bona fide impression that the affidavit at the instance of the State Government filed in the Hon'ble Apex Court remain true. This error was rectified by the Hon'ble Apex Court in I.A. No.3 arising out of W.P.(C) No.114 of 2014 (Common Cause) vide its order dated 12.09.2014 and the mines became operational from 30.09.2014. In the meantime, for the clandestine operation of the mines by Shri Dagara before entering into J.V. Agreement, the Mining Officer, Baripada Circle issued show cause notice requiring Shri Dagara to deposit a sum of

Rs.67,21,01,988/- towards cost price for raising the iron ore illegally from Sulaipat Iron Ore Mines. In the meantime, O.M.M Ltd. raised invoices to the tune of Rs.225,85,37,305/-against opposite party in the 1st Writ Petition Shri Dagara, for the cost incurred in excavation of iron ore from the Suleipat Iron ore mines for the financial years 2012-13, 2013-14 and 2014-15 and 2015-16. Yet Shri Dagara remained in clandestine raising of iron ore incurring loss to the OMM Ltd. In the meantime, the opposite party issued a composite work order dated 15.12.2014 for "Screening, Crushing and Stacking Iron Ore including removal of requisite quantity of over burden at Sulaipat Iron Ore Mine" in favour of M/s. Minefield Minerals and Metals (P) Ltd. Similar work order was also issued by Shri Dagara to M/s.Zillion Logistics Pvt. Ltd. for loading of Iron Ore from Sulaipat Iron Ore Mines at Kuldiha Railway Siding of South Eastern Railway. Finding the situation difficult and no scope for O.M.M Ltd. operating as a raising contractor, it time and again called the opposite party Shri Dagara in the earlier Writ Petition and petitioner in the subsequent Writ Petition to settle its long pending dues and further to honour its commitment following the conditions in the J.V. Agreement remained operational. It is alleged by the O.M.M. Ltd. that said Dagara instead of making any effort to resolve the dispute by honouring its obligation under the J.V. Agreement, physically restrained the O.M.M. Ltd from carrying out mining operations thereby obstructing operation of the J.V. Agreement. Finding the clandestine attempt by Shri Dagara a party to the J.V. Agreement and working in violation of terms and conditions under the J.V. Agreement, the petitioner-O.M.M Ltd. filed a petition U/s.9 of the Arbitration and Conciliation Act, 1996 on the file of the learned District Judge, Mayurbhanj at Baripada seeking protection by way of interim measure. The petition was registered as Arbitration Petition No.14 of 2015. Above Section-9 petition was taken up on 30.10.2015, on which date the District Judge, Mayurbhanj while issuing notice to Shri Dagara and fixing the case to 17.11.2015 was pleased to pass the following :

> "The prayer of the petitioner to issue an order of ad-interim injunction is allowed. The O.P., his servants, agents and assigns and each of them are hereby restrained by way of ad-interim injunction in interfering and obstructing with the mining operation carried out by the petitioner in terms of J.V. agreement in Sulaipat Iron Ore Mines and from causing any damage to the Petitioner in any manner till disposal of the Arbitration Petition or until further orders."

4. In the meantime the O.M.M Ltd. with an intention to invoke the arbitration clause under the J.V. Agreement put Shri Dagara on notice on 29.10.2015. On 17.11.2015 Shri Dagara appearing

in Arbitration Petition No.14 of 2015 along with its reply affidavit filed petition for vacation of interim order dated 30.10.2015. District Judge, Mayurbhanj upon hearing the parties passed an order on 15.12.2015 vacating the interim order dated 30.10.2015 for the time being and fixed the case to 7.01.2016. The O.M.M Ltd. being aggrieved by the order dated 5.12.2015 involving Arbitration Petition No.14 of 2015 preferred Arbitration Appeal no.34 of 2015 in this Court. This Court while issuing notice on the question of admission of the matter directed service of copy of memorandum of appeal along with documents on the counsel for the opposite party the respondent therein as there was already appearance by the counsel for the respondent, at the same time, however passed an interim order staying the operation of the order dated 15.12.2015 till final adjudication of the appeal.

While the matter stood thus the opposite party without any consultation with the petitioner terminated the J.V. Agreement on 7.12.2015 taking advantage of the order of the District Judge, Mayurbhanj dated 5.12.2015. In the meantime Arbitration Appeal No.34 of 2015 was finally disposed of by this Court vide its order dated 26.02.2016 whereby this Court directed the parties to maintain status quo in respect of the subject matter of the dispute till disposal of the Arbitration Petition No.14 of 2015. While the matter stood thus, by order dated 7.04.2016 in another development Arbitration Petition No.31 of 2015 filed U/s.11(5) of the Arbitration and Conciliation Act, 1996 was disposed of by this Court by referring the main dispute to the High Court of Orissa Arbitration Centre by appointing Justice B.P. Das, (Retd.) as the sole Arbitrator. In another development considering W.P.(C) No.23070 of 2015 filed before this Court at the instance of the opposite party, this Court hearing both the parties again by order dated 19.04.2016 vide Annexure-8 observed as follows:

> "In view of the facts and circumstances detailed above, the present writ petition against the very same impugned order dated 5.12.2015 is not maintainable.
>
> However, it is open for the petitioner to move the application, which is stated to have been filed for adjudication on the question of jurisdiction, which shall be considered on its own merit and in accordance with law.
>
> Writ petition is accordingly disposed of.
> Issue urgent certified copy as per rules."

5. Assailing the order dated 7.04.2016, 26.02.2016 & 19.04.2016 Shri Dagara filed three separate Special Leave petitions bearing SLP (C) No.13599 of 2016, SLP (C) No.13803 of 2016 and SLP (C) No.13824 of 2016 respectively before the Hon'ble Supreme Court of India, which SLPs were disposed of on 1.07.2016 by the Hon'ble Apex Court with the following order:

> "**<u>SLP (C) No.13599 of 2016</u>**
>
> Without expressing any opinion on the appointed Arbitrator and taking into consideration the suggestion of Mr. C.A. Sundaram, learned Senior counsel appearing on behalf of the petitioners as well as Mr. Gopal Subramonium, learned counsel appearing on behalf of Opposite party/Judgment Debtor no.1, we appoint Justice Vikramajit Sen, former Judge of this Court as the Sole Arbitrator to adjudicate the disputes between the parties and pass necessary Award.
>
> The learned Arbitrator shall be at liberty to fix his own remuneration and other terms of Arbitration including situs.
>
> The special leave petition is, accordingly, disposed of."
>
> **<u>SLP (C) No.13803 of 2016 and SLP (C) No.13824 of 2016</u>**
>
> In the light of the present order, nothing survives in these special leave petitions. The special leave petitions are, accordingly, disposed of.
>
> The proceedings pending before the Trial court will stand terminated with a further observation that whatever status quo in being maintained as on date, shall continue to be in force till the learned Arbitrator passes the appropriate orders."

Copy of detail order is available at Annexure-9 in W.P.(C) No.7445 of 2019.

6. After the above, further based on the developments after disposal of the SLPs in the Hon'ble Apex Court and on being noticed the petitioner/O.M.M. Ltd. filed its statement of claim before the sole Arbitrator. Similarly Shri Dagara also filed his statement of defence alongwith documents and petition U/s.17 of the Arbitration and Conciliation Act, 1996 before the Hon'ble Sole Arbitrator. Both the parties on 13.06.2017 entered into a "Terms of Settlement" whereby both the parties compromised the disputes and differences that had arisen by and between the parties. Consequent upon filing of application before the sole Arbitrator for passing award in terms of settlement by the petitioner on 18.08.2017 and by the opposite party on 20.01.2018, learned sole Arbitrator upon consideration of joint request passed the compromise award on 20.01.2018 vide Annexure-10 in W.P.(C) No.7445 of 2019, leaving the parties to act in accordance with the J.V. Agreement and other allied/ancillary agreements executed on 12.04.2010. It be noted here that, this consent award had never been challenged in higher forum by any either of the parties. While the matter stood thus, the opposite party did not allow the petitioner to enter into the mining lease hold area in gross violation of the consented award of the learned Arbitrator dated 20.1.2018 rather threatened the petitioner's agents, servants and employees from carrying out the mining operation in Sulaipat Iron Ore Mines in spite of revival of the J.V. agreement and other

allied/ancillary agreements pursuant to the consent award dated 20.01.2018 and thus the petitioner was constrained to write a complaint on 31.12.2018 vide Annexure-12 and finding no resolve of the problem the petitioner was constrained to take up the consent award for execution and accordingly filed Execution Petition No.1 of 2019 before the learned District Judge, Mayurbhanj at Baripada for enforcement / execution of the consent award dated 20.01.2018. It is along with the execution petition the petitioner was also constrained to file an application for interim protection inasmuch as seeking a direction to the opposite party Shri Dagara to allow the petitioner to resume the mining operation in Sulaipat Iron Ore Mines in terms of the consent award dated 20.01.2018 and further directing the opposite party not to carry out the mining operation in Sulaipat Iron Ore Mines on his own or through any other party and also further for a direction to the opposite party to act strictly in terms of the decree i.e. the consented arbitral award dated 20.01.2018 and not in derogation of the same. It be made clear that Section 151 of C.P.C. application was clearly in the trap of injunction application inter alia Section 9 of the Act, 1996. The interim application was taken up for hearing by the District Judge, Mayurbhanj on 7.02.2019. Upon hearing the petitioner the District Judge, Mayurbhanj at Baripada vide his order dated 7.02.2019 was pleased to pass the following interim order:

> "Hence, I am of the opinion that unless O.P./J.D.R. is restrained from carrying out any mining operation in Sulaipat Iron Ore mines by himself or through his agents or though any other party, the D.H.R. will suffer irreparable loss. The J.D.R. is therefore restrained from performing any mining activities in Sulaipat Iron Ore Mines by himself or through agent or through third party till next date i.e. 7.03.2019. The petition is disposed of accordingly. Issue summons to the J.D.R. in both the ways for appearance and filing of show cause."

