THE INDIAN LAW REPORTS
(CUTTACK SERIES, MONTHLY)

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

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

OCTOBER - 2019

Pages :209 to 400

Edited By

BIKRAM KISHORE NAYAK, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

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

Annual Subscription : ₹ 300/-

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DEEPAK GUPTA, J. & ANIRUDDHA BOSE, J.

CIVIL APPEAL NO. 7627 OF 2019
WITH
CIVIL APPEAL NO. 7626 OF 2019

MUNICIPAL CORPORATION OF GREATER MUMBAI & ORS. .....Appellant(s)

-Vs-

M/S. SUNBEAM HIGH TECH DEVELOPERS PRIVATE LTD. .....Respondent(s)

DEMOLITION – The question arose as to whether if a municipal corporation demolishes a structure in exercise of powers vested in it but in violation of the procedure prescribed, can the High Court direct the 'owner/occupier' of the building to reconstruct the demolished structure? – Held, No.

"The exercise of the power of demolition which affects the property of the citizens of this country must be exercised in an absolutely fair and transparent manner. Rules in this regard must be followed. At the same time, the Court has to balance the private interest with the larger public interest. Cities and towns must be well planned and illegal structures must be demolished. Rule of law comprises not only of the principles of natural justice but also provides that the procedure prescribed by law must be followed. Rule of law also envisages that illegal constructions which are constructed in violation of law must be demolished and there can be no sympathy towards those who violate law."

Supreme Court ultimately opined that even if the demolition is illegal, re-construction of the building cannot be permitted when it has not been decided whether the structure was legal to begin with.

Case Law Relied on and Referred to :-

1. AIR 1996 Bom 304 : Sopan Maruti Thopte & Anr. vs. Pune Municipal Corporation & Anr.

For Appelant(s) : M/s. J S Wad & Co.
For Respondent(s) : Mr.Chirag M. Shroff [caveat]

JUDGMENT Date of Judgment : 24.10.2019

DEEPAK GUPTA, J.

The issue involved in these appeals is whether if a municipal corporation demolishes a structure in exercise of powers vested in it but in violation of the procedure prescribed, can the High Court direct the 'owner/occupier' of the building to reconstruct the demolished structure?

2. The municipal corporations in the State of Maharashtra like in any other part of the country are vested with the power to demolish structures which violate the laws and have been built without any building plans or in violation of the laws. The exercise of the power of demolition which affects the property of the citizens of this country must be exercised in an absolutely fair and transparent manner. Rules in this regard must be followed. At the same time, the Court has to balance the private interest with the larger public interest. Cities and towns must be well planned and illegal structures must be demolished. Rule of law comprises not only of the principles of natural justice but also provides that the procedure prescribed by law must be followed. Rule of law also envisages that illegal constructions which are constructed in violation of law must be demolished and there can be no sympathy towards those who violate law.

3. Before we refer to the statutory provisions, we may make reference to a judgment of the Bombay High Court which appears to be the *locus classicus* on this subject, as far as the Bombay High Court is concerned. In ***Sopan Maruti Thopte and Another*** vs. ***Pune Municipal Corporation and Another***[1], the Bombay High Court referred to various provisions of law, and thereafter issued the following directions :-

> "**19**. Hence, on the basis of the law as discussed above, it is directed that after 1st May, 1996 the Bombay Municipal Corporation or the Municipal Corporations constituted under the B.P.M.C. Act would follow the following procedure before taking action under Section 351 of the B.M.C. Act or under S. 260 of the B.P.M.C. Act.
>
> (i) In every case where a notice under Section 351 of the B.M.C. Act/under Sec. 260 of B.P.M.C. Act is issued to a party 15 days' time shall be given for submitting the reply. In case the party to whom notice is issued sends the reply with the documents, and shows cause, the Municipal Commissioner or Deputy Municipal Commissioner shall consider the reply and if no sufficient cause is shown, give short reasons for not accepting the contention of the affected party.
>
> (ii) It would be open to the Commissioner to demolish the offending structure 15 days after the order of the Commissioner/Deputy Municipal Commissioner is communicated to the affected person.
>
> (iii) In case the staff of the Corporation detects the building which is in the process of being constructed and/or reconstructed and/or extended without valid permission from the Corporation, it would be open to the Commissioner to demolish the same by giving a short notice of 24 hours after drawing a panchanama at the site and also by taking photographs of

1. AIR 1996 Bom 304

such structure and/or extension. The photographs should indicate the date when the same were taken.

(iv) In case where the Municipal Corporation has followed due process of law and demolished the unauthorised structure and/or extension, if the same is reconstructed without valid permission within a period of one year, it would also be open to the Corporation to demolish the same by giving a short notice of 24 hours.

(v) If the offending structure and/or extension which is assessed by the Corporation for two years, notice shall provide for 15 days' time to show cause. If the Deputy Municipal Commissioner comes to the conclusion that he requires assistance of the party, he may give an oral hearing if he deems fit and proper before passing the order. It is made clear that oral hearing is not at all compulsory but it is at the discretion of the authority.

(vi) In any other case the Corporation is directed to issue a show cause notice in case of any structure and/or extension other than those mentioned in clauses (i) to (iv) above. The Corporation shall provide for 7 days' time to show cause in such a case.

20. In case the notice is issued under Sec. 478 of the B.P.M.C. Act, 1949 and if the person has not complied with the requisitions of the Commissioner, then it would be open to the Commissioner to demolish the unauthorised structure after expiry of 30 days of the period specified in the notice for removal of such construction.

21. The Municipal Corporations in the State of Maharashtra would follow the above directions so as to avoid unnecessary litigation."

After issuing these directions the Court also issued a word of caution to courts not to grant interim injunctions protecting illegal constructions from demolition. We may refer to the following observations :-

"24. In our view, passing interim orders indiscriminately and without apparent and due application of mind, which has the effect of allowing the plaintiff to continue to enjoy the fruits of his illegal actions including unauthorised construction tends to lower the Court's prestige and clearly undermines the Rule of Law.

xxxx xxxx xxxx

28. Considering the aforesaid decisions it should be borne in mind before issuance of an injunction that it is a discretionary and an equitable relief. It is not mandatory that for mere asking such relief should be given. It is not a charity at the cost of public. However, we make it clear that the procedure established by law has to be followed by the public authorities, whether it be the State or a local body, including the Municipal Corporations. At the same time, the procedural lapses, unintentional or intentional, which do not seriously affect the substantive rights of a person, ought not to result in ad interim orders which protect illegality having already been committed by the plaintiff and to give licence of continuing fruits of such illegality for years. Violators of law should not liberally be allowed to take protection of

Court of law by obtaining ad interim injunctions which have the effect of continuing such violation."

Statutory Provisions

4. The relevant provisions to deal with the issue in hand are covered under Chapter 12 of The Mumbai Municipal Corporation Act [Bom. III of 1888] (hereinafter referred to as 'the MMC Act'). Section 337 of the MMC Act provides that before erecting any building, notice in this behalf has to be given to the Commissioner of the Municipal Corporation. The phrase 'to erect a building' not only means erecting a new building but also includes within its ambit reerection of any building by demolishing the existing building entirely or erecting any building by removing the roof of the existing ground floor structures and adding one or more upper floors and to complete a dwelling house, originally meant to be used as one dwelling house into more than one dwelling houses. Building plans have to be furnished to the Commissioner, in terms of Section 338.

5. Even with regard to execution of works not amounting to erection of building notice under Section 342 of the MMC Act has to be given to the Commissioner. The relevant portion of the Section reads as follows :-

> **"342. Notice to be given to the Commissioner of intention to make additions, etc., to or change of user of, a building.**
>
> Every person who shall intend
>
> (a) to make any addition to a building, or change of existing user or
>
> (b) to make any alteration or repairs to a building involving the removal, alteration or reerection of any part of the building except tenantable repairs:
>
> Provided that no lowering of plinth, foundation or floor in a building shall be permitted.
>
> *Explanation.*- "Tenantable repairs" in this section shall mean, only,
> (i) providing guniting to the structural members or walls;
> (ii) plastering, painting, pointing;
> (iii) changing floor tiles;
> (iv) repairing W. C., bath or washing places;
> (v) repairing or replacing drainage pipes, taps, manholes and other fittings;
> (vi) repairing or replacing sanitary water plumbing, or electrical fittings; and
> (vii) replacement of roof with the same material, but shall not include,-
>
> (a) change in horizontal and vertical existing dimensions of the structure;
> (b) replacement or removal of any structural members of load bearing walls;
> (c) lowering of plinth, foundations or floors;

(d) addition or extension of mezzanine floor or loft; and

(e) flattening of roof or repairing roof with different material;

(c) [* * *]

(cc) to make any alteration in a building involving

(i) the subdivision of any room in such building so as to convert the same into two or more separate rooms,

(ii) the conversion of any passage or space in such building into a room or rooms, or

(d) to remove or reconstruct any portion of a building abutting on a street which stands within the regular line of such street,

shall give to the Commissioner, in a form obtained for this purpose under section 344, notice of his said intention, specifying the position of the building in which such work is to be executed, the nature and extent of the intended work, the particular part or parts, if any, of such work which is or are intended to be used for human habitation and the name of the person whom he intends to employ to supervise its execution."

6. An analysis of this Section clearly indicates that if any addition is to be made to the building or existing use of the building is to be changed then notice is required to be given to the Commissioner before such addition or change is made. Even for making any alteration or repair to a building which involves the removal, or alteration of any part of the building, permission is required except for tenantable repairs which have been specifically defined in the explanation of this Section. The proviso lays down that no lowering of plinth, foundation or floors in the building shall be permitted. Tenantable repairs have been defined and we need not dwell on what are tenantable repairs for the purpose of deciding these cases. We would, however, like to emphasise that even in case of repairs not falling within the category of tenantable repairs, notice will have to be given to the Commissioner and permission is to be taken and then only work can be commenced in terms of Section 347.

7. We are mainly concerned with Section 351 which reads as follows :-

"351. Proceedings to be taken in respect of buildings or work commenced contrary to section 347.

(1) The Commissioner shall, by notification in the *Official Gazette*, designate an officer of the Corporation to be the Designated Officer for the purposes of this section and of sections 352, 352A and 354A. The Designated Officer shall have jurisdiction over such local area as may be specified in the notification and different officers may be designated for different local areas.

(1A) If the erection of any building or the execution of any such work as is described in section 342, is commenced contrary to the provisions of section 342 or

347, the Designated Officer, unless he deems it necessary to take proceedings in respect of such building or work under section 354, shall-

(a) by written notice, require the person who is erecting such building or executing such work, or has erected such building or executed such work, or who is the owner for the time being of such building or work, within seven days from the date of service of such notice, by a statement in writing subscribed by him or by an agent duly authorized by him in that behalf and addressed to the Designated Officer, to show sufficient cause why such building or work shall not be removed, altered or pulled down; or

(b) shall require the said person on such day and at such time and place as shall be specified in such notice to attend personally, or by an agent duly authorized by him in that behalf, and show sufficient cause why such building or work shall not be removed, altered or pulled down.

Explanation. - "To show sufficient cause" in this subsection shall mean to prove that the work mentioned in the said notice is carried out in accordance with the provisions of section 337 or 342 and section 347 of the Act.

(2) If such person shall fail to show sufficient cause, to the satisfaction of the Designated Officer, why such building or work shall not be removed, altered or pulled down, the Designated Officer may remove, alter or pull down the building or work and the expenses thereof shall be paid by the said person. In case of removal or pulling down of the building or the work by the Designated Officer, the debris of such building or work together with other building material, if any, at the sight of the construction, belonging to such person, shall be seized and disposed of in the prescribed manner and after deducting from the receipts of such sale or disposal, the expenditure incurred for removal and sale of such debris and material, the surplus of the receipts shall be returned by the Designated Officer, to the person concerned.

(3) No court shall stay the proceeding of any public notice including notice for eviction, demolition or removal from any land or property belonging to the State Government or the Corporation or any other local authority or any land which is required for any public project or civil amenities, without first giving the Commissioner a reasonable opportunity of representing in the matter."

Subsection (1A) was the original subsection (1). It appears that if the erection of any building or the execution of any work is commenced contrary to the provisions of Section 342 or 347 then the designated officer shall issue written notice calling upon the builder, occupier, owner to submit his reply within 7 days from the service of notice to show cause as to why such a building should not be demolished. The designated officer can also require the person to appear before him personally on a time and date fixed by him. The *Explanation* is important. It lays down that 'sufficient cause' would mean that the work is being carried out in accordance with the provisions of Sections 337 or 342 and 347 of the MMC Act. This means that required

permission before the construction has to be obtained and if the person, within 7 days, is not able to produce such permission, then the designated officer can take steps to remove the building. Subsection (2) provides that if the noticee does not show cause or the designated officer is not satisfied with the reply filed, then the building can be removed or pulled out. Subsection (3) debars the jurisdiction of civil courts to stay proceeding of any such public notice.

8. Dealing with the issues relating to building under construction and/or reconstruction and/or extension without valid permission the Bombay High Court in ***Sopan's*** case (supra) had directed that a short notice of 24 hours be issued after drawing a panchnama at the site and also by taking photographs of such structure and/or extension. It was also ordered that the photographs should indicate the date when the same were taken. Direction 4 provided that if after demolition the unauthorised structure is re-erected without valid permission within a period of 1 year then also notice of only 24 hours would be required. We are not directly concerned with directions 5 and 6. In ***Sopan's*** case (supra), no direction was given that if the offending structure is demolished illegally the same should be permitted to be reconstructed. The reconstruction jurisprudence seems to have developed at a later stage.

9. At this juncture it would be necessary to point out that when ***Sopan's*** case (supra) was decided there was no provision fixing a time line for filing a reply to the notice. Now, 7 days have been fixed to file the reply in terms of Section 351 subsection (1A), and, therefore, the first direction in ***Sopan's*** case (supra) is no longer operative. The Legislature has enacted a provision and this direction cannot be said to be valid any more.

10. The main dispute is with regard to the 2nd direction in ***Sopan's*** case (supra) which provided that demolition of the building structure can be done only after giving 15 days' notice to the affected person.

11. Shri Atmaram N. Nadkarni, learned Additional Solicitor General, appearing for the appellants submits that by making an amendment to Section 351, providing a period of 7 days for notice to be given, the first direction in ***Sopan's*** case (supra) is no longer valid.

12. However, as pointed out by Mr. Bharat Zaveri, learned counsel appearing on behalf of the respondents that the second direction in ***Sopan's*** case (supra) requiring 15 days' notice to be given to the affected person before demolition of the structure, is still valid and, therefore, 2 notices are

required to be given viz.,(i) a show cause notice of 7 days in terms of Section 351 (1A) and; (ii) notice of 15 days in terms of ***Sopan's*** case (supra). The learned counsel also submits that the judgment in ***Sopan's*** *case* (supra) holds the field till date, and we agree with the counsel that in terms of direction no.2 in ***Sopan's*** case (supra), 15 days' notice has to be given before demolishing the structure. We are not oblivious to the fact that Subsection (2) of Section 351 does not lay down any timeline in this regard. It was in this context that when no timelines were laid down either for show cause notice or for demolition that the Bombay High Court in ***Sopan's*** case (supra), fixed two timelines of 15 days each for issuing show cause notice and, thereafter, to take action of demolition. The Legislature intervened and the first period has been curtailed from 15 days to 7 days but the second direction has not been interfered with by the Legislature. Therefore, that judgment continues to hold the field in this regard.

13. Admittedly, in both the cases the second notice does not comply with the direction given in ***Sopan's*** case (supra). Therefore, there is no manner of doubt that the requirement with regard to the second notice has not been complied with in either of the cases. As such, the action of demolition without following the procedure prescribed by law is illegal.

14. That brings us to the main issue before us. Is the writ court justified in issuing a direction that since the building has been demolished without following the procedure prescribed by law, the petitioners before the High Court (Respondents before us) be permitted to reconstruct the structure albeit using the same material, and of the same dimensions, as existed earlier? The second direction given is that before commencing of work of reconstruction, the petitioner shall serve a notice to the designated officer. It has further been observed by the High Court that the reconstruction of the structure on the basis of its order will confer no authenticity on the structure. The third important direction of the High Court provides that if the original structures were constructed without obtaining development permission, the structures reconstructed pursuant to the orders of the Court will also be construed to be constructed without proper development permission. Hence the Corporation can initiate action of demolition of the structures, after following the law laid down in ***Sopan's*** case (supra). We have been told that this is the regular practice followed in the Bombay High Court, throughout the State of Maharashtra.

15. We are constrained to observe that we cannot approve of such directions. The High Court itself is aware that some of these structures may have been constructed without permission. If that be so, even if the demolition was carried out without giving the second notice, why should the party who has violated the law by raising the construction without obtaining permission be permitted to raise another illegal structure which only has to be razed to the ground, after following the procedure prescribed by law? Why should the Nation's wealth be misutilised and misused for raising an illegal construction which eventually has to be demolished?

16. We make it clear that we do not approve the action of the Municipal Corporation or its officials in demolishing the structures without following the procedure prescribed by law, but the relief which has to be given must be in accordance with law and not violative of the law. If a structure is an illegal structure, even though it has been demolished illegally, such a structure should not be permitted to come up again. If the Municipal Corporation violates the procedure while demolishing the building but the structure is totally illegal, some compensation can be awarded and, in all cases where such compensation is awarded the same should invariably be recovered from the officers who have acted in violation of law. However, we again reiterate that the illegal structure cannot be permitted to be reerected.

17. Assuming that the structure is not illegal then also the Court will first have to come to a finding that the structure was constructed legally. It must come to a clearcut finding as to the dimensions of the structure, what area it was covering and which part of the plot it was covering. In those cases the High Court, once it comes to the conclusion that the structure which has been demolished was not an illegal structure, may be justified in permitting reconstruction of the structure, but while doing so the Court must clearly indicate the structure it has permitted to be constructed; what will be the length of the structure; what will be its width; what will be its height; which side will the doors and windows face; how many number of storeys are permitted etc. We feel that in most cases the writ court may be unable to answer all these questions. Therefore, it would be prudent to permit the structure to be built in accordance with the existing bylaws. Directions can be issued to the authorities to issue requisite permission for construction of a legal structure within a time bound period of about 60 days. This may vary from case to case depending upon the nature of the structure and the area where it is being built.

18. Blanket orders permitting reerection will lead to unplanned and haphazard construction. This will cause problems to the general public. Even if the rights of private individuals have been violated in as much as sufficient notice for demolition was not given, in such cases structures erected in violation of the laws cannot be permitted to be re-erected. We must also remember that in all these cases, the High Court has not found that the structures were legal. It has passed the orders only on the ground that the demolition was carried out without due notice. As already indicated above, compensation for demolished structure or even the cost of the new structure to be raised, if any, can be imposed upon the municipal authorities which should be recovered from the erring officials, but in no eventuality should an unplanned structure be permitted to be raised.

19. Times have changed. Technology has advanced. However, the legal fraternity continues to live in a state of *status quo*. ***Sopan's*** case (supra) was decided on 09.02.1996. More than two decades have elapsed. The Courts must not be hidebound by old decisions and the law must develop in accordance with changing times.

20. All concerned viz., the State, the Municipal authorities and the High Court need to take note and advantage of advancement in technology. We have been informed that disputes with regard to the dimensions and nature of the structure arise especially in those cases where rural or suburban areas are included at a later stage in the municipalities. Some of these structures have no sanctioned plans. The Development Control and Promotion Regulations for Greater Mumbai, 2034, provide that no permission shall be required to carry out tenantable repairs to the existing buildings which were constructed with the approval of the competent authority, or are in existence since 17.04.1964 in respect of residential structures, and 01.04.1962 in respect of nonresidential structures, as required under Section 342 of the MMC Act. We have already noted what is meant by tenantable repairs. This is explained in Section 342 of the MMC Act. Only repairs envisaged in the explanation are permitted to be carried out without permission and all other repairs have to be carried out with permission. Since these old buildings do not have plans it is difficult to find out whether the construction carried out is actually tenantable repairs or the structures are being constructed/reconstructed for which permission is required.

21. There is no difficulty to find a solution to this problem if the State is inclined to do so. Till the State frames any laws in this regard, we direct that before any construction/reconstruction, or repair not being a tenantable repair is carried out, the owner/occupier/builder/contractor/architect, in fact all of them should be required to furnish a plan of the structure as it exists. This map can be taken on record and, thereafter, the construction can be permitted. In such an eventuality even if the demolition is illegal it will be easy to know what were the dimensions of the building. This information should not only be in paper form in the nature of a plan, but should also be in the form of 3D visual information, in the nature of photographs, videos etc.

22. All over the country we find that when people raise illegal constructions it is claimed that the said construction has been existing for long. The answer is to get Geomapping done. The relevant technology is Geographic Information System (GIS). If on Google Maps one can get a road view, we see no reason as to why this technology cannot be used by the municipal corporations. At the first stage we direct that all the cities in Maharashtra where the population is 50 lakhs or more the municipal authorities will get Geomapping done not only of the municipal areas but also of areas 10 Kms. from the outer boundary. This can be done by satellite, drones or vehicles. Once one has the whole city geomapped it would be easy to control illegal constructions. We further direct the State of Maharashtra to ensure that sufficient funds are made available to the municipal corporations concerned and this exercise should be completed within a period of one year from the date of this order.

23. We also would like to give further directions regarding the manner in which the evidence of illegal construction/reconstruction etc., is collected and notices are issued and served. We, therefore, issue the following directions:-

> (1) It will be obligatory for all Municipal Corporations in the State of Maharashtra where the population is 50 lakhs or more to get geomapping and geophotography of the areas under their jurisdiction done within a period of one year. Geomapping will also be done of an area of 10 Kms. from the boundary of such areas. The records should be maintained and updated by the Municipal Corporations within such time period as the Municipal Corporation deems fit, keeping in mind the specific circumstances of the area under its jurisdiction.
>
> (2) Whenever any new area, which is not already geomapped, is brought under the jurisdiction of a particular municipality, it will be the duty of the concerned Municipal Corporation to ensure that geomapping of the area is conducted and the geomapping records of such area are created at the earliest.

(3) In cases where buildings are already existing and it is alleged by the Municipal Corporation that the building has been constructed in violation of applicable laws :-

3.1. The Commissioner/Competent Authority on coming to know that an illegal building has been constructed, shall issue a show cause notice giving 7 days in terms of Section 351 to the owner/occupier/builder/contractor etc. Along with this notice the Commissioner/Competent Authority shall also send photographs and visual images taken on the site clearly depicting the illegal structure. Photographs and images should digitally display the time and date of taking the photographs;

3.2. In case the notice is not replied to within the time prescribed, i.e., 7 days, then the building shall be immediately demolished by the Municipal Corporation;

3.3 In case the owner files a reply to the notice, the Commissioner/Competent Authority of the Municipal Corporation shall consider the reply and pass a reasoned order thereon. In case the reply is not found satisfactory then the order shall be communicated in the manner laid down hereinafter to the owner/occupier/builder/contractor etc. giving him further 15 days' notice before demolition of the property. During this period the owner/ occupier/ builder/ contractor etc. can approach the appellate/revisional authority or the High Court.

(4) In those cases where according to the municipal corporation there is ongoing construction which is being carried on in violation of the applicable laws :-

4.1. The Commissioner/Competent Authority on coming to know that there is ongoing construction in violation of the applicable laws shall issue a show cause notice giving 24 hours in terms of Section 351 to the owner/occupier/builder/contractor/architect etc. Along with this notice the Commissioner/Competent Authority shall also send photographs and visual images taken on the site clearly depicting the illegal structure. Photographs and images should digitally display the time and date of taking the photographs;

4.2. The Commissioner/Competent Authority can also issue an interim 'stopconstruction' order along with the notice or any time after issuing the notice. Such order shall also include the relevant pictures of the alleged violation(s). Photographs and images should digitally display the time and date of taking the photographs;

4.3. In case the notice is not replied to within the time prescribed, i.e., 24 hours, then the building shall be immediately demolished by the Municipal Corporation;

4.4. In case the owner/occupier/builder/contractor/architect etc. files a reply to the notice, the Commissioner/Competent Authority of the Municipal Corporation shall consider the reply and pass a reasoned order thereon. In case the reply is not found satisfactory then the order shall be communicated in the manner laid down hereinafter to the owner/ occupier/ builder/ contractor/ architect etc. giving him further 7 days' notice before demolition of the property. During this period the owner/occupier /builder/ contractor/ architect etc. Can approach the appellate/revisional authority or the High Court.

(5) In regard to service of notice we direct as follows :-

5.1. Wherever possible notice shall be served personally on the person who is raising or has raised the illegal structure including the owner/occupier/builder/contractor/architect etc.;

5.2. Notice, in addition to the traditional mode, can also be sent through electronic means, both by email and by sending a message on the mobile phones. Even a message to a foreman or person incharge of the construction at the site will be deemed to be sufficient notice;

5.3. In the notice, the municipal authorities shall also give an email ID and phone number where the noticee can send his reply through email or messaging services. This will hopefully do away with all disputes with regard to alleged nonservice of notice.

(6) Till the State frames any laws in this regard, we direct that before any construction/reconstruction, or repair not being a tenantable repair is carried out, the owner/occupier/builder/contractor/architect, in fact all of them should be required to furnish a plan of the structure as it exists. They will also provide an email ID and mobile phone number on which notice(s), if any, can be sent. This map can be taken on record and, thereafter, the construction can be permitted. In such an eventuality even if the demolition is illegal it will be easy to know what were the dimensions of the building. This information should not only be in paper form in the nature of a plan, but should also be in the form of 3D visual information, in the nature of photographs, videos etc.

24. As far as Civil Appeal No. 7627 of 2019 @ SLP(C) No.15909 of 2018 is concerned the structure has been rebuilt. That obviously cannot be undone now. We, however, direct the municipal corporation to ensure that fresh notice is issued to the respondent and thereafter action is taken strictly in accordance with law. The whole process should be completed within a period of three months. In case an order adverse to the respondent is passed

by the municipal corporation, then the respondent will be at liberty to approach the High Court and raise all grounds available to it.

25. As far as Civil Appeal No.7626 of 2019 @ SLP(C) No.16489 of 2018 is concerned, reconstruction has not been done and, therefore, we partly allow the appeal and set aside the order of the High Court to the extent it allows reconstruction. We remit the matter to the High Court which is requested to proceed in accordance with law laid down in this case.

26. Both the appeals are disposed of in the above terms. The Registrar General of the Bombay High Court shall cause copies of this judgment to be served upon the Chief Secretary, State of Maharashtra as well as Principal Secretary, Urban Development Department, Mumbai, Maharashtra, who will ensure that copy of this judgment is served upon all the municipal corporations in the entire State of Maharashtra. Pending application(s), if any, also stand(s) disposed of.

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2019 (III) ILR-CUT- 222

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

W.P.(C) NO. 20463 OF 2018

M/S. SAFARI RETREATS PVT. LTD. & ANR. ……..Petitioners

-Vs-

CHIEF COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX & ORS. ……...Opp. Parties

CENTRAL GOODS AND SERVICES TAX ACT, 2017 – Section 17 (5) (d) – Provisions under – Writ petition – Challenge is made to the action of the State opposite parties whereby the opposite parties without considering the provisions under Section 17(5)(d) of the Central Goods and Services Tax Act held that the provisions of the CGST Act is not applicable in the case of construction of immovable property intending for letting out for rent – Petitioners are mainly carrying on business activity of constructing shopping malls for the purpose of letting out of the same to numerous tenants and lessees – Huge quantities of materials and other inputs in the form of Cement, Sand, Steel, Aluminum, Wires, plywood, paint, Lifts, escalators, Air-Conditioning plant, Chillers, electrical equipments, special façade, DG sets, transformers, building automation systems etc. and also services in

the form of consultancy service, architectural service, legal and professional service, engineering service and other services including services of special team of international designers in every sphere of construction of Mall are required for the aforesaid construction purpose and therefore the petitioner no.1 Company has to purchase/receive these goods and services for carrying out the said construction – Whether the interpretation of the Opposite parties is legally correct? – The court held the following:

"The very purpose of the Act is to make the uniform provision for levy collection of tax, intra state supply of goods and services both central or State and to prevent multi taxation.

Therefore, the contention which has been raised by the learned counsel for the petitioners keeping in mind the provisions of Section 16 (1)(2) where restriction has been putforward by the legislation for claiming eligibility for input credit has been described in Section 16(1) and the benefit of apportionment is subject to Section 17(1) and (2). While considering the provisions of Section 17(5)(d), the narrow construction of interpretation put forward by the Department is frustrating the very objective of the Act, inasmuch as the petitioner in that case has to pay huge amount without any basis. Further, the petitioner would have paid GST if it disposed of the property after the completion certificate is granted and in case the property is sold prior to completion certificate, he would not be required to pay GST. But here he is retaining the property and is not using for his own purpose but he is letting out the property on which he is covered under the GST, but still he has to pay huge amount of GST, to which he is not liable.

In that view of the matter, in our considered opinion the provision of Section 17(5)(d) is to be read down and the narrow restriction as imposed, reading of the provision by the Department, is not required to be accepted, inasmuch as keeping in mind the language used in ***(1999) 2 SCC 361 (supra)****, the very purpose of the credit is to give benefit to the assessee. In that view of the matter, if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST, which is required to pay under Section 17(5)(d) of the CGST Act.*

In that view of the matter, prayer (a) is required to be granted. However, we are not inclined to hold it to be ultra vires. Prayer (b) is not accepted."

Case Laws Relied on and Referred to :-

1. (1999) 2 SCC 361 : Eicher Motors Ltd. v. Union of India
2. (1999) 7 SCC 448 : Collector of Central Excise, Pune v. Dai Ichi Karkaria Ltd.
3. (2016) 1 SCC 780 : Spentex Industries Limited v. Commissioner of Central Excise & Ors.
4. 1991 Supp (1) SCC 125 : Indian Metals & Ferro Alloys Ltd. v. Collector of Central Excise, Bhubaneswar
5. (2017) 9 SCC 1 : Shayara Bano v. Union of India & Ors.
6. (2001) 3 SCC 359 : Oxford University Press v. Commissioner of Income Tax
7. Vol.131(1981) ITR 597 : K.P.Varghese v. Income-Tax Officer, Ernakulam & Anr.

8. 1991 Supp(1)SCC 600 : Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress & Ors.
9. (TS-347-SC-2017-VAT) : Indian Oil Corporation Ltd Vs. State of Bihar
10. [2018-TIOL-310-HC-DEL-ST] : Cellular Operators Association of India and Others Vs. UoI
11. 2018-TIL-23-HC-Mum-GST : JCB India Ltd Vs. Union of India
12. (2008) 4 SCC 720 : Govt. of Andhra Pradesh & Ors. Vs. P. Laxmi Devi
13. (2012) 6 SCC 312 : State of M.P. Vs. Rakesh Kohli & Ors.

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For Opp. Parties: Mr. Tushar Kanti Satapathy, Sr.Standing Counsel, CT&GST
Mr. D. Behura, Standing Counsel (C.T.)
Addl. Got. Advocate

JUDGMENT Date of Hearing & Judgment : 17.04.2019

K.S. JHAVERI, C.J.

By way of this writ petition the petitioners have challenged the action of the opposite parties whereby the opposite parties without considering the provisions under Section 17 (5)(d) of the Central Goods and Services Tax Act (in short "the CGST Act") held that the provisions of the CGST Act is not applicable in the case of construction of immovable property intending for letting out for rent.

2. The case of the petitioners is that the petitioners are mainly carrying on business activity of constructing shopping malls for the purpose of letting out of the same to numerous tenants and lessees. Huge quantities of materials and other inputs in the form of Cement, Sand, Steel, Aluminum, Wires, plywood, paint, Lifts, escalators, Air-Conditioning plant, Chillers, electrical equipments, special façade, DG sets, transformers, building automation systems etc and also services in the form of consultancy service, architectural service, legal and professional service, engineering service and other services including services of special team of international designers in every sphere of construction of Mall are required for the aforesaid construction purpose and therefore the petitioner no.1 Company has to purchase/receive these goods and services for carrying out the said construction. All these goods and services which are purchased/received for such construction are taxable under the CGST Act and OGST Act and as such the petitioner No.1 has to pay very huge amounts of Central Goods and

Services Tax (hereinafter to be referred to as 'CGST') and Odisha Goods and Services Tax (hereinafter to be referred to as 'OGST') on such purchases.

One of the large shopping mall constructed by the petitioner No.1 Company at Esplanade, 721 Rasulgarh, Bhubaneshwar, Khordha, Odisha has been completed recently and the petitioner No.1 has made necessary arrangement for letting out different units of the said shopping mall to different persons on rental basis. It is an undisputed fact that the activity of letting out the units of the shopping mall attracts CGST and OGST on the amount of rent received by the petitioner No.1 because the activity of letting out the Units in the said Mall amounts to supply of service under the CGST Act/ OGST Act. The petitioner No.1 having accumulated input Credit of GST amounting to Rs 34,40,18,028/-(Rupees thirty four crores forty lacs eighteen thousand twenty eight only) in respect of purchases of inputs in the form of goods and services is desirous of availing of the credit of input tax charged on the purchase/supply of goods and services which are consumed and used in the construction of the said shopping mall in order to utilise the said input credits to discharge and pay the CGST and OGST payable on the rentals received by the petitioner no.1 from the tenants of the said shopping mall and approached the revenue authorities in this regard. However, the petitioner no.1 was advised to deposit the CGST and OGST collected without taking input credit in view of restrictions placed as per Section 17(5)(d) and was warned of penal consequences if it did not do so. The petitioner no.1 has thus to pay very large amounts of CGST and OGST.

3. Applicability of CGST Act and OGST Act in the present case are :

a) The CGST Act was implemented with effect from 1st July, 2017 inter alia with the object of avoiding the cascading effect of various indirect taxes and so as to reduce the multiplicity of a number of indirect taxes. The said CGST Act is based on the VAT concept of allowing input tax credit of tax paid on inputs, input services and capital goods which can be utilised for payment of output tax so as to obviate the cascading effect of multistage levies and taxes. GST is levied on supply of goods or services or both, in India w.e.f. 1st July, 2017. Each State Government has passed its own State GST Act to impose GST on the supply of goods or services or both within the State and these State GST Acts are practically copies of CGST Act, as the definitions and other provisions are identical. For the purpose of imposing GST within the State of Odisha, Government of Odisha has passed OGST Act wherein almost all the provisions are virtually identical to that of CGST Act.

b) The business of the petitioner No.1 in the present case inter alia consists of construction of shopping malls and letting them out to different persons on rental basis and collection of rent from them. In view of Section 7 of CGST Act and OGST Act read with paragraph-2 (b) of Schedule II of the aforesaid two Acts, the activity of the petitioner No.1 of letting out of the units of the shopping mall to different persons amounts to "Supply" within the meaning of both the two Acts and as such the petitioner No.1 squarely comes within the definition of 'supplier' as appearing in Section 2 (105) of both the aforesaid two Acts and accordingly the Petitioner is liable to pay CGST and OGST on the said rental amounts received by it.

c) Section 22(1) of CGST Act as well as OGST Act inter alia provide that every supplier shall be liable to be registered under the CGST Act and OGST Act in the State from where he makes a taxable supply of goods or services or both, if his aggregate turnover in a financial year exceeds twenty lakh rupees. Petitioner No.1 duly applied for such registration and a certificate of registration was issued to the petitioner No.1 in Form GST REG-06 under Section 25 of the CGST Act read with Rule 10 of the Central Goods and Service Tax Rules, 2017 and a Goods and Service Tax Identification Number was assigned to the petitioner No.1 which is 21AAGCS2244F1ZU (Annexure-1) to the writ petition. Once the petitioner No.1-Company is registered under Section 22 of the CGST Act, it becomes the "Taxable person" within the definition as contained in Section 2 (107) of the CGST Act and OGST Act.

d) Section 9 of the CGST Act is the charging section which inter alia provides that subject to the provisions of Sub-section (2) of Section 9, there shall be levied a tax called the Central Goods and Service Tax on all intra State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under Section 15 of the CGST Act and at such rates, not exceeding twenty percent, as may be notified by the Government on recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person. Similar provisions in the State Act namely OGST Act have also made under Section 9 of the said Act.

e) In view of the aforesaid discussion, petitioner No.1 being a taxable person is liable to pay CGST as well as OGST in respect of the rent realized by petitioner No.1 from different tenants to which the units of the shopping mall are let out.

f) In order to avoid the cascading effect of various input taxes, Section 16 of the CGST as well as OGST Acts which provides that every registered person shall, subject to such conditions and restrictions as may be prescribed

and in the manner specified in Section 49 of the CGST Act as well as Section 49 of the OGST Act, be entitled to take credit of the input tax charged on any supply of goods or services or both made to him, which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person. Therefore, in view of Section 16 of the CGST Act as well as OGST Act, the petitioner No.1 being a registered dealer is statutorily entitled to avail of the benefit of taking credit of the input tax charged on the supply of goods and various services which are consumed or utilized for the construction of the aforesaid shopping mall and set off the same against the CGST and OGST payable on the rentals received from the tenants of the said shopping mall as there is no break in the supply chain of petitioner No.1 and the receipt of rentals and the tax payable thereon are the direct and inexorable consequence of the construction of the mall and the payment of GST on the inputs goods and services which have been consumed and utilised for the construction of the shopping mall.

g) However, the benefit of input tax credit has been denied to the petitioner by applying Section 17(5) (d) of the CGST Act as well as of the OGST Act and the language of the said sub-section in both the Acts is identical. The said Section 17(5) (d) of both the aforesaid Acts inter alia provides that notwithstanding anything contained in sub section (1) of Section 16 of both the aforesaid Act and sub section (1) of Section 18 of both the aforesaid Acts, input tax credit shall not be available in respect of the goods and services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business. The Petitioner has been informed by the authorities under the CGST Act and OGST Act that in view of the aforesaid Section 17(5)(d) of both the aforesaid Acts the petitioner cannot avail of the benefit of credit of tax input paid by the petitioner on the purchases of input materials and services which have been used in the construction of the shopping mall for set off, against the CGST and OGST payable on rent received from the tenants of the shopping mall.

h) Section 17 of the CGST Act inter alia reads as under :

17. Apportionment of credit and blocked credits.- (1) Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.

(2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this

Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

(3) The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.
[Explanation.-For the purposes of this sub-section, the expression ''value of exempt supply'' shall not include the value of activities or transactions specified in Schedule III, except those specified in paragraph 5 of the said Schedule.]

(4) A banking company or a financial institution including a non-banking financial company, engaged in supplying services by way of accepting deposits, extending loans or advances shall have the option to either comply with the provisions of sub-section (2), or avail of, every month, an amount equal to fifty per cent. of the eligible input tax credit on inputs, capital goods and input services in that month and the rest shall lapse:

Provided that the option once exercised shall not be withdrawn during the remaining part of the financial year :

Provided further that the restriction of fifty per cent. shall not apply to the tax paid on supplies made by one registered person to another registered person having the same Permanent Account Number.
(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:-
[(a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:-
(A) further supply of such motor vehicles; or
(B) transportation of passengers; or
(C) imparting training on driving such motor vehicles;
(aa) vessels and aircraft except when they are used–
(i) for making the following taxable supplies, namely:-
(A) further supply of such vessels or aircraft; or
(B) transportation of passengers; or
(C) imparting training on navigating such vessels; or
(D) imparting training on flying such aircraft;
(ii) for transportation of goods;
(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):

Provided that the input tax credit in respect of such services shall be available -
(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;
(ii) where received by a taxable person engaged-
(I) in the manufacture of such motor vehicles, vessels or aircraft; or
(II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;
(b) the following supply of goods or services or both-
(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;
(ii) membership of a club, health and fitness centre; and
(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force;]
(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;
(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.
Explanation.—For the purposes of clauses (c) and (d), the expression "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalization, to the said immovable property;
(e) goods or services or both on which tax has been paid under section 10;
(f) goods or services or both received by a non-resident taxable person except on goods imported by him;
(g) goods or services or both used for personal consumption;
(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and
(i) any tax paid in accordance with the provisions of sections 74, 129 and 130.
(6) The Government may prescribe the manner in which the credit referred to in sub-sections (1) and (2) may be attributed.

> Explanation.- For the purposes of this Chapter and Chapter VI, the expression "plant and machinery" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes-
>
> (i) land, building or any other civil structures;
> (ii) telecommunication towers; and
> (iii) pipelines laid outside the factory premises.

On a plain reading of Section 17(5)(d), it is clear that what it contemplates and provides for is a situation where inputs are consumed in the construction of an immovable property which is meant and intended to be sold. The sale of immovable property post issuance of completion certificate does not attract any levy of GST. Consequently, in such a situation, there is a break in the tax chain and, therefore, there is full justification for denial of input tax credit as, on the completion of the transaction, no GST would at all be payable and, therefore, no set-off of the input tax credit would be required or warranted or justified. But the position is totally different where the immovable property is constructed for the purpose of letting out the same, because, in that event, the tax chain is not broken and, on the contrary, the construction of the building will result in a fresh stream of GST revenues to the Exchequer on the rentals generated by the building. The denial of input tax credit in such a situation would be completely arbitrary, unjust and oppressive and would be directly opposed to the basic rationale of GST itself, which is to prevent the cascading effect of multi-stage taxation and the inevitable increase in costs which would have to be borne by the consumer at the end of the day. In the present case also, the effect of denial of input tax credit would be a sharp and inevitable increase in the cost which the owner of the building would be compelled to incur, which would render the building itself uncompetitive as compared to previously existing similar built-up units. Further, the denial of the input tax credit in respect of a building which is meant and intended to be let out would amount to treat it as identical to a building which is meant and intended to be sold. As already pointed out, these two types of transactions cannot possibly be compared or bracketed together, for the purpose of levy of GST, as already explained in detail earlier. The treatment of these two different types of buildings as one for the purpose of GST is itself contrary to the basic principles regarding classification of subject-matter for the levy of tax and, therefore, violative of Article 14 of the Constitution. Such a classification also constitutes the treatment of assessees like the Petitioner on a totally different footing as

compared with other assessees who have a continuous business and an unbroken tax chain like the Petitioner and grant of input tax credit to others while denying it to the Petitioner. Thus, the same is violative of the Petitioners' fundamental right to equality guaranteed by and under Article 14 of the Constitution, on this distinct and independent ground also. Further, as also pointed out hereinafter, the GST authorities are themselves reading down Section 17(5)(d) and treating it as inapplicable to a builder who sells units in the building before the issuance of a completion certificate and who is required to pay CGST/OGST on the amount of sale price received by him. To grant input tax credit to a builder who sells building where completion certificate has not been issued at the time of sale while denying it to a person like the Petitioner is patently and egregiously arbitrary and discriminatory. Further, such an interpretation of Section 17(5)(d) of both CGST and OGST Act leads to double taxation, i.e., firstly, on the inputs consumed in the construction of the building and secondly, on the rentals generated by the same building. It is also a settled principle of interpretation of tax statutes, that interpretation should be adopted which avoids or obviates double taxation. This principle is also directly applicable to the present case. It would also be violative of the Petitioners' fundamental right to carry on business under Article 19(1)(g) of the Constitution as it would impose a wholly unwarranted and unreasonable and arbitrary restriction which would render buildings now constructed for letting out uncompetitive, by imposing the burden of double taxation of GST on such buildings, i.e., firstly, on the inputs consumed in the construction and, thereafter, on the rentals generated by the building. It is therefore, submitted that, in accordance with well-settled principles of interpretation of statutes, Section 17(5)(d) requires to be read down in order to save it from the vice of unconstitutionality, by confining the provision to cases where the building in question is constructed for the purpose of sale of the same post issuance of completion certificate, thereby terminating the tax chain, and by not applying Section 17(5)(d) to cases where the building in question is constructed for the purpose of letting out the same and where the tax chain is not broken. It is further submitted that if this interpretation of Section 17(5)(d) is not accepted, then there would be no alternative except to declare that provision as unconstitutional and illegal and null and void.

i) The interpretation of Section 17(5) (d) of both CGST Act and OGST Act which leads to the conclusion that on the facts and circumstances of the present case the petitioner No.1 is not entitled to avail the benefit of taking input tax credit while paying CGST and OGST on rent received from

different tenants of the shopping mall, clearly goes against the intention of the Legislature and also frustrates the object sought to be achieved by the Legislature in enacting the said CGST Act and OGST Act. It is an undisputed fact that CGST Act and OGST Act are implemented to obviate the cascading effect of various indirect taxes and to reduce multiplicity of indirect taxes. It cannot be disputed that in the business of the petitioner No.1-Company right from the starting point of construction of the shopping mall and upto letting out of different units of the said shopping mall, there is no break in the business activity of the petitioner and it is a continuous business of the petitioner No.1 and the supply of services to the tenants of the shopping mall are a continuous supply of services as defined in Section 2 (33) of the CGST Act and OGST Act. There is also no break or interruption in the tax chain. Therefore, when there is no break in supply of services, which implies the continuation of the business activity of the petitioner No.1 and there is no break in the tax chain and if that is the undisputed clear position then by interpreting Section 17(5) (d) of both CGST Act and OGST Act, the authorities under both the Acts cannot contend that in the middle of the business the petitioner No.1 is not entitled to take credit of input tax, against the CGST and OGST paid on rent received from the tenants of the shopping mall and such an interpretation clearly goes against the intention of the Legislature and also frustrates the object for which the aforesaid Acts were enacted. Such an interpretation will debar those taxable persons like the petitioner No.1, who carry on a continuous business without any break but in spite of that they would be treated differently being denied the benefit of taking input tax credit as available to those taxable person under Section 16 of both CGST Act and OGST Act and such classification of taxable persons into two category even though both have continuous business activities and both have an unbroken tax chain is a clear violation of the fundamental rights of the petitioner as guaranteed under Article 14 and 19(1) (g) of the Constitution of India.

j) The classification which the legislature has made in CGST Act and OGST Act by denying input tax credit to one class of taxable persons having a continuous business by placing them under Section 17 (5) (d) of both the aforesaid Act while other taxable persons coming under the aforesaid two Acts are allowed to avail the benefit of input tax credit under Section 16 of both the aforesaid two Acts, has no reasonable basis underlying such classification when both categories of taxable persons are carrying on a continuous business without any break in the tax chain. It is very important to

note that when a builder sells units in a building before issuance of a completion certificate, he is required to pay CGST and OGST on the amount of sale price received and at the same time he is also allowed credit and set off of the CGST and OGST paid on the inputs consumed to construct the building and thus the GST authorities themselves recognise and accept the position that where, in respect of a building under construction, the tax chain is not broken, Section 17(5)(d) is not applicable and input tax credit cannot be denied. Consequently, not to adopt the same interpretation of Section 17(5)(d) in the present case where also there is no break in the tax chain, is highly arbitrary and discriminatory. In the case of the petitioner even the business is a continuous one without a break in the tax chain, yet it has been placed under Section 17(5) (d) of the CGST Act and OGST Act and the benefit of taking input tax credit has been denied and therefore on that ground alone and by itself Section 17(5) (d) of CGST Act and OGST Act requires to be struck down as violative of Article 14 of the Constitution if the said clause (d) of sub-section (5) of Section 17 is not read down as submitted earlier.

k) Schedule II Paragraph 5 (b) inter alia provides that sale of a building to a buyer before issuance of a completion certificate etc. is a supply of service for the purpose of imposing CGST and OGST. Here the legislature used the phrase 'intended for sale' whereby the intention of the builder was made the decisive factor by the Legislature. Precisely the same approach should have been adopted in the present case also. Otherwise, it would be highly arbitrary and discriminatory application of the provision. Therefore, two different categories of builders were mentioned one in paragraph 5 (b) of Schedule II and the other is in Section 17 (5) (d) of the CGST Act and OGST Act. But the case of the petitioner No.1 is completely different from the two categories mentioned hereinbefore. The shopping mall which the petitioner No.1 is constructing is neither "intended for sale' nor "on his own account' but it is "intended for letting out". Therefore, by no stretch of imagination, it can be concluded that the shopping mall which is constructed by the petitioner No.1 is 'intended for sale' or 'on his own account' and as such when the said shopping mall is constructed purely for the purpose of letting out, then such construction of the shopping mall will not come within the mischief of Section 17(5)(d) of CGST Act and OGST Act. On the aforesaid clear position of law, if the GST authorities are trying to bring the petitioner case under section 17(5) (d) of both the aforesaid Acts then several words has to be read into the Section 17(5) (d) of the said two Acts which are not permissible in law and it is a well settled law that in constructing fiscal statute and in

determining the liability of a subject to tax, one must have regard to the strict letter of law and no words can be added to a statute or read into it which are not there. Legislature has also imposed another condition in Section 17(5) (d) of both the aforesaid Act which reads as 'when such goods or services or both are used in the course or furtherance of business' this condition is applicable only when the immovable property is constructed 'on his own account' as appearing in that sections, which means that the taxable person on whose account the said immovable property is constructed. The said condition cannot be applied to any other cases far less when the construction of the immovable property is intended for letting out.

l) If the benefit of taking credit of input tax under Section 16 of the CGST Act and OGST Act is denied to the petitioner No.1 by invoking Section 17(5) (d) of the CGST Act and OGST Act, in that event, the very object of enacting CGST Act and OGST Act for reducing the cascading effect of various indirect taxes and reduction of multiplicity of indirect taxes, will be frustrated even when the business of the petitioner No.1 is a continuous one and there is no break at any point of time. It is a well settled law that the interpretation which defeat the very intention of the legislature should be avoided and that interpretation which advances the legislative intent will have to be accepted.

4. Learned counsel for the petitioners in order to advance his argument regarding the purpose of Section 17 (5)(d) of the Act, has taken the provisions of Sections 16, 17(1), 17(2), 17(5) of the CGST Act which are reproduced below:

> "**16. Eligibility and conditions for taking input tax credit. -** (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.
>
> (2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,–
>
> (a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;
>
> (b) he has received the goods or services or both.
>
> [Explanation.—For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services–

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person;]

(c) subject to the provisions of section 41 [or section 43A], the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or installments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961 (43 of 1961), the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

This clause provides for eligibility, conditions and time period for taking input tax credit. This clause provides that a registered person is entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business. (Notes on Clauses).

17. Apportionment of credit and blocked credits.- (1) Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.

(2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the

Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

xxx xxx xxx

(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

[(a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:-
(A) further supply of such motor vehicles; or
(B) transportation of passengers; or
(C) imparting training on driving such motor vehicles;
(aa) vessels and aircraft except when they are used–
(i) for making the following taxable supplies, namely:-
(A) further supply of such vessels or aircraft; or
(B) transportation of passengers; or
(C) imparting training on navigating such vessels; or
(D) imparting training on flying such aircraft;
(ii) for transportation of goods;
(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):

Provided that the input tax credit in respect of such services shall be available-

(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;
(ii) where received by a taxable person engaged-
(I) in the manufacture of such motor vehicles, vessels or aircraft; or
(II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;
(b) the following supply of goods or services or both-
(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;
(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Explanation.—For the purposes of clauses (c) and (d), the expression "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalization, to the said immovable property;
(e) goods or services or both on which tax has been paid under section 10;
(f) goods or services or both received by a non-resident taxable person except on goods imported by him;
(g) goods or services or both used for personal consumption;
(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and
(i) any tax paid in accordance with the provisions of sections 74, 129 and 130."

5. Learned counsel for the petitioners further contended that for the purpose of letting out he is earning out commercial rent income and he has to pay 18% GST on that. This is a chain transaction pursuant to the construction activity which he has carried out. To support his contention, learned counsel for the petitioners has relied upon the decision of the Hon'ble Supreme Court in the case of ***Eicher Motors Ltd. v. Union of India***, reported in (1999) 2 SCC 361, paragraphs-5 and 6 of which are reproduced below:

"5. Rule 57-F(4-A) was introduced into the Rules pursuant to the Budget for 1995-96 providing for lapsing of credit lying unutilised on 16-3-1995 with a manufacturer of tractors falling under Heading No. 87.01 or motor vehicles falling under Heading Nos. 87.02 and 87.04 or chassis of such tractors or such motor vehicles under Heading No. 87.06. However, credit taken on inputs which were lying in the factory on 16-3-1995 either as parts or contained in finished products lying in stock on 16-3-1995 was allowed. Prior to the 1995-96 Budget, the Central excise/additional duty of customs paid on inputs was allowed as credit for payment of excise duty on the final products, in the manufacture of which such inputs were used. The condition required for the same was that the credit of duty paid on inputs could have been used for discharge of duty/liability only in respect of those final products in the manufacture of which such inputs were used. Thus it was claimed that there was a nexus between the inputs and the final products. In the 1995-96 Budget, the MODVAT Scheme was liberalised/simplified and the credit earned on any input was allowed to be utilised for payment of duty on any final product manufactured within the same factory irrespective of whether such inputs were used in its manufacture or not. The experience showed that credit accrued on inputs is less than the duty liable to be paid on the final products and thus the credit of duty earned on inputs gets fully utilised and some amount has to be paid by the manufacturer by

way of cash. Prior to the 1995-96 Budget, the excise duty on inputs used in the manufacture of tractors and commercial vehicles varied from 15% to 25%, whereas the final products attracted excise duty of 10% or 15% only. The value addition was also not of such a magnitude that the excise duty required to be paid on final products could have exceeded the total input credit allowed. Since the excess credit could not have been utilised for payment of the excise duty on any other product, the unutilised credit was getting accumulated. The stand of the assessees is that they have utilised the facility of paying excise duty on the inputs and carried the credit towards excise duty payable on the finished products. For the purpose of utilisation of the credit, all vestitive (sic) facts or necessary incidents thereto have taken place prior to 16-3-1995 or utilisation of the finished products prior to 16-3-1995. Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory on the basis of the existing Scheme. Now by application of Rule 57- F(4-A), the credit attributable to inputs already used in the manufacture of the final products and the final products which have already been cleared from the factory alone is sought to be lapsed, that is, the amount that is sought to be lapsed relates to the inputs already used in the manufacture of the final products but the final products have already been cleared from the factory before 16-3-1995. Thus the right to the credit has become absolute at any rate when the input is used in the manufacture of the final product. The basic postulate that the Scheme is merely being altered and, therefore, does not have any retrospective or retroactive effect, submitted on behalf of the State, does not appeal to us. As pointed out by us that when on the strength of the Rules available, certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the Scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that the right, which had accrued to a party such as the availability of a scheme, is affected and, in particular, it loses sight of the fact that the provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assesses concerned. Therefore, the Scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier Scheme was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the basis of the earlier Scheme necessarily that the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said Rule would result in affecting the rights of the assesses.

6. We may look at the matter from another angle. If on the inputs, the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the Rule cannot be applied to the

> goods manufactured prior to 16-3-1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods."

5.1 He has also relied upon the decision of the Hon'ble Supreme Court in the case of ***Collector of Central Excise, Pune v. Dai Ichi Karkaria Ltd***., reported in (1999) 7 SCC 448, paragraph-18 of which is quoted below:

> "18. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available."

6. Taking into consideration, learned counsel for the petitioners has contended that Section 17(5)(d) of the CGST Act is to be read down for the purpose of interpretation in continuation to give benefit to the assessee or to the person who has paid GST and it has to be interpreted in continuity of the transaction since rent income is arising out of the Malls which are constructed after paying GST on different items. He further contended that the interpretation which he is canvassing has now been supported by the Government Circular dated 8.12.2018 which is reproduced below:

> "Ministry of Finance
> **Effective tax rate on complex, building, flat etc.**
> Posted On:08 DEC 2018 5:16PM by PIB Delhi
>
> It is brought to the notice of buyers of constructed property that there is no GST on sale of complex/building and ready to move-in flats where sale takes place after issue of completion certificate by the competent authority. GST is applicable on sale of under construction property or ready to move-in flats where completion certificate has not been issued at the time of sale.
>
> Effective rate of tax and credit available to the builders for payment of tax are summarized in the table for pre-GST and GST regime.

Period	**Output Tax Rate**	**Input Tax Credit details**		**Effective Rate of Tax**
Pre-GST	Service Tax: 4.5% VAT: 1% to 5% (composition scheme)	Central Excise on most of the construction materials : 12.5% VAT:12.5 to 14.5% Entry Tax: Yes	No input tax credit (ITC) of VAT and Central Excise duty paid on inputs was available to the builder for payment of output tax, hence it got embedded in the value of properties. Considering that goods constitute approximately 45% of the value, embedded ITC was approximately 10-12%.	Effective pre-GST tax incidence: 15-18%
GST	Affordable housing segment: 8% Other segment: 12% after 1/3rd abatement of value of land	Major construction materials, capital goods and input services used for construction of flats, houses, etc. attract GST of 18% or more.	ITC available and weighted average of ITC incidence is approximately 8 to 10%.	Effective GST incidence, for affordable segment and for other segment has not increased as compared to pre-GST regime.

Passing projects in the affordable segment such as Jawaharlal Nehru National Urban Renewal Mission, Rajiv Awas Yojana, Pradhan Mantri Awas Yojana or any other housing scheme of State Government etc., attract GST of 8%. For such projects, after offsetting input tax credit, the builder or developer in most cases will not be required to pay GST in cash as the builder would have enough ITC in his books of account to pay the output GST.

For projects other than affordable segment, it is expected that the cost of the complex/ buildings/ flats would not have gone up due to implementation of GST. Builders are also required to pass on the benefits of lower tax burden to the buyers of property by way of reduced prices/installments, where effective tax rate has been down."

6.1 He contended that in view of this interpretation which is canvassed by the petitioners is supported by for which he has taken Clause 5 (b) of Schedule II of the Central Goods and Services Tax Act which is reproduced below:

"5. Supply of services

The following shall be treated as supply of services, namely:-

xxx xxx xxx

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the

entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier."

7. Learned counsel for the petitioners has also relied upon the decision of the Hon'ble Supreme Court in the case of ***Spentex Industries Limited v. Commissioner of Central Excise and others***, reported in (2016) 1 SCC 780, para 26 of which is reproduced below:

"26. We are also of the opinion that another principle of interpretation of statutes, namely, principle of contemporanea expositio also becomes applicable which is manifest from the act of the Government in issuing two notifications giving effect to Rule 18. This principle was explained by the Court in *Desh Bandhu Gupta and Co. v. Delhi Stock Exchange Association Ltd. (1979) 4 SCC 565* in the following manner: (SCC pp. 572-73, para 9)

"9. It may be stated that it was not disputed before us that these two documents which came into existence almost simultaneously with the issuance of the notification could be looked at for finding out the true intention of the Government in issuing the notification in question, particularly in regard to the manner in which outstanding transactions were to be closed or liquidated. The principle of contemporanea expositio (interpreting a statute or any other document by reference to the exposition it has received from contemporary authority) can be invoked though the same will not always be decisive of the question of construction. (Maxwell 12th Edn. p. 268). In Crawford on Statutory Construction (1940 Edn.) in para 219 (at pp. 393-395) it has been stated that administrative construction (i.e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction commonly referred to as practical construction although not controlling, is nevertheless entitled to considerable weight; it is highly persuasive. In *Baleshwar Bagarti v. Bhagirathi Dass* (1908) ILR 35 Cal 701 the principle, which was reiterated in *Mathuramohan Saha v. Ram Kumar Saha*, ILR 43 Cal. 790: (AIR 1916 Cal. 136) has been stated by Mookerjea, J. thus: (*Baleshwar Bagarti* case, ILR p.713)

"…. It is a well-settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it. I do not suggest for a moment that such interpretation has by any means a controlling effect upon the Courts; …. such interpretation may, if occasion arises have to be disregarded for cogent and persuasive reasons, and in a clear case of error, a Court would without hesitation refuse to follow such construction."

Of course, even without the aid of these two documents which contain a contemporaneous exposition of the Government's intention, we have come to the conclusion that on a plain construction of the notification the proviso permitted the closing out or liquidation of all outstanding transactions by entering into a forward contract in accordance with the rules, bye-laws and regulations of the respondent."

8. He has also relied upon the decision of the Hon'ble Supreme Court in the case of ***Indian Metals and Ferro Alloys Ltd. v. Collector of Central Excise, Bhubaneswar,*** reported in 1991 Supp (1) SCC 125, paragraphs 14 and 15 of which are reproduced below:

> "14. However, even assuming that there could have been some doubt as to the intention of the legislation in this regard, the matter is placed beyond all doubt by the revenue's own consistent interpretation of the item over the years. It has been pointed out that prior to March 1, 1975, residuary Item 68 was not in the schedule. If the revenue's contention that these poles are not pipes and tubes is correct then they could not have been brought to duty at all before March 1, 1975. But the fact is that transmission poles have been brought to duty between 1962 to 1975, and that could only have been under Item 26-AA (for there was no residuary item then). This is indeed proved by the fact that this very assessee was thus assessed initially and also by the issue of notifications of exemption from time to time which proceed on the footing that these poles were assessable to duty under Item 26-AA but were entitled to an exemption if certain conditions were fulfilled. Indeed, the assessee also applied for and obtained relief under one of those exemption notification since 1964.
>
> 15. It is contended on behalf of the department that this earlier view of the department may be wrong and that it is open to the department to contend now that the poles really do not fall under Item 26-AA. In any event, it was submitted since the poles were exempted from duty under one notification or other, it was not very material prior to March 1, 1975 to specifically clarify whether the poles would fall under Item 26-AA or not. This argument proceeds on a misapprehension. The revenue is not being precluded from putting forward the present contention on grounds of estoppels. The practice of the department in assessing the poles to duty (except in cases where they were exempt as the condition in the exemption notifications were fulfilled) and the issue of notifications from time to time (the first of which was almost contemporaneous with the insertion of Item 26-AA) are being relied upon on the doctrine of *contemporaneo expositio* to remove any possible ambiguity in the understanding of the language of the relevant statutory instrument: see *K.P. Varghese v. TTO, (1981) 4 SCC 173; State of Tamilnadu v. Mahi Traders, (1989) 1 SCC 724; CCE v. Andhra Sugar Ltd., 1989 Supp (1) SCC 144 and Collector of Central Excise v. Parle Exports P. Ltd., (1989) 1 SCC 345*. Applying the principle of these decisions, that a contemporaneous exposition by the administrative authorities is a very useful and relevant guide to the interpretation of the expressions used in a statutory instrument, we think the assessee's contention that its products fall within the purview of Item 26-AA should be upheld."

9. Learned counsel for the petitioners has also relied upon the decision of the Hon'ble Supreme Court in the case of ***Shayara Bano v. Union of India and others,*** reported in (2017) 9 SCC 1. Though he has requested to go through the pages 75 to 84 and pages 91 and 92 of the said judgment but he has relied upon paragraphs 67 and 87, which are reproduced below:

"67. We now come to the development of the doctrine of arbitrariness and its application to State action as a distinct doctrine on which State action may be struck down as being violative of the rule of law contained in Article 14. In a significant passage, Bhagwati, J., in *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3 stated: (SCC p.38, para 85)

"85. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalizing principle ? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate is activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. *From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14,* and if it effects any matter relating to public employment. It is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16." (emphasis supplied)

"87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in *McDowell,* State of A. P. v.

> McDowell and Co., (1996)3 SCC 709 when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution."

10. Another judgment learned counsel for the petitioners has sought to rely upon which relates to Income Tax, where accepting the contention of the Department the Hon'ble Supreme Court in the case of ***Oxford University Press v. Commissioner of Income Tax***, reported in (2001) 3 SCC 359 in paragraphs 26, 32, 35 and 36 has observed as under:

> "26. On examination of the different provisions in Section 10 dealing with exemption from the tax it would be clear that each one of the said provisions is intended to serve a definite public purpose and is meant to achieve a special object.
>
> 32. I am of the view that the expression "existing solely for educational purposes and not for purposes of profit" qualifies a "university or other educational institution". In a case where a dispute is raised whether the claim of exemption from the tax by the assessee is admissible or not it is necessary for the assessee to establish that it is a part of a university which is engaged solely or at least primarily for educational purposes and not for purposes of profit and the income in respect of which the exemption is claimed is a part of the income of the university. This question assumes importance in a case like the one in hand where the assessee is nothing more than a commercial establishment/business enterprise engaged in the business of printing, publishing and selling of books in this country. The label "University Press" is not sufficient to establish that it is engaged in any educational activity. The purpose of the existence of the assessee in this country, as appears from the material on record, is possibly to earn profit. If the interpretation of the provision in Section 10(22) of the Act as urged on behalf of the assessee is accepted the provision will be exposed to challenge on the ground of being irrational and, therefore, arbitrary. Then the question will arise for what purpose is this exemption from tax extended to the assessee? How is it different from the large number of such establishments engaged in the business of printing, publishing and selling of books.
>
> 35. Income of the public exchequer and expenditure from it is a matter of considerable public importance. Citizens of this country, particularly taxpayers, are entitled to know the rational basis for granting exemption from income tax to an assessee. In extending the exemption to universities which exist solely for educational purposes and not for the purposes of profit, there is a rational basis and valid reason. If establishments/institutions which are engaged solely in commercial activities are included in the expression "university" and are treated on a par for the

purpose of granting exemption from the tax then it will amount to treating unequals as equals and, therefore, discriminatory. A provision of exemption from tax in a fiscal statute is to be strictly construed. Interpretation of such a statutory provision which does not stand the test of rationality and will lead to absurd results cannot be accepted.

36. Giving a purposeful interpretation of the provision it will be reasonable to hold that in order to be eligible to claim exemption from tax under Section 10(22) of the Act the assessee has to establish that it is engaged in some educational activity in India and its existence in this country is not for profit only. This interpretation of Section 10(22) neither causes violence to the language of the provision nor does it amount to rewriting the same. On the other hand, it only gives a harmonious construction of the provision which subserves the object and purpose which the provision is intended to serve."

11. Learned counsel for the petitioners has also relied upon the decision of the Hon'ble Supreme Court in the case of ***K.P. Varghese v. Income-Tax Officer, Ernakulam and another***, reported in Vol.131 (1981) ITR 597, more particularly pages 604 and 605 which read as follows:

"The primary objection against the literal construction of s.52, sub-s.(2), is that it leads to manifestly unreasonable and absurd consequences. It is true that the consequences of a suggested construction cannot alter the meaning of a statutory provision but it can certainly help to fix its meaning. It is a well-recognised rule of construction that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. There are many situations where the construction suggested on behalf of the revenue would lead to a wholly unreasonable result which could never have been intended by the Legislature. Take, for example, a case where A agrees to sell his property to B for a certain price and before the sale is completed pursuant to the agreement and it is quite well known that sometimes the completion of the sale may take place even a couple of years after the date of the agreement the market price shoots up with the result that the market price prevailing on the date of the sale exceeds the agreed price, at which the property is sold, by more than 15% of such agreed price. This is not at all an uncommon case in an economy of rising prices and in fact we would find in a large number of cases where the sale is completed more than a year or two after the date of the agreement that the market price prevailing on the date of the sale is very much more than the price at which the property is sold under the agreement. Can it be contended with any degree of fairness and justice that in such cases, where there is clearly no under-statement of consideration in respect of the transfer and the transaction is perfectly honest and bona fide and, in fact, in fulfillment of a contractual obligation, the assessee, who has sold the property, should be liable to pay tax on capital gains which have not accrued or arisen to him? It would indeed be most harsh and inequitable to tax the assessee on income which has neither arisen to him nor is received by him, merely because he has carried out the contractual obligation undertaken by him. It is difficult to conceive of any rational reason why the Legislature should have thought it fit to impose liability to tax on an

assessee who is bound by law to carry out his contractual obligation to sell the property at the agreed price and honestly carries out such a contractual obligation. It would indeed be strange if obedience to the law should attract the levy of tax on income which has neither arisen to the asessee nor has been received by him."

12. Lastly, learned counsel for the petitioners has relied upon the decision of the Hon'ble Supreme Court in the case of ***Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others***, reported in 1991 Supp (1) SCC 600, paragraphs 118 and 122 of which are reproduced below :

"118. Legislation, both statutory and constitutional, is enacted, it is true, from experience of evils. But its general language should not, therefore, necessarily be confined to the form that evil had taken. Time works changes, brings into existence new conditions and purposes and new awareness of limitations. Therefore, a principle to be valid must be capable of wider application than the mischief which gave it birth. This is particularly true of the constitutional constructions. Constitutions are not ephemeral enactments designed to meet passing occasions. These are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it ..... ". In the application of a Constitutional limitation or inhibition, our interpretation cannot be only of 'what has been' but of 'what may be'. See the observations of this Court in Sunil Batra v. Delhi Administration, (1978) 4 SCC 494. Where, therefore, in the interpretation of the provisions of an Act, two constructions are possible, one which leads towards constitutionality of the legislation would be preferred to that which has the effect of destroying it. If we do not read the conferment of the power in the manner we have envisaged before, the power is liable to be struck down as bad. This, we say in spite of the argument by many including learned Solicitor General of India and Smt. Shyamla Pappu that in contractual obligations while institutions or organisations or authorities, who come within the ambit of Article 12 of the Constitution are free to contract on the basis of 'hire and fire' and the theory of the concept of unequal bargain and the power conferred subject to constitutional limitations would not be applicable. We are not impressed and not agreeable to accept that proposition at this stage of the evolution of the constitutional philosophy of master and servant framework or if you would like to call it employer or employee relationship. Therefore, these conferments of the powers on the employer must be judged on the constitutional peg and so judged without the limitations indicated aforesaid, the power is liable to be considered as arbitrary and struck down.

122. In the aforesaid view of the matter, I would sustain the constitutionality of this conferment of power by reading that the power must be exercised on reasons relevant for the efficient running of the services or performing of the job by the societies or the bodies. It should be done objectively, the reasons should be recorded, it should record this and the basis that it is not feasible or possible reasonably to hold any enquiry without disclosing the evidence which in the circumstances of the case would be hampering the running of the institution. The

reasons should be recorded, it need not be communicated and only for the purpose of the running of the institution, there should be factors which hamper the running of the institution without the termination of the employment of the employee concerned at that particular time either because he is a surplus, inefficient, disobedient and dangerous."

13. Mr. T.K. Satapathy, learned counsel for the opposite parties has also relied upon the counter affidavit of opposite party Nos.1, 2, 5 and 7. Paragraphs-4, 9 and 11 of the said counter affidavit are reproduced below:

"4. That as regard paragraphs-1 of the writ application the Petitioner's contention that the denial of input tax credit is ultra vires of Article 14 and 19 (1) (g) of the constitution of India is unjust and improper. In this regard, it is humbly submitted that in case of the ***Indian Oil Corporation Ltd v. State of Bihar (TS-347-SC-2017-VAT),*** while dealing with the issue of set up of VAT against the entry tax the Hon'ble Court held that 'no assessee' claim set off as a matter of right and levy of Entry Tax cannot be assailed as unconstitutional only because set off clear that Article 14 of the Constitution can be said to be breached only when there is perversity or gross disparity resulting in clear and hostile discrimination practiced by the legislature, without any rational jurisdiction for the same". In view of the above, the taxpayer cannot claim credit of Input Tax without any authority of law. Further, restrictions with respect to availment of credit accrued under the existing law being reasonable, are equally applicable to all. As the suitability and requirement of taxpayer varies from person to person, rule/Act can not be changed/amended acoordingly. It is mandatory for the taxpayers to adhere the restrictions prescribed in Act and Rule as such restrictions can not be challenged by the tax payer under the plea of being violative of the Petitioner's fundamental rights guareented under Articles 14 and 19(1)(g) of the Constitution of India.

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9. That as regard paragraph-5 (f) of the writ petition it is humbly submitted that As per Section 16 of the CGST as well as OGST Acts every registered person shall subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49 of the CGST Act as well as Section 49 of the OGST Act, be entitled to take credit of the input tax charged on any supply of goods or services or both made to him, which are used or intended to be used in the course of furtherance of his business and the said amount shall be credited. The Petitioner has stated that as they are registered dealer, they are statutorily entitled to avail of the benefit of taking credit of the input tax charged on the supply of the goods in various services which are consumed or utilized for the construction of the aforesaid Shopping mall and set off the same against the CGST and OGST payble on the rentals received from the tenants.

In this regard it is to state that as already mentioned in paragraph-7 of the counter affidavit regarding restrictions prescribed for the Registered persons under Section 17(5)(d) of the CGST/OGST Act'2017, to which the Petitioner is also required to strictly adhere to. While interpreting the Section 16 supra the Petitioner is omitting the conditions and restrictions as prescribed for the registrants. Nowhere under

CGST/OGST Act, 2017 and Rules framed thereunder it is mentioned that the Registrant shall follow the Act/Rule to the extent of their suitability only.