7. On 8.02.2019 the execution petition was placed before the District Judge on the strength of advance petition alongwith a petition to recall the order dated 7.02.2019 at the instance of Shri Dagara. The matter was next posted to 21.02.2019. On which date after hearing the parties the matter was postponed to 7.03.2019 keeping in view the request of the counsel for the petitioner-OMM Ltd. to come up with certain more documents. Again a petition to recall the order dated 7.02.2019 was filed on 21.02.2019 by Shri Dagara. Hearing the submission of the opposite party, the District Judge clarified the interim order dated 7.02.2019 indicating therein that the interim order dated 7.02.2019 shall not stand on the way of execution of supplementary lease deed between the Government of Odisha and the Opposite party. This order was however nothing to do with the main dispute

but by way of clarificatory only. On 7.03.2019 the petitioner filed its counter affidavit to the petition dated 21.02.2019 for recalling the order dated 7.02.2019. The District Judge heard the matter on 7.03.2019 but however vide his order dated 7.03.2019 rejected the petition dated 21.02.2019 filed by Shri Dagara find place at Annexure-19 in W.P.(C) No.7445 of 2019. On 19.03.2019 Shri Dagara filed W.P.(C) No.6353 of 2019 inter alia challenging the entire execution proceeding on the ground of maintainability and also the interim orders dated 7.02.2019 and 7.03.2019 passed in Execution Case No.1 of 2019. This Court hearing the parties allowing the W.P.(C) no.6353 of 2019 by its order dated 20.03.2019 (Annexure-20 in W.P.(C) No.7445 of 2019) remanded the matter back to the District Judge, Mayurbhanj thereby directing the District Judge to dispose the petition dated 21.02.2019 afresh and after giving opportunity of hearing to both the sides, fixed the date of appearance of the parties before the District Judge, Mayurbhanj at Baripada to 28.03.2019. Pursuant to the direction of this Court the parties appeared before the District Court. The petitioner on its appearance filed a memo enclosing a demand notice issued by the Government of Odisha against the opposite party-Shri Dagara U/s.21(5) of the MMDR Act, 1957 for his clandestine illegal mining for the period 2000-01 to 2010-11 and the Challans evidencing payment of amount involving the demand by Shri Dagara. The matter was again posted to 2.04.2019, on which date the District Judge in disposal of the interim application at the instance of the petitioner-OMM Ltd. as well as the petition on behalf of the opposite party-Shri Dagara finally observed as follows:

> "7. In result, the interim order dated 7.02.2019 passed by this Court is vacated subject to furnishing a bank gurantee of Rs.5(five) corers by the O.P./J.Dr within one month. The O.P./J.Dr is further directed not to dispose of or cause destruction to the Schedule-B property appended to the Execution petition till disposal of the Execution proceeding. It is made clear that the mining operation should not be resumed before full compliance of the order of the Hon'ble Supreme Court passed in I.A. No.58800/18 and the conditions laid by the Govt. of Odisha in its letter No.924 dated 12.2.19 and the date of resumption of mining operation shall be intimated to this Court in shape of affidavit.
>
> Both the petitions dated 25.1.19 filed U/sec.151 C.P.C. on behalf of the Petitioner/D.Hr and the petition dated 7.2.19 filed on behalf of the O.P./J.Dr are disposed of accordingly. Put up on the date fixed for filing of show-cause by the O.P./J.Dr."

The order dated 2.04.2019 is assailed herein in both the Writ Petitions but on different context.

8. Sri R.K. Rath, learned senior counsel appearing for the petitioner in W.P.(C) No.7445/2019 and contesting-opposite party in W.P.(C) No.7537/2019 on reiteration of the factual aspect involved herein, the stand taken by the OMM Ltd. in the court below as well as the grounds taken herein and taking this Court to the interim order passed by the District Judge involving the interim application pending the Execution proceeding as well as the order impugned herein submitted that District Judge in categoric terms came to observe that prima facie case, balance of convenience and irreparable loss rule in favour of the OMM Ltd. Sri Rath, learned senior counsel thus for the categoric finding of District Judge on all the three important ingredients involving protection in favour of the O.M.M. Ltd. contended that for the finding involving all these cases in favour of the O.M.M Ltd., the District Judge had no other option than to restrain Mr.Dagara, O.P. in W.P.(C) No.7445/2019 and the petitioner in W.P.(C) No.7537/2019 at least till final outcome involving the Execution proceeding. Taking this Court to the development taking place before the sole Arbitrator being appointed by the Hon'ble apex Court, Sri Rath, learned senior counsel, further contended that for the compromise award involving the arbitration proceeding between the parties and thereby for the revival of the J.V. agreement as well as the raising contract between the parties involved herein and for no scope to challenge the same in higher forum by Mr.Dagara, the arbitration award becomes a decree, and therefore, the OMM Ltd. has a right to put the decree involving the arbitration award for execution that too for non-cooperation of the opposite parties in working out the arbitral award vis-a-vis the J.V. agreement as well as the raising contract. Sri Rath, learned senior counsel taking this Court to some decisions of the Hon'ble apex Court attempted to justify that such an award becomes a decree and thus the OMM Ltd. has a right to enforce such award on application of Section 36 of the Act, 1996. Taking this Court to the observation of the District Judge on balance of convenience involving the impugned order, Shri Rath, learned Senior Counsel contended that the District Judge failed in appreciating the repurcation by virtue of the order of Hon'ble Apex Court involving I.A. No.58800 of 2018 and thereby has arrived at the wrong and erroneous findings. In the above background, Sri Rath, learned senior counsel further contended that for the clear case under Section 36 of the Act, 1996, the petitioner, i.e., the OMM Ltd. is bound to be protected. Further taking to the history involving the conduct of Sri Dagara entering into further contracts with third parties involving the same property placed on record, Sri Rath, learned senior counsel further urged that for the background involving the conduct of Sri Dagara and for the satisfaction of all

the three important ingredients in favour of the OMM Ltd., learned District Judge committed error on law in passing the impugned order thereby permitting Sri Dagara to work out the mining contract on its own or through his Agent subject to condition imposed therein. Sri Rath, learned senior counsel in the above circumstance assailing the impugned order prayed this Court for interfering in the same and reviving the interim order and/or modifying the impugned order as appropriate keeping in view the interest of the parties herein.

9. Sri J.Pattnaik, learned senior counsel being assisted by Sri A.Pattnaik, appearing for Shri Dagara, on the other hand, on reiteration of the plea of the parties in the court below enumerated herein above, the plea involving the petition for vacation of the interim order, further the grounds raised in W.P.(C) No.7537/2019 at the instance of Sri Dagara, submitted that Sri Dagara has a case for protection for the subsequent development by virtue of the Hon'ble apex Court order dated 6.9.2018 involving I.A. No.58800/2018. Sri J.Pattnaik, learned senior counsel further on the basis of aforesaid judgments and also taking this Court to the subsequent development such as extension of the lease period involving the mining lease involved herein by the State Government submitted that there is no existence of either the J.V. agreement or the raising contract involving the parties, therefore, even assuming that the arbitral award became a decree but nothing survived for execution of such decree.

It is, in the above circumstance, Sri J.Pattnaik, learned senior counsel submitted that the District Judge even though appreciated the development through the order of the Hon'ble apex Court involving I.A. No.58800/2018 and as a consequence, by passing the impugned order, the District Judge ought to have simply rejected the Section 151 application by recalling the interim order therein. Sri J.Pattnaik, learned senior counsel also assailed the impugned order on the premises that for the background involved herein, no application under Section 151, C.P.C. is maintainable. Further taking this Court to the amended provision in the MMDR (Amendment) Act, 2015 contended that pending grant of renewal, the mining operation was discontinued from 26.10.2015 and operation of the mining, if any, became ineffective from 12.1.2015.

In the circumstances, Sri Pattnaik, learned senior counsel claimed that the J.V. agreement executed between the parties on 12.4.2010 became inoperative from 26.10.2015. It is, in the above background of the matter, Sri

J.Pattnaik, learned senior counsel while resisting the claim of M/s. O.M.M. Ltd., however, confined his submission in challenging the impugned order so far it relates to imposition of condition by the District Judge directing Sri Dagara for furnishing bank guarantee of Rs.5.00 crore within one month and also the further condition against Sri Dagara asking him not to dispose of or cause destruction of Schedule 'B' property appended to the execution petition.

10. Considering the rival contentions of the parties, this Court finds, there is no dispute that Shri Dagara continues to be the lessee in respect of a mining lease for iron ore over 618 hectares at Suleipat Iron Ore Mines and the mining lease as per the communication of Government of Odisha, Steel & Mines Department No.924 dated 12.2.2019 has been extended upto 24.02.2025 but however, subject to the conditions stipulated therein. There is no dispute that there exists a Joint Venture agreement dated 12.04.2010 between the parties involving both the Writ Petitions more particularly between O.M.M. Ltd. and Shri Birat Chandra Dagara. Consequent upon which, the parties have also entered into a raising agreement on 12.04.2010 under the conditions stated therein. Involving a complication between the parties involved herein, further as Shri Dagara in terms of the J.V. Agreement did not clear the long pending dues and at the same time entered into the contractual agreement with M/s.Taurian Exin. (P.O.) Ltd. and M/s.MQM in respect of the mining ore involved thereby misappropriated the excavated stock iron ore and sold the iron ore to various parties instead of the companies under the J.V. agreement, on the premises of violation of terms and condition of the J.V. Agreement and misappropriation as well as sell by Shri Dagara, a proceeding U/s.9 of the Arbitration and Conciliation Act, 1996 was initiated and registered as ARBP No.14 of 2015 on the file of the District Judge, Mayurbhanj. Upon hearing the parties and on the premises that there is violation of condition of J.V. Agreement by Shri Dagara the District Judge, Mayurbhanj after coming to the finding that the O.M.M Ltd. is thereby sustaining irreparable loss which cannot be compensated in any manner by order dated 30.10.2015, as an interim measure passed an ad-interim order. After appearance of the parties and on contest of the parties, while vacating the interim order dated 30.10.2015 by his order dated 5.12.2015 the District Judge passed the following order:

> "9. The case is posted today for consideration as to whether the ad-interim injunction granted earlier will be made absolute or not ? It is pertinent to note here that on account of liberal adjournment with the consent of both sides. 30 days has already been elapsed as stated in foregoing paragraphs. The argument so advanced on behalf of the O.P. is

> required to be adjudicated during hearing of the main arbitration petition. When ad-interim injunction petition is taken up for hearing, the determination regarding the above point of jurisdiction is to be avoided, as it would prejudge the merit of the original arbitration petition. Considering the facts and circumstances of the case and when the O.P. has entered appearance and filed his show cause, in the interest of justice, I think it proper to vacate the ad-interim injunction and accordingly, the same stands vacated for the time being fixing the case to 7.1.16 for hearing on the injunction petition. Intimate the parties."

11. It is, against the order dated 5.12.2015 the O.M.M. Ltd. filed appeal U/s.37(I)(a) of the Arbitration and Conciliation Act, 1996 being registered as ARBA No.34 of 2015. While issuing notice in the Arbitration Appeal this Court considering the Misc. Case No.61 of 2015 by order dated 10.12.2015 passed an order staying the operation of the order dated 5.12.2015 passed by the learned District Judge, Mayurbhanj, Baripada in Arbitration Petition No.14 of 2015.