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11. That as regard paragraphs-5 (i) of the writ petition it is humbly submitted that the Government has restricted in availment of ITC u/s 17(5)(d) of the CGST Act 2017. The petiioner has erred in accepting the fact that Input tax credit is not a matter of right which cannot be deprived. This issues have already been decided by the Hon'ble Supreme Court in case of Oil Corporation India Limited v. State of Bihar under the Entry Tax Act.

(i) The Hon'ble Supreme Court, in its judgment in the case of Inidan Oil Corporation Ltd. Vs. State of Bihar [TS-347-SC-2017-VAT] while dealing with the issue of set off of VAT against entry tax, the court held that, "**..no assessee can claim set off as a matter of right and levy of Entry Tax cannot be assailed as unconstitutional only because set offf is not given".**

In view of the above, the taxpayer cannot claim credit accumulated due to suppy of inputs (goods as well as services) used by them for construction of their project as a vested right for payment of GST on the output taxable supply of Renting of their said property.

(ii) Powers to restrict flow of credit also exist under Section 16(1) of the CGST Act which empowers the Central Government to impose conditions and restrictions on availing input tax credit. This shows a Legislative intent that input tax credit may not always be allowed partially or fully. Input tax credit provisions do not provide for that all the tax paid on inputs should be available as credit. Some credits have been denied under section17 in the Act itself and to allow flexbility, the Act provides that restrictions can be placed on availabiltiy of credit. In this regard, reliance is also placed on the recent judgment of Hon'ble Delhi Court in the case of ***Cellular Operators Association of India and Others Vrs. UoI [2018-TIOL-310-HC-DEL-ST]*** wherein the Hon'ble Court rejected the claim of the taxpayer to allow credit of unutilised education and higher education cess and upheld the power of the Government to restrict utilisation of balance cess.

(iii) In case of ***Mohit Minerals Pvt Ltd. Vrs. Union of India*** wherein the petitioner challenged the decision of the Government to disallow the credit of Clean Environment Cess paid on coal that was in stock as on 30th of June, 2017 and payment of Compensation Cess thereon in the GST regime, thus resulting in double taxation. The Hon'ble Supreme Court held that the petitioner is not entitled for any set off of payments made towards Clean Energy Cess in payment of Compensations to States Cess.

(iv) GST is a new stystem of taxation which provides setting off of input tax credit against the output tax liability along the entire value chain till the final retail level. Under the earlier tax regime, credit of inputs was available for final product in respect of certain taxes/duties only. For eg. Credit of duty of excise could not be utilised against VAT and vice versa. It can be therefore said that GST is applicable only on value addition along the entire supply chain and thus, cascading effect of taxes has been eleminated. Thus, under the GST regime, more input tax credit is

available to tax payer along the entire supply chain as compared to the previous tax regime. Further, the transitional provisions under the CGST Act provide adeqauate credit of taxes accumulated under the erstwhile taxation regime to taxpayers in the GST regime.

(v) It may be noted that Section 17(5)(d) of the CGST Act prescribes denial of credit for certain class of taxpayers with certain conditions and limitations. This would mean that legislature has decided in its wisdom the credit of taxes which would be allowed in credit as ITC and the tax that has not been allowed, as policy call of the Government, given effect through legislation, cannot be obtained through judicial review.

(vi) In case of **JCB India Ltd Vs. Union of India 2018-TIL-23-HC-Mum-GST**, the Hon'ble Court held- "*CENVAT credit is a mere concesstion and it can not be claimed as a matter of right- Credit on inputs under the existing law itself is not absolute but restricted or conditional right- if the existing law itself imposes condition for its enjoyment or availment, then, it is not possible to agree with the Counsel that such rights under existing law could have been enjoyed and availed of irrespective of the period or time provided therein-. The period or the outer limit is prescribed in the existing law and the Rules of CENVAT credit enacted thereunder- In the circumstances, it is not possible to agree with the Counsel appearing for the Petitioner that imposition of condition vide clause(iv) is arbitrary, unreasonable and violative of Articles 14 and 19(1) (g) of the Constitution of India-if right to availment of CENVAT credit itself is conditional and not restricted or absoulte, then the right to pass on that credit cannot be claimed in absoulte terms-there cannot be estoppel against a statute- transitional arrangements that have been made have clear nexus with the object sought to be achieved cannot be struck down as having no such relation or nexus-petitions fail.*"-

14. Mr. Satapathy, learned counsel for the opposite parties has relied upon the unreported decision of the Bombay High Court in Writ Petition No.3142 of 2017 ***(JCB India Limited v. Union of India),*** paragraphs-6, 28, 56, 57 and 61 of which are reproduced below:

"6. To abolish the cascading effect, the CGST Act provides for the input tax credit eligibility in terms of these transitional provisions. Section 140(1) of the CGST Act inter alia provides that a manufacturer will be entitled to carry forward the closing balance of CENVAT credit, subject to certain conditions. Further, Section 140(3) of the CGST Act inter alia allows a registered trader to avail input tax credit of goods held in stock as on 1-7-2017, subject to certain conditions. It is submitted that upon a plain reading of the provisions and particularly Clause (iv) of sub-section (3) of Section 140, the input tax credit of stock of goods can be availed only when such goods are purchased after 30-6-2016. A trader or a depot of a manufacturer was not entitled to avail credit as the CENVAT suresh 20-21-WPGOJ-3142.2017.doc Credit Rules, 2004 allows credit availment only by a manufacturer or a service provider. However, there were provisions through which an importer could pass on the credit of duty paid by registration as first stage dealers. By the GST and particularly by virtue of the provisions contained in Section 140(1) and Section

140(3) of the CGST Act, a situation of inequality amongst the manufacturer and the depot/trader as far as the stock on 1-7-2017, occurs and such ineligibility of credit under the GST regime causes discrimination between the petitioner and other manufacturers. It is put to a disadvantageous position as far as the closing stock on 1-7-2017 in respect of goods lying in stock prior to 30-6-2016.

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28. Prior thereto, in support of the argument that Article 14 is salutary in its application, it is urged that the Judgments in the compilation would throw light on these propositions canvassed. Our attention was specifically invited to a Judgment in the case of Eicher Motors Ltd. v. Union of India, reported in 1999 (106) E.L.T. 3 (SC). That is on the point that rights accrued during the existing law are specifically saved under Section 174 of the CGST Act, 2017, which would include the right to pass on the CENVAT credit and such an accrued right cannot, therefore, be taken away and in the manner done. On the point of promissory estoppel, our attention has been invited to several Judgments in the compilation and particularly the principle emerging from the Judgment in Motilal Padampat suresh 20-21-WPGOJ-3142.2017.doc Sugar Mills Co. Ltd. v. State of Uttar Pradesh & Others, reported in (1979) 2 SCC 409.

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56. To our mind, therefore, the learned Additional Solicitor General is right in his contention that a CENVAT credit is a mere concession and it cannot be claimed as a matter of right. If the CENVAT Credit Rules under the existing legislation themselves stipulate and provide for conditions for availment of that credit, then, that credit on inputs under the existing law itself is not a absolute but a restricted or conditional right. It is subject to fulfilment or satisfaction of certain requirements and conditions that the right can be availed of. It is in these circumstances that we are unable to agree with the Counsel appearing for the petitioners that the impugned condition defeats any accrued or vested right. It was never vesting in them in such absolute terms, as is argued before us. If the existing law suresh 20-21-WPGOJ-3142.2017.doc itself imposes condition for its enjoyment or availment, then, it is not possible to agree with the Counsel that such rights under the existing law could have been enjoyed and availed of irrespective of the period or time provided therein. The period or the outer limit is prescribed in the existing law and the Rules of CENVAT credit enacted thereunder. In the circumstances, it is not possible to agree with the Counsel appearing for the petitioners that imposition of the condition vide Clause (iv) is arbitrary, unreasonable and violative of Articles 14 and 19(1)(g) of the Constitution of India.

57. We would refer to the Judgments which are heavily relied upon in this context. It is stated that the rights and privileges accrued during the existing law have been specifically saved under Section 174 of the CGST Act, 2017. If what are saved are the rights and privileges of the nature noted above, then it cannot be said de hors the conditions or de hors the restriction on availment or enjoyment of that right they have been saved by the CGST Act. In other words, if rights are conferred with conditions under the existing law, then, they are suresh 20-21-WPGOJ-3142.2017.doc saved by the CGST Act with such conditions and not otherwise.

> There must be clear provision to grant it otherwise than in terms of the existing Law or in other words, the restrictions or conditions on availment of that right are removed totally. No such provision has been brought to our notice. It is clear that if right to availment of CENVAT credit itself is conditional and not restricted or absolute, then, the right to pass on that credit cannot be claimed in absolute terms. It is argued that it is a vested right accruing to the petitioner.
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> 61. We are not confronted with a situation of the lapsing of the credit though the petitioners may equate the position before us with that of Elcher Motors. We are dealing with the validity and legality of a condition imposed in the transitional arrangement. While moving from one legislation to another comprehensive legislation, in the latter legislation the Legislature deemed it fit and proper to continue the earlier or erstwhile arrangement by terming it as a transition or suresh 20-21-WPGOJ-3142.2017.doc transitional one. <u>That continuation was with conditions and one of the conditions which is questioned here is consistent with the conditions imposed under the existing law. Such a situation was not dealt with in Elcher Motors. Thus, the decision is clearly distinguishable</u>."

15. Mr. Satapathy has also relied upon the decision of the Delhi High Court in Writ Petition (Civil) No.7837/2016 ***(Cellular Operators Association of India and others v. Union of India and another)*** decided on 15th February, 2018, paragraphs-5 and 16 of which are reproduced below:

> "5. The grievance of the petitioners is, and they claim a vested right to avail benefit of the unutilized amount of EC or SHE credit, which was available and had not been set off as on 1st March, 2015 and 1st June, 2015 for payment of tax on excisable goods and taxable services respectively. The contention is that EC and SHE were subsumed in the Central Excise Duty, the general rate of which was increased from 12% to 12.5%, and service tax, which was increased from 12.36% to 14%. Reliance is placed upon the Budget Speech of the Finance Minister and the memorandum explaining provisions of Finance Bill, 2015, which reads:-
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> 11.8. As part of the movement towards GST, I propose to subsume the Education Cess and the Secondary and Higher Education Cess in Central Excise duty. In effect, the general rate of Central Excise Duty of 12.36% including the cesses is being rounded off to 12.5%
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> 121..... It is proposed to increase the present rate of Service Tax plus education cesses from 12.36% to a consolidated rate of 14%.‖ Education Cess and Secondary & Higher Education Cess leviable on excisable goods are being subsumed in Basic Excise duty. Consequently, ... The standard ad valorem rate of Basic Excise Duty is being increased from 12% to 12.5% and specific rates of Basic Excise Duty on petrol, diesel, cement, cigarettes & other tobacco products (other than biris) are being suitably changed....
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> The Service Tax rate is being increased from 12% plus Education Cesses to 14%. The Education Cess' and Secondary and Higher Education Cess' shall be subsumed in the revised rate of Service Tax. Thus, effective increase in Service Tax rate will

be from existing rate of 12.36% (inclusive of cesses) to 14%. The new Service Tax rate shall come into effect from a date to be notified by the Central Government after the enactment of the Finance Bill, 2015. Till the time the revised rate comes into effect, the levy of Education cess' and Secondary and Higher Education cess' shall continue to be levied in Service Tax‖.

Reference is also made to the Explanation given by the Joint Secretary, Tax Research Unit, Ministry of Finance, Government of India, vide letter F.No.334/5/2015-TRU dated 28th February, 2015, which reads:-

The rate of Service Tax is being increased from 12% plus Education Cesses to 14%. The Education Cess' and _Secondary and Higher Education Cess' shall be subsumed in the revised rate of Service Tax.

Thus, the effective increase in Service Tax rate will be from the existing increase in Service Tax rate will be from the existing rate of 12.36% (inclusive of cesses) to 14%, subsuming the cesses‖ The contention is that EC and SHE, which were earlier imposed and then withdrawn from 1st March, 2015 and 1st June 2015 for excisable goods and taxable services respectively, had been subsumed and included in the excise duty and service tax, and therefore, the amount lying in the credit towards EC and SHE should be available for availing CENVAT credit. This was not a case of abolition of EC and SHE, but the cesses were added and became part of the excise duty or service tax. Reliance is placed on the dictionary definition of the term ―subsumed‖, which means to include, absorb in something else or incorporated into something larger or more general. Therefore under law, unutilised EC and SHE should be allowed to be utilised for payment of basic excise duty in excisable goods and service tax on taxable service, for otherwise the action would be clearly arbitrary, capricious and tantamount to lapsing of credit accrued on the input, though higher excise duty or service tax was payable on the output. The petitioners, it is asserted, have a vested right to claim benefit of utilization of the unutilized credit. Reliance is placed upon the judgment of the Supreme Court in Eicher Motors Limited and Another versus Union of India and Others, (1999) 2 SCC 361 and Samtel India Limited versus Commissioner of Central Excise, Jaipur, (2003) 11 SCC 324.

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16. The decision in the case of Eicher Motors Limited and Another (supra) is distinguishable, for in the said case, what was subject matter of challenge was Rule 57-F(4-A), which had stipulated that unutilized credit as on 16th March, 1995 lying with the manufacturers of tractors under Heading 87.01 or motor vehicles 87.02 and 87.04 or chassis of tractors or motor vehicles under Heading 87.06 shall lapse and shall not be allowed to be utilized for payment of duty on excisable goods. The proviso, however, had stipulated that nothing shall apply to the credit of duty, if any, in respect of inputs lying in stock or contained in finished products lying in stock as on 16th March, 1995, thereby creating an anomalous situation. Credit of tax paid on inputs and even finished products was available, but not in respect of the sold products. This was clearly taking away a vested right in the form of an amendment to the Rule. There was lapse of credit, which could not be utilized,

though the tax/duty had not been withdrawn. The Supreme Court noticed that the credit attributable to inputs had already been used in manufacture of final products that had been cleared, and this alone was sought to be lapsed, notwithstanding the fact that the right had become absolute. On a holistic reading of the entire scheme, it was observed that when acts have been done by the parties concerned on the strength of the Rules, incidence following thereto must take place in accordance with the scheme or the Rules, otherwise it would affect the rights of the assessees. Further, right had accrued on the date when the assessee had paid tax on the raw materials or inputs and the same would continue till the facility available thereto got worked out or until the goods existed. As noticed above, tax/duty had not been withdrawn. Lastly and more importantly, Section 37 of the Central Excise Tariff Act, 1985 did not enable the authorities to make the Rule impugned therein. The legal ratio in Eicher Motors Limited and Another (supra) was followed in Samtel India Limited (supra) wherein amended Rule 57-F(17) of the Central Excise Rules, 1944 was challenged. The Rules had postulated lapsing of credit in case of manufactured goods falling under sub-heading 8540.12, though the proviso had provided for credit of duty in respect of inputs lying in stock or contained in finished goods lying in stocks. It was held that the said scheme of credit of input tax, in view of amended provision, could not be made applicable to goods which had already come into existence and under which the assessee had claimed credit facility. As noticed above, in the present case, credit of EC and SHE could be only allowed against EC and SHE and could not be cross- utilized against the excise duty or service tax. In fact, what the petitioners seek is an amendment of the scheme to allow them to take cross utilization of the unutilized EC and SHE upon the two cesses being withdrawn against excise duty and service tax, though this was not the position even earlier. Both EC and SHE were withdrawn and abolished. They ceased to be payable. In these circumstances, it is not possible to accept the contention that a vested right or claim existed and legal issue is covered against the respondents by the decision in Eicher Motors Limited and Another (supra) and Samtel India Limited (supra). The said decisions are distinguishable and inapplicable."

16. Mr. Satapathy, has also relied upon the decision of the Hon'ble Supreme Court in the case of ***Government of Andhra Pradesh and others v. P. Laxmi Devi,*** reported in (2008) 4 SCC 720, paragraphs-72, 73 and 80 of which are reproduced below :

"72. As regards fiscal or tax measures greater latitude is given to such statutes than to other statutes. Thus in the Constitution Bench decision of this Court in *R.K. Garg* v. *Union of India* [(1981) 4 SCC 675 : 1982 SCC (Tax) 30] this Court observed: (SCC pp. 690-91, para 8)

"*8.* Another rule of equal importance is that *laws relating* to *economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc*. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or

straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. *The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved*. Nowhere has this admonition been more felicitously expressed than in *Morey* v. *Doud* [1 L Ed 2d 1485 : 354 US 457 (1957)] where Frankfurter, J. said in his inimitable style:

'In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events'self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.'

The court must always remember that 'legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry'; 'that exact wisdom and nice adaptation of remedy are not always possible' and that 'judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in *Secy. of Agriculture* v. *Central Roig Refining Co.* [94 L Ed 381 : 338 US 604 (1949)] , be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

(emphasis supplied)

73. All decisions in the economic and social spheres are essentially ad hoc and experimental. Since economic matters are extremely complicated, this inevitably entails special treatment for special situations. The State must therefore be left with

wide latitude in devising ways and means of fiscal or regulatory measures, and the court should not, unless compelled by the statute or by the Constitution, encroach into this field, or invalidate such law.

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80. However, we find no paradox at all. As regards economic and other regulatory legislation judicial restraint must be observed by the court and greater latitude must be given to the legislature while adjudging the constitutionality of the statute because the court does not consist of economic or administrative experts. It has no expertise in these matters, and in this age of specialisation when policies have to be laid down with great care after consulting the specialists in the field, it will be wholly unwise for the court to encroach into the domain of the executive or legislative (*sic* legislature) and try to enforce its own views and perceptions."

17. Lastly, Mr. Satapathy has relied upon the judgment of the Hon'ble Supreme Court in the case of ***State of M.P. v. Rakesh Kohli and Others***, reported in (2012) 6 SCC 312, paragraphs-23, 24 and 32 to 35 of which are reproduced below:

23. In *P. Laxmi Devi* [(2008) 4 SCC 720], a two-Judge Bench of this Court was concerned with a judgment of the Andhra Pradesh High Court. The High Court had declared Section 47-A of the 1899 Act, as amended by A.P. Act 8 of 1998 that required a party to deposit 50% deficit stamp duty as a condition precedent for a reference to a Collector under Section 47-A, unconstitutional. The Court said in *P. Laxmi Devi* [(2008) 4 SCC 720] as follows: (SCC p. 735, paras 19 & 21)

"*19*. It is well settled that stamp duty is a tax, and hardship is not relevant in construing taxing statutes which are to be construed strictly. As often said, there is no equity in a tax vide *CIT* v. *V. MR. P. Firm Muar* [AIR 1965 SC 1216] . If the words used in a taxing statute are clear, one cannot try to find out the intention and the object of the statute. Hence the High Court fell in error in trying to go by the supposed object and intendment of the Stamp Act, and by seeking to find out the hardship which will be caused to a party by the impugned amendment of 1998.

* * *

21. It has been held by a Constitution Bench of this Court in *ITO* v. *T.S. Devinatha Nadar* [AIR 1968 SC 623] (vide AIR paras 23-28) that where the language of a taxing provision is plain, the court cannot concern itself with the intention of the legislature. Hence, in our opinion the High Court erred in its approach of trying to find out the intention of the legislature in enacting the impugned amendment to the Stamp Act."

24. While dealing with the aspect as to how and when the power of the court to declare the statute unconstitutional can be exercised, this Court referred to the earlier decision of this Court in *Rt. Rev. Msgr. Mark Netto* v. *State of Kerala* [(1979) 1 SCC 23] and held in para 46 of the Report as under: (*P. Laxmi Devi case* [(2008) 4 SCC 720] , SCC p. 740)

"*46*. In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates

some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways e.g. if a State Legislature makes a law which only Parliament can make under Schedule VII List I, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope vide *Rt. Rev. Msgr. Mark Netto* v. *State of Kerala* [(1979) 1 SCC 23] , SCC para 6 : AIR para 6. Also, it is none of the concern of the court whether the legislation in its opinion is wise or unwise."

Then in paras 56 and 57 the Court stated as follows: (*P. Laxmi Devi case* [(2008) 4 SCC 720], SCC p. 744)

"*56*. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimisation of the Judges' personal preferences. The court must not invalidate a statute lightly, for, as observed above, invalidation of a statute made by the legislature elected by the people is a grave step. As observed by this Court in *State of Bihar* v. *Kameshwar Singh*[AIR 1952 SC 252] : (AIR p. 274, para 52)

'*52*. …The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence….'

57. In our opinion, the court should, therefore, ordinarily defer to the wisdom of the legislature unless it enacts a law about which there can be no manner of doubt about its unconstitutionality."

* * *

32. While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the court must have regard to the following principles:

(*i*) there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature,

(*ii*) no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found,

(*iii*) the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence,

(*iv*) hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law, and

(*v*) in the field of taxation, the legislature enjoys greater latitude for classification.

Had the High Court kept in view the above well-known and important principles in law, it would not have declared clause (*d*), Article 45 of Schedule I-A as violative of

> Article 14 of the Constitution being arbitrary, unreasonable and irrational while holding that the provision may pass the test of classification.
>
> **33.** By creating two categories, namely, an agent who is a blood relation i.e. father, mother, wife or husband, son or daughter, brother or sister and an agent other than the kith and kin, without consideration, the legislature has sought to curb inappropriate mode of transfer of immovable properties. Ordinarily, where executant himself is unable, for any reason, to execute the document, he would appoint his kith and kin as his power-of-attorney holder to complete the transaction on his behalf. If one does not have any kith or kin who he can appoint as power-of-attorney holder, he may execute the conveyance himself. The legislative idea behind clause (*d*), Article 45 of Schedule I-A is to curb the tendency of transferring immovable properties through power of attorney and inappropriate documentation.
>
> **34.** By making a provision like this, the State Government has sought to collect stamp duty on such indirect and inappropriate mode of transfer by providing that power of attorney given to a person other than kith or kin, without consideration, authorising such person to sell immovable property situated in Madhya Pradesh will attract stamp duty at two per cent on the market value of the property which is the subject-matter of the power of attorney. In effect, by bringing in this law, the Madhya Pradesh State Legislature has sought to levy stamp duty on such ostensible documents, the real intention of which is the transfer of immovable property.
>
> **35.** The classification, thus, cannot be said to be without any rationale. It has a direct nexus to the object of the 1899 Act. The conclusion of the High Court, therefore, that the impugned provision is arbitrary, unreasonable and irrational is unsustainable."

Therefore, he has contended that the interpretation is to be put as per the language used in Section 17(5)(d) of the Act.

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

19. The very purpose of the Act is to make the uniform provision for levy collection of tax, intra state supply of goods and services both central or State and to prevent multi taxation.

Therefore, the contention which has been raised by the learned counsel for the petitioners keeping in mind the provisions of Section 16 (1)(2) where restriction has been putforward by the legislation for claiming eligibility for input credit has been described in Section 16(1) and the benefit of apportionment is subject to Section 17(1) and (2). While considering the provisions of Section 17(5)(d), the narrow construction of interpretation putforward by the Department is frustrating the very objective of the Act, inasmuch as the petitioner in that case has to pay huge amount without any basis. Further, the petitioner would have paid GST if it disposed of the property after the completion certificate is granted and in case the property is

sold prior to completion certificate, he would not be required to pay GST. But here he is retaining the property and is not using for his own purpose but he is letting out the property on which he is covered under the GST, but still he has to pay huge amount of GST, to which he is not liable.

20. In that view of the matter, in our considered opinion the provision of Section 17(5)(d) is to be read down and the narrow restriction as imposed, reading of the provision by the Department, is not required to be accepted, inasmuch as keeping in mind the language used in ***(1999) 2 SCC 361 (supra)***, the very purpose of the credit is to give benefit to the assessee. In that view of the matter, if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST, which is required to pay under Section 17(5)(d) of the CGST Act.

21. In that view of the matter, prayer (a) is required to be granted. However, we are not inclined to hold it to be ultra vires. Prayer (b) is not accepted.

The writ petition is allowed to the aforesaid extent.

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2019 (III) ILR-CUT- 258

S. PANDA, J. & P. PATNAIK, J.

W.P.(C) NO. 5671 OF 2019

MANAGEMENT OF M/S. NAVA BHARAT VENTURES LTD. ..... Petitioner

-Vs-

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

INDUSTRIAL DISPUTES ACT, 1947 – Section 2(s) – Workman – Definition of – Writ petition by the Management challenging the award of Labour court directing reinstatement with back wages – Plea that the employee concern was working as a Supervisor and as such cannot be treated as a workman – Management failed to prove the nature of duties to prove that the employee was not a workman – Held, it cannot be said that he is not coming within the purview of workman – Award upheld.

Case Laws Relied on and Referred to :-

1. (2013) 10 SCC 324 : Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) & Ors.
2. AIR 1994 SC 1824 : S.K.Maini Vs. Carona Sahu Co. Limited
3. AIR 1964 SC 477 : Syed Yakoob Vs. K.S.Radhakrishnan & Ors.
4. (2015) 4 SCC 270 : M/s. Pepsico India Holding Private Limited Vs. Krishna Kant Pandey

For Petitioner : M/s.Sanjay Ku.Mishra, S.S.Sahoo

For Opp. Parties : M/s. B.K.Baral, P.Nayak, M/s.Dhirendra Ku.Mohapatra, M.Mishra

ORDER Date of Order : 20.09.2019

S. PANDA, J.

Heard learned counsel for the petitioner and learned counsel appearing for opposite party No.3-workman.

Petitioner-management in this writ petition seeks to challenge the award dated 26th July, 2018 passed by the Labour Court, Bhubaneswar in I.D. Case No. 4 of 2017 on the following reference:-

"Whether the termination of services of Sri Chinmaya Prasad Mishra, Ex-Supervisor w.e.f. 19.6.2015 by the management of M/s. Nava Bharat Ventures Ltd., At/Po- Kharagprasad, Dist-Dhenkanal is legal or justified? If not, to what relief Sri Mishra is entitled?"

While answering the said reference the Labour Court recorded a finding that the second party is a workman and in view of non-compliance of Section 25 of the Industrial Disputes Act, 1947 (hereinafter referred to as the I.D. Act) the workman is entitled to reinstatement and back wages as per Section 25-N and 25-H of the I.D. Act subject to deduction of the payment made to him at the time of termination. The award is to be complied with within one month from the date of its publication in the Official Gazette, or else, the second party will be entitled for interest @ 6% per annum on the awarded back wages till it is realized.

Learned counsel for the petitioner submitted that the award passed by the Labour Court is perverse and non-consideration of materials on record and the same is liable to be interfered with. Since the opposite party is not a workman as such he is not coming within the purview of Section 25-H and 25-N of the I.D. Act. He further submitted that the workman was defined

under Section 2(s) of the Act i.e. any person who being employed in a supervisory capacity and draws wages exceeding ten thousand rupees either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature and function as such is not a workman. In view of the fact that his service was ended with the terms and conditions of the service, the case is coming under Section 2(oo)(bb) of the I.D. Act i.e. the definition of the retrenchment and "of such contract being terminated under a stipulation in that behalf contained therein".

He draws attention of the Court to the appointment letter wherein it was clearly stated that the second party member was placed as Supervisor (Operation) in the supervisory staff cadre PPSS-1 and his gross salary is Rs.11,105/- with a term and condition that he is to perform the duty such as supervision, co-ordination, maintenance of relevant records etc. as required for the work and on completion of period of probation if found satisfactory then confirmation of services will be made. During the period of probation, either party can terminate the services by giving one month notice or salary in lieu thereof without assigning any reason. On confirmation the services are terminable by three months' notice or payment of three months' salary on either side. Salary for this purpose shall consist of only basic pay, dearness allowance and special pay but not other allowances or benefits etc. In view of such terms and conditions the second party was confirmed in services with effect from 14.12.2013. In the confirmation letter it was specifically stipulated that all other terms and conditions of employment set out in the probation order remain unaltered. As the establishment of the workman was not in a good condition it was decided to terminate the services of many employees who are surplus. Accordingly three months' salary was calculated and paid. He has also received the same towards full and final settlement. He also stated that he has no objection and no further claim in that regard. The said document was annexed as Annexure-6 series to the writ petition. The above documents which are part of the record and produced before the Court below the same are not considered while passing the award. Thus, the award is liable to be quashed. The memorandum of settlement dated 30.10.2012 between the management and their workman is not applicable to the present case in view of Clause 2(v) of the said terms of settlement wherein the employees like clerical, supervisory, officers are excluded from the said settlement along with other category of employees.

Learned counsel appearing for the opposite party-workman contended that the Labour Court on threadbare analyzing the evidence on record held that the second party is a workman, in absence of any materials that he being a Supervisor was primarily doing supervisory or managerial nature of duties. He further submitted that since the management has engaged the persons after the termination of the second party, passed the award of reinstatement by the Labour Court which need not be interfered with as there is no error apparent on the face of record. In support of his contention he has relied on the decision of the Apex Court in the case of ***Deepali Gundu Surwase Vrs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and others*** reported in ***(2013) 10 SCC 324***.

Learned counsel appearing for the management submitted that the management in its evidence categorically stated that the persons who are engaged are only trainees and they are not regular employees. The same has not been considered by the court below. He has drawn attention of the Court to the said deposition which was annexed to the writ petition as Annexure-9 series wherein M.W.2 examined on behalf of management has stated that sometimes the old power plant and sometimes the new second power plant runs intermittently and inter changeably. Some Degree Engineers were appointed as trainees by the management in the new 60 megawatt power plant and some are engaged through service provider, contractor and they worked at Boiler Desk and the substation of the plant and not in the turbine desk of the old power plant where the second party was working. In support of his contention he has relied on the decisions of the Apex Court reported in ***AIR 2002 SC 2495, AIR 2006 SC 3613, AIR 2006 SC 387***.

On the rival submission of the parties and after going through the materials as discussed above it appears that the work Supervisor was reflected in the office order where the management has placed the second party as Supervisory Staff cadre. The said office order was issued on 6.2.2013. In the said order it was clearly stated that the said posting is on the following terms and conditions with effect from 14.12.2012 on a back date with terms and conditions that he will perform the duties of supervision, co-ordination, maintenance of relevant records etc. There is no materials that he was supervising the work of others, rather he was doing a skilled and technical work i.e. maintenance of turbine desk in connection with industrial dispute.

For better appreciation Section 2(s) of the Industrial Disputes Act is quoted herewith:-

> "(s)workman means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenchment has led to that dispute, but does not include any such person-
>
> (i) who is subject to the Air Force Act, 1950(45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957(62 of 1957); or
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> (ii) who is employed in the police service or as an officer or other employee of a person, or
>
> (iii) who is employed mainly in a managerial or administrative capacity, or
>
> (iv) who, being employed in a supervisory capacity, draws wages exceeding (ten thousand rupees) per mensem or exercises, either by the nature of the duties attached to the office or by the reason of the powers vested in him, functions mainly of a managerial nature."

The Apex Court in the case of ***S.K.Maini Vrs. Carona Sahu Co. Limited*** reported in ***AIR 1994 SC 1824*** held that the determinative factor is the main duties of the employees concerned and not some works incidentally done. In other words, what is, in substance, the work which employees does or what is substance he is employed to do. Viewed from this angle, if the employee is mainly doing supervisory work but incidentally or for a fraction of time also does some manual or clerical work, the employee should be held to be doing supervisory works. Conversely, if the main work is of manual, clerical or of technical nature, the mere fact that some supervisory or other work is also done by the employee incidentally or only a small fraction of working time is devoted to some supervisory works, the employees will come within the purview of 'workmen' as defined in Section 2(s) of the Industrial Disputes Act.

The Court below rightly recorded a finding that the second party is a workman as management failed to prove the nature of duties. Thus, it cannot be said that he is not coming within the purview of workman. The Labour Court has rightly passed the award and directed for reinstatement as there was no stipulation that it is a contractual engagement or appointment. All the points raised by the learned counsel for the petitioner are answered accordingly.

The Apex Court in the case of ***Syed Yakoob Vrs. K.S.Radhakrishnan and others*** reported in ***AIR 1964 SC 477*** wherein it was held that finding of fact recorded by the Tribunal cannot be challenged in proceeding for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said findings are within the exclusive jurisdiction of the Tribunal and the said points cannot be agitated before a writ Court. The aforesaid settled principle still hold good and the said principle was reiterated in a decision reported ***in (2015) 4 SCC 270, M/s. Pepsico India Holding Private Limited Vrs. Krishna Kant Pandey***.

In view of the above settled principle and taking into consideration all the material facts available on record, the Labour Court has rightly passed the award. Hence, we are not inclined to interfere with the same.

Accordingly the writ petition is dismissed.

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2019 (III) ILR-CUT- 263

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

CRIMINAL APPEAL NO. 225 OF 1999

SIRAJI NAIK @ DHUDI ..... Appellant

-Vs-

STATE OF ODISHA ..... Respondent

(A) INDIAN EVIDENCE ACT, 1872 – Section 134 – Provisions under – Appreciation of evidence – Principles and scope – Indicated.

"Section 134 of the Indian Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact, which means that a solitary witness, if his evidence is acceptable, can also form the basis of conviction but in our opinion a criminal court, before placing reliance upon a solitary witness to record conviction for a criminal offence must test his evidence in the anvils of the objective circumstances of the case.

It is also well settled that witnesses are generally categorized in three types, i.e. wholly reliable, wholly unreliable, neither wholly reliable nor wholly unreliable. When the case comes under first two categories, the court has no problem in

appreciating the evidence. If the witness is held to be wholly reliable then the court will simply accept his evidence and proceed to record its findings. Similarly if it is held that a witness is wholly unreliable then also the court has no problem in coming to its conclusion which would be just and proper. But difficulty arises where the witness is neither wholly reliable nor wholly unreliable. In that case the court has to shift his evidence, find nuggets of truth or falsehood from his evidence and take a decision whether to record a conviction on his evidence of any criminal offence or not."

(B) CRIMINAL TRIAL – Offence under section 302/34 of IPC – Conviction of one out of five accused persons only on the basis of the testimony of one eye witness and the doctor – Prosecution not examined other eye witness – Several contradictions in the deposition of the only eye witness with regard to the injuries – Whether the conviction can be sustained? – Held, No.

"Thus, it appears that there are inherent contradictions between the statement of the informant which he has made in the F.I.R. and his statement made in the court. The contents of the F.I.R. are contradicted by the evidence of P.W.3 as P.W.3 has found as many as 5 injuries on the body of the deceased. It is worthwhile to mention here that the injury nos.(ii) and (iii) are incised injuries found on the right cheek and mandible of the deceased. The injury no.(iv) are three parallel abrasions on the left side neck of the deceased just nearer to the injury no.(i). There are also two horizontal incised injuries exposing the head of the right humorous bone. It is nobody's case that the appellant dealt blows on the mandible or face of the deceased or on the humorous bone i.e. the right hand of the deceased. The only blow that P.W.1 says is the blow given on his neck which is evident from the F.I.R. Moreover, in the examination-in-chief, he has also not stated as to the exact seat of the injuries caused by the blows given by the appellant. So in this view of the matter, the objective circumstances available in the case do not fully support the case of the prosecution as presented through P.W.1. Keeping in view the aforesaid discussions and conspectus of the materials available on record, we are of the opinion that the prosecution has not brought home its case beyond all reasonable doubt. Rather the evidence of P.W.1 suffers from infirmity that has been mentioned in the body of the judgment which raises a reasonable doubt regarding complicity of the appellant in commission of the crime."

For Appellant : M/s. A. Routray, P. K. Padhi and U.R. Bastia.
For Respondent : Mr. B. P. Pradhan, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment : 24.07.2019

S.K. MISHRA, J.

In this appeal the convict Siraji Naik @ Dhudi assails his conviction U/s.302 of the Indian Penal Code, 1860 (herein after referred as "I.P.C." for brevity) and order of sentence of imprisonment for life in S.T. Case No.213/10 of 1996-99 of the Court of learned Addl. Sessions Judge, Jharsuguda on 24th July, 1999.