12. ARBA No.34 of 2015 was finally heard and disposed of and by order dated 26.02.2016 this Court on contest of the parties passed the following:

> "Considering the submissions made and without expressing any opinion on the merits of the case, the appeal is disposed of directing both the parties to maintain status quo in respect of the subject matter of the dispute till disposal of the Arbitration Petition No.14 of 2015.
> It is open for the parties to raise all such pleas as are available to them in law at the time of hearing of the arbitration petition, including the question of jurisdiction."

13. In another development an application U/s.11(5) of Arbitration Act was moved to this Court registered as ARBP No.31 of 2015 for appointment of Arbitrator. This matter was decided on contest and disposed of by appointing Shri B.P. Das, a former Judge of this Court as sole Arbitrator to adjudicate the dispute between the parties fixing the venue of the Arbitration at Orissa High Court Arbitration Centre. In the meantime, Shri Dagara filed Writ Petition vide W.P.(C) No.23070 of 2015 challenging the order dated 5.12.2015, this Court disposing the W.P.(C) No.23070 of 2015 by order dated 19.04.2016 held that the Writ Petition is not maintainable. Involving the above developments three Special Leave Petitions Vide SLP(C) No.13599 of 2016, SLP (C) No.13803 of 2016 and SLP (C) No.13824 of 2016 were preferred. All the three Special Leave Petitions were disposed of by a common order of the Hon'ble Apex Court dated 1.07.2016 (Annexure-9 in W.P.(C) No.7445 of 2019), wherein the Hon'ble Apex Court in disposing the SLP(C) No.13599 of 2016 interfering in the order of this Court in Arbitration Petition No.31 of 2015 appointed Justice Vikramajit Sen, former Judge of the Hon'ble Apex Court as the sole Arbitrator to adjudicate the dispute between

the parties and pass necessary award. Similarly disposing the other two SLPs while terminating the proceeding pending before the trial court vide ARBP No.14 of 2015 requested the sole Arbitrator appointed by the Hon'ble Apex Court to take up the application, if any, moved by Shri Dagara in the first instance and pass order as expeditiously as possible and without being influenced by any of the orders passed by the Courts below, while directing the parties to maintain status quo as on the date of disposal of the above SLPs on 1.07.2016.

It is needless to mention here that by this order the order dated 26.02.2016 wherein this Court in disposal of the ARBA No.34 of 2015 directed the parties to maintain status quo in respect of the subject matter of the dispute, got revived. In the meantime, pursuant to the direction of the Hon'ble Apex Court Justice Vikramajit Sen was appointed as the sole Arbitrator for adjudication of the Arbitration proceeding between the parties. For filing of the application by the respective parties for passing award in terms of settlement arrived at between the parties, respected Sole Arbitral Tribunal disposed of the Arbitration proceeding at his end by passing an award in terms of settlement dated 13.06.2017 find place at page 138 to 140 of the W.P.(C) No.7445 of 2019. For the gravity of the matter further to erase any doubt, this Court feels it appropriate to take note of the conditions in the settlement being very relevant in terms of status of both the parties as the award is passed in terms of settlement, which are reproduced as herein below:

"(A) The parties above mentioned had executed a Joint Venture Agreement and other related/ Ancillary Agreements on 12.04.2010 for Suleipat Iron Ore Mines of the Second Party in accordance to the terms and conditions mentioned therein.

(B) The Agreements as aforesaid were made operational by both the parties in terms and conditions stipulated in these Agreements and the arrangements so stipulated continued to be operational till October, 2015.

(C) The disputes and difference arose between the parties in October, 2015, the First Party invoked the Arbitration Clause in the Agreement and filed Section-9 Application in Court. The matter was heard by different Judicial Forum and is presently in Arbitration being conducted by the Hon'ble Sole Arbitrator Justice Vikramajit Sen, (Retd.) Judge, Hon'ble Supreme Court of India.

(D) The parties have now mutually agreed to settle all their inter-se disputes among themselves at the following terms and conditions (hereinafter referred to as the "TERMS OF SETTLEMENT").

(E) Both the parties hereby declared that such a settlement has been reached without any undue pressure or haste, and, is a result of well thought out business decision arrived by the parties after prolonged discussion between the parties in mutual business interest.

(F) The parties hereby stipulate the terms of settlement herein below in complete mutual agreement:

(1) The said terms of settlement has been arrived at mutually agreed by and between both the parties after obtaining proper consent/ authorization. The settlement shall be binding on all the legal heirs/nominees, assigns of both the parties.

(2) The relationship between the parties shall be governed exclusively by the terms and conditions of the J.V. Agreement and all other allied Agreements executed between the parties on 12.04.2010 which shall be binding on both the parties. All other documents, understanding, disputes shall deemed not to be in existences and shall become legally inoperative with immediate effect in view of this settlement.

(3) All the authorizations already given by Sri B.C. Dagara to O.M.M. for State Govt. MoEF, IBM, Railways and other Statutory Agencies shall be reissued and all such authorization shall be accepted by the parties as irrevocable.

(4) On and from the date of execution of this Deed of Settlement between the parties, either of the parties shall have no grievance against each other. All the Sub-Judice claims of either of the parties against each other stands settled and closed.

(5) The parties have executed this legally binding Terms of Settlement incorporating the above mentioned points and do hereby undertake to mutually approach the Hon'ble Arbitrator praying to the Hon'ble Tribunal for a consent award at the earliest with this terms of settlement being a part of the Award.

(6) The terms of settlement as executed between the parties is the final document governing relationship between the parties inter-se. It shall be read as an integeral part of earlier Agreement and other Agreements executed earlier between the parties and shall form a part and parcel of the same.

(7) The parties shall file this terms of settlement before the Hon'ble Arbitrator within one week of its execution along with an application requesting the Hon'ble Arbitrator to pass a consent award in terms of this settlement.

(8) The parties shall bear their own costs.

(9) All the outstanding account/ receivables between both the parties shall be settled as per the books of accounts of both the parties."

Reading the aforesaid terms in the settlement between the parties and further looking to the directions contained in the award, this Court finds, it becomes clear that not only there has been revival of the J.V. agreement but parties are also required to be governed exclusively by the terms and conditions of the J.V. agreement and all other allied agreement executed between the parties on 12.04.2010. The settlement also made it clear that on and from the date of execution of the settlement deed between the parties involved herein either of the parties shall have no grievance against each other and all the sub-judice claim of either of the parties against each other stands settled and closed finally. It is also agreed therein that all the outstanding accounts/receivables between both the parties shall be settled as per the books of accounts of both the parties again leaving no room of doubt in the matter of payment. It is while the matter stood thus and while no party has challenged the award passed by the sole Arbitrator, the award of the sole Arbitrator remained as a decree in terms of the Section 35 of the Act, 1996

and binding on the parties therein in terms of Section 35 of the Act. For not allowing the O.M.M. Ltd. functioning as a raising Contractor in terms of the J.V. agreement and further threatening the authority of the O.M.M. Ltd and their personnels, the O.M.M. Ltd. while filing an F.I.R. before the Badampahar Police Station vide Annexure-12 in its Writ Petition choose to file an execution petition U/s.36 of the Act, 1996 on the file of District Judge, Mayurbhanj, registered as Execution Petition No.1 of 2019. On the clandestine attempt of Shri Dagara and his working not only in violation of the J.V. agreement and the subsequent agreements involving the J.V. agreement further in clear contravention to the award passed by the respected sole Arbitrator, the O.M.M. Ltd. was constrained to file an application U/s.151 of C.P.C. pending final adjudication of the Execution Petition. The District Judge by his order dated 7.02.2019 finding prima facie case, balance of convenience and irreparable loss in favour of M/s. O.M.M. Ltd. while prohibiting the judgment debtor from carrying out any mining operation in Sulaipat Iron Ore Mines passed the following:

> "Peruse the award and other relevant papers. The terms and conditions on which the matter was resolved are mentioned in the award of the sole arbitrator. Being satisfied with the fact that the D.H.R. has prima-facie case and balance of convenience leans in its favour. Hence, I am of the opinion that unless O.P./J.D.R is restrained from carrying out any mining operation in Sulaipat Iron Ore mines by himself or through his agents or through any other party, the D.H.R. will suffer irreparable loss. The J.D.R. is therefore restrained from performing any mining activities in Sulaipat Iron Ore Mines by himself or through agent or through third party till next date i.e. 07.03.2019. The petition is disposed of accordingly. Issue summons to the J.D.R. in both the ways for appearance and filing of show cause." (Underlining is of this Court)

14. In the meantime, Shri Dagara on his appearance filed an application to recall the order dated 7.02.2019 on the ground stated therein. Reading the application, it appears, Shri Dagara on the premises of the order of the Hon'ble Apex Court dated 6.09.2018 involving I.A. No.58800 of 2018 in W.P.(Civil) No.114 of 2014 pressed his application asking the District Judge to recall the order dated 7.02.2019 under the guise of a new lease of life being created in his favour. This Court looking to the order dated 6.09.2018 involving disposal of the I.A. No.58800 of 2018 arising out of W.P.(C) No.114 of 2014 finds, by the said order the Hon'ble Apex Court while recording the statement of the learned Counsel for the State of Odisha regarding the payment of dues in terms of the earlier direction of the Hon'ble Apex Court as a measure of fine imposed on account of illegal mining by different mining holders including Sri Dagara, directed for resumption of mining involving Sri Dagara but however, subject to compliance of all the regulatory requirements including clearance. For the subsequent development

involving the letter of the Government of Odisha in Steel & Mines Department dated 12.02.2019, this Court observes not only there has been resumption of the mining lease but the period of lease has also been extended under the direction of the competent authority upto 24.10.2025. Looking to the background involving the case and the conditions in the J.V. Agreement, taking into account the compromise award by the respected sole Arbitrator, this Court here observes not only prima facie case, balance of convenience and irreparable loss leans in favour of the petitioner i.e. M/s. O.M.M. Ltd, the order involving I.A. No.58800 of 2018 arising out of W.P.(C) No.114 of 2014 since was on a different context, was no way obstructing in working out of the arbitral award put to execution rather keeping the entitlement of the O.M.M. Ltd. open to be worked out by the executing Court. It is, at this stage of the matter, this Court finds, the District Judge by order dated 21.02.2019 passed the following:

> "Shri A.K. Mohanty and his associates file Vokalatnama executed by J.Dr. Birat Chandra Dagara along with a petition to recall the order dated 7.2.2019. He has also filed documents as per list. Copy of the petition is served on the learned counsel for the D.Hr. The learned counsel prayed to grant some time for filing objection to the petition filed today by J.Dr. At this stage, the learned counsel Sri Mohanty submitted that the J.Dr. Is directed by the Govt. Of Orissa to execute supplementary lease deed within a period of three months from the date of issue of letter i.e. 12.2.2019. It is made clear that the interim order dated 7.2.2019 shall not stand on the way of execution of Supplementary Lease Deed between the Govt. And J.Dr.. Put up on the date fixed i.e. 7.3.2019 for objection and hearing of both the petitions."