2. Shorn of all unnecessary details, the case of the prosecution is that on 29.11.1995 at about 9 A.M. the informant Sarat Kumar Naik (P.W.1) and his father, deceased Narottam Naik, after reaping paddy, were collecting paddy sheaves from their paddy field at Bhedakhandimundatala. At that time Jibardhan Majhi, accused, since acquitted, came over the ridge of the land of Narottam Naik, the deceased. The deceased asked the said Jibardhan as to why he came through his ridge. At this Jibardhan started abusing the deceased and called for his master, convict Siraji Naik. On hearing the call of Jibardhan, it is alleged that convict Siraji Naik, Dasarath Naik, Ashok Naik and Anand Naik rushed to the spot for assaulting the deceased. It is further alleged that the convict Siraji snatched away the axe from the hand of Jibardhan Majhi and dealt axe blow from the front side to the neck of the deceased Narottam Naik for which the deceased fell down and after that the convict Siraji dealt a blow with a sickle for which a portion of the sickle got broken and stuck to the left arm pit of the deceased. Thereafter Dasarath Naik, Ashok Naik, Anand Naik and Jibardhan Majhi assaulted the deceased. Seeing this P.W.-1, the informant proceeded to rescue his father. At that time Dasarath Naik and Anand Naik caught hold of him. Seeing Narottam Naik dead, all the accused persons left the spot. It is further alleged that Dasarath Naik and convict Siraji Naik ran away with the axe and the broken portion of the sickle. It is also the case of the prosecution that prior to the occurrence, the father of the informant had a case with convict Siraji Naik U/s.145 of the Code of Criminal Procedure (for brevity 'the Code') for lands and because of that convict Siraji Naik was bearing a grudge on the deceased.

Information was lodged regarding the occurrence before the police officer attached to Baghdihi out post by P.W.1 on the date of occurrence, i.e. on 29.11.1995. Police, on the receipt of said informant, registered the case and took up investigation. On completion of investigation the investigating officer submitted charge-sheet against four accused persons U/s.302/34 I.P.C.

3. The plea of the accused persons in this case is that of complete denial of the occurrence as alleged by the prosecution. It is their further case that they have been falsely implicated in this case. Further it is also decipherable from the examination of Jibardhan Majhi recorded U/s. 313 of the Code that while he was going to cut paddy from the land of convict Siraji Naik, on seeing him deceased Narottam Naik abused him and chased to assault him with an axe which he snatched away and thereafter the deceased Narottam Naik rushed at him with a sickle and to save him when he brandished the axe, it hit the body of deceased Narottam Naik. The further plea of Jibardhan

Majhi is that the sickle fell from the hand of deceased Narottam Naik and Narottam Naik when fell down on the sickle, the sickle pierced to his body.

4. The prosecution, in order to bring home its case, examined four witnesses in all and amongst them P.W.1 is the solitary eye- witnesses who happens to be the informant of the case. P.W.2 is the post occurrence witness. P.W.3 is the doctor who conducted post mortem over the dead body of the deceased Narottam Naik on 30.11.1995. P.W.4 is the investigating officer who has conducted investigation of the case and the counter case and has submitted charge-sheet against the accused persons.

5. Learned Addl. Sessions Judge, relying upon the version of P.W.1, taking corroboration from the evidence of P.W.3 and other circumstances, came to the conclusion that the prosecution has proved its case beyond all reasonable doubt and thereafter proceeded to convict Siraji Naik @ Dhudi for the offence U/s.302 of I.P.C.. However, learned Addl. Sessions Judge came to the conclusion that prosecution has failed to prove the case against Ananda Naik, Ashok Naik, Dasarath Naik and Jibardhan Majhi and therefore acquitted them from the charge U/s.302/34 I.P.C. The conviction of appellant Siraji Naik is challenged in this case.

6. It is apparent from the record, especially from paragraph 22 of the cross-examination of P.W.4 that his investigation reveals that Satrughana Majhi, Kirtani Naik, Lokeswar Naik and Jogeswar Majhi are the eye witnesses of the occurrence in addition to P.W.1 but for the reasons best known to the prosecution, these witnesses have not been examined by it and they have been with-hold from the witness box leaving the case hanging on the evidence of P.W.1 only.

Section 134 of the Indian Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact, which means that a solitary witness, if his evidence is acceptable, can also form the basis of conviction but in our opinion a criminal court, before placing reliance upon a solitary witness to record conviction for a criminal offence must test his evidence in the anvils of the objective circumstances of the case.

It is also well settled that witnesses are generally categorized in three types, i.e. wholly reliable, wholly unreliable, neither wholly reliable nor wholly unreliable. When the case comes under first two categories, the court has no problem in appreciating the evidence. If the witness is held to be

wholly reliable then the court will simply accept his evidence and proceed to record its findings. Similarly if it is held that a witness is wholly unreliable then also the court has no problem in coming to its conclusion which would be just and proper. But difficulty arises where the witness is neither wholly reliable nor wholly unreliable. In that case the court has to shift his evidence, find nuggets of truth or falsehood from his evidence and take a decision whether to record a conviction on his evidence of any criminal offence or not.

In our considered opinion, P.W.1 is a witness who comes under 3rd category. He is neither wholly reliable nor wholly unreliable. So in this case his evidence is to be carefully examined. First it is to be seen that he is the informant of this case. In the FIR he has mentioned that Siraji Naik snatched away the axe from the hands of Jibardan Majhi and cut the neck of his father (MO BAPARA BEKARA SAMNAPATE HANIDELA), then his father fell down and he again assaulted by means of a sickle which broke and piece of the said sickle stuck to the left side arm pit of his father. From a close reading of these sentence keeping in view the other materials available in the F.I.R. itself, we are of the opinion that the informant has mentioned in the F.I.R. that the appellant gave one cut blow on the front side neck of the deceased. However, while was examined as a witness, in paragraph 2 of his examination-in-chief he has stated that Siraji snatched away the 'Budia' (small axe) from the hands of Jibardhan and gave blows by that axe on the neck of his father. Receiving the blows when his father fell down, accused Siraji assaulted by sickle near the arm pit of his father. A portion of the sickle pierced the body of his father.

7. The only objective circumstance appearing in this case against the appellant is the evidence of P.W.3, the doctor, namely Dr. Kishore Chandra Das who had conducted autopsy on the dead body of the deceased. He has stated on oath that at about 2 P.M. on 30.11.1995, he conducted autopsy over the dead body of the deceased and found the following injuries :-

(i) Incised injury on the upper part of the neck just above the thyroid cartilage and below the mandible, extending from 1" below the right mastoid process to left mastoid process. Its length was 8" and breadth was 4" at the centre, gradually lessening to the periphery, up to 3". The injury was extending up to the vertebral column cutting completely the larynx, esophagus muscle, arteries, veins, nerves and ligaments of the neck.

(ii) Incised injury 3" x 1/4" x 1/6" situated ½" above the lower border of right side of mandible.

(iii) Incised injury 3½" x 1½" x 3" just over the injury no.ii and below the right ear exposing the muscle of the right cheek and mandible bone.

(iv) Three parallel abrasions, 2" x 1/4" x 1/6" situated on the left side of neck just lateral to the injury no.i.

(v) Two horizontal incised injuries 4" x 1" and 3" x 1", exposing the head of the right humorous bone.

(vi) Incised injury 1¼" x 1" x 1/2" on the left side of chest half inch below the mid-point of the clavicle.

(vii) One broken sickle was pierced into the left axilla. After the sickle was removed, the size of the sickle was found to be 8½". Half of it was piercing into the body and 4" of the sickle was visible outside. The muscle in the axilla was torn and the pointed end of the sickle had torn the ligaments of the lower portion of the left shoulder joint.

In the cross-examination, he has stated that if two persons struggled with each other to snatch away the axe, injury no.(i), found on the neck of the deceased, can be caused. He has further stated that barring injury no.(i), other injuries are not fatal.

Thus, it appears that there are inherent contradictions between the statement of the informant which he has made in the F.I.R. and his statement made in the court. The contents of the F.I.R. are contradicted by the evidence of P.W.3 as P.W.3 has found as many as 5 injuries on the body of the deceased. It is worthwhile to mention here that the injury nos.(ii) and (iii) are incised injuries found on the right cheek and mandible of the deceased. The injury no.(iv) are three parallel abrasions on the left side neck of the deceased just nearer to the injury no.(i). There are also two horizontal incised injuries exposing the head of the right humorous bone. It is nobody's case that the appellant dealt blows on the mandible or face of the deceased or on the humorous bone i.e. the right hand of the deceased. The only blow that P.W.1 says is the blow given on his neck which is evident from the F.I.R. Moreover, in the examination-in-chief, he has also not stated as to the exact seat of the injuries caused by the blows given by the appellant.

So in this view of the matter, the objective circumstances available in the case do not fully support the case of the prosecution as presented through P.W.1.

8. Moreover, there is material on record that there was a counter case between the same parties in which the accused persons who are witnesses and Jibardhan Majhi was the injured. The Investigating Officer at para-17 of his cross-examination denies the fact that Jibardhan was admitted to District Headquarters Hospital, Jharsuguda on 29.11.1995. However, in the later paragraph, i.e. at paragraph 20, he has admitted that the accused Jibardhan Majhi was treated at District Headquarters Hospital, Jharsuguda from

29.11.1995 to 22.12.1995. This aspect shows that P.W.4 was not independent while investigating into the case and was a partisan witness.

9. Moreover, there is material on record that there is dispute between the families of the accused and the deceased regarding landed properties and for that a proceeding U/s.145 of the Code was pending between them. So, there is every possibility of false accusation in this case.

10. Keeping in view the aforesaid discussions and conspectus of the materials available on record, we are of the opinion that the prosecution has not brought home its case beyond all reasonable doubt. Rather the evidence of P.W.1 suffers from infirmity that has been mentioned in the body of the judgment which raises a reasonable doubt regarding complicity of the appellant in commission of the crime.

In that view of the matter, we are of the considered opinion that the conviction and sentence awarded by learned Addl. Sessions Judge, Jharsuguda cannot be sustained in the eye of law and has to be set aside.

In the result, the appeal is allowed.

Conviction of appellant Siraji Naik @ Dhudi for the offence U/s.302 of I.P.C. and sentence of imprisonment for life are hereby set aside. He is acquitted of the charges.

11. This Court has ordered release of the appellant on bail upon appeal on dtd.12.11.2001. The trial court shall verify if he has availed the bail granted to him. If he has been released on bail, the bail bonds shall be cancelled. If he is still in custody, he be set at liberty forthwith, if his detention is not required in any other cases.

L.C.R. be returned forthwith.

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2019 (III) ILR-CUT- 269

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

WPCRL NO. 96 OF 2017

SMT. SWARNALATA MISHRA ..... Petitioner

- Vs-

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

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition in the nature of habeas corpus – Scope of – Held, a writ court can adjudicate the jurisdictional facts, not adjudicatory facts which are required to be assessed on establishment of facts by evidence. (Para 8)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition in the nature of habeas corpus – Natural mother prays for custody of her baby child – Provisions of Hindu Minority and Guardianship Act, 1956, Hindu Guardians and Wards Act, 1956 and Juvenile Justice (Care and Protection of Children) Act, 2015 discussed – Parentage and guardianship – Distinction – Explained.

"*Parents are natural guardians U/s.6 of the Hindu Minority and Guardianship Act, 1956. The status of the father and mother as natural guardian of a minor child in respect of their person as well as property is well protected under Law. Under the proviso, natural guardian can be disqualified when he ceases to be a Hindu or completely and finally renounces the world becoming hermit. Noticeably, under explanation to section 6 of the Act, 1956, the father and mother do not include step father and step mother. After the commencement of this Act, no person can claim to be a legal guardian of a minor unless he/she comes within one of the four clauses of person provided U/s.4 of the Act, 1956. Regarding guardianship, the custody of a minor child who has not completed the age of 5 years, shall ordinarily be with the mother. Where the custody of a minor who has not completed the age of 5 years, is given to the mother, law does not contemplate that father is removed from the guardianship. Thus, the right of a mother to have the custody of a minor daughter below 5 years is unequivocally recognized under the Act, 1956. Parent versus parent dispute for the custody of their children involves consideration of the need of the child and his welfare. In case of third-party-dispute where a non-parent claims custody against parents, the consideration involves whether the custody of the child from the parent would be removed if the child with them or if not, whether child from the third party would be brought back for re-unification. In both the cases, the parental custody gets primacy but not the parentage.*

Where the question of abandonment of child comes, it is addressed under the Juvenile Justice (Care and Protection of Children) Act, 2015. Under Section 2 (14), "Child in need of care and protection", has been defined to include a child "(v) who has a parent or guardian and such parent or guardian is found to be ***unfit*** *or* ***incapacitated****, by the* ***Committee*** *or the* ***Board****, to care for and protect the safety and well-being of the child."*

Under Section 39 of J.J. Act, the process of rehabilitation and social re-integration of children has been undertaken, based on the individual care plan of the child, preferably through family based care such as by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care.

Thus seen, the parentage of a child is fully protected and parents are not only treated as natural guardian but are also entitled to get the child when it is felt to

be restored by Child Welfare Committee or by the J.J. Board. Adoption is only a means to change the parentage whereby the identity of the child is divested with the adoptive parents from biological parents.

In the case at hand the opposite party no.5 wants to retain the custody of the baby claiming that she has adopted her and thereby wants to prevent re-unification of the child with the natural mother. Opposite party no.5 does not opt to be appointed as guardian of the child on the ground that biological parents abandoned the baby. Instead, he wants the custody alleging unfitness of the natural parents. The dispute is inherently a change of parentage. Adoption is a mechanism known to our Law to change the lineage of parents and it is governed by Hindu Adoption and Maintenance Act, 1956 (as the parties are Hindu in this case). The dispute of guardianship is governed by the Hindu Guardians and Wards Act, 1956. If it is a dispute involving a child in need of care and protection, the provisions of J.J. Act would govern. All the remedies are efficacious but not availed here.

The factors needed to be considered are similar to the factors addressed in ***Tejaswini Gaud*** *case (supra). There the child was in tender age, i.e. one and half years. Her choice could not be ascertained and then it is held by Hon'ble Apex Court at paragraph 36 in the following manner:-*

"36. Taking away the child from the custody of the appellants and handing over the custody of the child to the first respondent might cause some problem initially; but, in our view, that will be neutralized with the passage of time. However, till the child is settled down in the atmosphere of the first respondent-father's house, the appellants No.2 and 3 shall have access to the child initially for a period of three months for the entire day, i.e. 8 A.M. to 6 P.M. at the residence of the first respondent. The first respondent shall ensure the comfort of appellants No.2 and 3 during such time of their stay in his house. After three months, the appellants No.2 and 3 shall visit the child at the first respondent's house from 10 A.M. to 4 P.M. on Saturdays and Sundays. After the child completes four years, the appellants No.2 and 3 are permitted to take the child on every Saturday and Sunday from the residence of the father from 11 A.M. to 5 P.M. and shall hand over the custody of the child back to the first respondent – father before 5 P.M. For any further modification of the visitation rights, either parties are at liberty to approach the High Court."

Paving the path in the same way and bestowing our anxious consideration to the admitted facts and the rival claims, we are of the considered opinion that the claim of opposite party no.5 to retain the custody of the baby child on the ground of adoption is not acceptable being contrary to Law. He has alternative remedy under Hindu Guardianship Act and J. J. Act. Considering the age and the consistent efforts of natural mother to regain custody of her girl child, we feel it appropriate and justified that the natural mother – petitioner shall be the custodian of the girl child and it would be in the best interest of the child.

Case Laws Relied on and Referred to :-

1. (2009) 7 SCC 322 : Anjali Kapoor (Smt) Vrs. Rajiv Baijal
2. 2009 (4) MPHT 215 : Tabassum Bano (Smt.) Vrs. State of M.P. & Ors.
3. AIR 2002 Ker 16 : Sangeetha L. Vrs. The Commissioner of Police, Kochi & Ors.

4. AIR 1960 SC 93 : Gohar Begam Vrs. Suggi @ Nazma Begam
5. (1973) 1 SCC 840 : Rosy Jacob Vrs. Jacob A. Chakramakkal
6. (1981) 3 SCC 92 : Dr. Veena Kapoor Vrs. Varinder Kumar Kapoor
7. (2001) 5 SCC 247 : Syed Saleemuddin Vrs. Dr. Rukhsana
8. (2008) 9 SCC 413 : Nil Ratan Kundu Vrs. Abhijit Kundu
9. (2009) 1 SCC 42 : Gaurav Nagpal Vrs. Sumedha Nagpal
10. 2019 SCC online SC 713 : Tejaswani Gauda & Ors. Vrs. Shekhar Jagdish Prasad Tewari & Ors.

For Petitioner : M/s. H. N. Tripathy. B. P. Rath, S. R. Tripathy.

For Opp.Parties : M/s. S. R. Mohapatra, B. R. Mohanty, L. Pattnaik, M. K. Swain, S. Harichandan, M/s. S. K. Nayak-I, D. Nayak, D. Nayak-A, S.K.Sahu.

JUDGMENT Date of Hearing : 29.07.2019 : Date of Judgment : 19.08.2019

Dr. A. K. MISHRA, J.

This writ for habeas corpus is filed by the mother – petitioner seeking custody of her tiny tot daughter.

2. Narrated in a nutshell, the grievance of the petitioner is that on 19.07.2016 she gave birth a girl child in the Moon Hospital, Cuttack. On 31.03.2017 at 7 A.M., while the baby was sleeping on the outer verandah of her house and she was busy in the household work inside, opposite party no.4 – Ganeswar Nayak came in a vehicle bearing registration No.OR-05-AR-6120 and took away the baby. The petitioner clamored for rescue of the child but it was in vain. Later she came to know that opposite party no.4 had sold her daughter to opposite party no.5 – Biswajit Nayak for a consideration of Rs.20,000/-. The petitioner made efforts to get back her daughter but opposite party no. 5 refused to hand over the custody of the child. The petitioner lodged written F.I.R. before the I.I.C., Athagarh Police Station (Opposite Party no.3) but the same was not registered. Police did not respond to her repeated request. Petitioner sent the written F.I.R. by registered post vide Annexure-3 to opposite party no.3. Even on 19.6.2017 she sent e-mail to Superintendent of Police, Cuttack vide Annexure-4. On 27.6.2017 the petitioner brought the inaction of the I.I.C., Athagarh to the notice of Superintendent of Police, Cuttack. Being unsuccessful in all her efforts, she filed this writ petition on 12.07.2017.

3. On behalf of opposite party nos.2 and 3, the I.I.C., Athagarh Police Station filed counter affidavit. It is stated therein that the petitioner was the mother of 3 girl children. The baby in question was her 4th issue.

Further it is stated that as per the Panchayatnama, the petitioner while returning home by the Ambulance of opposite party no.4, asked the driver, opposite party no.4 either to handover the baby to somebody else or to leave the baby in any orphanage and to keep the matter in secrete. The opposite party no.4 instead of working out the proposal of the petitioner, handover the newborn baby to the wife of opposite party no.5, namely Bismita Nayak who accepted the baby as her new daughter and celebrated all functions normally done in every family in the eve of newborn child. Thereafter the petitioner – mother did not enquire about the child. She deserted the child declaring that a dead female child was born. She even observed the obsequies ceremony for the dead child. There was a 'Panchayatnama' in presence of about 100 villagers on 18.06.2017 vide Annexure-A/3. It was mentioned therein that the petitioner having not performed her duty towards the baby child and having acted in cruel manner, was not entitled to the custody of the child.

Further it is stated in the counter affidavit that Athagarh P.S. Case No.161 dtd.18.7.2017 has been registered and is under investigation.

4. Opposite party nos.4 and 5 have filed joint counter affidavit duly sworn by opposite party no.4. It is stated therein that opposite party no. 4 being the Ambulance driver, had taken the petitioner with her husband to Moon Hospital. On 19.7.2016 the petitioner gave birth to a girl child. She did not want to keep the child and approached number of persons and Hospital staff to take the girl child or else she would kill her. Nobody agreed. She along with her child and husband returned home in the Ambulance of opposite party no.4. On the way, the petitioner attempted to throw the child in Sapua River. She was restrained by opposite party no.4. The petitioner requested opposite party no.4 to keep the child with a promise not to disclose before any villagers as she would declare that a dead child was born to her. Opposite party no.4 assured that he would keep the child with his cousin brother and accordingly since 19.7.2016 the child has been residing under the care and custody of opposite party no.5.

It is further stated in the counter affidavit that opposite party no.5 is serving as Havildar in Indian Army and his wife Bismita Nayak has adopted the child performing 21st day celebration and the child has been named. The child has been given immunization at P.P.C., Athagarh. At the same time the petitioner has already performed the obsequies ceremony to show that a dead child was born to her.

It is further affirmed in the counter affidavit that opposite party no.5 has no daughter. She has only one son. He and his wife have been keeping the baby girl with all care and affection as parents.

Further it is stated that the husband of the petitioner is a drug addict and taking advantage of the weakness and manly attachment of the wife of opposite party no.5 with the child, on 29.03.2017 at the instance of some mischievous persons, he demanded a sum of rupees two lakhs towards custody of the girl child. The opposite party no.5 who happens to be a cousin brother of opposite party no.4 intimated the villagers the above facts. As a result, a village meeting was held. It was decided therein in presence of petitioner and her husband and other villagers that the custody of girl child would be continued with opposite party no.5. The allegation of theft and sale of the child, as made by petitioner, is categorically denied by opposite party nos.4 and 5.

5. The petitioner has filed rejoinder affidavit denying the allegation made by opposite party nos.3, 4 & 5. It is stated that in the so called 'Panchayatnama' (Annexure-A/3) the petitioner has not signed and it was a fabricated document prepared in response to the F.I.R. to protect opposite party nos. 4 and 5. After passing of direction of personal appearance in this Court, the F.I.R. was registered vide Athagarh P.S. Case No.161 of 2017 and police has not conducted proper enquiry.

6. Learned counsel for the petitioner submits that;

(i) Mother of the child being the natural guardian is only entitled to have the custody of the baby child.
(ii) The child was born on 19.07.2016. On 12.06.2017 grievance was made before police. This writ petition was filed on 12.7.2017. By then the baby child was less than 1 year and the child should not have been kept out of biological mother as she was a sucking baby then.
(iii) The claim of adoption of child by opposite party no.5 is self proclaimed illegality which should not be perpetuated at the cost of child's welfare.
(iv) The date of registration of F.I.R. after filing of this case and the 'Panchayatnama' in which neither the petitioner nor her husband has signed is proof of the fact that police, in collusion of opposite party no.5, has created such document to show that petitioner – mother had abandoned and was not in a condition to provide better life to the child.

7. Learned counsel for opposite party nos.4 and 5 submits that;

(i) Writ for habeas corpus is not maintainable as the petitioner has alternative efficacious remedy and factum of abandonment and kidnapping is required to be established by evidence.
(ii) The welfare of the child is a paramount consideration in deciding the custody of the child and natural and biological mother has no preemptive right in respect of a child to whom she has abandoned in a cruel manner.
(iii) The opposite party no.5 and his wife have not only adopted the child but also have provided all sorts of comfort for the upbringing of the baby child. The interest of the child would be jeopardized if her custody is handed over at this juncture.

In support of his contention, learned counsel has relied upon the decision of Hon'ble Apex Court reported in **(2009) 7 SCC 322, Anjali Kapoor (Smt) Vrs. Rajiv Baijal** and decision of Division Bench of Hon'ble Madhya Pradesh High Court (Jabalpur Bench) in the case of **Tabassum Bano (Smt.) Vrs. State of Madhya Pradesh and Ors, 2009 (4) MPHT 215**.

8. Within the scope of writ for habeas corpus, a writ court can adjudicate the jurisdictional facts, not adjudicatory facts which are required to be assessed on establishment of facts by evidence.

There is no dispute that the baby child was born in the Moon Hospital, Cuttack on 19.07.2016. By the time of filing of this writ petition on 12.07.2017 admittedly the baby child was in the custody of opposite party no.5. By then she was less than 1 year old. On 08.09.2017, as this record reveals, the child was produced in the court by opposite party no.5 and as an interim measure the custody of the child was allowed to be continued with opposite party no.5 and his wife till further direction. There was a mediation between the parties but it was unsuccessful.

On 23.3.2018, on the apprehension of the petitioner about safety of the child, the court directed opposite party no.5 and his wife to ensure proper care of the child with further direction that "they shall be responsible for any untoward incident affecting the child."

9. In view of the age of the baby child, she was unable to express an intelligent preference about her custody.

In **Sangeetha L. Vrs. The Commissioner of Police, Kochi and Ors, AIR 2002 Ker 16** it has been held at paragraph 21 as follows:-

"21. It is well settled proposition of law that custody of children by their very nature is not final but are interlocutory in nature subject to modification upon

change of circumstances requiring change of custody and such change of custody must be proved to be in the best interest of the children. Reliance may be placed on the decisions, ***Rosy Jacob V. Jacob A. Chakramakkal MANU / SC / 0260 / 1973 : (1973) 1 SCC 840, Jai Prakash Khadria V. Srinath Prasad V. Nandamuri Jayakrishna 2001 AIR SCW 1033****. Some of the cases are coming under the Guardians and Wards Act. Courts have reiterated that paramount consideration is the welfare of the children and Court has got the power to change their custody in the best interest of the children and taking into consideration of various attendant circumstances.*"

In **Anjali Kapoor (Smt.)** case (supra) the mother of the child died after giving birth a premature baby who was kept with her grand-mother. The natural father claimed custody. Petition was filed under the Guardians and Wards Act, 1890 before the Family Court. After taking evidence, on 18.3.2004 the custody of child was given to the natural father. High court, in appeal, confirmed the same. Appeal was carried out to Hon'ble Supreme Court. The respondent did not appear. The girl child was found to be studying in one of the reputed schools and the grand-mother was taking proper care and attention and as the natural father – respondent had shown his lack of concern in the matter and had gone for the second marriage, the custody of the child was allowed to continue with the grand-mother till the child attain the age of majority.

In **Tabassum Bano** case (supra) of Hon'ble Madhya Pradesh High Court, the petitioner mother claimed custody of the child as during her illness, out of depression, the doctor, in consultation with the elder sister, handed over the custody to respondent and the child was studying in the school and the Court had ascertained the choice of the child by personal interaction and thereafter refused to grant any relief to the petitioner in Habeas Corpus petition.

In both the cases, the children were found prosecuting their study and were capable enough to express their intelligent preference regarding custody. But in the case at hand, this court is unable to get any such assistance from the child about her intelligent preference regarding custody between natural mother and the 3rd party.

For the above factual differentia, the decisions cited by learned counsel for opposite party no.5 are of no help to him.

10. Relying upon the aforesaid **Tabassum Bano** case and other decisions in **Gohar Begam Vrs. Suggi @ Nazma Begam,** reported in **AIR 1960 SC 93**, **Rosy Jacob Vrs. Jacob A. Chakramakkal** reported in **(1973) 1 SCC**

840, **Dr. Veena Kapoor Vrs. Varinder Kumar Kapoor** reported in **(1981) 3 SCC 92**, **Syed Saleemuddin Vrs. Dr. Rukhsana** reported in **(2001) 5 SCC 247**, **Nil Ratan Kundu Vrs. Abhijit Kundu** reported in **(2008) 9 SCC 413** and **Gaurav Nagpal Vrs. Sumedha Nagpal** reported in **(2009) 1 SCC 42** Hon'ble Apex Court have clarified the position in the latest decision in the case of **Tejaswani Gauda and Others Vrs. Shekhar Jagdish Prasad Tewari and Others** reported in **2019 SCC online SC 713**, (judgment dtd.06.05.2019). The relevant portion reads thus:-

> *"18. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.*
>
> *19. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant difference between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."*

11. In the backdrop of above legal position, if narratives projected in the case at hand are considered, it is clear that natural mother has alleged that her 1 (one) year old baby child was kidnapped and sold at Rs.20,000/- by opposite party no.4 to opposite party no.5 and kept in illegal custody of opposite party no.5.

The opposite party nos.4 and 5 have alleged that natural parents, expressing their inability to bear the burden of 4th girl child, wanted to kill her and abandoned the custody in favour of opposite party no.4, who, in turn,

handed over the child to opposite party no.5. Later the husband of the petitioner wanted to extract money for such custody.

In this regard, as stated above, the court, on 08.09.2017, allowed as an interim measure, the custody of the child with opposite party no.5 and subsequently directed him to ensure proper care. Opposite party no.5 has categorically stated that they have adopted the child and have performed the required ceremonies.

Setting apart the narratives and counter narratives, the core remains undisturbed to the extent that the opposite party no.5 claims parentage right over the child.

12. Conferment or confirmation of parentage is a legal mode to strike a balance between rights of a child and duty of parents without disturbing the identity of the child. There is an appreciable difference between custody and guardianship.

Establishment of parentage in certain circumstances may invoke legal jurisdiction but the same cannot be decided by the unilateral action of a party. Even if the biological parents do not have any money or job to support the child or do not want to be involved in child's life, the parentage cannot be conferred automatically upon others.

Termination of parentage right of biological parents need to be addressed by the Law of the land. In our land, parents hold a preferred position for the child below 5 years old. For that, there is a presumption that the parents are the most fit and proper person to raise the child.

13. Parents are natural guardians U/s.6 of the Hindu Minority and Guardianship Act, 1956 (herein after referred as the 'Act, 1956' for brevity). The status of the father and mother as natural guardian of a minor child in respect of their person as well as property is well protected under Law. Under the proviso, natural guardian can be disqualified when he ceases to be a Hindu or completely and finally renounces the world becoming hermit. Noticeably, under explanation to section 6 of the Act, 1956, the father and mother do not include step father and step mother. After the commencement of this Act, no person can claim to be a legal guardian of a minor unless he / she comes within one of the four clauses of person provided U/s.4 of the Act, 1956. Regarding guardianship, the custody of a minor child who has not completed the age of 5 years, shall ordinarily be with the mother. Where the

custody of a minor who has not completed the age of 5 years, is given to the mother, law does not contemplate that father is removed from the guardianship. Thus, the right of a mother to have the custody of a minor daughter below 5 years is unequivocally recognized under the Act, 1956.

14. Parent versus parent dispute for the custody of their children involves consideration of the need of the child and his welfare. In case of third-party-dispute where a non-parent claims custody against parents, the consideration involves whether the custody of the child from the parent would be removed if the child with them or if not, whether child from the third party would be brought back for re-unification. In both the cases, the parental custody gets primacy but not the parentage.

15. Where the question of abandonment of child comes, it is addressed under the Juvenile Justice (Care and Protection of Children) Act, 2015, (herein after referred as 'J.J. Act' for brevity). Under Section 2 (14), "Child in need of care and protection", has been defined to include a child "(v) who has a parent or guardian and such parent or guardian is found to be **unfit** or **incapacitated**, by the **Committee** or the **Board**, to care for and protect the safety and well-being of the child."

Under Section 39 of J.J. Act, the process of rehabilitation and social re-integration of children has been undertaken, based on the individual care plan of the child, preferably through family based care such as by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care.

Thus seen, the parentage of a child is fully protected and parents are not only treated as natural guardian but are also entitled to get the child when it is felt to be restored by Child Welfare Committee or by the J.J. Board. Adoption is only a means to change the parentage whereby the identity of the child is divested with the adoptive parents from biological parents.

16. In the case at hand the opposite party no.5 wants to retain the custody of the baby claiming that she has adopted her and thereby wants to prevent re-unification of the child with the natural mother. Opposite party no.5 does not opt to be appointed as guardian of the child on the ground that biological parents abandoned the baby. Instead, he wants the custody alleging unfitness of the natural parents. The dispute is inherently a change of parentage. Adoption is a mechanism known to our Law to change the lineage of parents

and it is governed by Hindu Adoption and Maintenance Act, 1956 (as the parties are Hindu in this case). The dispute of guardianship is governed by the Hindu Guardians and Wards Act, 1956. If it is a dispute involving a child in need of care and protection, the provisions of J.J. Act would govern. All the remedies are efficacious but not availed here.

17. The factors needed to be considered are similar to the factors addressed in **Tejaswini Gaud** case (supra). There the child was in tender age, i.e. one and half years. Her choice could not be ascertained and then it is held by Hon'ble Apex Court at paragraph 36 in the following manner:-

> *"36. Taking away the child from the custody of the appellants and handing over the custody of the child to the first respondent might cause some problem initially; but, in our view, that will be neutralized with the passage of time. However, till the child is settled down in the atmosphere of the first respondent-father's house, the appellants No.2 and 3 shall have access to the child initially for a period of three months for the entire day, i.e. 8 A.M. to 6 P.M. at the residence of the first respondent. The first respondent shall ensure the comfort of appellants No.2 and 3 during such time of their stay in his house. After three months, the appellants No.2 and 3 shall visit the child at the first respondent's house from 10 A.M. to 4 P.M. on Saturdays and Sundays. After the child completes four years, the appellants No.2 and 3 are permitted to take the child on every Saturday and Sunday from the residence of the father from 11 A.M. to 5 P.M. and shall hand over the custody of the child back to the first respondent – father before 5 P.M. For any further modification of the visitation rights, either parties are at liberty to approach the High Court."*

18. Paving the path in the same way and bestowing our anxious consideration to the admitted facts and the rival claims, we are of the considered opinion that the claim of opposite party no.5 to retain the custody of the baby child on the ground of adoption is not acceptable being contrary to Law. He has alternative remedy under Hindu Guardianship Act and J. J. Act.

19. Considering the age and the consistent efforts of natural mother to regain custody of her girl child, we feel it appropriate and justified that the natural mother – petitioner shall be the custodian of the girl child and it would be in the best interest of the child.

As the taking away of the child from the custody of the opposite party no.5 and handing over to petitioner – natural mother might cause some problem, initially the opposite party no.5 and his wife are given access to the child for a period of three months during day time at the residence of the petitioner.

The Child Welfare Committee of Cuttack District under J. J. Act shall keep watch over the child for six months and are free to act as per law.

The handing over of the child within a week shall be done in presence of the Child Welfare Committee.

For compliance of the order, Registry is directed to supply free copy of this order to the petitioner, opposite party no.5 and the Chairman of Child Welfare Committee, Cuttack through the Member Secretary, Legal Services Authority, Cuttack.

The WPCRL is allowed accordingly.

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2019 (III) ILR-CUT- 281

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

MATA NOs. 36 OF 2014 AND 109 OF 2013

PRASANT KUMAR PRADHAN ..... Appellant

- Vs-

SMT. BHARATI BEHERA ..... Respondent

HINDU MARRIAGE ACT, 1955 – Section 13(1-A) (i) read with Section 23 – Provisions under – Husband files an application for divorce on the ground of desertion and cruelty – Cruelty – Not proved – Family Judge, however, considering the evidence on record came to the conclusion that factum of desertion as pleaded by the husband was not proved and he was debarred to take advantage of his own wrong as per section 23 of the Hindu Marriage Act – Similarly, the husband had failed to establish the allegation of cruelty as pleaded – Family Judge granted judicial separation instead of divorce only on the failure of the wife to prove the allegations of extra marital relationship of her husband with another woman leaving a room for reconciliation between the spouses – After one year the husband filed application seeking divorce on the ground that more than one year had been elapsed and there was no resumption of co-habitation between the parties and there was no possibility of reunion between them – Application for divorce allowed – Challenged by wife in appeal – The question arose as to whether the decree of divorce is legally sustainable? – Held, No – Reasons indicated.

"Husband filed divorce petition on the ground of cruelty and desertion. It was dismissed but decree for Judicial Separation was granted. Husband was the decree holder. He filed divorce petition on the ground that one year has been elapsed from the date of decree of Judicial Separation. He is found to have not made any effort to resume cohabitation with wife. The wife, had tried to resume cohabitation but her effort was frustrated by the husband. Is husband taking advantage of his own wrong?

Law on this point has been well analyzed by the Hon'ble Apex Court in the decision reported in 2001 AIR SC 1285- 2001(2) Supreme Court ***Hirachand Srinivas Managorkar v. Sunanda****. The relevant portion having direct bearing to the question at hand reads thus:-*

"12. xxx xxx. The object of sub-section (1-A) was merely to enlarge the right to apply for divorce and not to make it compulsive that a petition for divorce presented under sub-section (1-A) must be allowed on a mere proof that there was no cohabitation or restitution for the requisite period. The very language of Section 23 shows that it governs every proceeding under the Act and a duty is cast on the Court to decree the relief sought only if the conditions mentioned in the sub-section are satisfied, and not otherwise. Therefore, the contention raised by the learned counsel for the appellant that the provisions of Section 23(1) are not relevant in deciding a petition filed under sub-section (1-A) of Section 13 of the Act, cannot be accepted.

15. xxx xxx. If the provisions in Section 13(1A) and Section 23(1)(a) are read together the position that emerges is that the petitioner does not have a vested right for getting the relief of a decree o divorce against the other party merely on showing that the ground in support of the relief sought are stated in the petition exists. It has to be kept in mind the relationship between the spouses is a matter concerning human life. Human life does not run on dotted lines or charted course laid down by statute. It has also to be kept in mind that before granting the prayer of the petitioner to permanently snap the relationship between the parties to the marriage every attempt should be make to maintain the sanctity of the relationship which is of importance not only for the individuals or their children but also for the society whether the relief of dissolution of the marriage by a decree of divorce is to be granted or not depends on the facts and circumstances of the case. In such a matter it will be too hazardous to lay down a general principle of universal application.