It appears, by order dated 21.02.2019, keeping in view the subsequent developments, the District Judge only clarified that the order dated 7.02.2019 shall not stand on the way of execution of supplementary lease deed between the Government and the Judgment debtor, appears to be an outcome on the basis of the communication of the Government dated 12.2.2019 thereby extending the period of lease up to 24.10.2025 and thereby by clause no.18 asking the Judgment debtor to execute a supplementary lease deed. In the meantime, for the District Judge passing an order on 7.03.2019, rejected the application for recalling the order dated 7.02.2019, thereby maintaining the order dated 7.02.2019 to continue. This order was challenged by Shri Dagara in filing W.P.(C) No.6353 of 2019, disposed of on context where this Court while setting aside the order dated 7.03.2019 remanded the matter for rehearing of the petition for recalling of the order dated 7.02.2019 while allowing the order dated 7.02.2019 to continue till disposal of the recalling application. In the meantime on rehearing of the matter for the remand direction by this Court, the District judge by order dated 2.04.2019 while observing that there is prima facie case in favour of M/s. O.M.M. Ltd. for the

new lease of life to the J.V. agreement on the basis of the direction of the Hon'ble Apex Court in I.A. No.58800 of 2018 but considering the question of balance of convenience as well as inconvenience involving the parties and the question of irreparable loss to be sustained by M/s.O.M.M. Ltd. while vacating the interim order dated 7.02.2019 and directing Shri Dagara to furnish a bank gurantee of rupees five crores, thereby further directing the Judgment Debtor Shri Dagara not to dispose of or cause obstruction to Schedule-B property till disposal of the execution proceeding at the same time also restrained Shri Dagara from resuming the mining operation before full compliance of the order of the Hon'ble Apex Court in I.A. No.58800 of 2018 and the conditions laid by the Government of Odisha in its letter No.924 dated 12.02.2019. This Court observes, while deciding the petition dated 21.02.2019 at the instance of the Judgment debtor to recall the order dated 7.02.2019 the District Judge has a clear finding on prima facie case as well as irreparable loss in favour of the decree holder i.e. M/s.O.M.M. Ltd. It is, at this stage, in disposal of the petition for vacating the interim order dated 7.02.2019 the District judge in disposal of both the applications at the instance of the respective parties vide paragraph nos.5, 6 & 7 by order dated 2.04.2019 passed the following:

> "5. Law is well settled that non mentioning or wrong mentioning of provisions of law in the petition would not be of any relevance if the court had the requisite jurisdiction to pass an order. This court having jurisdiction to pass an order of injunction U/sec.9 of the Act as well as U/sec.151 of the C.P.C., the question of wrong mentioning of provisions of law becomes redundant. In order to invoke the jurisdiction to grant discretionary remedy such as injunction, the court will take into consideration of three ingredients namely prima-facie case, balance of convenience. In other words it is to be seen whether the comparative inconvenience or mischief which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it. The Court is also required to consider if the petitioner willo suffer irreparable loss if injunction is not granted in his favour. In order to get interim injunction, the petitioner/D.Hr is to satisfy the above points. It has already been discussed in the preceding paragraph on the background of the present proceeding which involves a joint venture agreement and consent award passed by the sole arbitrator Hon'ble Justice (Retd.) Vikramjit Sen. The petitioner/D.Hr has to point out that there is serious question to be tried at the hearing and there is probability that he will be entitled to the relief sought by him. The Hon'ble Supreme Court in the I.A. No.58800/18 directed the State of Odisha to take necessary steps and then, mining may be resumed subject to compliance of all the regulatory requirements including clearances. After the order of the Hon'ble Supreme Court, the State of Odisha taken the first step by extending the validity period of mining lease for Iron Ore in Suleipat and directed the J.Dr/O.P to execute the supplementary lease deed. The extension of the said validity period of lease are subjected to nine conditions vide Govt. of Odisha in

Steel and Mines Deptt. Letter no.924, dated 12.2.19. Had the extension of the validity period been denied by the Hon'ble Supreme Court as well as State of Odisha, the joint venture agreement would have expired/terminated automatically. In fact, the order of the Hon'ble Supreme Court followed by the extension of validity period of mining lease in favour O.P./J.Dr gives a new lease of life to the joint venture agreement executed between the petitioner and the O.P. and therefore, the petitioner/D.Hr has a prima-facie case in his favour.

Now, coming to the second point i.e. the balance of convenience or comparative inconvenience it is found that the petitioner/D.Hr has invested a huge amount of money after entering into a joint venture agreement. Although, the petitioner/D.Hr has filed an expenditure statement showing payment of details of D.R and S.R, as well as compensation U/sec. 21(5) of the Act and bank guarantee, but the documents such as D.D. and E-Challan are not produced. The mining operation in the Suleipat Iron Ore mines will boost the economic development of the State as well as the District and stopping of the same may cause a greater inconvenience to the State in general and the local people in particular. So far as the irreparable loss or injury that is likely to be arose in not granting the injunction is concerned, it can be adequately compensated by awarding damages.

6. For the foregoing reasons, this court comes to a conclusion that the petitioner/D.Hr has a strong prima-facie case, but the other two ingredients such as the comparative inconvenience and the irreparable injury or loss do not leans in favour of the petitioner/D.Hr.

7. In the result, the interim order dated 7.2.19 passed by this court is vacated subject to furnishing a bank gurantee of Rs.5 (five) cores by the O.P./J.Dr within one month. The O.P./J.Dr is further directed not to dispose of or cause destruction to the Schedule-B property appended to the Execution petition till disposal of the Execution proceeding. It is made clear that the mining operation should not be resumed before full compliance of the order of the Hon'ble Supreme Court passed in I.a. No.58800/18 and the conditions laid by the Govt. of Odisha in its letter no.924 dated 12.2.19 and the date of resumption of mining operation shall be intimated to this court in shape of affidavit.

Both the petitions dated 25.1.19 filed U/sec. 151 C.P.C. on behalf of the Petitioner/D.Hr and the petition dated 7.2.19 filed on behalf of the O.P./J.Dr are disposed of accordingly. Put up on the date fixed for filing of show-cause by the O.P./J.Dr."

Reading both the orders dated 7.02.2019 and the order dated 2.04.2019 this Court finds, District Judge taking into account the revival of the J.V. agreement by virtue of the sole Arbitrator's award and for the renewal of the lease in favour of the JDr. for allowing for restoration of the mining operation by the competent authority in favour of the Judgment Debtor by virtue of the letter of the competent authority dated 12.02.2019, has come to the categoric findings finding prima facie case as well as irreparable loss in favour of the Decree Holder but somehow differed from his earlier view on balance of convenience by deciding the same in favour of the Judgment Debtor.

15. Reading the impugned order dated 2.04.2019, this Court again finds, there is finding on the prima facie case in favour of the petitioner in W.P.(C) No.7445 of 2019 as clearly indicated in the end of 1st para of paragraph no.5 therein. But however, in paragraph no.6 therein the District Judge misinterpreted the issue of balance of convenience in spite of the finding that the Decree Holder has invested huge amount and on issue of irreparable loss decided the said issue in favour of the decree holder but on the premises that loss of the decree holder can be compensated by way of damages merely on the basis that unless the mines remain operative, there may be hampering on the Economic boost in the locality and the State may be the sufferer.

Going back to the conditions in the settlement award binding on both the parties, this Court finds, clause 2 & 4 of the conditions No.F therein reads as follows:-

> "(2) The relationship between the parties shall be governed exclusively by the terms and conditions of the J.V. Agreement and all other allied Agreements executed between the parties on 12.04.2010 which shall be binding on both the parties. All other documents, understanding, disputes shall deemed not to be in existences and shall become legally inoperative with immediate effect in view of this settlement.
>
> (4) On and from the date of execution of this Deed of Settlement between the parties, either of the parties shall have no grievance against each other. All the Sub-Judice claims of either of the parties against each other stands settled and closed."

Reading the above conditions forming part of the award since binds both the parties herein, this Court finds, the observation and finding of the District Judge on balance of convenience and part of irreparable loss in favour of the Judgment Debtor becomes bad. This Court here observes that in deciding the question of balance of convenience and irreparable loss the District Judge has totally lost the sight of existence of a settlement award pending for execution as well as the clandestine conduct of Sri Dagara in misappropriating the minerals leased as well as entering into new raising contracts with 3rd parties. From the basis of finding of the District Judge involving the impugned order, it is needless to observe here that neither the I.A. No.58800 of 2018 nor W.P.(C) No.114 of 2014 nor action of the Government of Odisha in issuing the letter dated 12.02.2019 involved the award in terms of settlement between the parties involved herein. From the observation of the District Judge in the impugned order this Court finds, there is misreading of the development through the order in I.A. No.58800 of 2018 and letter dated 12.02.2019 by the District Judge. This Court, accordingly interfering in the findings of the District Judge on balance of convenience and that part on irreparable loss, answers both in favour of the Decree Holder.

16. On the question of maintainability of the application U/s.151 of C.P.C., this Court is in confirmity with the findings of the District Judge and thus affirms the view of the District Judge by holding that the application gets into the trap of Section 9 of the Act, 1996. Law is fairly well settled that mere nomenclation has nothing to do with the assessment, it is the purpose involving the same matters.

17. Taking into consideration the further submissions made by Sri J.Pattnaik, learned senior counsel and going through the application for re-calling the order dated 7.2.2019 at the instance of Mr. Dagara appearing at Annexure-9 at page-99 of W.P.(C) No.7537/2019, this Court finds, many of the grounds raised herein by Sri J.Pattnaik, learned senior counsel are silent in the application filed in Court below and finds at Annexure-9 to W.P.(C) No.7537/2019. Law does not permit a party to raise new grounds for the first time in the higher forum.

18. It is, in the circumstance, this Court interfering in the impugned order dated 2.04.2019 find place at Annexure-22 involving W.P.(C) No.7445 of 2019 and Annexure 1 in W.P.(C) No.7537 of 2019 sets aside the impugned order dated 2.04.2019 thereby reviving the order dated 7.02.2019 passed by the District Judge. The direction therein shall remain operative till disposal of the execution proceeding No.1 of 2019. For already appearances of the Judgment debtor in execution proceeding this Court also directs the District Judge, Mayurbhanj to conclude the hearing of the Execution Petition giving opportunity of hearing to both the sides as expeditiously as possible preferably within a period of six weeks hence. Both the parties are directed to appear before the Executing Court on 16.07.2019 along with the judgment of this Court.

19. Both the Writ Petitions stand disposed of with interference with the impugned order therein and allowing revival of order dated 7.02.2019 and with the other directions given hereinabove. However, there is no order as to cost.

* The SLP (C) No. 16647 of 2019 filed challenging this Judgment has been dismissed vide order Dated 02.08.2019 by the Hon'ble Apex Court.

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2019 (II) ILR - CUT- 861

BISWANATH RATH, J.

W.P.(C) NO. 8785 OF 2019

BHASKAR NARAYAN MISHRA & ORS. ....Petitioners

.Vs.

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

ORISSA LAND REFORMS ACT, 1960 – Section 22 – Applicability – Properties stand recorded jointly in the names of general and scheduled caste persons – Non-scheduled caste person wanted to sale his share – Refusal for registration by the Sub-Registrar on the ground of non-compliance of the provision under section 22 of the OLR Act – The question arose as to whether in such circumstances the provision of section 22 of the Act is applicable? – Held, No.

Now coming to deal with the question as to in the circumstances stated hereinabove and particularly for involvement of some of Scheduled Caste persons as joint holder of a common property whether sale of share by a person belonging to general caste provision of Section 22 of the OLR Act has application, this Court for the discussion of this Court vide 2015 (II) ILR-CUT-344 holds since the transaction involves sale of share of a joint record holding belonging to general caste further for no involvement of share of the Scheduled Caste persons involved therein there is no difficulty in sale of his share by the petitioner and there can not be application of provision of Section 22 of the OLR Act to the case at hand and as such both the correspondences vide Annexures-6 and 7 becomes inapplicable.

Case Laws Relied on and Referred to :-

1. 2015 (II) ILR-CUT-344 : Sitarani Rath .Vs. The Inspector General of Registration, Odisha & Ors.

For Petitioners : M/s. S.K. Dash, A.K. Otta, S. Das, A. Sahoo & S. Mohanty.
For Opp Parties : Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment: 30.07.2019

BISWANATH RATH, J.

This is a writ petition involving non-registration of sale deed by the Sub-Registrar, Hindol, opposite party no.4 and involves the following prayer :-

> "It is, therefore, prayed by the petitioners that this Hon'ble Court may graciously be pleased to admit the writ application and issue RULE NISI calling upon the opposite parties to show cause as to why these petitioners cannot present and get the sale deed executed in respect of their appropriate share registered in accordance with law and on their failure to show cause or showing insufficient cause may further be pleased to quashing the letter of the opposite party no.2 under Annexure-

7 to the writ application as opposed to law and issue appropriate Writ(s)/Direction(s) to the opposite party no.4 for accepting the sale deed for transfer of proportionate share in the joint holding for registration forthwith on presentation and may pass such other order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. Short fact involving the case is 12 persons inclusive of persons belonging to General Caste and Scheduled Caste were applicants for allotment of a parcel of land before the Ex-Ruller of Ex-State, Hindol prior to coming into force of the Constitution of India, 1950. In due process of law all these twelve persons were jointly granted permanent lease in respect of an area of Ac.98.42 in Nayabadi Khata No.470 of 1946 -47 out of Sabik Plot No.1286/1366 measuring Ac.1595.87 situated in village Khaliborei, P.S. Rasol. Jamabandi was also issued favouring these 12 persons. All these twelve persons were in occupation of the said land and in the meantime all of them were declared as Stitiban tenants involving the whole land allotted in their favour. During settlement operation 1969 Record of right was also prepared in respect of Ac.98.180 decimals appertaining to Plot No.1921 having an area of Ac.36.130, Plot No.2/2938 area Ac.26.390, Plot No.1388 area Ac.7.350 and Plot No.1924/2954, area Ac.28.010 under Khata No.119 of Mouza-Khalilborei, jointly in the name of original lessee and the legal heirs of the deceased lessee also died in the meantime. Involving Mutation Case No.1705 of 2018 the lease hold land stood recorded in the names of original recorded tenants and involving legal heirs of deceased the recorded tenants. While the matter stood thus for the legal necessity legal heirs of lessee Jayakrushna Mishra one of 12 equal share holders intended to sale their share of Ac.8.18 out of total area and one Asish Swayam Prakash agreed to purchase the share of Jayakrushna Mishra through their legal heirs i.e. petitioners. Accordingly petitioners prepared the sale deed and placed the same before the Sub-Registrar, Hindol for registration but however Registrar, Hindol blocked the registration on the premises that for involvement of Scheduled Castes people in the Record of Rights, he will register the instrument only after getting clarification from Addl. District Magistrate-cum-District Registrar. On seeking instruction the Additional District Magistrate on the application of provision at Section 22 of the OLR Act, 1960 vide Annexure-5 the doubt in the mind of the Sub-Registrar, the Addl. District Magistrate-cum-District Registrar, Dhenkanal again sought for clarification from opposite party no.2 on the application of provisional of Section 22 of the OLR Act 1960 before registering the deed. In response to which the opposite party no.2 wrote back to the Registrar that there is application of Section 22 of the OLR Act to the case at hand. Consequent

upon receipt of communication vide Annexure-7 the Sub-Registrar involved declined to register the instrument in absence of compliance of provision of Section 22 of the OLR Act, 1960. Subsequent to communication vide Annexure-6 the giving rise to filing of writ petition at hand.

3. Assailing this action of the Sub-Registrar involved Sri S.K. Dash, learned counsel appearing for the petitioner submitted that for having equal share over the disputed property further for involvement of sale of share of a person belonging to general caste even though the Record of Rights stands in the name of persons including some Scheduled Castes, there is no prohibition in sale of his own share by the petitioner. For no involvement of Scheduled Caste persons share there is no question of application of provisions of Section 22 of the OLR Act 1960. Sri Dash thus contended that the Sub-Registrar as well as the I.G.R. all failed in understanding the distinction between sale of share and sale of land. Sri Dash also taken support of a decision of this Court in the case of ***Sitarani Rath –vrs.- The Inspector General of Registration, Odisha and others,*** reported in 2015 (II) ILR-CUT-344, and sought for intervention of this Court in the impugned action of the Sub-Registrar and also declaring the correspondence vide Annexures-6 and 7 have no application to the case at hand.

4. Sri S.N. Mishra, learned Addl. Government Advocate in his opposition while supporting the instructions vide Annexure-7 contended that for joint recording of land involving Scheduled Castes there is clear application of provision of Section 22 of the OLR Act 1960. It is in the above premises, Sri Mishra, learned counsel for the State sought for dismissal of the writ petition.

5. Taking into account the decision vide 2015 (II) ILR-CUT-344, this Court finds on the question as to whether a person is entitled to sell his share involving a joint holding property taking into account several decisions taken note thereof has come to hold that law does not prohibit sale of share of a person except possession thereof shall be dependant on partition of the property involved.

6. Now coming to deal with the question as to in the circumstances stated hereinabove and particularly for involvement of some of Scheduled Caste persons as joint holder of a common property whether sale of share by a person belonging to general caste provision of Section 22 of the OLR Act has application, this Court for the discussion of this Court vide 2015 (II) ILR-CUT-344 holds since the transaction involves sale of share of a joint record holding belonging to general caste further for no involvement of share of the

Scheduled Caste persons involved therein there is no difficulty in sale of his share by the petitioner and there can not be application of provision of Section 22 of the OLR Act to the case at hand and as such both the correspondences vide Annexures-6 and 7 becomes inapplicable.

7. In the circumstances, this Court interfering the impugned action, this Court holds the instructions vide Annexure-7 not applicable to the case at hand. This Court therefore directs the Sub-Registrar, Hindol, opposite party no.4 to register the instrument at the instance of the petitioners presented before him by taking appropriate action within a period of seven days from the date of communication of this order. The writ petition succeeds. No costs.

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2019 (II) ILR - CUT- 864

S. K. SAHOO, J.

CRLMC NO. 1639 OF 2018

MANORAMA SINGH ………Petitioner

.Vs.

STATE OF ORISSA ………Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Prayer for quashing of the order taking cognizance – Alleged offences are under sections 420/468/467/465 of the Indian Penal Code – Materials suggest the dispute is civil in nature – The complainant in order to create pressure on the petitioner for obvious reasons has instituted the criminal proceeding – Since the criminal proceeding has been instituted with malafide intention and the ingredients of the offences are not attracted and the dispute between the parties being civil in nature, the continuance of such proceeding would amount to abuse of process – Entire criminal proceeding quashed.

For Petitioner : M/s. Ramanikanta Pattnaik, B.Ch.Parija,
N. Das A. Swain,Niranjan Das

For State of Odisha : Mr. Jyoti Prakash Patra, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 22.07.2019

S. K. SAHOO, J.

The petitioner Manorama Singh has filed this application under section 482 of the Code of Criminal Procedure, 1973 for quashing the

impugned order dated 04.12.2017 passed by the learned S.D.J.M., Jagatsinghpur in G.R. Case No.806 of 2017 in taking cognizance of offences under sections 420/468/467/465 of the Indian Penal Code and issuance of process against her.

It appears that one Laxmi Narayan Singh filed a complaint petition in the Court of learned S.D.J.M., Jagatsinghpur against the petitioner and one Kailash Chandra Sahoo for commission of offences under sections 420/468/465/467/294/506/34 of the Indian Penal Code which was registered in I.C.C. Case No.181 of 2017. The learned S.D.J.M., Jagatsinghpur sent the complaint petition to the Inspector in Charge of Raghunathpur police station under section 156(3) of Cr.P.C. for registration of the F.I.R. and for investigation and accordingly, Raghunathpur P.S. Case No.94 of 2017 was registered on 02.03.2017 under sections 420/468/465/467/294/506/34 of the Indian Penal Code.

After completion of investigation, charge sheet has been submitted only against the petitioner under sections 420/468/467/465 of the Indian Penal Code, on the basis of which the impugned order dated 04.12.2017 was passed.

It appears from the narration in the complaint petition that the land appertaining the Khata No.19 of Mouza Gokulapur belonged to one Sitaram Singh who died leaving his son Bhagabat Singh and daughter Anandi @ Adaramani Singh as his legal heirs to succeed his entire property. Bhagabat Singh and his wife died issueless leaving Anandi @ Adarmani Singh as their sole successor. During the consolidation operation, the properties under Khata No.19 was recorded in the name of Anandi Singh but wrongly recorded in the name of the petitioner. It is the further case of the complainant that Anandi Singh died in the year 2009 leaving behind the complainant Laxmi Narayan Singh and another son and daughters as her legal heirs. Since the complainant was residing at Bhubaneswar, taking advantage of his absence, the petitioner managed the record her name wrongly showing herself as the sole daughter of Anandi Singh by gaining over the Tahasil staff and R.I., Chikinia and with the help of accused no.2 Kailash Chandra Sahoo mutated the land in her name and obtained the R.O.R. and by taking advantage of wrong recording, the petitioner transferred the property in favour of accused no.2 mutated Kailash Chandra Sahoo by way of registered sale deed on 06.12.2017. It is the further case of the complainant that when he came to know about the same, he collected the certified copy of the records and then called the accused persons for

settlement but they refused for such settlement rather scolded him and threatened him with dire consequences.