17.xxx xxx. As the provision clearly provides the decree for judicial separation is not final in the sense that it is irreversible; power is vested in the Court to rescind the decree if it considers it just and reasonable to do so on an application by either party. The effect of the decree is that certain mutual rights and obligations arising from the marriage are as it were suspended and the rights and duties prescribed in the decree are substituted therefor. The decree for judicial separation does not sever or dissolve the marriage tie which continues to subsist. It affords an opportunity to the spouse for reconciliation and re-adjustment. The decree may fall by a conciliation of the parties in which case the rights of respective parties which float from the marriage and were suspended are restored. Therefore, the impression

that Section 10(2) vests a right in the petitioner to get the decree of divorce notwithstanding the fact that he has not made any attempt for cohabitation with the respondent and has even acted in a manner to thwart any move for cohabitation does not flow from a reasonable interpretation of the statutory provisions. At the cost of repetition it may be stated here that the object and purpose of the Act is to maintain the marital relationship between the spouses and not to encourage snapping of such relationship."

In the light of above law, on consideration of facts presented we are satisfied that to grant a relief of divorce to husband would be to permit him to take advantage of his own wrong. The decree of divorce granted vide order dated 12.11.2013 in C.P. No.250 of 2012 is liable to be set aside."

Case Laws Relied on and Referred to :-

1. AIR 2009 SC 2254 : Vishnu Datta Sharma v. Manju Sharma and
2. 2010 AIR SC 201 : Nilam Kumari V. Dayarani.
3. AIR 2002 SC 2582 : Raveen Mehta v. Inderjit Mehta.
4. (2011) 12 SCC 1 : Pankaj Mahajan V. Dimple Alias Kajal.
5. AIR 2009 SC 2254 : Vishnu Datta Sharma v. Manju Sharma.
6. 2010(S) SC 201 : Neelam Kumar V. Dayarani.
7. 2001 AIR SC 1285 - 2001(2) SC : Hirachand Srinivas Managorkar v. Sunanda.

For Appellant : M/s. Umakanta Sahoo, Dr. G.G. Mohanty
(MATA No.36 of 2014)
M/s. Prafulla Kumar Rath, A. N. Samantaray,
R.N.Parija, A.K.Rout, S. K. Patnaik
(MATA No.109 of 2013)

For Respondent : Mr. Prafulla Kumar Rath, A. N. Samantaray,
R.N.Parija, A.K.Rout, S. K. Pattnaik, S. K. Behura
(In MATA No.36 of 2013)
M/s. Umakanta Sahoo, Dr. G.G. Mohanty
(In MATA No. 109 of 2013)

JUDGMENT Date of Hearing: 06.08.2019 : Date of Judgment : 26.08.2019

Dr. A.K. MISHRA, J.

Both the appeals are taken up for disposal for being preferred against a common Judgment dtd. 12.11.2013 by the learned Judge, Family Court, Rourkela in C.P. No.250 of 2012 and C.P. No.210 of 2011.

2. Regardless of party position in the appeal memorandums, the Judgment to follow hereinafter shall refer the wife and the Husband for convenience.

3. Marriage between Smt. Bharati Behera, the wife and Mr. Prasant Kumar Pradhan, the husband was solemnized on 19.01.2004 at Kansabahal as per Hindu rites and customs. On 16.12.2004, they were blessed with a son, namely, Dibyansu Pradhan (one of the respondents to seek maintenance in

C.P. No.210 of 2011 in the lower Court). Dissension started between the couples.

On 15.01.2005, the wife left the house of her husband and went to her paternal house with baby son. Thereafter, till October, 2005 mediation through local gentries was taken up to resolve the dispute but could not yield any result. On 05.11.2005 husband issued a notice through his lawyer to wife asking her to return to his company, the wife refused to join. On 20.07.2006 the husband filed C.P. No.149 of 2006 for restitution of conjugal rights. On 15.09.2006, the wife lodged FIR at Sector-7 Police Station, Rourkela under section 498(A) IPC and 4 DP Act vide G.R. Case No.1805 of 2006. The husband and his father were arrested and remained in custody for some time. On 25.09.2006 the husband was released on bail. Both husband and his father were suspended from their services. On 26.04.2007 the husband withdrew the case for restitution of conjugal rights, i.e., C.P. No.149 of 2006. On 11.10.2008 the husband filed C.P. No.199 of 2008 in the Court of Judge, Family Court, Rourkela for divorce on the ground of cruelty and desertion under section 13(I-A)(i) of the Hindu Marriage Act, 1955. In that divorce case both parties adduced oral evidence examining themselves. On behalf of husband, advocate notice reply, certified copy of the FIR and suspension orders were marked Exhibits-1 to 5. Learned Family Judge considering the evidence on record came to the conclusion that factum of desertion as pleaded by the husband was not proved and he was debarred to take advantage of his own wrong as per section 23 of the Hindu Marriage Act. Similarly, the husband had failed to establish the allegation of cruelty as pleaded. Then learned Family Judge felt that it was just and proper to grant judicial separation instead of divorce only on the failure of the wife to prove the allegations of extra marital relationship of her husband with another woman leaving a room for reconciliation between the spouses. And then a decree of judicial separation was granted vide Judgment dated 25.08.2011.

4. This judicial separation decree dtd.25.08.2011 becomes a frontier for both the spouses thereafter.

C.P. No.250 of 2012 was filed by the husband praying divorce on the ground that more than one year had been elapsed since the passing of the decree of Judicial Separation on 25.08.2011 in C.P. No.199 of 2008 and there was no resumption of co-habitation between the parties. Further there was no possibility of reunion between them. The wife filed written statement admitting marriage and the decree of Judicial Separation. But urged about

non-payment of interim maintenance granted by the Court. She had also pleaded that during her stay in the house of husband, she was cruelly treated and her effort to resume co-habitation by sending letter on 14.08.2012 had not been responded. She prayed to dismiss the prayer for dissolution of marriage.

5. Wife and her minor son filed C.P. No.210 of 2011 under section 18 and 20 of Hindu Adoption and Maintenance Act against husband/father stating that since 29.03.2005 she being driven out, had been staying in her father's house. She had no independent source of income. Her son was pursuing study in an English Medium School, at Kansabahal. Husband was working as a Junior Executive in Rourkela Steel plant having monthly income of Rs.32,000/-. She claimed Rs.12,000/- for herself and 6,000/- per month for her son towards subsistence.

The husband/father filed counter admitting relationship. He disputed the grounds for separate living. He stated that he was drawing Rs.26,500/- salary per month out of which he was repaying loan installment and insurance. He asserted that he was paying interim maintenance Rs.3000/- per month as per order passed under section 24 of Hindu Marriage Act in C.P. No.199 of 2008. He had expressed his readiness to pay Rs.3000/- per month as he was unable to give the claimed amount Rs.18000/- to both wife and son.

6. Learned Judge, Family Court, analogously heard both the cases and framed following three issues:-

> i) Whether there has been no resumption of cohabitation as between the petitioner and the respondent for a period of one year or upwards after passing of the decree for judicial separation in C.P. No.199 of 2008?
>
> ii) Whether the respondents(wife and son are entitled to get maintenance from the petitioner and if so to what extent?
>
> iii) To what other relief, the parties are entitled to?

Both the parties adduced oral evidence examining themselves in support of their respective cases. Learned Judge, Family Court, held that:-

> "*Though, decree for judicial separation has been passed on 25.08.2011, the petitioner filed the present proceeding on 3.9.2012 which is after one year of the passing of the decree for judicial separation. So, the petitioner is entitled to the relief as claimed in the petition."*

Further on the issue of maintenance, it was found that husband's monthly income was Rs.40,000/- and considering the need of wife qua status granted monthly maintenance to wife at the rate of Rs.5000/- and to son Rs.3000/-

Accordingly, the following order is passed:-

"*The petition filed by the petitioner-husband in Civil Proceeding No.250 of 2012 is allowed on contest. The marriage solemnized between the petitioner and the respondent No.1 on 19.1.2004 is hereby dissolved by a decree of divorce to be effective from the date of the decree.*

The petition filed by the respondents within the scope of section 18 and 20 of Hindu Adoption and Maintenance Act is also allowed on contest. The petitioner (husband/Father) is directed to pay Rs.5000/-(rupees five thousands) per month to the respondent no.1 and Rs.3000/- (rupees three thousands) per month to respondent no.2 towards their maintenance with effect from the date of its application, i.e., 24.08.2011. The petitioner is further directed to pay the maintenance of respondent no.2 through respondent no.1. The respondent is further directed to pay the arrear maintenance of the respondents through respondent no.1 within a period of six months, hence, in six installments direct to the address of respondent no.1 failing which, the respondent no.1 is at liberty to realies the same through due process of law. The respondent is further directed to pay the arrear dues of the respondent after making adjustment of the amount already paid to them. In the circumstances of the case, there is no order as to cost".

7. The above order is now assailed, in these two appeals filed by the wife and husband separately. The minor son being not before us, the order of maintenance passed in his favour in C.P. No.210 of 2011 has attained its finality.

Wife has assailed the impugned order in MATA No.109 of 2013 with prayer to set aside the order dated 12.11.2013 passed by the learned Judge, Family court, Rourkela in Civil Proceeding No.250 of 2012.

The husband in MATA No.36 of 2014, prayed to nullify the part of the learned Family Court's (Rourkela) Judgment dtd.12.11.2013 passed in Civil Proceeding No.250 of 2012 about payments of monthly maintenance of Rs.5000/- to the Respondent (Respondent No.1 in Court below) vis-à-vis directing to this Appellant for payment of Rs.2,00,000/- (Rupees two lakhs) as permanent alimony within four months after the date of final disposal of this appeal so also confirming the legality on the decree of divorce as passed therein

8. Learned counsel for the wife submits that:-

i) The decree for judicial separation in favour of husband was passed despite his failure to prove cruelty and desertion in a proceeding for divorce and that decree being not challenged, is found to have attained finality. In such backdrop, when the husband has not taken any step to resume cohabitation, he cannot be allowed to seek divorce only on the ground of expiry of one year from the date of judicial separation. Because the husband had not acquired any vested right on expiry of one year. He further submits that plea of cruelty and desertion in absence of appeal against the decree of judicial separation, cannot be questioned in this appeal and the husband should not be allowed to take advantage of his own wrong. He relied upon a decision reported in 2001 AIR SC 1285; ***Hirachand Srinivas Managorkar v. Sunanda***. Nextly he submits that the decree of divorce cannot be stated to have been passed on the ground of irretrievable break down of marriage as the same was not available under law. For that he relied upon the decisions reported in (1) AIR 2009 SC 2254; ***Vishnu Datta Sharma v. Manju Sharma*** and (2) 2010 AIR SC 201 ***Nilam Kumari V. Dayarani.***

9. Learned counsel for the husband submits that the happenings between the spouses establish that the wife has not only subjected the husband with cruelty but also deserted him. She has taken resort to legal proceedings to harass the husband and his family members both mentally and financially. Drawing support from above submission, he proceeded to make a point that when wife has not come forward to stay with the husband, the resumption of cohabitation after judicial separation was a distant dream. The decree of divorce on that ground was not only permissible but also legally sustainable. Further he submits that granting of maintenance on monthly basis is unjust and unreasonable for which his offer to convert the same to a gross sum of Rs.2,00,000/- (rupees two lakhs) as permanent alimony should be accepted. He relied upon the decision reported in AIR 2002 SC 2582 ***Raveen Mehta v. Inderjit Mehta***, (2011) 12 SCC 1 ***Pankaj Mahajan V. Dimple Alias Kajal.***

10. Perused the record patiently. Heard the submissions anxiously. The marital lives between the parties have already suffered a roughweather, spending more time in litigations than with the minor son under one roof. Relationship is admitted. The litigating relationship has placed their minor son at the victim's end.

10(a). On the basis of allegation and counter allegation, both husband and wife reached the stage of Judicial Separation vide order dtd.25.08.2011 in C.P. No.199 of 2008. The Said case was filed by the husband for divorce on the ground of desertion and cruelty. Learned Court found that the husband had failed to establish both the grounds and in order to give a chance for reconciliation, while denying the decree for divorce, Judicial Separation was granted.

10(b). The version and counter version throughout are chameleonic. In course of litigation, parties have allowed the situation to move in such a way that it is difficult to draw a baseline to test their conduct vis-à-vis the ground for divorce. As the impugned divorce order is passed on the ground of non-resumption of cohabitation despite elapse of one year from the date of Judicial Separation decree dtd. 25.8.2011, we feel it proper to test the said ground urged uninfluenced by any other grounds which could have been taken by the parties. The authority of appeal also commands the same. Irretrievable breakdown of the marriage is no more a ground to decree a divorce. It is settled in the decision reported in AIR 2009 SC 2254, ***Vishnu Datta Sharma v. Manju Sharma*** and 2010(S) Supreme Court 201 ***Neelam Kumar V. Dayarani.***

11. In the case at hand, husband has admitted in his cross examination evidence as P.W.1 that "after decree of Judicial Separation, I have taken no steps for reunion". On the other hand, wife as R.W.1 has stated that she on 14.08.2012, she sent a letter by registered post to the husband which was returned un-served and (she) tried her best to contact over phone but hearing her voice, the husband disconnected the same. Having carefully gone through the testimonies of both parties, we are satisfied to record that after passing of decree of Judicial Separation, the husband had not taken any initiative to resume co-habitation with the wife till filing of divorce. Wife may not be free from blame to make allegation but divorce has been granted under section 13(I-A)(i) of the Hindu Marriage Act. The said provisions reads thus:-

> *"i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties."*

Husband filed divorce petition on the ground of cruelty and desertion. It was dismissed but decree for Judicial Separation was granted. Husband was the decree holder. He filed divorce petition on the ground that one year has been elapsed from the date of decree of Judicial Separation. He is found to have not made any effort to resume cohabitation with wife. The wife, had tried to resume cohabitation but her effort was frustrated by the husband. Is husband taking advantage of his own wrong?

12. Law on this point has been well analyzed by the Hon'ble Apex Court in the decision reported in 2001 AIR SC 1285- 2001(2) Supreme Court ***Hirachand Srinivas Managorkar v. Sunanda***. The relevant portion having direct bearing to the question at hand reads thus:-

" 12. xxx xxx. The object of sub-section (1-A) was merely to enlarge the right to apply for divorce and not to make it compulsive that a petition for divorce presented under sub-section (1-A) must be allowed on a mere proof that there was no cohabitation or restitution for the requisite period. The very language of Section 23 shows that it governs every proceeding under the Act and a duty is cast on the Court to decree the relief sought only if the conditions mentioned in the sub-section are satisfied, and not otherwise. Therefore, the contention raised by the learned counsel for the appellant that the provisions of Section 23(1) are not relevant in deciding a petition filed under sub-section (1-A) of Section 13 of the Act, cannot be accepted.

15. xxx xxx. If the provisions in Section 13(1A) and Section 23(1)(a) are read together the position that emerges is that the petitioner does not have a vested right for getting the relief of a decree o divorce against the other party merely on showing that the ground in support of the relief sought are stated in the petition exists. It has to be kept in mind the relationship between the spouses is a matter concerning human life. Human life does not run on dotted lines or charted course laid down by statute. It has also to be kept in mind that before granting the prayer of the petitioner to permanently snap the relationship between the parties to the marriage every attempt should be make to maintain the sanctity of the relationship which is of importance not only for the individuals or their children but also for the society whether the relief of dissolution of the marriage by a decree of divorce is to be granted or not depends on the facts and circumstances of the case. In such a matter it will be too hazardous to lay down a general principle of universal application.

17.xxx xxx. As the provision clearly provides the decree for judicial separation is not final in the sense that it is irreversible; power is vested in the Court to rescind the decree if it considers it just and reasonable to do so on an application by either party. The effect of the decree is that certain mutual rights and obligations arising from the marriage are as it were suspended and the rights and duties prescribed in the decree are substituted therefor. The decree for judicial separation does not sever or dissolve the marriage tie which continues to subsist. It affords an opportunity to the spouse for reconciliation and re-adjustment. The decree may fall by a conciliation of the parties in which case the rights of respective parties which float from the marriage and were suspended are restored. Therefore, the impression that Section 10(2) vests a right in the petitioner to get the decree of divorce notwithstanding the fact that he has not made any attempt for cohabitation with the respondent and has even acted in a manner to thwart any move for cohabitation does not flow from a reasonable interpretation of the statutory provisions. At the cost of repetition it may be stated here that the object and purpose of the Act is to maintain the marital relationship between the spouses and not to encourage snapping of such relationship."

In the light of above law, on consideration of facts presented we are satisfied that to grant a relief of divorce to husband would be to permit him to take advantage of his own *wrong*. The decree of divorce granted vide order dated 12.11.2013 in C.P. No.250 of 2012 is liable to be set aside.

As the decree of divorce is set aside, the offer of husband to pay rupees two lakhs as permanent alimony merits no consideration. The granting of maintenance to wife at the rate of Rs.5000/- per month in the impugned order is based on factors required to be considered under section 18 of the Hindu Adoptions and Maintenance Act, 1956. The amount is just and reasonable having regards to the salary of the husband.

At the cost of repetition, but to keep the record straight, we reiterate that the lower courts order granting maintenance to minor son has attained finality and this order shall in no way make any inroad to that case, save and except what law permits.

In the wake of above analysis, the MATA No.109 of 2013 is allowed and the decree of divorce granted in the impugned judgment dated 12.11.2013 in C.P. No.250 of 2012 stands set aside.

The MATA No. 36 of 2014 stands dismissed. There shall be no order as to cost.

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2019 (III) ILR-CUT-290

S. K. MISHRA, J.

TRPCRL NO. 17 OF 2019

PRASANT KU. MISHRA … Petitioner

-Vs-

STATE OF ORISSA (VIG.) … Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 407 – Transfer of criminal case – Offence under the penal provisions of the Prevention of Corruption Act, 1988 – FIR in Vigilance P.S. at Cuttack – Trial started and some of the witnesses were examined by the Vigilance court at Cuttack – Midst of trial the case transferred to the Vigilance court at Angul – Petitioner seeks transfer of the case to Cuttack on the ground that all the witnesses belong to Cuttack district and that he has engaged a Senior counsel from Cuttack – Principles and scope of transfer considered – Held, as under.

"The case under Section 7 of the P.C. Act constitutes demand, offer and acceptance of bribe money. In this case, the demand has been made at Angul as it reveals from the F.I.R. However, cause of action is spread over the districts of Cuttack, Angul, Jagatsinghpur and Kendrapara as the installation erected by the petitioner are situated in these districts. So, in my considered view, both the Vigilance Judge Cuttack and Vigilance Judge, Angul have jurisdiction to try the case. But, so far as the hostile attitude of the local members of the Angul Bar Association is concerned, it is the view of this Court that a fair trial may not be possible so far as the criminal case of the petitioner is concerned. In this case, learned counsel for the petitioner relies upon the case of ***Bhiaru Ram and others – vrs.- Central Bureau of Investigation and others****: (2010) 47 OCR (SC) 286, wherein the Hon'ble Supreme Court has held that transfer of the case cannot be made on the mere allegation that there is apprehension that justice will not be done or that mere inconvenience may not be sufficient ground for the exercise of power of transfer. The Court must be satisfied that the apprehension of the petitioner must be real, so that the case should be transferred. In this case, firstly, it is seen that most of the witnesses belong to Cuttack district except the Investigating Officer. However, the cause of action wholly or partly arose at Cuttack where the pre-trap memorandum was prepared. The petitioner was allegedly trapped at Bhubaneswar, so Bhubaneswar court has also jurisdiction to try this case. Since the case has become part heard, most of the witnesses are from Cuttack and the petitioner has engaged a Senior Counsel to conduct his case who is usually practicing at Cuttack, it will be in the interest of justice, if the aforesaid case transfers from the court of the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Angul to the court of the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Cuttack."*

Case Law Relied on and Referred to :-

1. (2010) 47 OCR (SC) 286 : Bhiaru Ram & Ors. -V- C.B.I. & Ors.

For Petitioner : M/s. Rakesh Ku Mallick, U.C.Sethi, R.R.Chhottaray, U.C. Sethi, R.R.Chhottaray.

For Opp.Party : Mr. M.S. Rizvi (A.S.C. Vig.)

ORDER Date of Order : 20.09.2019

S.K. MISHRA, J.

This order arises out of the application under Section 407 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C." for brevity) for transfer of T.R. Case No.68 of 2011 arising out of Vigilance G.R. Case No.17 of 2009 corresponding to Cuttack Vigilance P.S. Case No.17 of 2009 from the court of the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Angul to the court of the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Cuttack on the ground that the offences were allegedly committed and the cause of action arose within the

jurisdiction of the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Cuttack.

On 08.05.2009, the informant submitted a written report before the Superintendent of Police, Vigilance, Cuttack Division, Cuttack alleging that the petitioner has demanded a sum of Rs.1,10,000/- as bribe for inspection and issuance of inspection report of 11 numbers of electrical lines and transformers of different companies i.e. 25KVA of Bharati Infratel Ltd., ATC Tower Co. Ltd., Excel Telecom Pvt. Ltd., Vodafone etc. at various places of the districts of Cuttack, Angul, Jagatsinghpur and Kendrapara. During the investigation, a trap was laid on 09.05.2009 at room no.217 of Hotel Urmee, Bhubaneswar and the case was proceeded on the allegation of demanding and accepting illegal gratification of Rs.1,10,000/- from the complainant for which the prosecution case was set into motion and the petitioner was forwarded to the learned Chief Judicial Magistrate, Cuttack, who committed the case to the court of the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Cuttack. Charges were framed under Section 13(2) read with Section 13(1)(d) and Section 7 of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the P.C. Act" for brevity) by the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Cuttack. The petitioner faced trial and the complainant was examined and deposed, and his deposition has already been recorded by the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Cuttack. In the midst of the trial, the matter was transferred to the court of the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Angul though all the witnesses cited in the charge-sheet are residents of Cuttack except the Investigating Officer. The petitioner has also engaged a Lawyer from Cuttack. Because of the transfer of the case at the midst of the trial, the petitioner has to approach this Court for re-transfer of the case to the court of the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Cuttack.

The petitioner asserted that the F.I.R. was registered in Cuttack and the part of the investigation i.e. preparation of the reports both pre-trap and post-trap were made in the office of the Deputy Superintendent of Police, Vigilance, Cuttack. Most of the witnesses have their addresses at Cuttack. Moreover, it was submitted that whenever the case is fixed at Angul, the learned counsel for the petitioner and the petitioner are facing immense resistance from the members of the local Bar. Because of their hostile attitude, there is serious and dangerous threat to the life and liberty of the petitioner and his counsel and, therefore, there is a very bleak chance of fair trial.

The case under Section 7 of the P.C. Act constitutes demand, offer and acceptance of bribe money. In this case, the demand has been made at Angul as it reveals from the F.I.R. However, cause of action is spread over the districts of Cuttack, Angul, Jagatsinghpur and Kendrapara as the installation erected by the petitioner are situated in these districts.

So, in my considered view, both the Vigilance Judge Cuttack and Vigilance Judge, Angul have jurisdiction to try the case. But, so far as the hostile attitude of the local members of the Angul Bar Association is concerned, it is the view of this Court that a fair trial may not be possible so far as the criminal case of the petitioner is concerned. In this case, learned counsel for the petitioner relies upon the case of **Bhiaru Ram and others – vrs.- Central Bureau of Investigation and others**: (2010) 47 OCR (SC) 286, wherein the Hon'ble Supreme Court has held that transfer of the case cannot be made on the mere allegation that there is apprehension that justice will not be done or that mere inconvenience may not be sufficient ground for the exercise of power of transfer. The Court must be satisfied that the apprehension of the petitioner must be real, so that the case should be transferred. In this case, firstly, it is seen that most of the witnesses belong to Cuttack district except the Investigating Officer. However, the cause of action wholly or partly arose at Cuttack where the pre-trap memorandum was prepared. The petitioner was allegedly trapped at Bhubaneswar, so Bhubaneswar court has also jurisdiction to try this case. Since the case has become part heard, most of the witnesses are from Cuttack and the petitioner has engaged a Senior Counsel to conduct his case who is usually practicing at Cuttack, it will be in the interest of justice, if the aforesaid case transfers from the court of the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Angul to the court of the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Cuttack.

In the result, the TRPCRL is allowed. It is hereby directed that the T.R. Case No.68 of 2011 arising out of Vigilance G.R. Case No.17 of 2009 corresponding to Cuttack Vigilance P.S. Case No.17 of 2009 shall be transferred from the court of the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Angul to the court of the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Cuttack. Learned Additional Sessions Judge-cum-Special Judge (Vigilance), Angul is directed to transmit the record in the aforesaid case to the transferee court forthwith. Learned Additional Sessions Judge-cum-Special Judge (Vigilance), Angul shall also intimate about the transfer of the aforesaid case to the prosecution and the

defence counsel and also stipulate a suitable date for appearance of both the parties before the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Cuttack.

With such observations and directions, the TRPCRL is disposed of. There shall be no orders as to costs.

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2019 (III) ILR-CUT-294

DR. A.K. RATH, J.

R.S.A. NO. 91 OF 2009

DAITARY SHA .....Appellant

-Vs-

STATE OF ORISSA & ORS. ..... Respondents

ORISSA PREVENTION OF LAND ENCROACHMENT ACT, 1972 – Section 12(1) – Appeal against any decision or order by the Tahasildar – Whether public can file? – Held, Yes – Sub-sec.(1) of Sec.12 of the OPLE Act provides that an appeal shall lie to the Sub-divisional Officer from any decision or order made by the Tahasildar – Admittedly the suit land originally belonged to the Government – The public has substantial interest over the Govt. property – Any public, who is essentially aggrieved by the order of settlement, can prefer appeal under Sec.12 of the OPLE Act.

Case Law Relied on and Referred to :-

1. AIR 1940 PC 105 : Secretary of State Vs. Mask & Co.

For Appellant : Mr. D.P. Mohanty.
For Respondent Nos.1 to 3 : Miss Samapika Mishra, A.S.C.

JUDGMENT Date of Hearing & Judgment : 04.04.2019

Dr. A.K. RATH, J.

This appeal at the instance of plaintiff assails the affirming judgment of learned Civil Judge (Sr. Divn.), Anandapur in R.F.A. No. 4 of 2006.

2. Plaintiff instituted the suit for declaration of title, declaration that the order passed in Encroachment Appeal No.79/98 is illegal, inoperative and permanent injunction. The case of the plaintiff is that the State of Orissa is the paramount owner of the suit land. His father was in possession of the suit land since 15.10.1958. Since dissensions cropped up in the family, the plaintiff is separated from his father. He is in possession over 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. While the matter stood thus, the Tahasildar, Anandapur, defendant no.4, initiated Encroachment Case No.15/94 against him. After due inquiry, the land was settled in his favour, since he is a homesteadless person. Defendant no.1, a co-villager, filed Encroachment Appeal No.79/98 before the Sub-Collector, Anandapur, defendant no.3. On the basis of the perfunctory report submitted by the R.I., the defendant no.3 allowed the appeal and set aside the order of settlement passed in Encroachment Case No.15/94. With this factual scenario, he instituted the suit seeking the reliefs mentioned supra.

3. Defendant nos.2 to 4 filed written statement denying the assertions made in the plaint. It was pleaded that in the year 1994, the plaintiff had forcibly encroached upon the suit land. The Tahasildar, Anandapur initiated Encroachment Case No.15/94 against him. Without observing any paraphernalia, the Tahasildar settled the land in favour of the plaintiff. The order was set aside by the Sub-Collector, Anandapur in Encroachment Appeal No.79/98. The plaintiff is not in possession of the suit land for more than 30 years.

4. Defendant no.1 filed written statement stating therein that the suit land is being used by the villagers for communal purpose. Prior to the settlement of the land, no notice was served on the villagers. After knowing the settlement of land in favour of the plaintiff, the villagers preferred appeal against the order of the Tahasildar, Anandapur before the Sub-Collector, Anandapur. The appeal was allowed.

5. Stemming on the pleading of the parties, learned trial court struck nine issues. To substantiate the case, plaintiff had examined two witnesses and on his behalf four documents had been exhibited. Learned trial court dismissed the suit holding inter alia that plaintiff had not perfected title by way of adverse possession. The court has no jurisdiction to declare the order in Encroachment Appeal No. 79/98 as illegal and inoperative. Plaintiff is a

trespasser. He cannot claim relief of permanent injunction. Unsuccessful plaintiff filed R.F.A. No.4 of 2006 before learned Civil Judge (Sr. Divn.), Anandapur, which was eventually dismissed.

6. The appeal was admitted on the following substantial questions of law.

> "(1) Whether the learned trial court committed an error of law in holding that the civil court has no jurisdiction to declare the order of the Sub-Collector in the encroachment appeal as illegal and inoperative and also has no authority to deal with the case and whether the learned lower appellate court has acted contrary to law in confirming the said finding ?
>
> (2) Whether, as admittedly the land was settled in favour of the plaintiff in a case under the OPLE Act, being a Government land earlier, and the Government did not prefer an appeal against the said order of settlement, the learned lower appellate court has committed an error in confirming the finding of the learned trial court that the State Government having better title over the suit land, the plaintiff is not entitled to the relief of permanent injunction as prayed for?
>
> (3) Whether in view of the materials available on record the learned courts below have erred in holding that there is no cause of action on the part of the plaintiff to institute the suit ?"

7. Heard Mr. D.P. Mohanty, learned Advocate for the appellant and Miss Samapika Mishra, learned A.S.C. for the respondent nos.1 to 3.

8. Mr. Mohanty, learned Advocate for the appellant submits that the plaintiff is a landless person. He is 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. Encroachment Case No.15/94 was initiated against him by the Tahasildar, Anandapur. Plaintiff filed an application for settlement of the land in his favour. Notice was duly published in the locality after observing paraphernalia. The Tahasildar, Anandapur settled the suit land in faovur of the plaintiff. The Government have not preferred any appeal. But then, the defendant no.1, a co-villager, filed appeal after lapse of four years from the date of settlement. No leave of the court was taken. Learned lower appellate court proceeded to decide the appeal on merit and dismissed the same. In view of the same, the order passed by the Sub-Collector, Anandapur in Encroachment Appeal No.79/98 is *ex facie* illegal.

9. Per contra, Miss Mishra, learned A.S.C. for the respondent nos.1 to 3 submits that in Encroachment Case No.15/94, the Tahasildar, Anandapur has illegally settled the land in favour of the plaintiff. The same has been set side

by the Sub-Collector in Encroachment Appeal No.79/98. She further submits that plaintiff is not a landless person. Notice was not duly published in the locality.

10. Before adverting the contentions raised by the parties, it is necessary to set out the provisions of Sec.12(1) of the Orissa Prevention of Land Encroachment Act, 1972, ("OPLE Act").

> "12(1) - An appeal from any decision or order made under this Act by the Tahasildar shall lie to the Sub-divisional Officer."

11. Sub-sec.(1) of Sec.12 of the OPLE Act provides that an appeal shall lie to the Sub-divisional Officer from any decision or order made by the Tahasildar. Admittedly the suit land originally belonged to the Government. The public has substantial interest over the Govt. property. Any public, who is essentially aggrieved by the order of settlement, can prefer appeal under Sec.12 of the OPLE Act. In the Encroachment Appeal No.79/98, the plaintiff was respondent. Argument was advanced on merit in the appeal. The Sub-Collector, Anandapur came to hold that by order dated 17.6.1994, the Tahasildar, Anandapur directed the plaintiff to file an affidavit. But the plaintiff failed to do so. General notice had not been duly proclaimed. The father of the plaintiff, namely, Dharani Sa, had other landed properties. He is not a homesteadless or landless person. There is irregular settlement of land. Thus it is too late in the day to contend that appeal at the behest of the villagers is not maintainable and no leave of the court was taken.

12. The civil court has plenary jurisdiction. Seventy-five years ago, the Privy Council in the case of *Secretary of State vs. Mask & Co.,* AIR 1940 PC 105 held that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if the jurisdiction is so excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

13. On a vivid analysis of the material on record, the Sub-Collector, Anandapur came to hold that there is irregular settlement of the land in favour of the plaintiff. Opportunity of hearing was afforded to the plaintiff.

14. Adverse possession is not a pure question of law but a blended one of fact and law. Both the courts below concurrently held that the plaintiff had not perfected title by way of adverse possession. There is no illegality or infirmity in the said finding. The substantial questions of law are answered accordingly.

15. 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 (III) ILR-CUT-298

DR. A.K. RATH, J.

C.M.P. NO. 1528 OF 2017

SMT. PUSPA SHARMA ……..Petitioner

-Vs-

KITEI NAYAK & ORS. …….Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 227 – Writ petition – Challenge is made to an order passed in an Execution proceeding to consider its maintainability – Whether can be permitted? – Held, the Plaintiff instituted the suit for declaration of right, title and interest over the suit property and recovery of possession in the event, she is dispossessed from the property during pendency of the suit and permanent injunction – Suit decreed – But the reason best known to her, she filed first appeal for recovery of possession – Learned appellate court held that plaintiff is in possession of the suit land – Further by order dated 16.7.2015, the executing court held that there is no impediment in issuing delivery of possession as sought by the decree holder in the proceeding – The said order has attained finality – In view of the same, the executing court has travelled beyond its jurisdiction to decide the maintainability of the execution case, more so, when no application was filed to recall the order dated 16.7.2015 – The impugned order, if allowed to stand, the same will cause miscarriage of justice – The court below has exercised jurisdiction in a manner not permitted by law and failure of justice has occasioned thereby.

Case Law Relied on and Referred to :-

1. AIR1972 SC 1371 : Bhavan Vaja & Ors. Vrs. Solanki Hanuji Khodaji Mansang & Anr.
2. AIR1976 SC 1476 : Mulla Alibhai & Ors. Vrs. Madrasai Hakimia and Coronation High School & Ors.
3. AIR1988 Orissa 9 : Biswanath Vrs. Smt. Uttara Bewa & Ors.

For Petitioner : Mr. Banshidhar Baug
For O.P.(7 to 11) : None
For O.P.(2 to 6) : Mr. Ganesh Prasad Samal

JUDGMENT Date of Hearing & Judgment : 08.04.2019

Dr. A.K.RATH, J.

This petition challenges the order dated 13.11.2017, passed by the learned Civil Judge, (Senior Division), First Court, Cuttack, in Execution Case No.20 of 2013, whereby and whereunder, learned executing court deferred the hearing of the petition filed by the D.Hr.-petitioner for appointment of a survey knowing commissioner to decide the maintainability of the execution proceeding.

2. This case has a chequered history. Plaintiff-petitioner instituted the Civil Suit no.14 of 2008 for declaration of right, title and interest, recovery of possession, in the event she is dispossessed from the suit property during pendency of the suit and permanent injunction, impleading opposite parties as defendants. The suit was decreed on 06.04.2011. The operating portion of the judgment is extracted hereunder:

> "The right, title, interest of the plaintiff over the suit land is hereby declared, and her possession over the same is hereby confirmed. The defendants, their men, agents or any person claiming through them, are hereby restrained not to enter into the suit land, and not to disturb in the peaceful possession of the plaintiff over the same by way of perpetual injunction."

3. Felt aggrieved, plaintiff filed RFA No.85 of 2011 before the learned District Judge, Cuttack, which was subsequently transferred to the court of leaned 3rd Addl. District Judge, Cuttack and renumbered as RFA No.117 of 2013. Learned appellate court dismissed the appeal holding inter alia that "so in neither way it is emerging from the evidence that the plaintiff was not in possession or to have been dispossessed from the suit land at any time during pendency of the suit."

4. RSA No.368 of 2013 filed by her before this Court was withdrawn. While matter stood thus, she levied Execution Case No.20 of 2013 to execute the decree. By order dated 16.7.2015, learned executing court held that there

is no impediment to execute the decree. Thereafter she filed an application for deputation of a survey knowing commissioner. But then, learned executing court deferred hearing of the petition to decide the maintainability of the petition.

5. Heard Mr. Banshidhar Baug, learned counsel for the petitioner and Mr. Ganesh Prasad Samal, learned counsel for the opposite party nos.2 to 6. None appears for opposite party no.1 and 7 to 11.