Mr. Ramanikanta Pattnaik, learned counsel for the petitioner contended that the materials available on record indicate that a part of property in question was transferred by way of a registered gift deed by Jaina Singh, the widow of Sitaram Singh in the year 1983 in favour of the petitioner and similarly Rukmani Dei who is the daughter-in-law of Sitaram Singh being the wife of his son Bhagabat Singh sold the rest of the properties to the petitioner by way of two registered sale deeds, one executed in the year 1984 and the other in the year 1987. Learned counsel for the petitioner further submitted that after the petitioner came into the ownership of such properties due to the execution of gift deed and sale deeds, she was in lawful possession of the property and sold the same to the accused no.2 Kailash Chandra Sahoo on 06.02.2017. It is further contended that after the petitioner became the registered owner of the property, neither the complainant nor anybody challenged such sale deed and gift deeds and at a belated stage, the criminal proceeding has been instituted with malafide intention and since the dispute is basically civil in nature, the criminal proceeding should be quashed in the interest of justice.

Mr. Jyoti Prakash Patra, learned Addl. Standing Counsel for the State on the other hand placed the first information report and submitted that the investigating officer has rightly submitted charge sheet and there is no infirmity in the impugned order of taking cognizance passed by the learned S.D.J.M., Jagatsinghpur.

Considering the submissions made by the learned counsel for the respective parties and perusing the complaint petition as well as the documents which are annexed to this application, it appears that the petitioner became owner of the property in question since long by virtue of the execution of the sale deed and gift deeds and the complainant who happens to be the son of the daughter of the original owner Sitaram Singh has not challenged such sale deeds or gift deed before the competent Court at any point of time. During course of investigation, the allegation against accused no.2 Kailash Chandra Sahoo which was leveled in the complaint petition was not found to be correct and therefore, charge sheet was submitted only against the petitioner. Prima facie evidence is lacking that the petitioner committed any act of cheating which is defined under section 415 of the Indian Penal Code or forgery as defined under section 463 of the Indian Penal Code. The dispute between the parties is basically civil in nature. It appears

that without resorting to the civil remedy as available under law, the complainant in order to create pressure on the petitioner for obvious reasons has instituted the criminal proceeding. Since the criminal proceeding has been instituted with malafide intention and the ingredients of the offences are not attracted and the dispute between the parties is basically civil in nature, I am of the humble view that continuance of such proceeding would amount to abuse of process and therefore, invoking any inherent powers under section 482 of Criminal Procedure Code, I accept the prayer made in this application and direct the quashing of the impugned order dated 04.12.2017 passed by the learned S.D.J.M., Jagatsinghpur in G.R. Case No.806 of 2017 and the entire criminal proceeding of the said case. Accordingly, the CRLMC application is allowed.

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2019 (II) ILR - CUT- 867

S. K. SAHOO, J.

CRLMC NO. 2419 OF 2017

SATYABRATA PATEL ....Petitioner

.Vs.

STATE OF ORISSA ....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 468 – Limitation – Computation thereof – Offence under sections 23 and 25 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 – Plea that the order taking cognizance having been passed long after the filing of the complaint petition, the same is barred by the limitation – Held, No.

"Section 468 of Cr.P.C. creates a bar to take cognizance after lapse of the period of limitation and in subsection (2)(c), the period of limitation prescribed is three years, if the offence is punishable with imprisonment for term exceeding one year but not exceeding three years. In the case of Japani Sahoo Vrs. Chandra Sekhar Mohanty, reported in (2007) 38 Orissa Criminal Reports (SC) 309, the Hon'ble Supreme Court has held that for the purpose of computing the period of limitation, the relevant date must be considered as the date of filing of the complaint or initiating the criminal proceeding and not the date of taking cognizance by a Magistrate or issuance of process by a Court and accordingly, all the decisions in which it was held that the crucial date for computing the period of limitation is taking of cognizance by the Magistrate/Court and not of filing of complaint or initiation of criminal proceedings, were over-ruled."

Case Laws Relied on and Referred to :-

1. (2007) 38 OCR (SC) 309 : Japani Sahoo Vs. Chandra Sekhar Mohanty.

For Petitioner : Mr. B.K.Ragada, L.N.Patel, N.KDas, U.C.Dora & H.K.Muduli

For Opp. Party : Mr. Prem Kumar Patnaik (Addl. Govt. Adv.)

JUDGMENT Date of Hearing & Judgment: 29.07.2019

S. K. SAHOO, J.

The petitioner Satyabrata Patel has filed this application under section 482 of Cr.P.C. challenging the impugned order dated 05.08.2017 passed by the learned S.D.J.M., Jharsuguda in 2(C) CC No. 1630 of 2012 in taking cognizance of the offences under sections 23 and 25 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (in short, "PCPNDT Act") and issuance of process against him.

2. The complaint petition was filed by the DTO -cum- Authorised Officer of the District Appropriate Authority, Jharsuguda under the PCPNDT Act against the petitioner and others wherein it is stated that the State PC & PNDT monitoring team visited Jharsuguda on 22.08.2012 for a surprise inspection and met the Collector-cum- District Appropriate Authority, Jharsuguda and appraised the latter regarding one unregistered ultrasound clinic run by the petitioner. The Collector-cum- District Appropriate Authority authorized Dr.Hrushikesh Naik, the DTO vide order No.324 dated 22.08.2012 to inspect the ultrasound clinic along with the State team. The State team proceeded to the Doctors Chamber, Jyoti Medical Store near Hotel Gourav, Main Road, Behermal, Jharsuguda at about 1.30 p.m. During such inspection, the team found 2-3 patients were present in the ultrasound clinic and waiting for the ultrasound test and the petitioner was conducting ultrasound test of one patient namely, Debanda Patel, S/o. Late Laxman Patel, At/P.O.Jhirpali, P.S.Likera, District- Jharsuguda. It is stated in the complaint petition that the ultrasound clinic was run by the petitioner without registration and he unauthorisedly purchased the portable ultrasound machine bearing model No.DP-6600, Serial No.BE-75-5898 from Greaves Systems, P-597, Hemanta Mukhopadhaya Sarani (Keyatola Road), 3rd floor, Kolkata-700 029. During course of inspection, the petitioner himself admitted that the ultrasound clinic in the name and style of "Doctors Chamber" is not registered under the PCPNDT Act and he is not a trained person as per PCPNDT Rules, 1996 and that the clinic was not maintaining the mandatory records as per the said Act and that he had purchased the said un-registered

ultrasound machine since 28.05.2007. During inspection, the statement of the petitioner was recorded in presence of the inspection team, the C.D.M.O. and other witnesses. It is also stated in the complaint petition that the petitioner is a Government doctor being posted as Medical Officer, O.S.A.P. Hospital, Jharsuguda and unauthorisedly he was conducting ultrasound test of the pregnant women involving sex selection practices in the said chamber by using the unregistered portable ultrasound machine and also doing infertility cases in the said clinic. It is also stated that the petitioner was not a qualified person to perform the ultrasound test as per Rule 3(3)(1)(b) of the PCPNDT Rules, 1996. It is also stated that the manufacturer of the said ultrasound machine MINDRAY knowing the provisions of the said Act, unauthorisedly sold the ultrasound machine to the petitioner through the dealer, Greaves Systems P-597, Hemanta Mukhopadhaya Sarani (Keyatola Road), 3rd Floor, Kolkata-700 029 violating the prevision of section 3-B of the PCPNDT Act and Rule 3-A of the PCPNDT Rules. The authorized signatory, namely, Debasish Chothria for Greaves Systems is also responsible along with MINDRAY ultrasound manufacturer for violation of the provisions of the PCPNDT Act and PCPNDT Rules. During course of inspection, the following articles of the said clinic were seized:

(i) One portable ultrasound machine bearing model DP-6600, Serial No.BE-75-5898.
(ii) Report on abdomen and pelvic sonography of the clinic 54 nos.
(iii) Ultrasound scan report- two numbers.
(iv) Xerox scan report- 3 nos.
(v) Prescription pad of Dr.Satyabrata Patel
(vi) Invoice of portable ultrasound machine bearing model DP-6600, Serial No.BE-75-5898 in favour of Dr.Satyabrata Patel.
(vii) Xerox copy of certificates and other seized papers.

While filing the complaint petition, the complainant has filed the following documents:

(a) Notification of the Government as District Appropriate Authority.
(b) Seizure list dated 22.08.2012
(c) Report on abdomen and pelvic sonography of the clinic 54 nos.
(d) Ultrasound scan report- two numbers.
(e) Xerox scan report- 3 nos.
(f) Prescription pad of Dr.Satyabrata Patel
(g) Invoice of portable ultrasound machine bearing model DP-6600, Serial No.BE-75-5898 in favour of Dr.Satyabrata Patel.
(h) Xerox copy of certificates and other seized papers.
(i) Statements of witnesses.

3. It appears that after filing of the complaint petition on 05.11.2012, the learned S.D.J.M., Jharsuguda took cognizance of the offence under section 28(2) of the PCPNDT Act and directed for issuance of process against the petitioner. The petitioner challenged the said order by filing an application under section 482 of Cr.P.C. before this Court vide CRLMC No. 215 of 2017 and this Court by order dated 14.07.2017 quashed the impugned order as cognizance was not taken under any penal provision and section 28(2) of the PCPNDT Act only specifies the jurisdiction of the Court, who can try the offences under the said Act. This Court held that penal provision is necessary to be mentioned so that the accused can know what charge is levelled against him and what punishment is prescribed for the offence. The matter was remitted back to the learned S.D.J.M., Jharsuguda for reconsideration on the question of taking cognizance of offences. After receipt of the order of this Court, the learned S.D.J.M., Jharsuguda perused the complaint petition, the notification of the Government as District Appropriate Authority, seizure list, statements of witnesses, invoice and chalan of the ultrasound machine and other equipments in favour of the petitioner, sanction order and other connected papers and being satisfied about the existence of prima facie case for commission of the offences under sections 23 and 25 of the PCPNDT Act, took cognizance of such offences and issued process against the petitioner.