6. Mr. Baug, learned counsel for the petitioner submits that the decree holder levied Execution Case No.20 of 2013, for execution of decree. She was in possession of the suit property. She filed an application on 16.9.2017 for appointment of a survey knowing commissioner for demarcation of the land, but the learned executing court deferred the same to decide the maintainability of the execution case. He further submits that on 16.7.2015, the executing court came to hold that there is no impediment in issuing delivery of possession, but the subsequent Presiding Officer deferred the matter to decide the maintainability of the execution case. The order dated 16.7.2015 has attained finality.

7. Per contra, Mr. Samal, learned counsel for the opposite party nos. 2 to 6 submits that there is no irregularity or infirmity in the order of the executing court. The case has been posted to decide the maintainability of the execution case. The decree is not executable. Petitioner is not prejudiced in any way.

8. Taking a cue from the decisions of the apex Court in the case of *Bhavan Vaja and others Vrs. Solanki Hanuji Khodaji Mansang and another,* AIR 1972 SC 1371 and *Mulla Alibhai and others Vrs. Madrasai Hakimia and Coronation High School and others,* AIR 1976 SC 1476, this court in *Biswanath Vrs. Smt. Uttara Bewa and others,* AIR 1988 Orissa 9, speaking through Mr. Justice D. P. Mohapatra (as he then was) in no uncertain terms held:

> "6. From the decree under execution in the case, it is clear that there is no express direction for delivery of possession of the suit land to the plaintiff. The principle is also well established that ordinarily the executing court cannot go behind the decree. But it is within the competence of the executing court to interpret the decree sought to be executed and for doing so the court can refer to reliefs sought in the plaint and discussion in the judgment to ascertain the true import of the decree. In the present case, as noticed earlier, the plaintiff prayed for declaration of title, confirmation of possession and in the alternative for recovery of possession

> of the suit land. She asserted in the plaint that she was in possession of the disputed properties but after the entry in the settlement record of rights in their favour, the defendants were threatening to dispossess her. The suit was tried and disposed of ex parte. Relying on the evidence on record, the court found the plaintiff to be in possession of the property and accordingly passed the decree referred to earlier. Apparently, the court did not feel the necessity to direct recovery of possession in view of its finding that the plaintiff was in possession of the suit properties. Taking these facts and circumstances into consideration, the executing court interpreted the decree to mean that the reliefs sought in the plaint were granted in favour of the plaintiff. One of the reliefs sought, was to direct recovery of possession. Therefore, it cannot be said that the executing court travelled beyond its jurisdiction or committed any illegality in holding the execution case to be maintainable overruling the objection raised by the petitioner."

9. Reverting to the facts of the case and keeping in view the law laid down by this Court in the decision cited supra, this Court finds that the plaintiff instituted the suit for declaration of right, title and interest over the suit property and recovery possession in the event, she is dispossessed from the property during pendency of the suit and permanent injunction. The suit was decreed. But the reason best known to her, she filed first appeal for recovery of possession. Learned appellate court held that plaintiff is in possession of the suit land. Further by order dated 16.7.2015, the executing court held that there is no impediment in issuing delivery of possession as sought by the decree holder in the proceeding. The said order has attained finality. In view of the same, the executing court has travelled beyond its jurisdiction to decide the maintainability of the execution case, more so, when no application was filed to recall the order dated 16.7.2015.

10. The impugned order, if allowed to stand, the same will cause miscarriage of justice. The court below has exercised jurisdiction in a manner not permitted by law and failure of justice has occasioned thereby.

11. In the wake of the aforesaid, the impugned order is quashed. The executing court shall proceed with the case in accordance with law. The petition is allowed. No costs.

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2019 (III) ILR-CUT-302

DR. A.K. RATH, J.

S.A. NO. 324 OF 1990

SRI GOVINDO BHUYAN (SINCE DEAD) THROUGH L.Rs. .....Appellants

-Vs-

SRI SADHU CHARAN PATNAIK & ORS. .....Respondents

(A) SPECIFIC RELIEF ACT, 1963 – Section 19 – Subsequent purchaser – When can resist the specific performance of a prior contract of sale? – Principles to be established – Held, he is a bona fide purchaser for value, he had no notice of the prior contract and before he had notice of the prior contract of sale, he paid the consideration money to the owner.

(B) SPECIFIC RELIEF ACT, 1963 – Section 19 – Subsequent purchaser – Suit for specific performance of contract – Suit partly decreed – Court directed for refund of the part consideration with interest to the defendant – Second appeal – The substantial question arose as to whether the court can direct refund of the amount in absence of any prayer? – Held, Yes. ***(Firm Srinivas Ram Kumar VS. Mahabir Prasad, AIR (38) 1951 SC 177. Followed).***

Case Laws Relied on and Referred to :-

1. AIR 1976 Ori.113 : Simanchal Mahapatro & Anr. vs. Budhiram Padhi & Anr.
2. AIR (38) 1951 SC 177: Firm Srinivas Ram Kumar vs. Mahabir Prasad

For Appellants : Mr. Sanjat Das
For Respondents : None

JUDGMENT Date of Hearing : 20.04.2018 : Date of Judgment : 30.4.2018

Dr. A.K. RATH, J.

Plaintiff is the appellant against a confirming judgment in a suit for specific performance of contract.

02. The case of the plaintiff is that defendant no.1 is the owner of the suit land. To press his legal necessity, defendant no.1 intended to sell the same. Defendant no.1 executed an agreement to sell the land on 24.8.1980 in his favour for a consideration of Rs.6,000/-. He paid a sum of Rs.5,000/- towards part consideration to the defendant no.1. Defendant no.1 agreed that the land will be sold within three months and the balance of Rs.1,000/- shall be paid at

the time of registration of the sale deed. The defendant no.1 maintained a stony like silence. The plaintiff sent a letter on 25.10.1980 under certificate of posting to him for execution of the sale deed. After receipt of the notice, defendant no.1 sent a reply on 13.11.1980 stating that he was not prepared to sell the land in view of rise in price. The plaintiff enquired into the matter and ascertained that defendant no.1 had executed a nominal sale deed in the name of the defendant no.3. The plaintiff was ready and willing to perform his part of contract, but the defendant no.1 failed to do so. With this factual scenario, he instituted the suit seeking the reliefs mentioned supra.

03. The defendant no.1 filed written statement denying the assertions made in the plaint. The specific case of the defendant no.1 was that the suit land originally belonged to his cousin Radhasyam Patnaik. Radhasyam was a friend of the plaintiff. Radhasyam sold the entire plot to one Bacha Das. Again Radhasyam mortgaged the same to the Government fraudulently to secure loan. The land was put to auction by the Government for recovery of the loan amount. He was the auction purchaser. Since the possession was not delivered, he instituted T.S. No.63/67 against Bacha Das. Radhasyam was looking after the case. He had obtained a number of blank signed papers from him to utilize in the court in his absence, whenever the same was necessary. After the suit was decreed, the plaintiff sold Ac.1.64 dec. of land to the sons of Radhasyam. Since the rest portion of the suit land was not sold, Radhasyam bore a grudge against him. Neither he executed any agreement for sale in favour of the plaintiff, nor received any amount. The document is a fraudulent one.

04. Defendant nos.2 and 3 filed a joint written statement stating inter alia that defendant no.3 is a bonafide purchaser of the suit land for value. The suit land was delivered to him. He had no knowledge with regard to agreement entered into between plaintiff and defendant no.1.

05. On the inter se pleadings of the parties, learned trial court struck five issues. Parties led evidence, oral and documentary, to substantiate their cases. Learned trial court decreed the suit in part with the finding that Ext.1 is a genuine and valid document. Defendant no.3 had no knowledge about the execution of Ext.1 for sale of land by the defendant no.1. Defendant no.3 is a bonafide purchaser. It directed the defendant no.1 to refund Rs.5000/- to the plaintiff with simple interest at the rate of 12% per annum from the date of execution of Ext.1 (24.8.80) till realization of the entire decreetal dues. The plaintiff appealed before the learned District Judge, Ganjam, which was

subsequently transferred to the court of learned 1st Additional District Judge, Ganjam, Berhampur and renumbered as T.A. No.27/88 (T.A. No.59/87 GDC). Learned lower appellate court held that writings in Ext.1 raised suspicion. Writing had been started from the top of the paper leaving a little gap. At the beginning almost the first half of the writing contains small letters and gradually the size of the letters had been increased. Ext.1 is not a genuine document. The same had been fabricated using a blank paper containing the signature of defendant no.1. It further held that "there is nothing to disbelieve that defendant no.1 has not executed the sale deed, Ext.B, in favour of defendant no.3." But then, it came to a conclusion that "So Ext.B is a sale deed executed under which the entire consideration money has not been paid. Under the peculiar facts of the case, I hold that it is a nominal sale deed." Held so, it dismissed the appeal. It is apt to mention here that during pendency of the second appeal, the appellant-plaintiff and respondent no.1-defendant no.1 died. The legal heirs have been substituted.

06. The second appeal was admitted on the following substantial questions of law.

> "(i) Whether the appellate court is correct in reversing the findings of the trial court without assigning any reason ?
> (ii) Whether the learned appellate court had put the onus properly ?"

07. Heard Mr. Sanjat Das, learned counsel for the appellants. None appeared for the respondents.

08. Mr. Das, learned counsel for the appellants, submitted that defendant no.1, to press his legal necessity, entered into an agreement to sell the suit land in favour of the plaintiff on 24.8.1980, Ext.1. The defendant no.1 received Rs.5000/- towards part consideration. It was agreed upon between the parties that the sale deed will be executed within three months and balance consideration shall be paid at the time of registration of sale deed. The plaintiff was ready and willing to perform his part of contract. But the defendant no.1 failed to do so. Defendant no.1 clandestinely executed a nominal sale deed in favour of defendant no.3, Ext.B. He further submitted that the finding of the learned lower appellate court that Ext.1 is a fabricated document is perverse.

09. Section 19 of the Specific Relief Act, which is relevant, is quoted hereunder :

"Section 19. Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against –
(a) either party thereto;
(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;
xxx xxx xxx"

10. Section 19 of the Specific Relief Act was the subject matter of interpretation in the case of *Simanchal Mahapatro and another vs. Budhiram Padhi and another*, AIR 1976 Ori.113. This Court held that the subsequent purchaser in order to successfully resist a suit for specific performance of a prior contract of sale must establish that –

(a) he is a bona fide purchaser for value,
(b) he had no notice of the prior contract, and
(c) before he had notice of the prior contract of sale, he paid the consideration money to the owner.

11. On a bare perusal of Ext.1, it is evident that the letters had been written symmetrically. The size of the letters is same. The finding of the learned lower appellate court that the first four lines of Ext.1 were written in small letters and the remaining parts were written in big letters is perverse. Though the learned lower appellate court came to a conclusion that "there is nothing to disbelieve that defendant no.1 had not executed the sale deed Ext.B in favour of the defendant no.3", it abruptly came to a conclusion that "Ext.B is a sale deed executed under which the entire consideration money has not been paid. Under the peculiar facts of this case, I hold that it is a nominal sale deed." The judgment suffers from internal inconsistencies.

12. The conclusion is irresistible that Ext.1 is a genuine document under which the defendant no.1 had received an amount of Rs.5,000/- from the plaintiff. But then, defendant no.1 alienated the property in favour of defendant no.3 by means of a registered sale deed dated 14.4.1981, Ext.B, for a valid consideration and thereafter delivered possession. Learned trial court on a vivid analysis of record and document came to hold that defendant no.3 had no knowledge with regard to agreement to sell between the plaintiff and defendant no.1. There is no perversity in the said findings. The substantial questions of law are answered accordingly.

13. The next question arises for consideration as to whether the court can direct the defendant no.1 to refund the amount in the absence of any prayer. The apex Court in the case of *Firm Srinivas Ram Kumar vs. Mahabir Prasad,* AIR (38) 1951 SC 177 held thus :

"xxx xxx xxx

The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the court to give him relief on that basis. The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit.

xxx xxx xxx"

14. In view of the authoritative pronouncement of the apex Court in the case of *Firm Srinivas Ram Kumar* (supra), learned trial court is perfectly justified in directing the defendant no.1 to pay an amount of Rs.5000/-. But then, the interest as awarded appears to be too exorbitant. Instead of 12%, the same should be 6%.

15. In view of the foregoing discussions, the judgment of the appellate court is set aside. The appeal is allowed. The suit is decreed to the above extent. The parties shall bear the costs throughout.

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2019 (III) ILR-CUT-306

DR. B.R. SARANGI, J.

W.P.(C) NO. 11333 OF 2014

SUBASH CHANDRA BALIARSINGH .....Petitioner

-Vs -

BHARAT PETROLEUM CORPORATION LTD. & ORS. .....Opp. Parties

(A) WORDS AND PHRASES – '*Audi alteram partem*' – Meaning thereof – Means hear the other side; hear both sides. Under the rule, a person who is to decide must give the parties an opportunity of being heard before him and fair opportunity to those who are parties in the controversy for contradicting or correcting anything prejudicial to their view. (Para 11)

(B) SERVICE LAW – Termination without providing an opportunity of hearing – Effect of – Held, the basic rudiment of law requires that an opportunity of hearing has to be given to the aggrieved party while passing the order by a *quasi-judicial* or administrative authority and the order impugned does not indicate the reason for non-acceptance of the caste certificate produced by the petitioner – In absence of the same and for non-compliance of the principles of natural justice, this Court is of the considered view that the order impugned cannot sustain in the eye of law and the same is liable to be quashed. (Para 15)

Case Laws Relied on and Referred to :-

1. AIR 2016 SC 1098 : Ram Kumar Gijroya v. Delhi Subordinate Services Selection Board
2. (1978) 1 SCC 248 : Maneka Gandhi vrs. Union of India
3. AIR 1981 SC 818 : Swadeshi Cotton Mills vrs. Union of India
4. (1993) 3 SCC 259 : D.K. Yadav v. J.M.A. Industries Ltd.
5. (2008) 16 SCC 276 : Nagarjuna Construction Co. Ltd. v. Govt. of A.P.
6. AIR 1985 SC 1416 : Union of India v. Tulsiram Patel
7. AIR 1990 SC 1480 : Charan Lal Sahu v. Union of India
8. AIR 1967 SC 361 : Bharat Barrel & Drum Mfg. Co. v. L.K. Bose

For Petitioner : M/s. B. Dash, P.K. Mohanty, N.C. Jena & R.L. Kar.

For Opp. Parties : M/s. S. Patnaik, T.P. Paul & N.C. Rout.

JUDGMENT Decided on : 25.06.2019

Dr. B.R.SARANGI, J.

The petitioner, by means of this writ petition, seeks for following reliefs :

> *"……to issue a Rule NISI calling upon the opp. parties to show cause as to why Annexure-11 refusing acceptance of Caste Certificate of the petitioner which was submitted under Annexure:-10 shall not be accepted and as to why the order of termination shall be quashed and as to why the petitioner shall not be reinstated in his service as before;*
>
> *And if the opposite parties fail to show cause or show insufficient cause the rule may be made absolute against the opp. parties and a writ of mandamus may be issued to the opp. parties particularly the opp. party No.2 and 3 to allow the petitioner to join in his post;"*

2. The factual matrix of the case, in hand, is that the petitioner belonged to scheduled tribe community being sub-tribe 'Sabar' and is a permanent resident of village Bajpur under Khurda district in the State of Odisha. He was selected by following due process of selection and appointed as

Operator-V (Field) in the L.P.G. Bottling Plant at Khurda, as a scheduled tribe candidate, pursuant to order dated 25.01.1999 issued by opposite party no.3 in Annexure-1. At the time of his entry into service, the petitioner had produced a caste certificate issued by the Tahasildar, Khurda in Misc. Case No. 330 of 1991. The opposite parties, being satisfied with the documents produced by the petitioner, allowed him to discharge his duty and confirmed his service by letter dated 18.05.2000 in Annexure-3. Subsequently, considering the performance of the petitioner, the opposite parties promoted him to the post of Operative-IV(F) (Mobile) Lab. Attendant-cum-Helper, by letter dated 10.02.2004 in Annexure-4.

2.1 When the position stood thus, opposite party no.2 wrote a letter to the petitioner on 02.05.2006 calling upon him to submit an explanation within seven days as to why his service with the Corporation would not be terminated, as the information and certificate furnished by him with regard to his caste is not genuine. The petitioner sought for time to produce caste certificate, but he could not do so within time specified. Again, vide letter dated 30.07.2007, the petitioner was intimated that he failed to produce the caste certificate, as almost 1 year and 2 months passed, therefore submit the same without further delay. Since he could not submit the caste certificate, as demanded by the authority, he was terminated from service vide letter dated 18.03.2008 in Annexure-7 granting one month salary. Subsequently, the petitioner obtained a caste certificate on 25.04.2008 issued by the Tahasildar, Khurda in Misc. Case No. 66, and submitted a representation on 28.04.2008 to opposite party no.2 for reinstating him in service. As no action was taken on his representation, the petitioner approached this Court by filing W.P.(C) No. 16013 of 2009 seeking direction to the opposite parties to accept the caste certificate issued by the Tahasildar, Khurda in Misc. Case No. 66 dated 25.04.2008 and reinstate the petitioner in service by quashing Annexure-7. This Court disposed of the said writ application by order dated 26.03.2014 directing the opposite parties to consider the grievance of the petitioner taking into account caste certificate issued by the Tahasildar, Khurda under Annexure-10 dated 25.04.2008 and pass necessary order. Though such order was produced before the authority concerned, along with the caste certificate issued by the competent authority, the opposite party no.2 passed the order impugned on 25.04.2014 in Annexure-11 stating that under Clause 8(i) of the appointment letter dated 25.01.1999, while he was appointed as Operator-V (Field) in the Corporation, the appointment was offered on the basis of correct information furnished regarding his past service, and that if at any

time it is revealed that employment has been obtained by furnishing false information or withholding pertinent information, the Corporation will be free to terminate the service at any time with notice as required. Hence, this writ application.

3. Mr. B. Dash, learned counsel for the petitioner contended that Annexure-11 dated 25.04.2014 passed by opposite party no.2 is an outcome of non-application of mind and non-compliance of order dated 26.03.2014 passed by this Court in W.P.(C) No. 16013 of 2009. As such, the opposite parties, while considering the case of the petitioner, have not given him opportunity of hearing in compliance of principles of natural justice, and thereby the order impugned cannot sustain in the eye of law.

4. Mr. S. Patnaik, learned counsel for the opposite parties argued with vehemence that once the petitioner has entered into service by furnishing a fake caste certificate, the action taken in consonance with clause 8(i) of the appointment letter is well justified. It is further contended that as the petitioner had got employment by furnishing false information and withholding pertinent information, the opposite party Corporation is justified in taking such action against him. It is further contended that the order impugned in Annexure-11 has been passed by the authority with due application of mind. In order to substantiate his contention he has relied upon a judgment of the apex Court in ***Ram Kumar Gijroya v. Delhi Subordinate Services Selection Board***, AIR 2016 SC 1098.

5. This Court heard Mr. B. Dash, learned counsel for the petitioner and Mr. S. Patnaik, learned counsel for the opposite parties 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.

6. Admittedly, the petitioner had got employment by producing a caste certificate issued by the Tashasildar, Khurda in Misc. Case No. 330 of 1991 stating that the petitioner belonged to scheduled tribe community being sub-caste ‘Sabar’. While he was discharging his duty, pursuant to the judgment passed by Delhi High Court with regard to verification of caste certificates produced by Scheduled Caste and Schedule Tribe candidates, the opposite parties caused verification of caste certificate produced by the petitioner and found to be a fake one. During such enquiry, no opportunity of hearing was given to the petitioner and was done behind his back. Accordingly, a

proceeding was initiated against the petitioner for terminating him from service. In the said proceeding, the petitioner had candidly stated that he belonged to scheduled tribe community being sub-caste 'Sabar' and furnished a genuine caste certificate issued by the Tahasildar, Khurda in Misc. Case No.66 dated 25.04.2008. Before that, the petitioner had also produced two certificates; one issued by the local Sarpanch and the other by the M.L.A., to the effect that the petitioner belonged to scheduled tribe community being sub-caste 'Sabar', awaiting the certificate to be issued by the competent authority. But the opposite parties, without considering the same, terminated the services of the petitioner, relying upon clause 8(i) of the appointment letter. Therefore, the petitioner approached this Court by filing W.P.(C) No. 16013 of 2009, which was disposed of by order dated 26.03.2014 directing the opposite parties to consider the case of the petitioner taking into account the caste certificate produced by him in Annexure-10. But, in compliance of the said order dated 26.03.2014 passed by this Court in W.P.(C) No. 16013 of 2009, the opposite party no.2 passed the order impugned in Annexure-11 dated 25.04.2014 assigned the reason in paragraph-5 thereof, which reads thus :-

> *"Your subsequent production of another Caste Certificate dated 25.04.2008 and as attached as Annexure-10, to the Corporation does not merit any consideration by the Corporation as in the first instance during the year 1999, you have resorted to production of fake certificate to the Corporation. You are also aware that the said action of yours was contrary to what mentioned in the appointment letter dated 25.01.1999 issued to you."*

A bare reading of the above would go to show that the opposite party no.2 in the order impugned has only reiterated the earlier stand that the petitioner resorted to falsehood by producing fake caste certificate to the Corporation and such action of the petitioner was contrary to what mentioned in the appointment letter dated 25.01.1999. But this was not the purport of the order dated 26.03.2014 passed by this Court in W.P.(C) No. 16013 of 2009, in which this Court had clearly directed the opposite parties to consider the case of the petitioner taking into account the caste certificate produced by him in Annexure-10 and pass appropriate order. Furthermore, opposite party no.2, while passing the order dated 25.04.2014 in Annexure-11, has not complied the principles of natural justice by affording opportunity of hearing to the petitioner.

7. In ***Maneka Gandhi vrs. Union of India***, (1978) 1 SCC 248, Hon'ble Justice P.N. Bhagwati stated that the soul of natural justice is 'fair play in action'.

8. In ***Swadeshi Cotton Mills vrs. Union of India***, AIR 1981 SC 818, the apex Court while considering the meaning of natural justice held as follows :

> *"The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of a cast-iron formula. Historically, "natural justice" has been used in a way "which implies the existence of moral principles of self-evident and unarguable truth", "Natural Justice" by Paul Jackson, 2nd Ed., page 1. In course of time, judges nurtured in the traditions of British jurisprudence, often invoked it in conjunction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". "Natural justice" was considered as "that part of natural law which relates to the administration of justice."*

9. In ***D.K. Yadav v. J.M.A. Industries Ltd.,*** (1993) 3 SCC 259, the apex Court held that the order of termination of the service of an employee visits him with civil consequences of jeopardizing not only his livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee, fair play requires that a reasonable opportunity to put forth his case is given and domestic enquiry conducted complying with the principles of natural justice.

10. In ***Nagarjuna Construction Company Limited v. Government of Andhra Pradesh***, (2008) 16 SCC 276, the apex Court held that over the years by a process of judicial interpretation two rules have been evolved as representing the fundamental principles of natural justice in judicial process including therein quasi-judicial and administrative process, namely, an adjudicator should be disinterested and unbiased (*nemo judex in causa sua*) and that the partiesmust be given adequate notice and opportunity to be heard (*audi alteram partem*). They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men.

11. '*Audi alteram partem*' means hear the other side; hear both sides. Under the rule, a person who is to decide must give the parties an opportunity of being heard before him and fair opportunity to those who are parties in the controversy for contradicting or correcting anything prejudicial to their view.

12. In ***Union of India v. Tulsiram Patel***, AIR 1985 SC 1416, the apex Court held as follows:-

> *"…… audi alteram partem rule, in its fullest amplitude means that a person against whom an order to his prejudice may be passed should be informed of the allegations and charges against him, be given an opportunity of submitting his explanation*

thereto, have the right to know the evidence, both oral or documentary, by which the matter is proposed to be decided against him, and to inspect the documents which are relied upon for the purpose of being used against him, to have the witnesses who are to give evidence against him examined in his presence and have the right to cross-examine them, and to lead his own evidence, both oral and documentary, in his defence….."

13. In ***Charan Lal Sahu v. Union of India***, AIR 1990 SC 1480, the pervasiveness of the rule was indicated by the apex Court which reads as follows:-

"No man or no man's right should be affected without an opportunity to ventilate his views. We are….conscious that justice is a psychological yearning, in which men seek acceptance of their view point by having an opportunity of vindication of their view point before the forum or the authority enjoined or obliged to take a decision affecting their right."

14. In ***Bharat Barrel & Drum Mfg. Co. v. L.K. Bose***, AIR 1967 SC 361 the apex Court held as follows :-

"Where a breach of principle of natural justice is alleged, the Court should not proceed as if there are any inflexible rules of universal application but has to consider whether in the light of the facts and circumstances of the issue involved in the inquiry, a reasonable opportunity of being heard was furnished to the affected party."

15. Therefore, the basic rudiment of law requires that an opportunity of hearing has to be given to the aggrieved party while passing the order by a *quasi-judicial* or administrative authority and the order impugned does not indicate the reason for non-acceptance of the caste certificate produced by the petitioner in Annexure-10. In absence of the same and for non-compliance of the principles of natural justice, this Court is of the considered view that the order impugned in Annexure-11 cannot sustain in the eye of law and the same is liable to be quashed.

16. Reliance has been placed by the opposite parties on the judgment of the apex Court in ***Ram Kumar Gijroya*** (supra), it does not support the claim of the opposite parties, rather it supports the case of the petitioner in view of the observation made in paragraph 17 thereof which is extracted hereunder:-

"*17. The matter can be looked into from another angle also. As per the advertisement dated 11th June, 1999 issued by the Board, vacancies are reserved for various categories including 'SC' category. Thus in order to be considered for the post reserved for 'SC' category, the requirement is that a person should belong to 'SC' category. If a person is SC his is so by birth and not by acquisition of this category because of any other event happening at a later stage. A certificate issued*

by competent authority to this effect is only an affirmation of fact which is already in existence. The purpose of such certificate is to enable the authorities to believe in the assertion of the candidate that he belongs to 'SC' category and act thereon by giving the benefit to such candidate for his belonging to 'SC' category. It is not that petitioners did not belong to 'SC' category prior to 30th June, 1998 or that acquired the status of being 'SC' only on the date of issuance of the certificate. In view of this position, necessitating upon a certificate dated prior to 30th June, 1998 would be clearly arbitrary and it has no rationale objective sought to be achieved."

In view of such position, factually and legally the petitioner is entitled to be given an opportunity of hearing.

17. For the foregoing discussions, order impugned in Annexure-11 dated 25.04.2014 is hereby quashed. The matter is remitted back to opposite party no.2 for fresh adjudication, in the light of the observation made above, by affording opportunity of hearing to the petitioner. Needless to mention, this being a year old case, the opposite party no.2 shall consider and dispose of the matter as expeditiously as possible, preferably within a period four months from the date of production of a certificated copy of this judgment.

18. In the result, the writ petition is allowed. No order as to costs.

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2019 (III) ILR-CUT-313

DR. B.R. SARANGI, J.

W.P.(C) NO. 5067 OF 2013

SHIBA PRASAD SATPATHY .....Petitioner

-Vs-

C.G.M, S.B.I, BHUBANESWAR & ORS. .....Opp.Parties

SERVICE LAW – Petitioner a bank employee – Criminal cases registered following FIRs by CBI – Trial ended up in conviction – Confirmed in Appeal – Petitioner discharged from service consequent upon the conviction – In Revision High court set aside the conviction and sentence on the ground that there was no legal evidence – Plea that the petitioner having been completely exonerated from a criminal proceeding and not being visited with any penalty, he should not be deprived of the benefits including salary of the promotional post – Whether the benefits as claimed by the petitioner can be granted ? – Held, No. only entitled for terminal benefits.

"On critical analysis of the judgments, which have been relied upon by the learned counsel for the opposite parties in ***Ranchhodji Chaturji Thakore****,* ***Jiapal Singh, Mohammed Abdul Rahim*** *and also in* ***Banshi Dhar****, mentioned above, this Court is of the considered view that the same are fully applicable to the present case. Applying the ratio decided therein to the case in hand, this Court does not find any illegality or irregularity committed by the authorities in passing the order impugned in Annexure-1 dated 05.07.2012 so as to call for interference by this Court at this stage. The order impugned, which is absolutely clear that the period from the date of discharge till the date of superannuation, i.e., from 16.07.1996 to 31.03.2008 the petitioner shall be entitled to terminal benefits in terms of the State Bank of India Officers' Service Rules, 1992, is well justified. So far as payment of salary for such period with all consequential benefits, including promotion, is concerned, the same cannot have any justification, in view of the law discussed above."* (Para 15)

Case Laws Relied on and Referred to :-

1. AIR 1991 SC 2010 : (1991) 4 SCC 109 :Union of India v. K.V. Jankirama.
2. AIR 1996 SC 571 : (1996) 1 SCC 63 : Smt. Sudha Shrivastava v. Comptroller and Auditor General of India.
3. AIR 1999 SC 3734 : (1999) 7 SCC 739 : Yoginath D. Bagde v. State of Maharashtra.
4. Vol.101 (2006) CLT 454 : Union of India v. Sibaram Nayak.
5. (1996) 11 SCC 603 :Ranchhodji Chaturji Thakore v. Supdt. Engineer, Gujarat Electricity Board.
6. (2004) 1 SCC 121 : Union of India v. Jaipal Singh.
7. (2013) 11 SCC 67 : State Bank of India v. Mohammed Abdul Rahim
8. (2007) 1 SCC 324 : Banshi Dhar v. State of Rajasthan

For Petitioner : M/s H.K. Mund and A.K. Dei.
For Opp. Parties : M/s D.K. Mishra and D. Pattnaik.

JUDGMENT Date of Hearing : 16.07.2019 : Date of Judgment: 23.07.2019

Dr. B.R. SARANGI, J.

The petitioner, by means of this writ application, seeks to quash order dated 05.07.2012 in Annexure-1, by which the Deputy General manager & Circle Development Officer, State Bank of India has refused to treat the period from the date of his discharge from Bank's service till the date of attaining the age of superannuation, i.e. from 16.07.1996 to 31.03.2008 as on duty and denied to pay salary for the said period with all other consequential benefits including promotion, while allowing to get terminal benefits as applicable to him in terms of the State Bank of India Officers Service Rules, 1992.

2. The factual matrix of the case, in hand, is that the petitioner, who is a science graduate, joined in service of the State Bank of India as a cashier, ADB at its Balangir Branch on 09.01.1973. While he was serving as Field Officer at Nuapada Branch of the Bank, two FIRs were registered by the Central Bureau of Investigation vide S.P.E. Case No. 25 of 1988 and S.P.E. Case No. 26 of 1988 on the allegation of commission of offences under Sections 420/468/471/120-B of the Indian Penal Code. In both the cases, the allegations are similar to the extent that the loans were recommended by the petitioner in favour of loanees, who were fictitious persons by forging their signatures, thereby the bank was put to loss. In both the cases the petitioner was tried and convicted by the learned Addl. Chief Judicial Magistrate, Bhubanewsar. Consequent upon his conviction, the petitioner was discharged from service of the bank with effect from 16.07.1996, by order dated 07.06.1996 passed by the Chief General Manager, State Bank of India.

2.1. Against the judgment of conviction and order of sentence dated 14.02.1996 passed by the learned trial Court in S.P.E. Case No. 25 of 1996, the petitioner preferred Criminal Appeal No. 12 of 1996 in the Court of learned Special Judge (Vigilance)-cum-Addl. Sessions Judge, Bhubaneswar, who confirmed the judgment and order of conviction vide its judgment dated 13.06.1996. Assailing the aforesaid judgment of conviction and sentence, the petitioner preferred before this Court Criminal Revision No. 365 of 2001, which was allowed vide judgment dated 07.04.2011 by setting aside the judgment and order of conviction imposed by the Courts below holding that the offences for which the petitioner was convicted and sentenced, there is no legal evidence.

2.2 Similarly, against the judgment of conviction and order of sentence dated 31.01.1996 passed by the learned trial Judge in S.P.E. Case No. 26 of 1998, the petitioner preferred Criminal Appeal No. 2/10 of 1997/96 before the learned Second Addl. Sessions Judge, Bhubaneswar, who also confirmed the same vide judgment dated 15.09.1998, challenging the same petitioner preferred Criminal Revision No. 423 of 1998 and vide judgment dated 07.04.2011 this Court allowed the revision and set aside the judgment of conviction and order sentence by holding that prosecution case against the petitioner had no leg to stand and that there was not even an iota of evidence on the basis of which the petitioner could be held guilty of the charges framed against him.

2.3 Had the petitioner been continued in service, he would have been retired on 31.03.2008, but owing to his involvement in criminal prosecution

he has been discharged from service with effect from 16.07.1996. After acquittal by this Court in revision applications on 07.04.2011, the petitioner submitted a representation on 23.07.2011 to the Chief General Manager, State Bank of India claiming his dues and all other service benefits from the date he was discharged from service till the date of superannuation, i.e., from 16.07.1996 to 31.03.2008. But the said representation was disposed of vide order dated 05.07.2012 by the Deputy General Manager and Circle Development Officer, State Bank of India, Local Head Office, Bhubaneswar intimating the petitioner that although the said period from 16.07.1996 to 31.03.2008 had been treated as periods spent on duty for the purpose of calculation of terminal benefits, but declined to make any payment of salary and all other service benefits including promotion due to him, as the petitioner not rendered any service to the bank during the said period. Hence, this application.

3. Ms. A.K.Dei, learned counsel for the petitioner emphatically submitted that when an employee is completely exonerated from a criminal proceeding and is not visited with the penalty even of censure, indicating thereby that he was not blameworthy in the least, he should not be deprived of any benefits including salary of the promotional post, and as such, the normal rule of "no work no pay" is not applicable to such cases where the employee although is willing to work is kept away from work by the authorities for no fault of him. It is further contended that even an allegation levelled against the petitioner in a criminal case and for the selfsame allegation disciplinary proceeding was initiated against him and imposed a penalty for dereliction in duty, if the petitioner has already been penalized in the disciplinary proceeding, he cannot be penalized twice by denying his legitimate dues. It is further argued alternatively that if this Court in criminal revision acquitted the petitioner of the charges, it would only have been just and proper to restore to the petitioner all service benefits, which he was deprived of for no fault of him.

To substantiate her contention learned counsel for the petitioner has relied upon the judgments of the apex Court in ***Union of India v. K.V. Jankiraman,*** AIR 1991 SC 2010 : (1991) 4 SCC 109; ***Smt. Sudha Shrivastava v. Comptroller and Auditor General of India*****,** AIR 1996 SC 571: (1996) 1 SCC 63 ; ***Yoginath D. Bagde v. State of Maharashtra,*** AIR 1999 SC 3734 : (1999) 7 SCC 739; and of this Court in ***Union of India v. Sibaram Nayak***, Vol.101 (2006) CLT. 454.

4. Per contra, Mr. D.K. Mishra, learned counsel appearing for the opposite party bank strenuously argued before this Court contending that the bank cannot be faulted with for having kept the petitioner out of service, since the law obliges a person convicted of an offence to be kept out and not to be retained in service. It is further submitted that if such an employee is acquitted by the higher Court, he may be reinstated in service, but will not be entitled to back wages, i.e., salary for the period he was kept out of service, because the employee disabled himself from rendering service on account of his conviction and sentence. Consequentially, it is contended that the petitioner is not entitled to any financial benefits for the period from 16.07.1996 to 31.03.2008, because he was kept out of service, as he was convicted and sentenced by the Court below and the matter was kept pending before the higher forum. It is also contended that so far as the claim of the petitioner for promotion is concerned, the promotion being not by seniority but by selection, the benefit cannot be granted to the petitioner, as he had not rendered any service in promotional post by following his selection. Consequentially, he contended that the order impugned dated 05.07.2012 is well justified and needs no interference by this Court at this stage.

To substantiate his case, he has relied upon the judgments of the apex Court in ***Ranchhodji Chaturji Thakore v. Supdt. Engineer, Gujarat Electricity Board***, (1996) 11 SCC 603; ***Union of India v. Jaipal Singh***, (2004) 1 SCC 121; and ***State Bank of India v. Mohammed Abdul Rahim***, (2013) 11 SCC 67.

5. Having heard Ms. A.K. Dei, learned counsel for the petitioner and Mr. D.K. Mishra, learned counsel for the opposite parties and pleadings between the parties having been exchanged, with their consent, the matter is being disposed of finally at the stage of admission.