4. Mr.B.K. Ragada, learned counsel appearing for the petitioner challenged the impugned order mainly on two grounds; i.e. (i) since the punishment prescribed for the offence under section 23 of the PCPNDT Act is up to three years and the punishment prescribed for the offence under section 25 of the said Act is up to three months, the offence having been taken place as per the complaint petition on 22.08.2012, the order taking cognizance on 05.08.2017 is beyond the prescribed period of limitation in view of section 468 of Cr.P.C. and (ii) when the surprise inspection was made on 22.08.2012 in the clinic in the name and style of "Doctors Chamber", Jyoti Medical Store near Hotel Gourav Main Road, Behermal, Jharsuguda, no female person was present in the clinic and one Dr.Debasis Behera had applied for registration of the clinic and therefore, filing of the complaint petition against the petitioner and that too for commission of the offences under the PCPNDT Act is illegal.

Mr. Prem Kumar Patnaik, learned Addl. Government Advocate, on the other hand, supported the impugned order and contended that when the matter was remanded back by this Court in CRLMC No.215 of 2017 after

perusing the complaint petition and all other relevant documents, which were filed along with such complaint petition, the impugned order has been passed and the relevant date for considering the period of limitation is the date of filing of the complaint petition and not the date of taking cognizance. It is further submitted that since during inspection, it was found that the petitioner was performing the test and the ultrasound machine and the reports seized also substantiated that tests were being conducted in an unregistered clinic in violation of the provisions of the PCPNDT Act and therefore, there is no illegality or infirmity in the said order.

5. Adverting to the contentions raised by the learned counsel for the respective parties, let me first consider the point relating to the cognizance being taken beyond the prescribed period of limitation.

There is no dispute that section 23 of the PCPNDT Act prescribes a punishment for a term which may extend to three years and with fine, which may extend to rupees ten thousand rupees for any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise if he contravenes any of the provisions of the PCPNDT Act or the Rules made thereunder and on subsequent conviction, the imprisonment may extend to five years and with fine, which may extend to fifty thousand rupees. Similarly, section 25 of the PCPNDT Act prescribes punishment up to three months or with fine, which may extend to one thousand rupees or with both in case of contravention of the provisions of the Act and rules for which no specific punishment is prescribed and in the case of continuing contravention, with an additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention.

6. In the case at hand, the offence was detected on 22.08.2012 in Doctors Chamber, Jyoti Medical Store near Hotel Gourav Main Road, Behermal, Jharsuguda when the authorized officer with the monitoring team visited the clinic and the complaint petition was filed on 05.11.2012, which was within three months of such detection.

Section 468 of Cr.P.C. creates a bar to take cognizance after lapse of the period of limitation and in sub-section (2)(c), the period of limitation prescribed is three years, if the offence is punishable with imprisonment for

term exceeding one year but not exceeding three years. In the case of **Japani Sahoo Vrs. Chandra Sekhar Mohanty, reported in (2007) 38 Orissa Criminal Reports (SC) 309**, the Hon'ble Supreme Court has held that for the purpose of computing the period of limitation, the relevant date must be considered as the date of filing of the complaint or initiating the criminal proceeding and not the date of taking cognizance by a Magistrate or issuance of process by a Court and accordingly, all the decisions in which it was held that the crucial date for computing the period of limitation is taking of cognizance by the Magistrate/ Court and not of filing of complaint or initiation of criminal proceedings, were over-ruled.

In view of the settled position of law as decided in the case of **Japani Sahoo (supra),** I am not inclined to accept the contention raised by the learned counsel for the petitioner that the impugned order dated 05.08.2017 is beyond the period of limitation since the complaint petition has been filed within three months of detection of offence which is within the prescribed period of limitation.

7. Coming to the next contention, it appears that from the materials available on record that the petitioner is not a trained person as per the PCPNDT Rules and the Doctors Chamber where the ultrasound test was conducted, is not a registered one as per PCPNDT Act. The ultrasound machine and the reports, which were seized along with the statements of witnesses prima facie reveal that tests were being conducted without following the provisions of the said Act and Rules.

Section 3-A of the PCPNDT Act creates a prohibition of sex selection and it states that no person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them. Similarly, section 3-B creates a prohibition on sale of ultrasound machine etc, to persons, laboratories, clinics etc. not registered under the Act.

Needless to say that under Chapter-VI of the said Act, procedure has been prescribed regarding application to be made for registration of genetic counseling centres, genetic laboratories and genetic clinics and after application is made with prescribed fees, the appropriate authority is to hold an inquiry and after being satisfied that the applicant has complied with all the requirements of the Act and the Rules framed thereunde r and having

regard to the advice of the Advisory Committee in that behalf can grant certificate of registration in the prescribed form and after obtaining such registration certificate, a person can purchase ultrasound machine or imaging machine or scanner or any other equipments for establishing a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinics. In this case since no registration certificate has been obtained by the Doctors Chamber and the petitioner is not a trained person to conduct such test, I am of the humble view that prima facie case under sections 23 and 25 of the PCPNDT Act is made out.

8. The scope of interference of this Court with an order of taking cognizance by invoking the power under section 482 of Cr.P.C. is very limited and it is to be sparingly used only when the ingredients of the offences are not made out or to prevent the abuse of the process of the Court or otherwise to secure the ends of justice. After perusing the materials available on record, I find no illegality or infirmity in the impugned order. Therefore, I am not inclined to interfere with the same.

9. The learned S.D.J.M., Jharsuguda shall proceed with the case and since it is a case of the year 2012, all endeavours should be made to conclude the trial within a period of six months from the date of receipt of a copy of this judgment. It is made clear that I have not expressed any opinion on the merits of the case and while adjudicating the guilt or otherwise of the petitioner, the learned trial Court shall strictly take into the evidence adduced by both the sides during trial.

A copy of this judgment be sent to the learned S.D.J.M., Jharsuguda forthwith.

With the aforesaid observation, the CRLMC stands disposed of.

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2019 (II) ILR - CUT- 873

P. PATNAIK, J.

W.P.(C) NO. 3597 OF 2012

SUNIL CHANDRA MOHAPATRA ………Petitioner.

Vs.

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

DISCIPLINARY PROCEEDING – Petitioner working as a Constable in CISF – While on medical leave there was an altercation with the Head Constable – Petitioner was suspended and after an enquiry he was removed from service – Punishment awarded appears to be in excess to the charges levelled – The question arose as to whether the contention of the petitioner for quashing the order of removal from service by the disciplinary authority being confirmed by the appellate authority and revisioning authority can come within the scope and ambit of doctrine of proportionality? – Held, Yes – The second point which falls for determination as to whether defence taken by the present petitioner has been properly considered vis-à-vis the evidence – The court held, the following:-

"It is no more res integra that this Court under Article 226 of the Constitution of India can interfere with the punishment only if it finds same to be shockingly disproportionate to the charges found to be proved. In such a case, the court is to remit the matter to the Disciplinary Authority for reconsideration of the punishment. In the case in hand, the major punishment i.e. removal from service has been interpreted, but the petitioner due to alleged charges of being involved with altercation with Head Constable thereby committing misconduct and the petitioner has been found guilty in the enquiry whereas; the other Head Constable has been let off. Therefore, the punishment of removal from service appears to be harsh and disproportionate to the proved charges. In view of the aforesaid factual aspects and applying the ratio of the judgment of the Hon'ble Apex Court (supra), this Court is of the considered view that in order to subserve the interest of justice the impugned order of removal from service by the Disciplinary authority being confirmed by the order of appellate authority and the revisional authority are quashed and set aside.The matter is remitted to the disciplinary authority to pass orders on the quantum of punishment commensurate with the proved charges."

<u>Case Laws Relied on and Referred to</u> :-

1. (1995) 6 SCC 157 : Ram Kishan Vs. Union of India (UOI) & Ors.
2. (2015) 2 SCC 410 : Collector Singh Vs. L.M.L. Limited.
3. (2007) 7 SCC 257 : Union of India & Ors.Vs. S.S. Ahluwalia
4. 2017 (II) OLR 60 : Arjun Charan Sahoo Vs. State of Odisha & Ors.
5. 2010(I) OLR 742 : Sudarsan Giri Vs. Union of India & Ors.
6. (2014) 2 SCC 748 : Iswar Chandra Jaiswal Vs. Union of India & Ors.
7. (2007) 7 SCC 257 : Union of India Vs. S.S. Ahulwalia

For petitioner : Mr. Debasis Tripathy, G.Senapati & Kamal Ranjan Mohapatra
For opp.parties : Mr.Gyanaloka Mohanty, C.G.C. & Banesh Ch.Swain

JUDGMENT Date of Hearing :03.07.2019 : Date of Judgment:16.08.2019

P. PATNAIK, J.

In the accompanied writ petition, the petitioner has inter alia prayed for quashing of the order of removal vide Annexure-6 and the order of the

appellate authority under Annexure-8 and the order passed by the revisioning authority vide Annexure-10 and further prayer has been made for reinstatement into service with her all consequential benefits including the arrears, gratuities and other financial dues with interest.

2. The brief facts of the case is that the petitioner entered into service as Constable in the Central Industrial Security Force (herein after referred to as CISF) in the year 1994 and underwent training at Hyderabad. Thereafter the petitioner was posted at Bhilai Steel Plant, Bhilai. The petitioner during his service career has served at different places of CISF units as and when directed by the superior authorities. While the petitioner continuing at F.C.I., Dighaghat on 24.08.2010 he met with an accident and sustained injuries while on official duties and he was on medical leave with effect from 24.08.2010 to 06.09.2010. On 04.09.2010 the petitioner wanted to keep his bike in the unit which was refused by HC/GD Sri R.R.Singh. Though the petitioner and Sri Singh were good friends, but on being teased by said R.R.Singh some altercation ensued and the petitioner was pushed by the Head Constable as a result of which he fell down sustaining leg injury. Due to such incident the petitioner was placed under suspension on 05.09.2010 and was charge sheeted in contemplation of the disciplinary proceeding. The petitioner was charge sheeted vide Memo No.V-15014/Disc-36/FCI(D OSCM/10-3755 dated 07.10.2010 on the allegation that the petitioner during his medical rest period in F.C.I. Dighaghat on 04.09.2010 at about 20.30 P.M. came to the main gate and misbehaved and manhandled the on duty Constable Sri Ram Roop Singh breaking the wrist watch and detached the loop from Lanyard, thereby committed indiscipline and misconduct. In pursuance of the said charge sheet, the petitioner submitted written statement of defence on 18.10.2010 explaining the detailed facts with a prayer to drop the said charges. The authorities after going through the written statement of defence of the petitioner decided to hold enquiry and accordingly the Inquiry Officer was appointed and the Inquiry Officer submitted his report holding that the charges leveled against the petitioner is proved. Copy of the enquiry report was supplied to the petitioner to submit his reply on the enquiry report and the petitioner submitted his reply on the enquiry report. The Disciplinary authority i.e. Group Commandant vide order dated 07.03.2011 removed the petitioner from service. Being aggrieved by the order of removal the petitioner preferred appeal which has been dismissed by opposite party no.2 and against the said order of the appellate authority the petitioner preferred revision which also met the same fate. Being aggrieved by the aforesaid impugned order, the petitioner left with no other alternative and efficacious

remedy has been constrained to invoke the extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India.

3. Controverting the averments made in the writ petition, a counter affidavit has been filed by the opposite parties wherein it has been submitted that the CISF is a Central Armed Police Force which is deployed in sensitive sectors such as Air Ports, Ports, Unit of department of atomic energy, department of Space, Metro, Power & Steel and the Force requires to maintain discipline of the highest order.

In the counter affidavit it has been inter alia stated that the petitioner was awarded punishment of "removal from service" after conducting a departmental enquiry and for proven delinquencies. During the enquiry, the petitioner was given ample opportunity to defend his case. He was also given opportunity to take assistance to defend his side and to cross-examine the P.Ws. All possible opportunities were provided to the petitioner during departmental enquiry to meet the requirement of the principle of natural justice. The Disciplinary authority awarded the punishment after careful study of enquiry report, evidences on record, statement of P.Ws, the brief note of Presenting Officer, defence statement of the petitioner. The punishment awarded to the petitioner is well commensurate with the gravity of offence and is also proportionate. Article 14 and 21 of the Constitution of India is not violated and laid down procedure has been followed during departmental enquiry. The appellate as well as revisioning authority issued speaking and reasoned order. While disposing the appeal petition, the appellate authority has gone through each and every points raised by the petitioner in his appeal memo, heard him in person, gone through the enquiry report, statements of P.Ws and evidences and order passed by the disciplinary authority and found no reason to interfere with the order of the disciplinary authority and rejected the appeal being devoid of merit. The revisioning authority has also gone through the revision petition, order passed by disciplinary authority and report/records/evidences available in the case file and applied his mind to this case. He found that the disciplinary and appellate authorities have passed speaking orders after careful examination of all records. He found no room to interfere with the order passed by the disciplinary authority which was further confirmed by the appellate authority.

It is further submitted that on 24.08.2010 the petitioner, Ex-Constable of CISF Unit, Dighaghat while going to the FCI Dighaghat after collecting official dak from Eastern Sector/Eastern Zone and Group H.Qrs, Patna through his personal motor bike met with an accident and got injury. After

treatment the Medical Officer advised him rest with effect from 24.08.2010. During the medical rest period on 04.09.2010 at about 20.50 hours the petitioner came to the main gate of CISF Unit FCI, Dighaghat and indulged in quarrelling with on duty Head Constable Ram Roop Singh in the matter of huge expenditure towards repairing charges of his motor bike. He used unparliamentary words against Sri Singh and scuffled with him. Sri Singh was on duty at Main Gate of FCI, Dighaghat. During medical rest period the petitioner came to the duty place of Sri Singh and started quarrelling. Nothing adverse has been reported against Sri Singh either in the preliminary enquiry or in the departmental enquiry. Since the CISF is a Central Armed Police Force of the Union, such type of conduct is not expected from a discipline member of the Force. Therefore, the petitioner was placed under suspension pending initiation of departmental proceeding.

It has been further submitted that in an Armed Force of the Union like CISF, such type of misconduct cannot be tolerated. The petitioner is a habitual offender. During his service tenure in CISF he was awarded three minor and two major punishments including this one for which he filed this writ petition. In a similar offence he was awarded punishment of "Removal from service" with effect from 31.07.2006 by the Commandant, CISF Unit UCIL Jaduguda. But considering his appeal petition, young age and future prospects etc. the appellate authority took a lenient view and gave him an opportunity to repent his misdeeds and mend himself and directed for reinstatement in service awarding him a lesser punishment of reduction of pay by four stages for a period of three years with cumulative effect. Though the petitioner joined duty on 08.12.2006 he failed to mend himself and committed another similar serious indiscipline act. This shows that the petitioner is a habitual offender and does not deserve mercy as evident from Annexure-A & B to the counter.

4. Learned counsel for the petitioner has submitted with vehemence that the order of removal vide Annexure-6 is based on without appreciation of facts as well as the circumstances of the case which is actuated with mala fide. Learned counsel for the petitioner further submits that the order of appeal as well as the revision vide Annexures-9 and 10 being mechanical suffers from non-application of mind. Learned counsel further submits that on perusal of the alleged charges it was found that the misconduct has been proved in a perfunctory enquiry by which the petitioner has become a scapegoat whereas the Head Constable Mr.R.R.Singh has given a clean chit. The petitioner has been subjected to hostile discrimination in the parity of treatment of punishment. Learned counsel for the petitioner further submits

that the enquiry is an empty formality and is based on no evidence and there has been breach of principle of natural justice without taking cognizance of the material evidence on record.

As against the submission of the learned counsel for the petitioner, learned Central Government Counsel has strenuously submitted that from the initiation of departmental proceeding till its conclusion there has been no infraction of principle of natural justice nor there has been any prejudice in the conduct of Disciplinary proceeding.

5. Learned Central Government Counsel further submits that taking into consideration the previous delinquencies of the petitioner and the complicity of the petitioner as found out from the enquiry report justifies awarding of punishment of removal from service which has been confirmed by the appellate as well as revisioning authority. Therefore, this Court under Article 226 of the Constitution should be loath to interfere in the departmental proceeding as the punishment inflicted is just and appropriate to the proven charges.

6. After hearing the learned counsel for the respective parties at length and on perusal of the records the crisps and seminal point that falls for determination as to whether the contention of the petitioner for quashing the order of removal from service by the Disciplinary Authority being confirmed by the appellate authority and revisioning authority vide Annexures-6, 8 an 10 can come within the scope and ambit of doctrine of proportionality. The second point which falls for determination as to whether defence taken by the present petitioner has been properly considered vis-à-vis the evidence of P.Ws.2,3 and 4.

7. In the instant case, the gravamen of the charge is that the petitioner during his medical rest period in FCI, Digha Ghat on 04.09.2010 at about 20.30 P.M. came to the main gate and misbehaved and man handled the on-duty constable-Sri Ram Rup Singh thereby breaking the wrist watch and detached the loop from lanyard and thereby committing indiscipline and misconduct.

The alleged charges have been proved by the Inquiry Officer and from the initiation of Departmental Proceeding till this culmination, there has been no procedural irregularity.

The short question which falls for determination is as to whether the punishment inflicted on the petitioner is proportionate to the alleged charge. In order to fortify his claim, the learned counsel for the petitioner has referred

to ***(1995) 6 SCC 157 : Ram Kishan v. Union of India (UOI) & Others; (2015) 2 SCC 410: Collector Singh v. L.M.L. Limited; (2007) 7 SCC 257: Union of India and others v. S.S. Ahluwalia; 2017 (II) OLR 60: Arjun Charan Sahoo v. State of Odisha and others & 2010(I) OLR 742: Sudarsan Giri v. Union of India and others.***

8. On perusal of the pleadings, counter affidavit and the procedure adopted by the Disciplinary Authority, there is no scope to interfere with regard to procedural aspects of the Disciplinary Proceeding, but so far as infliction of punishment of dismissal from services appears to be a grossly disproportionate considering the proved charges.

It is no more res integra that this Court under Article 226 of the Constitution of India can interfere with the punishment only if it finds same to be shockingly disproportionate to the charges found to be proved. In such a case, the court is to remit the matter to the Disciplinary Authority for reconsideration of the punishment.

9. On culling out the decision of the Hon'ble Apex Court, High Court under Article 226 of the Constitution of India, indisputably it cannot pass order regarding quantum of punishment unless there is existence of sufficient reasons so as to shock the conscience of the Court. So far as the quantum of punishment is concerned, the Hon'ble apex Court in Union of India & others –vrs.-S.S.Ahuluwalia (2007) 7 SCC at page 257 has been pleased to hold that if the conscience of the Court is shocked as to disproportionate or inappropriateness of the punishment imposed it can remand the matter back for fresh consideration to the Disciplinary Authority concerned.

The Hon'ble apex Court in another judgment rendered in **Iswar Chandra Jaiswal –vrs.-Union of India and others, (2014) 2 SCC 748** in paragraph-5 has been pleased to held as follows:

"It is now well settled that it is open to the Court, in all circumstances, to consider whether the punishment imposed on the delinquent workman or officer, as the case may be, is commensurate with the Articles of Charge leveled against him. There is a deluge of decisions on this question and we do not propose to travel beyond **Union of India v.S.S.Ahulwalia (2007) 7 SCC 257** in which this Court had held that if the conscience of the Court is shocked as to the severity or inappropriateness of the punishment imposed, it can remand the matter back for fresh consideration to the Disciplinary Authority concerned. In that case, the punishment that had been imposed was the deduction of 10% from the pension for a period of one year. The

High Court had set aside that order. In those premises, this Court did not think it expedient to remand the matter back to the Disciplinary Authority and instead approved the decision of the High Court."

In Union of India vs. P.Gunasekaran, the Hon'ble Apex Court in Paragraph-20 has held as follows:

"Equally, it was not open to the High Court, in exercise of its jurisdiction under Articles 226/277 of the Constitution of India, to go into the proportionality of punishment so long as the punishment does not shock the conscience of the Court. In the instant case, the disciplinary authority has come to the conclusion that the respondent lacked integrity. No doubt, there are no measurable standards as to what is integrity in service jurisprudence but certainly there are indicators for such assessment. Integrity according to Oxford dictionary is "moral uprightness; honesty". It takes in its sweep, probity, innocence, trustfulness, openness, sincerity, blamelessness, immaculacy, rectitude, uprightness, virtuousness, righteousness, goodness, clearness, decency, honour, reputation, nobility, irreproachability, purity, respectability, genuineness, moral excellence etc. In short, it depicts sterling character with firm adherence to a code of moral values."

In the case in hand, the major punishment i.e. removal from service has been interpreted, but the petitioner due to alleged charges of being involved with altercation with Head Constable thereby committing misconduct and the petitioner has been found guilty in the enquiry whereas; the other Head Constable has been let off. Therefore, the punishment of removal from service appears to be harsh and disproportionate to the proved charges.

In view of the aforesaid factual aspects and applying the ratio of the judgment of the Hon'ble Apex Court (supra), this Court is of the considered view that in order to subserve the interest of justice the impugned order of removal from service by the Disciplinary authority being confirmed by the order of appellate authority and the revisional authority are quashed and set aside. The matter is remitted to the disciplinary authority to pass orders on the quantum of punishment commensurate with the proved charges within a period of eight weeks from the date of receipt/communication of the order. Resultantly, the writ petition stands allowed.

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