6. The facts discussed above are not in dispute. Therefore, the only question to be considered by this Court on the basis of the admitted facts is, whether the petitioner is entitled to salary and promotion from the date of his discharge from service, i.e., 16.07.996 to 31.03.2008, the date on which he attained the age of superannuation, on being acquitted of the criminal charges on 07.04.2011.

7. Much reliance has been placed by learned counsel for the petitioner on the judgment of the apex Court in ***K.V. Jankiraman*** (supra) and reference has been made to paragraph-7 which is reproduced hereunder :-

> *"We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary /criminal proceedings."*

But while referring to the above portion of paragraph-7, learned counsel for the petitioner did not proceed further, where the apex Court has also considered the various aspects with regard to grant of the benefits claimed herein to an employee. In the very same paragraph, after the above quoted portion, the apex Court has further observed as follows :-

> "*However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. In such circumstances, the concerned authorities must be vested with the power to decide whether the employee at all deserves any salary for the intervening period and if he does, the extent to which he deserves it. Life being complex, it is not possible to anticipate and enumerate exhaustively all the circumstances under which such consideration may become necessary. To ignore, however, such circumstances when they exist and lay down an inflexible rule that in every case when an employee is exonerated in disciplinary/criminal proceedings he should be entitled to all salary for the intervening period is to undermine discipline in the administration and jeopardise public interests."*

8. In the case of ***Sudha Srivastava***, mentioned supra, on which reliance has been placed by learned counsel for the petitioner, the husband of the appellant was a member of the Indian Audit and Accounts Service (Class-I). While in service a case under the Prevention of Corruption Act was instituted against him and he was convicted by the trial Court. He preferred an appeal to the High Court and during pendency of the appeal he expired. On an application being made the appellant was substituted as L.R. in the proceeding and was permitted to argue the appeal. Ultimately, the said appeal was allowed by the High Court and the conviction and sentence were set aside. Thereafter, the appellant sent representations to the authority claiming retrospective promotion and consequential benefits to her husband. On the said claims being rejected, the appellant filed a proceeding before the Central Administrative Tribunal. The Tribunal rejected the application of the appellant by holding that the right for enforcement of promotion accrued only on the acquittal of the appellant's husband and as before such acquittal he had died, then his personal right of enforcement of promotion did not actually

accrue and therefore, nothing survived to his legal heirs. Recording the aforesaid reasoning of the Tribunal, the Supreme Court held as follows:-

> "*Even otherwise, if the husband of the appellant was not to be promoted, he would certainly be entitled to receive salary in the lower post till the date of his death in October, 1981.*"

The fact of above noted judgment is quite distinguishable from the case in hand, inasmuch as, in that case the apex Court has denied the benefit of promotion. Therefore, the said judgment does not support the case of the petitioner rather it supports the case of the opposite parties.

9. In ***Yoginath D. Badge's*** case, as cited on behalf of the petitioner, a disciplinary proceeding was initiated against the appellant on the ground that he being the Sessions Judge, while in seisin over a trial had demanded bribe from an accused. The enquiry officer exonerated the appellant of all the charges. However, the disciplinary authority disagreed with the findings of the enquiry officer and imposed the penalty of dismissal from service. On appeal the Supreme Court reversed the order of dismissal with the direction that the appellant shall be reinstated in service forthwith with all consequential benefits, including all arrears of pay. The fact of this case is distinguishable from the present one, inasmuch as, in that case the appellant was not convicted or sentenced, for which he was kept out of service.

10. Reliance has also been placed on behalf of the petitioner on a judgment of this Court in ***Sibaram Nayak*** (supra), in which though the Tribunal has directed that his case should be considered by treating him as if he was in service from the date of his dismissal and therefore, entitled to all consequential benefits including back wages. This Court did not interfere with such finding of the Tribunal and held that payment of back wages to be decided by the authorities. Nothing has been placed on record to indicate whether such judgment has been challenged in the higher forum or not.

11. Therefore, on complete analysis of the judgments, which have been referred to by the learned counsel for the petitioner, this Court arrives at a conclusion that the same have been decided on their own facts and circumstances, and each one of them is distinguishable from the facts of the present case. But the facts which are akin to the present case and issue relating to entitlement of back wages stands on somewhat a different footing and basis of refusal of back wages by the apex Court would appear to be the inability of the employer to avail the service of the employee due to conviction and sentence.

12. In ***Ranchhodji Chaturji Thakore*** (supra), as relied upon by learned counsel for the opposite parties, the apex Court had only directed for reinstatement but denied back wages on the ground that the department was no way concerned with the criminal case and, therefore, cannot be saddled with the liability also for back wages for the period when the employee was out of service during/after conviction suffered by him in the criminal case. It is further held if as a citizen the employee or a public servant got involved in a criminal case and if after initial conviction by the trial court, he gets acquittal on appeal subsequently, the department cannot in any manner be found fault with for having kept him out of service, since the law obliges a person convicted of an offence to be so kept out and not to be retained in service. Consequently, the reasons given in the decision relied upon, for the appellants are not only convincing but are in consonance with reasonableness as well. Though exception taken to that part of the order directing reinstatement cannot be sustained and the respondent has to be reinstated in service, for the reason that the earlier discharge was on account of those criminal proceedings and conviction only, the appellants are well within their rights to deny back wages to the respondent for the period he was not in service. The appellants cannot be made liable to pay for the period for which they could not avail of the services of the respondent. The High Court, in our view, committed a grave error, in allowing back wages also, without adverting to all such relevant aspects and considerations. Consequently, the order of the High Court insofar as it directed payment of back wages is liable to be and is hereby set aside.

13. In ***Jaipal Singh*** (supra), on which reliance has been placed by learned counsel for opposite parties, the view taken in ***Ranchhodji Chaturji Thakore*** case has also been upheld and he has been denied payment of back wages for the period of absence, i.e., from the date of discharge to reinstatement, but directed that he will be entitled to back wages from the date of acquittal and except for the purpose of denying the respondent actual payment of back wages, that period also will be counted as period of service, without any break.

14. In ***Mohammed Abdul Rahim*** (supra), as cited on behalf of learned counsel for the opposite parties, the apex Court, referring to the judgments in ***Ranchhodji Chaturji Thakore*** and ***Jaipal Singh*** (supra) held as follows :

> *"……..No doubt, the respondent was not in custody during the period for which he has been denied back wages inasmuch as the sentence imposed on him was suspended during the pendency of the appeal. But what cannot be lost sight of is that the conviction*

> *of the respondent continued to remain on record until it was reversed by the appellate court on 22-2-2002. During the aforesaid period there was, therefore, a prohibition in law on the appellant Bank from employing him. If the respondent could not have remained employed with the appellant Bank during the said period on account of the provisions of the Act, it is difficult to visualise as to how he would be entitled to payment of salary during that period. His subsequent acquittal though obliterates his conviction, does not operate retrospectively to wipe out the legal consequences of the conviction under the Act. The entitlement of the respondent to back wages has to be judged on the aforesaid basis. His reinstatement, undoubtedly, became due following his acquittal and the same has been granted by the appellant Bank."*

Such finding of the apex Court is also based on reasonable reasonings given in ***Banshi Dhar v. State of Rajasthan,*** (2007) 1 SCC 324, where the apex Court while answering the question against the employee by holding that grant of back wages is not automatic and such an entitlement has to be judged in the context of the totality of the facts of a given case.

15. On critical analysis of the judgments, which have been relied upon by the learned counsel for the opposite parties in ***Ranchhodji Chaturji Thakore***, ***Jiapal Singh, Mohammed Abdul Rahim*** and also in ***Banshi Dhar***, mentioned above, this Court is of the considered view that the same are fully applicable to the present case. Applying the ratio decided therein to the case in hand, this Court does not find any illegality or irregularity committed by the authorities in passing the order impugned in Annexure-1 dated 05.07.2012 so as to call for interference by this Court at this stage. The order impugned, which is absolutely clear that the period from the date of discharge till the date of superannuation, i.e., from 16.07.1996 to 31.03.2008 the petitioner shall be entitled to terminal benefits in terms of the State Bank of India Officers' Service Rules, 1992, is well justified. So far as payment of salary for such period with all consequential benefits, including promotion, is concerned, the same cannot have any justification, in view of the law discussed above.

16. Accordingly, this Court does not find any merit in this writ petition, which is hereby dismissed. No order to costs.

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2019 (III) ILR - CUT-322

DR. B.R. SARANGI, J.

W.P.(C) NO. 15328 OF 2014
&
W.P.(C) NO. 16081 OF 2014

ARDHENDU SEKHAR RATH & ANR. .....Petitioners

-Vs-

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

&

W.P.(C) NO.16081 OF 2014

BHARAT SWAIN .....Petitioner

-Vs-

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

SERVICE LAW – Petitioners seek direction to extend their age of retirement from 58 to 60 years – Pursuant to the resolution passed by the Finance Department, Government of Orissa and to grant all consequential benefits as due and admissible to them – Petitioner's claim not accepted – Held, not proper, equality before law should be maintained.

"Considering the above law laid down by the apex Court, as discussed above, and applying the same to the present context, since under our Constitution Article 14 prescribes equality before law, law should be deal alike with all in one class; that there shall be equality of treatment under equal circumstances, which means "that equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated as alike". Meaning thereby, the petitioners, being the employees of OCCL, were to retire from service on attaining the age of 58 years, but they were allowed extension till 31.10.2014. Subsequently, it was resolved on 28.08.2014 by OCCL to extend the age of superannuation of its employees from 58 to 60 years and on being moved the Government approved the same on 17.09.2014. Consequentially, OCCL extended the retirement age of its employees from 58 to 60 years, pursuant to letter dated 19.09.2014. Therefore, the petitioners, being similarly situated persons, have been discriminated and are not treated equally, and as such, the principle that equals should not be treated unlike and unlikes should not be treated alike has been breached in the case in hand." (Para 16)

Case Laws Relied on and Referred to :-

1. 2015 (II) OLR 214 : Premalata Panda v. State of Orissa
2. (2017) 2 ILR CUT 876 : Digambar Behera v. State of Orissa
3. (2006) 8 SCC 212 : M. Nagraj v. Union of India
4. (2002) 4 SCC 34 : Ashutosh Gupta v. State of Rajasthan
5. (1994) 6 SCC 349 : Gauri Shankar v. Union of India
6. (2001) 1 SCC 728 : State of Karnatak v. B. Suvarva Malini
7. (2005) 3 SCC 618 : Food Corporation of India v. Bhanu Lodh

8. (1997) 7 SCC 752 : Faridabad CT Scan Centre v. Director General of Health Services
9. (2001) 1 SCC 442 : K.R. Laxman v. Karnatak Electricity Board.

For Petitioners : M/s. A.K. Mohapatra, S.J. Mohanty, B.R. Pati, P. Panda & P. Kar.
Mr. Manoj Mishra, Sr.Counsel & Mr. S. Senapati.

For Opp. Parties : Mr. S. Mishra, Addl. Govt. Adv.
Mr. L. Pangari, Sr. Counsel
M/s Bikash Jena, B.Mohapatra, A.K. Das, S.K. Mishra, S.K. Nath & S. Mohanty.

JUDGMENT Date of Hearing: 19.07.2019 : Date of Judgment : 30.07.2019

Dr. B.R.SARANGI, J.

The petitioners, who are erstwhile employees of Odisha Construction Corporation Limited (OCCL), seek to quash order dated 11.08.2014, whereby office order dated 31.07.2014 allowing the employees of the Corporation, who were to superannuate on attaining the age of 58 years on 31.07.2014, 31.08.2014 and 30.09.2014, to continue in service upto 31.10.2014 has been cancelled with immediate effect, and further seek for direction to the opposite parties to extend their age of retirement from 58 to 60 years, pursuant to the resolution passed by the Finance Department, Government of Orissa dated 28.06.2014 in Annexure-1, and grant all consequential benefits as due and admissible to them.

2. The factual matrix of the case, in hand, is that the petitioners, on 05.05.2014, were served with notices of their retirement on attaining the age of superannuation of 58 years w.e.f. 31.07.2014. The Government of Orissa in its Finance Department resolution dated 28.06.2014 enhanced the retirement age of its employees on superannuation from 58 to 60 years with immediate effect, i.e., from 28.06.2014 by amending the Code 71 (a) of Orissa Service Code. The OCCL circulated office order dated 31.07.2014 to retain the services of the retiring employees up to 31.10.2014 or till receipt of order of Public Enterprises Department, in this regard, whichever would be earlier. The resolution dated 02.08.2014 of the Public Enterprises Department, regarding enhancement of age of retirement on superannuation of the employees of the State Public Sector Undertakings from 58 to 60 years, was received on 04.08.2014 with a stipulation that the Public Sector Undertakings (PSUs) fulfilling the specified preconditions, have to place a proposal for enhancement of age of superannuation before the Board of

Directors. Consequent upon such stipulation, the proposal for retention of the service of retired employees was withdrawn by OCCL vide order dated 11.08.2014. Therefore, OCCL issued order dated 11.08.2014 to the petitioners for their retirement from service, followed by relieve orders directing them to handover charges to their controlling authority. But such office orders could not be served on the petitioners, due to their refusal to receive the same, as per the reports of the special messenger, who had been to their residential quarters, and remarks of the postal department.

3. The Board of Directors of OCCL, on examination of letter dated 02.08.2014 of Public Enterprises Department and the pre-conditions for enhancement of retirement age, resolved that the retirement age of its employees be enhanced from 58 to 60 years and, accordingly, vide letter dated 28.08.2014, OCCL requested the Government to approve the proposal. Consequently, Addl. Secretary to the Government in the Department of Water Resources communicated approval of the Government, vide letter dated 17.09.2014, for extension of retirement age of regular, work charged regular and work charged employees of OCCL, including employees of central workshop cadre, from 58 to 60 years, as per Public Enterprises Department resolution dated 02.08.2014. As a consequence thereof, OCCL issued implementation order on 19.09.2014 for extension of retirement age of its employees from 58 to 60 years giving effect from that date. The petitioners, who were to retire from service w.e.f. 31.07.2014 and whose services had been extended upto 31.10.2014 and allowed to continue till 11.07.2014, being aggrieved by the decision so taken by the OCCL on 19.09.2014 extending the age of service from 58 to 60 years in respect of similarly situated employees, have approached this Court by filing the present application, and contend that similar benefits should be extended allowing them to continue till attaining the age of 60 years.

4. Mr. A.K. Mohapatra, learned counsel appearing for the petitioners in W.P.(C) No.15328 of 2014 contended that the petitioners, who were working as Manager (F&A) and Dy. Manager (F&A) respectively in the office of OCCL (a State PSU), though issued with notices to superannuate from service on attaining the age of superannuation on 31.07.2014, but subsequently, on the basis of the resolution passed by the Finance Department on 28.06.2014, by which the retirement age of the State Government employees for superannuation was enhanced from 58 to 60 years, by amending Rule-71(a) of the Odisha Service Code, the OCCL, in anticipation

of the government approval to the extension of age of superannuation of its employees from 58 to 60 years, enhanced the date of superannuation of the petitioners, who were to be superannuated from service on attaining the age of 58 years on 31.07.2014, till 31.10.2014 or till receipt of orders of Public Enterprises Department, whichever is earlier. It is contended that on 02.08.2014, the Principal Secretary, Department of Public Enterprises, Government of Odisha issued clarification regarding enhancement of retirement age on superannuation of the employees of State Public Sector undertakings from 58 to 60 years subject to fulfillment of certain conditions and, as such, by that time the petitioners were continuing in service. But all on a sudden, on 11.08.2014, the Managing Director of OCCL revoked the extension order regarding continuance of service of the petitioners upto 31.10.2014, which is non est in the eye of law, in view of the fact that when the Board of Directors of OCCL took decision with regard to enhancement of retirement age of its employees from 58 to 60 years w.e.f. 19.09.2014, the same benefit should have been extended to the petitioners without cancelling the continuance order of the petitioners upto 31.10.2014.

It is also contended that OCCL followed the State Government rules and procedure for its employees by passing various resolutions, therefore applying the said resolution with regard to acceptance of the Odisha Service Code, which is applicable to the employees of OCCL, the benefit of enhancement of retirement age should have been extended to the petitioners in consonance with the Government resolution passed on 28.06.2014. Further, since OCCL had satisfied the subsequent resolution published by the Public Enterprises Department on 02.08.2014, as a consequence of which, the proposal submitted by the Board of Directors of OCCL was duly approved by the Government allowing extension of retirement age of OCCL employees from 58 to 60 years on 19.09.2014, the said benefit should have been extended to the petitioners who were to retire in the interregnum period between 31.07.2014 and 31.08.2014, without making any discrimination thereof. It is further contended that similar question had come up for consideration before this Court in the case of ***Premalata Panda v. State of Orissa***, 2015 (II) OLR 214, and the petitioners herein, having stood in the same footing, should have been extended with the benefits flowing from the said judgment.

5. Mr. S. Senapati, learned counsel appearing for the petitioner in W.P.(C) No.16081 of 2014 adopted the argument advanced by Mr.A.K. Mohapatra, learned counsel appearing for the petitioners in W.P.(C)No.15328

of 2014, and contended that the petitioner, having stood in similar footing with the existing employees of the OCCL, should have been extended the benefit of extension of age of superannuation from 58 to 60 years, by quashing the order dated 11.08.2014. To substantiate his contention, he has relied upon the judgment of this Court in ***Digambar Behera v. State of Orissa***, (2017) 2 ILR CUT 876.

6. Mr. S. Mishra, learned Addl. Government Advocate contended that whether the retirement age of the petitioners will be extended from 58 to 60 years pursuant to resolution passed by the Finance Department on 28.06.2014 and subsequent resolution passed by the Public Enterprises Department on 02.08.2014, the same is within the domain of OCCL, on which the State has no role to play. As a matter of fact, the Government in its resolution dated 28.06.2014 amended Rule-71(a) of Odisha Service Code and enhanced retirement age of its employees from 58 to 60 years. In pursuance thereof, Public Enterprises Department passed resolution on 02.08.2014 for public sector undertakings to satisfy certain requirements so as to give effect the enhancement of age of superannuation of their employees from 58 to 60 years, after getting due approval of the Government. Meaning thereby, unless the public sector undertakings satisfy the conditions stipulated in the resolution dated 02.08.2014, their employees are not entitled to get enhancement of retirement age from 58 to 60 years.

7. Mr. L. Pangari, learned Sr. Counsel appearing along with Mr. S. Nath, learned counsel for opposite party no.3 emphatically submitted that OCCL has not adopted the Orissa Service Code to be implemented in the case of its employees. Therefore, the Government resolution dated 28.06.2014 enhancing retirement age of its employees from 58 to 60 years, by amending Rule-71(a) of the Orissa Service Code, ipso facto cannot and could not be applicable to the employees of OCCL. It is further contended that pursuant to resolution passed by Public Enterprises Department on 02.08.2014 stipulating certain conditions to be satisfied by public sector undertakings, OCCL, being one of the public sector undertakings of Government of Orissa, having satisfied the conditions stipulated in the said resolution, its Board of Directors recommended the matter to the Government for according approval to the enhancement of retirement of age of its employees, which was duly approved and consequentially the same was implemented by issuing letter on 19.09.2014. Therefore, the benefit of extension of retirement age would only be applicable prospectively to those employees who were going to superannuate from service after 19.09.2014. Admittedly, as the petitioners

were to retire on 31.07.2014, the said circular dated 19.09.2014 cannot apply to them. It is further contended that the ratio decided in ***Premalata Panda*** and ***Digamber Behera*** (supra) cannot have any application to the present context, in view of the fact that in those cases the respective PSUs have applied Odisha Service Code for their employees but here OCCL has not done so till date, thereby, those cases are distinguishable.

8. This Court heard Mr. A.K. Mohapatra and Mr. S. Senapati, learned counsel appearing for the petitioners in respective writ petitions; Mr. S. Mishra, learned Addl. Government Advocate; and Mr. L. Pangari, learned Sr. Counsel for opposite party no.3-Corporation; and perused the record. Pleadings having been exchanged, with the consent of learned counsel for the parties, the writ petitions are being disposed of finally at the stage of admission.

9. In the peculiar facts and circumstances of the case, this Court, keeping aside the questions whether the Odisha Service Code is applicable to the employees of OCCL and whether the judgment rendered in ***Premalata Panda*** and ***Digambar Behera*** mentioned (supra) are applicable to the petitioners or not, deemed it proper to consider whether the petitioners have been discriminated by their employer, namely, OCCL in directing them to superannuate from service, pursuant to letter dated 11.08.2014, by cancelling their extension letter dated 31.07.2014 by which they had been allowed to continue till 31.10.2014. If the similar benefit has been extended to the employees of the OCCL by enhancing the age of superannuation from 58 to 60 years, pursuant to letter dated 19.09.2014, had the petitioners continued pursuant to the extension order dated 31.07.2014 till 31.10.2014, they would have enjoyed such benefit of retirement till attaining the age of superannuation, i.e., 60 years. Needless to mention, by the time the petitioners were directed to handover the charge on 11.08.2014, OCCL was aware of the resolution dated 02.08.2014 issued by the Public Enterprises Department. Therefore, without examining such resolution, which they did subsequently on 28.08.2014 and recommended for extension of retirement of age of its employees from 58 to 60 years, the action of OCCL taken on 11.08.2014 cancelling the office order dated 31.07.2014 and directing the petitioners immediately to handover the charge, is absolutely arbitrary, unreasonable and contrary to the provisions of law, meaning thereby the entire action of OCCL is violative of Article 14 of the Constitution of India.

10. In ***M. Nagraj v. Union of India***, (2006) 8 SCC 212, the apex Court held that the constitutional principle of equality is inherent in the rule of law. The rule of law is satisfied when the laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified.

11. In ***Ashutosh Gupta v. State of Rajasthan***, (2002) 4 SCC 34, the apex Court held that the doctrine of equality before law is a necessary corollary to the concept of the rule of law of the Constitution.

12. In ***Gauri Shankar v. Union of India***, (1994) 6 SCC 349, the apex Court held that under our Constitution Article 14 prescribes equality before law. But the fact remains that all persons are not equal by nature, attainment or circumstances and therefore a mechanical equality before law may result in injustice. The principle of equality of law means not that the same law should apply to everyone, but that a law should deal alike with all in one class; that there shall be equality of treatment under equal circumstances. It means that equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated alike. Similar view has also taken in ***State of Karnatak v. B. Suvarva Malini***, (2001) 1 SCC 728.

13. In ***Food Corporation of India v. Bhanu Lodh***, (2005) 3 SCC 618, the apex Court held that the question of discrimination will arise only as between persons who are similarly, if not identically situated.

14. In ***Faridabad CT Scan Centre v. Director, General of Health Services***, (1997) 7 SCC 752, the apex Court held that the importance of Article 14 is that, its benefit accrues to every person in India, whether he is a citizen or not. We are a country governed by Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before Law and equal protection of the Laws.

15. In ***K.R. Laxman v. Karnatak Electricity Board***, (2001) 1 SCC 442, the apex Court held that when a provision is challenged as violative of Article 14, it is necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it and having ascertained the policy and object of the Act, the Court has to apply dual test namely whether the classification is rational and based upon an intelligible differentia which

distinguished persons or things that are grouped together from others and that are left out of the group and whether the basis of differentiation has any rational nexus or relation with its avowed policy and objects.

16. Considering the above law laid down by the apex Court, as discussed above, and applying the same to the present context, since under our Constitution Article 14 prescribes equality before law, law should be deal alike with all in one class; that there shall be equality of treatment under equal circumstances, which means "that equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated as alike". Meaning thereby, the petitioners, being the employees of OCCL, were to retire from service on attaining the age of 58 years, but they were allowed extension till 31.10.2014. Subsequently, it was resolved on 28.08.2014 by OCCL to extend the age of superannuation of its employees from 58 to 60 years and on being moved the Government approved the same on 17.09.2014. Consequentially, OCCL extended the retirement age of its employees from 58 to 60 years, pursuant to letter dated 19.09.2014. Therefore, the petitioners, being similarly situated persons, have been discriminated and are not treated equally, and as such, the principle that equals should not be treated unlike and unlikes should not be treated alike has been breached in the case in hand.

17. The underlying provisions, as mentioned above, have been duly considered and it is found that there was no rational nexus in passing the office order dated 11.08.2014 cancelling the order dated 31.07.2014 extending the date of retirement of the petitioners till 31.10.2014. When the Public Enterprises Department issued resolution dated 02.08.2014 putting certain conditions for PSUs to enhance the retirement age of their employee from 58 to 60 years, and as such, on that basis the Board of Directors of OCCL took decision on 28.08.2014 for extension of retirement age of its employees from 58 to 60 years and recommended to the Government for approval, which was done on 17.09.2014, and thereafter issued circular dated 19.09.2014 extending the age of superannuation of its employees from 58 to 60 years, the benefit should have been extended to the similarly situated employees including the petitioners.

18. Considering the factual and legal aspects, as discussed above, this Court is of the considered view that the order dated 11.08.2014 cancelling extension of retirement age of the petitioners upto 31.10.2014, cannot sustain in the eye of law and the same is hereby quashed. As a consequence thereof,

it is deemed that the petitioners were continuing in service till 31.10.2014 and they were employees of OCCL till then. Since OCCL extended the age of retirement of its employees from 58 to 60 years, pursuant to circular issued on 19.09.2014, consequent upon the resolution passed on 28.08.2014 which was duly approved by the Government on 17.09.2014, the petitioners, having stood in the same footing, are entitled to continue till they attain the age of 60 years and are also entitled to get the consequential benefits as due and admissible. Needless to say that since a few persons have been allowed to superannuate from service in the interregnum period from 31.07.2014 till 19.09.2014, the OCCL and also the State Government shall do well to extend the similar benefit to the petitioners at par with their counterparts, with whom the petitioners are similarly situated, by granting them the benefits allowing to extend the retirement age from 58 to 60 years and consequentially pay the dues as admissible in accordance with law, as expeditiously as possible, preferably within a period of four months from the date of communication of the judgment.

19. Both the writ petitions are thus allowed. However, there shall be no order as to cost.

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2019 (III) ILR-CUT-330

DR. B.R. SARANGI, J.

W.P.(C) NO. 27225 OF 2013

PARTHPRATIMA PANDA ……..Petitioner

-Vs-

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

ORISSA RESERVATION OF VACANCIES (SCHEDULED CASTES AND SCHEDULED TRIBES) ACT, 1975 READ WITH PERSONS WITH DISABILITIES (PHYSICALLY HANDICAPPED) EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) RULES, 1995 – Section 3(d) – Provisions under for reservation – Applicability to the appointments made under contractual basis – Held, Not applicable unless the provision is amended or any policy decision is taken.

Section 3(d) of the ORV Act, 1975 specifically excludes its application to the appointments to be made under contractual basis. This question no more remains res integra in ***Dr. Rupananda Brined*** *(supra) wherein this Court, after analyzing the relevant provisions and taking into consideration the stand taken by the State Government, affirmed the position that the ORV Act, 1975 is not applicable until amendment of Section 3(d) and accordingly directed the State Government to either amend the statute or take a policy decision to adopt provision of the ORV Act, 1975 in respect of contractual appointments. Nothing has been placed before this Court to indicate that the State Government has taken any step for amendment of Section 3 of ORV Act, 1975 nor any policy decision has been taken prior to selection of opposite party no.4 under reserved category. It is further clarified that the provision of the ORV Act, 1975, so far as NRHM programme is concerned, the State Government through the Mission Director has consistently taken the stand that the ORV Act, 1975 is not attracted to the appointment made under contractual basis. But for implementation of the project in the rural and tribal area, some posts are reserved for SC and ST candidates, which have already been specified in the advertisement itself.*

Case Laws Relied on and Referred to :-

1. 2008(II) OLR 357 : Dr. Rupananda Brined v. State of Orissa
2. W.P.(C) No. 24677/2013 (disposed of on 21.03.2014) : Dr. P.K. Gochhayat v. Odisha State Health and Family Welfare Society

For Petitioner : M/s. G.M. Rath, S.K. Patnaik,S.S. Padhy & B. Guin.

For Opp. Parties : M/s. B.P. Tripathy, T. Barik & N. Barik.
Mr. D.K. Pani, Addl. Standing Counsel
M/s. M.K. Mohanty, M.R. Pradhan & T. Pradhan.

JUDGMENT Date of Hearing : 14.08.2019 : Date of Judgment : 20.08.2019

Dr. B.R. SARANGI, J.

The petitioner, by means of this writ application, seeks direction to the opposite parties to give him appointment as AYUSH Doctor (Ayurvedic) under unreserved male category in the district of Bhadrak, as per advertisement no.26/13 in Annexure-1, by quashing the selection of opposite party no.4 as AYUSH Doctor (Ayurvedic) under the said category.

2. The fact of the case, in hand, is that National Rural Health Mission (NRHM) has been in operation since 2005 in the State of Odisha aiming to improve primary health care of the rural people, especially poor, women and children. The programme includes integration of health concern with determinant of health like sanitation and hygiene, nutrition and safe drinking water. To attain the above objective, NRHM introduces various schemes and programmes and implement the same district-wise. Rastriya Bal Surakshya

Karyakram (RBSK) is one of such programmes implemented by NHRM which aims at early detection and complete treatment of physical problem of children between 0-18 age and intends to cover over 1.21 crores of children within its domain. The programme of RBSK runs through NRHM and requires a mobile medical team for effective implementation of the programme. Mobile Medical Teams (MMTs) comprise of AYUSH Doctor (Ayurvedic/ Homoeopathic), Pharmacists and Staff Nurse/ANM.

2.1 In order to implement the programme, opposite party no.2 issued an advertisement inviting applications from eligible candidates for filling up of posts of AYUSH Doctor (Ayurvedic/Homoeopathic), Pharmacists and Staff Nurse/ANM for all the 30 districts on contractual basis for a term of 11 months with specified remuneration indicated against the posts. The petitioner, being a qualified Ayurvedic Doctor and registered practitioner possessing the required qualification and experience, as per the advertisement, applied for the post of AYUSH Doctor (Ayurvedic) for the vacancy against Bhadrak district under unreserved male category. As per advertisement, total 14 nos. of vacancies in AYUSH Doctors were intended to be filled up from the candidates having Bachelor Degree in Ayurvedic Medicine and Surgery (B.A.M.S). The advertisement stipulates that out of total 14 vacancies, 7 posts would be filled up by women candidates and rest by male candidates. From out of 7 male vacancies, 4 were to be filled up by unreserved category. The scheme of selection procedure, as per the advertisement, was based upon career weightage.

2.2. The authority, after receiving applications, on due scrutiny published a short list of eligible candidates for Ayush Doctor (Ayurvedic) on the basis of career weightage. As per the said short list, the petitioner's name figured at Sl. No.8, and among the unreserved male candidates, the petitioner was figured at Sl. No.5 of the merit list prepared on the basis of career weightage. The candidate at Sl. No.1, namely, Akshaya Kumar Khilar with career weightage of 60.671 in unreserved male category did not opt for the post. Hence the petitioner became eligible as the fourth candidate in the merit list. The authority, accordingly, called upon the petitioner and verified all the original documents. Therefore, the petitioner has got every legitimate expectation to be selected to the post of AYUSH Doctor (Ayurvedic) under unreserved male category, but his name did not figure in the final list of candidates selected for the post. Out of four unreserved male candidates, having better weightage and placed above the petitioner in the shortlist, the

names of the three appeared in the final selection list. As Akshaya Kumar Khilar placed at Sl. No.1 did not turn up, the name of the petitioner, which ought to have been reflected at Sl. No.4 of the selected candidates under unreserved male category, had not appeared and instead the name of Debraj Panigrahi, opposite party no.4 had figured in the final selection list though the said opposite party had figured at Sl. No.12 in the shortlisted candidate with career weightage of 49.692.

2.3. The petitioner sought for information under the Right to Information Act, 2005, but the same was not responded. Consequentially, on 25.11.2013, he requested opposite party no.2, by filing representation, for knowing the reason of such exclusion of his name, but no action was taken. Though the petitioner has secured more weightage than opposite party no.4, reason for exclusion has not been indicated. Hence this application.

3. Mr. G.M. Rath, learned counsel for the petitioner contended that as per the merit list drawn by the selection committee though the petitioner stood in 5th position, since the candidate stood in Sl. No.1, namely, Akshya Kumar Khilar did not opt for the post, automatically the petitioner would have been selected against 4th post of male AYUSH Doctor (Ayurvedic) under unreserved category. Instead of placing the petitioner against serial No.4, opposite party no.4 was figured at serial no.4 in the final select list. The selection of opposite party no.4, whose name found place at serial no.12 in the select list, is arbitrary and contrary to the provisions of law. Therefore, he seeks for quashing of the same. To substantiate his contentions, he has relied upon ***Dr. Rupananda Brined v. State of Orissa***, 2008(II) OLR 357 and ***Dr. P.K. Gochhayat v. Odisha State Health and Family Welfare Society*** (W.P.(C) No. 24677 of 2013 disposed of on 21.03.2014).

4. Mr. D.K. Pani, learned Additional Standing Counsel appearing for opposite parties no.1 and 3 supporting the appointment of opposite party no.4 contended that he was selected and appointed as AYUSH Doctor (Ayurvedic) under unreserved category following Orissa Reservation of Vacancies (Scheduled Castes and Scheduled Tribes) Act, 1975 and as per the resolution made by G.A. Department, Government of Odisha.

5. Mr. M.K. Mohanty, learned counsel appearing for opposite party no.4 contended that opposite party no.4, being a physically handicapped candidate with 40% disability, is eligible for the post as per Government of Orissa G.A. Department Resolution dated 20.09.2005 read with Orissa Reservation of

Vacancies (Scheduled Castes and Scheduled Tribes) Act, 1975 (for short "ORV Act, 1975) read with Persons with Disabilities (Physically Handicapped) Equal Opportunities, Protection of Rights and Full Participation) Rules, 1995. It is further contended that opposite party no.4 is a physically handicapped candidate for which, he has been given engagement against the vacancy. Therefore, the authority has not committed any illegality or irregularity in giving such appointment to opposite party no.4.

6. This Court heard Mr. G.M. Rath, learned counsel for the petitioner; Mr. D.K. Pani, learned Additional Standing Counsel appearing for opposite parties no.1 and 3; and Mr. M.K. Mohanty, learned counsel for opposite party no.4. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties the matter is being disposed of finally at the stage of admission.

7. In view of the pleaded facts and the contentions raised by learned counsel for the respective parties, the only question which falls for consideration is whether opposite party no.4 could have been appointed against the 4th post under unreserved male category of physically handicapped having secured less marks.

8. In the advertisement in Annexure-1, it has been specifically mentioned that applications were invited from eligible candidates for filling up of posts of AYUSH Doctors (Ayurvedic/Homeopathic), Pharmacist, Staff Nurse/ANM in the Mobile Medical Teams(MMTs) under Rashtriya Bal Swasthya Karyakram (RBSK), NRHM, Odisha on contractual basis for a term of 11 months with monthly remuneration as noted against each and subject to renewal as per the Society norms basing on the performance and subsistence of the programme. Performance incentives and other benefits are also admissible for all posts as per norms and orders issued thereunder from time to time. The details of vacancy, eligibility, criteria and term of reference can be downloaded from the official website (www.nrhmorissa. gov.in). The above positions are purely temporary and also co-terminus with the scheme. Intending candidates fulfilling the eligibility criteria were to apply online through the aforesaid website. The printed copy of the application generated from the system, along with all supportive certificates, were to be sent to the concerned CDMO-cum-District Mission Directors of the district on or before 10.10.2013 by 5.00 P.M. through Regd. Post/Speed Post/Courier only and the envelope containing the application should be superscribed clearly the name

of the post applied for and one candidate is eligible to apply for one district only. The qualification/experience for recruitment to the post of AYUSH Doctor (Ayurvedic/Homoeopathic) as prescribed in the advertisement states as follows:

Sl. No	Name of the post	Vacancy	Monthly Base Remuneration (in Rs.)	Qualification /Experience
01	AYUSH doctor (Ayurvedic/ Homoeopathic	Details can be verified from the official website (www.nrhmorissa.gov.in)	12,000/-	The candidate must have a Bachelor degree in Ayurvedic Medicine & Surgery (B.A.M.S)/Bachelor in Homoeopathic Medicine and Surgery (B.H.M.S) as the case may be, from a recognized University. S/he must have completed the Internship Training if any. S/he should have passed Odia up to M.E. Standard. Should have registered in the Odisha State Council of Ayurvedic/Homoeopathic Medicine at the time of application. No provisional registration certificate is acceptable. Applicant should be above 21 years and below 37 years age as on 1st October 2013 and the upper age limit as prescribed will be relaxable only for the categories mentioned below. Upto a maximum of 5 years if a candidate belongs to SC/ST or Women or ex-serviceman. To maximum of 10 years in case of Physically challenged candidates. Applicant belonging more than one category shall avail

9. On perusal of the above, it can be seen that the upper age limit has been fixed to 32 years as on 1st October 2013 and will be relaxable only upto a maximum of 5 years if a candidate belongs to SC/ST or Women or ex-serviceman and to maximum of 10 years in case of physically challenged candidates. Therefore, the advertisement clearly indicates that the age relaxation shall be up to 10 years so far as physically challenged candidates are concerned. As such, there is no reservation made for physically challenged candidates. But in the counter affidavit filed by opposite party no.3, it has been specifically mentioned in paragraph-4 that as per advertisement no.26/13 of Mission Director, NRHM, Odisha regarding filling up of posts of Mobile Medical Terms(MMTS) under Rashtriya Bal Swasthya Karyakrama (RBSK), 14 nos. of posts (UR-08, ST-04, SC-02) of AYUSH Ayurvedic Doctors were to be filled up. 16 nos. of applications were received for the post of AYUSH Doctor (Ayurvedic), out of which 02 nos. of applications were rejected on preliminary scrutiny and rest 14 nos. (04-

Female & 10-Male) of candidates from unreserved categories were shortlisted for document verification. No applications were received from SC or ST category candidates. During final selection, the guidelines issued by Mission Director regarding selection procedures for recruitment in MMTs under RBSK, and as per the ORV Act, 1975 and the letter dated 20.11.2012 of Mission Director, NRHM, Odisha were strictly followed. In paragraph-8 of the counter affidavit it has been specifically admitted that as per the final list of candidates shortlisted for document verification uploaded in the website, the petitioner was in 5th position on the basis of career weightage. The candidate at the Sl. No.01 (Akshya Kumar Khilar) did not appear for verification of the documents. Hence, the petitioner became eligible for the 4th position in the list under unreserved (male) category. But, in paragraph-9, it has been stated that opposite party no.4 (Dr. Debaraj Panigrahi) was selected for the post of AYUSH Doctor (Ayurvedic) under unreserved category following ORV Act, 1975 and as per the resolution made by G.A. Department, Govt. of Odisha. Though the petitioner has secured 53.319 and opposite party no.4 secured 49.692 in career weightage, opposite party no.4 was selected for the 4th position of AYUSH Doctor (Ayurvedic) under unreserved (male) category following the principle of ORV Act, 1975 and the petitioner was enlisted in the 1st position of the waiting list.

10. On perusal of Annexure-E/3, the Resolution dated 20.09.2005 passed by Government of Orissa in General Administration Department with regard to reservation of vacancies in favour of physically handicapped persons, sportsmen and ex-servicemen in initial recruitment in State Civil Services and posts, it reveals that the State Government has reserved 3% of the vacancies for physically handicapped persons, 1% for sportsmen, 3% for ex-servicemen in case of initial recruitments in State Civil Services. Now, it is to be examined the applicability of the provisions of ORV Act, 1975 to the present case, since the appointments are contractual in nature for a period of 11 months and are purely temporary and also co-terminus with the scheme as per advertisement issued in Annexure-1. Section 3(d) of the ORV Act, 1975 specifically excludes its application to the appointments to be made under contractual basis. This question no more remains res integra in ***Dr. Rupananda Brined*** (supra) wherein this Court, after analyzing the relevant provisions and taking into consideration the stand taken by the State Government, affirmed the position that the ORV Act, 1975 is not applicable until amendment of Section 3(d) and accordingly directed the State Government to either amend the statute or take a policy decision to adopt

provision of the ORV Act, 1975 in respect of contractual appointments. Nothing has been placed before this Court to indicate that the State Government has taken any step for amendment of Section 3 of ORV Act, 1975 nor any policy decision has been taken prior to selection of opposite party no.4 under reserved category. It is further clarified that the provision of the ORV Act, 1975, so far as NRHM programme is concerned, the State Government through the Mission Director-opposite party no.2 has consistently taken the stand that the ORV Act, 1975 is not attracted to the appointment made under contractual basis. But for implementation of the project in the rural and tribal area, some posts are reserved for SC and ST candidates, which have already been specified in the advertisement itself.

11. Mr. B.P. Tripathy, learned counsel appearing for NRHM produced the communication dated 13.08.2019 before this Court containing instructions issued to him wherein it has been specifically mentioned that the advertisement was made to fill up vacant contractual posts of AYUSH MOs, Pharmacist and Staff Nurse/ANM under RBSK Programme under National Health Mission scheme. The advertisement in Annexure-1 clearly indicates reservation of candidates for SC and ST, and as such, no reservation was there for physically handicapped category. It is also specifically mentioned in the instruction as follows:-

> *"Further, it will be important to mention here that, posts under RBSK are purely schematic, temporary and programmatic with 50% reservation for women candidates as per Government of India mandate having no resemblance to any regular position under Government. This contravenes the maximum ceiling of 33% reservation for women candidates in any recruitment for civil posts under Govt. The posts are therefore, sui-generis having no equivalent parallel under government, for which it was, clearly mentioned in the advertisement itself that, "the posts under RBSK are purely temporary and programmatic, their continuance is dependent on the subsistence of the programme."*

In view of such instruction issued by the Mission Director, NHM, Odisha, it is made clear that there was no reservation for physically handicapped category candidates, as has been claimed by opposite party no.4 in its counter affidavit. Under the NRHM scheme only certain benefits have been granted that for implementation of the projects in the rural and tribal areas some posts are reserved for SC and ST category candidates, which has already been mentioned in the judgment in ***Dr. P.K. Gochhayat*** (supra). Therefore, in the above premises, this Court unhesitatingly holds that the selection of opposite party no.4, basing on the ORV Act, 1975, cannot be tenable in the eye of law.

12. Mr. M.K. Mohanty, learned counsel for opposite party no.4 emphatically submitted that opposite party no.4 has been selected under physically handicapped category i.e. in consonance with the ORV Act, 1975 and provisions of Rule 4(2) of the Persons with Disabilities (Equal Opportunities, Protection of Right and Participation) Rules, 1996 read with Gazette Notification dated 06.08.1986 issued by the Ministry of Welfare, Government of India. On perusal of the advertisement in Annexure-1 to the writ petition, it clearly specifies reservation of posts for SC and ST or Women or Ex-servicemen and no reservation of post has been specified for physically handicapped category candidates. But fact remains, under the said advertisement the age relaxation up to maximum of 10 years in case of physically handicapped category candidates has been provided for. Admittedly, opposite party no.4 has availed such age relaxation of maximum of 10 years, as he was 46 years 9 months by the time of submission of application, as against maximum age fixed as 37 years for other reserved category of candidates. In absence of any reservation of posts for physically handicapped candidates in the advertisement, selection of opposite party no.4 for the post of un-reserved category is not permissible under law. Apart from the same, opposite party no.4 had furnished disability certificate dated 25.08.2009 with the category of disability "Visually" and percentage of disability "40%". In view of Rule 4(2) of the Persons with Disability (Equal Opportunities, Protection of Right and Participation) Rules, 1996 and as per the guidelines issued by the Ministry of Welfare Government of India vide Gazette Notification dated 06.08.1986, the said disability certificate is invalid and not a real one for selection of opposite party no.4 to the present post. The said rules and the guidelines at Clause-6(i) clearly mandate that the certificate is valid for a period of three years. Since in the present case, the impugned advertisement was issued in the year 2013 and opposite party no.4, pursuant to such advertisement, submitted his application with the disability certificate issued on 25.08.2009, by that time it had lost its validity.

13. In course of hearing, Mr. M.K. Mohanty, learned counsel for opposite party no.4 argued with vehemence that as per provisions contained in Persons with Disability (Equal Opportunities, Protection of Right and Participation) Rules, 1996, 3% of the posts is reserved for physically handicapped candidates, therefore, contended that selection of opposite party no.4 under such category cannot be found fault with the authority. A query was made by this Court that if total posts advertised in respect of Bhadrak district were 14 and out of the same if 3% of posts were to be reserved for physically

handicapped category, the same cannot be done because to get one post reserved for physically handicapped candidate, the minimum posts should be 33. In absence of advertisement to that extent, so far as Bhadrak district is concerned, the claim made by opposite party no.4 that one post was reserved for physically handicapped category candidates is absolutely a misconceived approach and thus selection of opposite party no.4 under such category cannot sustain in the eye of law. Furthermore, neither the advertisement nor any other documents indicate that any reservation of posts was made available to the physically handicapped category candidates, save and except the SC and ST or Women or Ex-serviceman. Apart from the same, the selection and engagement was made to a schematic posts on contractual basis for a period of 11 months subject to renewal as per Society norms basing on the performance of the candidates and the reliance placed on the Government of India Resolution is only applicable to the holders of civil posts not to the candidates of schematic appointment/contractual appointment. Thereby, the selection of opposite party no.4 against un-reserved vacancy of 4th post of AYUSH Doctor (Ayurvedic), pursuant to advertisement in Annexure-1, cannot sustain in the eye of law.

14. In view of the facts and circumstances and settled position of law, as discussed above, this Court is of the considered view that the selection of opposite party no.4 under physically handicapped category by applying the provisions of ORV Act, 1975 cannot sustain in the eye of law and the same is hereby quashed. Admittedly, the petitioner is at serial no.5 in the select list. Since the first person, namely, Akshaya Kumar Khilar did not opt for job, the vacancy made available was to be filled up by the petitioner. In that view of the matter, this Court directs the opposite parties to issue necessary engagement order in favour of the petitioner disengaging opposite party no.4 as expeditiously as possible, preferably within a period of four months from the date of production/communication of this judgment.

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

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2019 (III) ILR-CUT-340

D. DASH, J.

CRLREV NO. 250 OF 2013

PRATAP CHANDRA MOHANTY .....Petitioner.

-Vs-

BATA KRISHNA SAHOO & ANR. .....Opp. Parties

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 – Offence under – Conviction – Contention first time raised in the revision that the Company being not impleaded as the accused, the complaint is not maintainable in view of section-141 of the N.I. Act – Held, misconceived as the accused was in business and there is no document to support that the cheque had been issued only as security for the amount paid by the complainant for its smooth recovery – Presumption under section 139 of the N.I. Act has not been rebutted – Accused in his statement recorded under section 313 Cr.P.C. has not whispered a word and not explained as to for what reason he had issued the cheque of such high value in favour of the complainant – Conviction upheld – Sentence modified.

Case Law Relied on and Referred to :-

1. (2012) 5 SCC 661 : Anil Hada -Vs.- Godfather Travels & Towers (P) Ltd.

For Petitioner : M/s. P.K. Das,
M/s. G.Ch. Rout and D.K. Das.

For Opp.Parties : Addl. Standing Counsel
Mr. B.B. Kar,
M/s. C.Kasturi, K.K. Jena, & A.K. Khan,
M/s. L. Mishra, B.K. Pani

JUDGMENT Date of Hearing & Judgment : 23.07.2019

D. DASH, J.

The petitioner by filing this revision has called in question, the judgment dated 21.03.2013 passed by learned Addl. Sessions Judge, Rourkela in Criminal Appeal No. 52 of 2012.

The petitioner (accused) having been convicted by the learned Civil Judge (Jr.Divn.)-cum-J.M.F.C., Rourkela for commission of offence under section 138 of the N.I. Act and sentenced to undergo simple imprisonment for a period of two years with the direction to pay compensation of Rs.23,00,000/- in default to undergo simple imprisonment for five months; on

appeal said judgment of conviction and order of sentence dated 20.11.2012 in 1.C.C. No. 360 of 2010 filed by the original opposite party no. 1 as complainant have been confirmed.

It may be stated here that the opposite party no.1, the complainant having died during pendency of this revision; his legal heirs have been brought on record who are now contesting this revision.

2. The case of the complainant is that the accused was known to him and they were having friendly relationship. In view of that the complainant as per the request of the accused had made investment in the chemical business of the accused with an assurance that towards that investment, he would be paid with some more amount from out of the profit. So on 3.12.2009, the accused issued a cheque bearing no. 162142 for a sum of Rs.11,50,000/- drawn on his account with Industrial Bank Ltd., Cuttack in favour of the complainant. The cheque having been placed for collection on 1.6.2010 through Sundargarh District Central Bank Ltd., Rourkela bounced back being dishonoured as the account on which it had been drawn stood closed by then.

The accused was then issued with the notice in terms of clause (b) of the proviso to section 138 of the N.I. Act with the demand of payment of money covered under the cheque. As no response came, the complaint was lodged.

The case of defence is that of denial and false implication.

3. The trial court upon scrutiny of the evidence of the complainant examined as C.W.1 and examining the documents admitted on his behalf vide Ext. 1 to 5 as also the evidence of the witness (D.W.1) examined in defence, has come to a conclusion that the accused had issued the cheque in favour of the complainant to discharge his debt and liability. So the complainant's case having been held to have been proved, the accused has been convicted for offence under section 138 of the N.I. Act and accordingly, he has been sentenced and directed to pay the compensation with the default stipulation as aforesaid.

The accused having carried the appeal in challenging the judgment of conviction and order of sentence as well as the direction to pay compensation, has failed in that move. Hence the revision.

4. Learned counsel for the petitioner (accused) submits that when as per the case of the complainant, he had paid the amount for investment in the chemical business running in the name of M/s. Ashok Scientific Laboratory,

and the cheque had been issued for return of the investment that company having not been arraigned as an accused, the complaint has to fail being not maintainable in the eye of law. In support of the said submissions, he has placed reliance upon the decision in case of Anil Hada-vs.-Godfather Travels & Towers (P) Ltd; (2012) 5 SCC 661.

He further submitted that the evidence on record being there that the cheque (Ex-1) had been issued by the accused as collateral security, the Courts below ought not to have held the accused guilty of commission of offence under section-138 of the N.I. Act. According to him, the statutory presumption under Section-139 of the N.I. Act has been well rebutted through the evidence of D.W.1 and the findings of the courts below to the contrary are the outcome of perverse appreciation of evidence as that aspect has to be judged by preponderance of probability which facet has been completely lost sight of by the courts below.

Learned Counsel for the opposite parties (legal heirs of original opposite party no.1, the complainant) submits all in favour of the findings returned by the courts below. According to him, both the courts below having concurrently found upon analysis of evidence that the cheque, Ext-1 had been issued by the accused for discharge of debt and liability and as there appears no perversity in the said findings, interference with the same in exercise of revisional jurisdiction is not warranted.

5. The issuance of cheque (Ext-1) by the accused in favour of the complaint is not in dispute. It is the case of defence through evidence of D.W.1 that the accused has asked him to arrange money for investment in his business and for the purpose of security, the accused had issued the cheque for the said sum through him as he had arranged that amount for the accused from the complainant to meet the needs of the accused to tide over the difficulty in running his business.

Although, it is stated by the complainant that the accused was carrying on business in the name of M/S. Ashok Scientific Laboratory, it is nowhere stated that it was a company incorporated under Indian Companies Act. Even D.W.1 has not stated so. What he has deposed is that as per the request of the accused to arrange money for running his business, he had so contacted the complainant who in turn imposed the condition for which the cheque (Ext.1) had been given to him and it has been issued by the authorised signatory of the accused.

In view of the evidence as above, the contention of learned counsel for the accused, first time raised in this revision that the company being not impleaded as the accused, in view of section-141 of the N.I. Act the complaint is not maintainable, is found to be misconceived.

6. Let us now come to the next contention that the findings that the cheque Ext. 1 had been issued by the accused for discharge of his debt and liability towards the complainant is unsustainable. The courts below upon analysis of evidence let in by prosecution and on the face of the evidence tendered by the accused that he had issued the cheque appear to have rightly drawn the statutory presumption as available under section 139 of the N.I. Act. It is next to be seen that how far it has been rebutted by the accused.

The accused was in business and there is no document to support that the cheque had been issued only as security for the amount paid by the complainant for its smooth recovery. The appellate court even accepting the evidence of D.W. 1 has said that the presumption under section 139 of the N.I. Act has not been rebutted. Moreover, the accused in his statement recorded under section 313 Cr.P.C. has not whispered a word and not explained as to for what reason he had issued the cheque of such high value in favour of the complainant.

When it is there in evidence that for repayment of the amount paid by the complainant to the accused through this D.W. 1 who had then acted as the facilitator, the cheque had been issued, the findings of the courts below that the statutory presumption drawn upon acceptance of evidence of P.W.1 and the documents has not been rebutted, in my considered view do not suffer from the vice of perversity warranting interference in this revision.

Therefore, the courts below have rightly found the accused guilty for commission of offence under section 138 of the N.I. Act.

7. Keeping in view, the facts and circumstances as obtained in evidence, the order of sentence of simple imprisonment for two years and direction to pay compensation of Rs.23,00,000/- which is double the amount covered under the cheque, in my considered opinion, appears to be on a higher side.

In that view of the matter it is ordered that for the conviction as above, the accused shall undergo sentence of simple imprisonment for a period of eight months and pay compensation of Rs.17,00,000/- to the complainant's legal heirs who are opposite parties nos.1(a) to 1(e) in this

revision and in default of payment of the same, he would undergo simple imprisonment for six months.

With the modification of order of sentence and direction for payment of compensation to the extent as aforesaid, this revision stands disposed of.

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2019 (III) ILR-CUT-344

D. DASH, J.

CRA NO.158 OF 1993

BANA BIHARI PATRA ……..Appellant

-Vs-

STATE OF ORISSA & ORS. ……..Respondents

ESSENTIAL COMMODITIES ACT, 1955 read with Clause-3 of the Orissa Rice and Paddy Control Order, 1965 – Offence under – Conviction – The case of defence is that the owner of the paddy bags had sent his care taker to Rice Mill for milling – Truck with the paddy was seized enroute – The question arose as to whether the seizure of the paddy weighing 113 quintals and 69 kgs. kept in 157 bags from the truck after its detention enroute can be the basis for a finding of contravention of Clause (3) of the Control Order – Held, No.

"In order to answer the above, it is profitable to take note of the decision of the Apex Court in case of B.K. Agarwalla v. State; 1996(2) OCR (SC) 573.

The aforesaid case had arisen from the decision of this Court reported in 1989(I) OCR 66. The question that came up for consideration is whether paddy loaded in truck in excess of the permissible limit while on transit can be deemed to have been 'stored' within the meaning of the word 'storage' in the said Control Order. Referring to the meaning of the word 'store' in "Black's Law Dictionary and Webster's Comprehensive Dictionary, (International Edition) as well as Concise Oxford Dictionary, it has been held that 'storing' has an element of continuity as the purpose is to keep the commodity in store and retrieve it at some future date, even within a few days. If goods are kept or stocked in a warehouse, it can be immediately described as an act of 'storage'. A vehicle can also be used as a storehouse. But, whether in a particular case, a vehicle was used as a 'store' or whether a person had stored his merchandise in a vehicle would be a matter of fact in each case. Carrying goods in a vehicle cannot per se amount to 'storing' although it may be quite possible that a vehicle is used as a store. Transporting is not storing."

Adverting to the fact of the case as projected by the prosecution, the seizure of paddy bags took place when those were being carried in the truck i.e. during transit and while under transportation, that too on the way being detained. The prosecution case is not that the truck being loaded with the paddy bags, those bags were stored as such for being delivered /unloaded at different points. It is not said that the accused after having loaded the paddy bags in the truck was carrying those to different places for selling so as to infer that the truck was thus being used as "store house". Applying the ratio of the decision in case of B.K. Agarwalla (supra); mere transportation as shown in this case does not amount to contravention of Clause-3 of the Control Order so as to hold that there has been commission of offence punishable under section 7(1)(a)(ii) of the Act. In that view of the matter, the judgment of conviction and order of sentence are liable to be set aside."

Case Law Relied on and Referred to :-

1. 1996(2) OCR (SC) 573 : B.K. Agarwalla v. State

For Appellants : Mr. D. Mohanty.
For Respondent : Mr. Purna Ch. Das, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 13.08.2019

D. DASH, J.

The appellant by filing this appeal has questioned the judgement of conviction and order of sentence dated 30.04.1993 passed by the learned Special Judge, Balasore in Special Case No. 20 of 1991.

By the impugned judgment and order, the petitioner has been convicted for committing offence under section 7(1)(a)(ii) of the Essential Commodities Act (for short, 'the Act') and sentenced to undergo rigorous imprisonment for a period of three months.

2. Prosecution case in short is that on 07.02.1991 around 8.15 AM morning, when the Marketing Inspector (P.W.5) was on patrol duty along with his staff, a truck bearing registration No. ORB-5415 near Haladipada was found to proceeding ahead. As the truck was loaded with paddy bags, they stopped it and asked the accused who was in the truck about the authority behind such carriage of said 157 paddy bags. As the accused could not produce any license/ permit in that connection, the paddy bags were seized and on weighment, the bags were found to contain 113 quintals and 69 kgs of paddy. The statement of the accused was recorded by P.W.5, the Marketing Inspector. In view of above, prosecution was launched against the accused for commission of offence under Section 7(1)(a)(ii) of the Act for violation of Clause-3 of the Orissa Rice and Paddy Control Order 1965 (for short, 'the Control Order').

The case of defence is that one Amulya Kumar Mohapatra, examined as D.W.1 was the owner of the paddy bags and accused was his care taker. The accused has carrying paddy to Haladipada Rice Mill for milling under the direction of Shri Amulya Kumar Mohapatra (D.W.1).

3. The prosecution in total examined five witnesses, when the defence has examined one i.e. Amulya Kumar Mohapatra as D.W.1. Besides the oral evidence, the prosecution has proved the seizure list and statement of the accused marked as Exts.1 & 2 respectively. From the side of the defence, the partition deed along with the rent receipts have been proved as Ext.A & Ext.B series.

Upon examination of the evidence on record, the trial court has found the accused to be in possession of 113 quintals and 69 kgs. of paddy kept in 157 bags without authority in violation of Clause-3 of the Control Order. The trial court has held the case of defence that the paddy belongs to D.W.1 to be an afterthought. Thus, finding the accused to be in possession of such quantity of paddy coming within the purview of the definition the 'dealer' without the license as required under the Control Order; he has been held guilty for commission of offence under section 7(1)(a)(ii) of the Act in violation of Clause-3 of the Control Order. Accordingly, he has been sentenced.

4. Learned counsel for the appellant (accused) submits that accepting the factum of seizure of 113 quintals and 69 kgs. of paddy kept in 157 bags from the truck on being detained en-route as to have been established, the finding that the accused has committed the offence under the Act for violation of Clause-3 of the Control Order is unsustainable. According to him, the paddy bags being under transportation based on the evidence on record, no offence can be said to have been committed by the accused. It is his submission that as provided in the Control Order, a 'dealer' can be said to a person engaged in business of purchase or sale of rice or paddy or rice and paddy taken together in quantity exceeding 5 quintals or of storage for sale of rice or paddy or rice and paddy taken together in quantities exceeding 10 quintals at any time and excluding a cultivator or landlord in respect of rice or paddy being the produce of land cultivated or owned by him. In the present case, according to him, the prosecution case being that paddy having been seized while on transit in the truck, the same cannot amount to storage and this petitioner cannot be attributed with the possession of the same and therefore the prosecution is to be held to be misconceived. So, he contends that the

accused cannot be held guilty of contravention of the provision of Clause- 3 of the Control Order, when it is not the case of prosecution nor any such evidence is there on record to show that the accused was doing business of purchase or sale of paddy which also cannot be presumed from one instance in the absence of proof of regularity in that regard.

5. Learned counsel for the State supports the finding rendered by this learned Special Judge. It is his submission that in this case, the prosecution having established by leading clear, cogent and acceptable evidence through P.W.1 to 5 that the paddy bags were in possession of the accused, even if those were on transit, the same can be said to have been stored by the accused. Therefore, he contends that the judgment of conviction and order of sentence are not liable to be interfered with.

6. On such rival submission, first of all it requires consideration that accepting for a moment that there was seizure of the paddy weighing 113 quintals and 69 kgs. kept in 157 bags from the truck after its detention enroute whether there can be a finding of contravention of Clause (3) of the Control Order.

In order to answer the above, it is profitable to take note of the decision of the Apex Court in case of *B.K. Agarwalla v. State*; 1996(2) OCR (SC) 573.

The aforesaid case had arisen from the decision of this Court reported in 1989(I) OCR 66. The question that came up for consideration is whether paddy loaded in truck in excess of the permissible limit while on transit can be deemed to have been 'stored' within the meaning of the word 'storage' in the said Control Order. Referring to the meaning of the word 'store' in "Black's Law Dictionary and Webster's Comprehensive Dictionary, (International Edition) as well as Concise Oxford Dictionary, it has been held that 'storing' has an element of continuity as the purpose is to keep the commodity in store and retrieve it at some future date, even within a few days. If goods are kept or stocked in a warehouse, it can be immediately described as an act of 'storage'. A vehicle can also be used as a storehouse. But, whether in a particular case, a vehicle was used as a 'store' or whether a person had stored his merchandise in a vehicle would be a matter of fact in each case. Carrying goods in a vehicle cannot per se amount to 'storing' although it may be quite possible that a vehicle is used as a store. Transporting is not storing."

7. Adverting to the fact of the case as projected by the prosecution, the seizure of paddy bags took place when those were being carried in the truck i.e. during transit and while under transportation, that too on the way being detained. The prosecution case is not that the truck being loaded with the paddy bags, those bags were stored as such for being delivered /unloaded at different points. It is not said that the accused after having loaded the paddy bags in the truck was carrying those to different places for selling so as to infer that the truck was thus being used as "store house". Applying the ratio of the decision in case of B.K. Agarwalla (supra); mere transportation as shown in this case does not amount to contravention of Clause-3 of the Control Order so as to hold that there has been commission of offence punishable under section 7(1)(a)(ii) of the Act. In that view of the matter, the judgment of conviction and order of sentence are liable to be set aside.

8. In the wake of aforesaid the judgment of conviction and order of sentence impugned in this appeal are set aside. Accordingly, the appeal stands allowed. The bail bonds furnished by the appellant (accused) shall stand discharged.

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2019 (III) ILR-CUT-348

BISWANATH RATH, J.

W.P.(C) NO. 19912 OF 2018

BAPUJI SAHOO ……..Petitioner

-Vs-

SMT. SUNANDA SAHOO & ORS. ……..Opp. Parties

THE ORISSA PANCHAYAT SAMITI ACT, 1959 – Section 44(B) – Presentation of election petition – Petition dismissed on the ground of delay – Delay of five months in presenting/filing the petition – "Sufficient cause" to condone the delay – Petitioner pleaded that, due to wrong advice of his lawyer he filed the writ petition instead of presenting the election petition – Explanation considered – Held, five months delay in filing the election petition is inordinate delay & there being no reasonable explanation, this court confirms the view of the election tribunal rejecting the limitation petition.

Case Laws Relied on and Referred to :-

1. AIR 1972 ORISSA 76 : State of Orissa & Anr. Vrs. Govind Chaudhury
2. (2014) SCC 163 : Manoharan Vrs. Sivarajan & Ors.
3. AIR 1987 SC 1353 : Collector, Land Acquisition,Anantnag &Anr. Vrs.Mst.Katiji & Ors.
4. 2018(5) SCC 698 : Mohinder Singh (dead) throu' L.Rs. Vrs. Paramjit Singh & Ors.
5. 2019(I) OLR-476 : Smt. Aditi Das Vrs. Sri Seshadev Das
6. 2006(Supp.-I) OLR 908 : Maharagu Naik Vrs. Civil Judge (Sr.Divn.) -cum- Election Commissioner, Boudh & Ors.

For Petitioner : Sri K.K.Jena
For Opp. Parties : --

ORDER Date of Order : 14.10.2019

BISWANATH RATH, J.

Heard Sri K.K.Jena, learned counsel for the petitioner.

2. This writ petition involves a challenge to the order dated 10.10.2018 at Annexure-8 passed by the Senior Civil Judge, Nayagarh in Election Petition No.7 of 2017 thereby rejecting the application for condonation of delay accompanied the Election Petition.

3. Short background involving the case is that the petitioner is the elected Panchayat Samiti Member from Tendabadi Grama Panchayat. O.P.1 is the elected Panchayat Samiti Member from Similisahi Grama Panchayat under Daspalla Panchayat Samiti. After election of the Membership is over, Notification was issued for direct election for the post of Chairman of the Panchayat Samiti, Daspalla to be held on 11.3.2017. The petitioner as well as O.P.1 both filed their respective nominations being the candidates for the post of Chairman, Daspalla Panchayat Samiti. Election was held on 11.3.2017. Counting being conducted, O.P.1 was declared elected on 11.3.2017 itself. On 20.3.2017 a petition was filed by the petitioner praying therein for re-counting of ballot papers before the Chief Election Commissioner, Odisha. The Chief Election Commissioner forwarded the said application to the Collector, Nayagarh to enquire into the matter and take needful action. The Collector similarly forwarded the matter to the D.P.O., Nayagarh for taking necessary action. No action being taken by the Collector as well as the D.P.O., Nayagarh for about four months, the petitioner approached this Court in W.P.(C) No.14299 of 2017 following an advice of Sri Birendra Nath Nayak, Advocate. Considering that the result involving election was declared long since and the dispute could not be resolved through writ petition, this writ petition was disposed of on 24.7.2017 thereby observing that the

petitioner had the only scope to remedy out his dispute through an election dispute. As a consequence and depending upon the observation of this Court, the petitioner claimed to raise an election dispute under Section 44(B) of the Orissa Panchayat Samiti Act, 1959 bearing Election Petition No.7 of 2017 in the Court of Senior Civil Judge, Nayagarh, ten days after receipt of copy of the order involving W.P.(C) No.14299 of 2017. For delay in filing the election dispute attributed on account of the petitioner's wrongly proceeding in a writ petition, the petitioner also filed an application for condonation of delay, which application was heard after appearance of the opposite parties and entering into hearing by final order and entering into the evidence by order dated 10.10.2018, the Civil Judge (Sr.Divn.), Nayagarh rejected the delay condonation application thereby also rejected Election Petition No.7 of 2017 resulting the present writ petition.

4. Sri K.K.Jena, learned counsel for the petitioner taking this Court to the sequences involved including the petitioner's complaining in the matter of re-counting to the Chief Election Commissioner referring the matter to the Collector for taking appropriate decision and the Collector again referring the matter to the D.P.O., Nayagarh for taking appropriate action at his end and subsequently for the inaction of the Chief Election Commissioner, the Collector and the D.P.O., Nayagarh, the petitioner on wrong advice of Sri Birendra Nath Nayak, Advocate moving a writ petition to this Court and the date of disposal of the writ petition being 24.7.2017, contended that Election Petition No.7 of 2017 having been filed on 19.8.2017, the delay, if any, filing the election dispute was not only for the wrong advice of the Advocate but occasion for filing election dispute arose only after the observation of this Court in disposal of W.P.(C) No.14299 of 2017. Sri Jena further taking this Court to the evidence of the Advocate and the evidence of the petitioner involving the limitation petition contended that the allegation of the petitioner that the delay in filing the election dispute reasoned for the wrong advice of the Advocate has not only been substantiated by his own evidence but also being substantiated for the evidence of the Advocate itself. Sri Jena, learned counsel for the petitioner further taking this Court to the decisions in ***State of Orissa & another vrs. Govind Chaudhury*** : AIR 1972 ORISSA 76, ***Manoharan vrs. Sivarajan & others*** : (2014) SCC 163, ***Collector, Land Acquisition, Anantnag & another vrs. Mst. Katiji & others*** : AIR 1987 SC 1353, ***Mohinder Singh (dead) through legal representatives vrs. Paramjit Singh & others*** : 2018(5) SCC 698 & ***Smt. Aditi Das vrs. Sri Seshadev Das*** : 2019(I) OLR-476 contended that for the law of the land supporting the case

of the petitioner with sufficient evidence, there appears, there is wrong consideration of the application for condonation of delay by the court requiring interference by this Court in the same.

5. Involvement of an election dispute at hand, the reason of delay appearing from the application, advanced with argument and for the rejection of the limitation petition by the Election Tribunal, this Court taking up the hearing on the question of admission finds, when the case involves an election dispute under the provision of the Orissa Panchayat Samiti Act, 1959, the provision at Section 44-B reads as follows :-

> "44-B. Presentation of petitions -(1) The petition shall be presented on one or more of the grounds specified in Section 44-L before the [Civil Judge (Senior Division)] having jurisdiction over the place at which the office of the Samiti is situated] together with a deposit of [two hundred rupees] as security for costs within fifteen days after the day on which the result of the election was announced.
>
> Provided that if the office of the [Civil Judge (Senior Division)] is closed on the last day of the period of limitation as aforesaid the petition may be presented on the next day on which such office is open;
>
> Provided further that if the petitioner satisfies the [Civil Judge (Senior Division)] that sufficient cause existed for the failure to present the petition within the period aforesaid the [Civil Judge (Senior Division)] may in his discretion condone such failure :
>
> Provided also that in cases where the result of the election was announced prior to the 26th day of January 1961, the aforesaid period of limitation shall be computed from the said date."

The provision reflected herein above makes it clear that the election petition under the Orissa Panchayat Samiti Act, 1959 is required to be filed within fifteen days, after the date of which the result of election was announced but however with a rider permitting the election petition to be filed even after fifteen days but however with sufficient cause for failure to present such petition within the aforesaid period. Therefore, there is no doubt that the application for condonation can be entertained but however a party is required to satisfy that there exists sufficient cause. This Court again makes it clear that though the provision provides a discretion with the Election Tribunal to condone the delay but however such discretion has to be exercised subject to the election petitioner satisfying that there existed sufficient cause. Admittedly, the result of the election involved herein was declared on 11.3.2017 and the election dispute was filed on 19.8.2017. Therefore, there appears, there is almost more than five months delay in filing the election case.

6. This Court now requires to find as to whether there was sufficient reason to file the election dispute with five months delay ? and whether the decisions cited by the petitioner has any application to the case at hand resultantly requiring a decision on the impugned order ?

Coming to record the factual aspect involving the case involved the election was declared on 11.3.2017 and on the advice of Sri Birendra Nath Nayak, Advocate, on 20.3.2017 the grievance petition was filed before the Chief Election Commission requesting therein for re-counting, which petition was forwarded to the Collector of the District on 21.3.2017. On the very same day, the Collector forwarded the petition to the D.P.O., Nayagarh. The party after waiting for almost four months approached this Court in W.P.(C) No.14299 of 2017 seeking direction to the competent authority to dispose of the grievance petition of the petitioner. This writ petition was dismissed with observation that for the election involving grievance petition and the result of the election having been declared, the petitioner had only option to raise election dispute. It is trite to indicate here that this Court in disposal of W.P.(C) No.14299 of 2017 passed the following :-

> "Heard learned counsel for the parties.
>
> Since the petitioner has a statutory remedy of Election Dispute, this writ petition cannot be entertained at this stage.
>
> Accordingly, this writ petition stands dismissed."

From the above order of this Court, it is found that the writ petition was not entertained for the petitioner having a remedy of election dispute. Reading the direction coupled with the prayer involving the writ petition, this Court again observes, the prayer in the writ petition was for a direction to the competent authority for a decision on the grievance petition at his instance. But however, there is direction permitting to file the election dispute on condonation of delay, if any.

7. Now at this stage, taking into consideration the plea of the petitioner involving the delay in filing of the election dispute on 19.11.2017, this Court finds, the petitioner's sole plea is that he was moving under different forums under wrong advice of the Advocate. The petitioner also deposed on the same premises claiming as foundation to condone the delay. The Advocate named herein above also appeared in the matter and deposed, in paragraphs-2 to 5 as follows :-

> "2. That, I had advised to Sr Bapuji Sahoo, Son of Late Haribandhu Sahoo of Village: Sakni, P.O,-Poibadi, P.S.-Daspalla, Dist: Nayagarh regarding the matter of Election of Chairman, Daspala Panchayat Samiti.
>
> 3. That, it is understood from the briefing that the facts of this matter involves wrongful consideration of invalid votes to valid votes and declaring a tie by the Election Officer for which he has not been elected as Chairman.
>
> 4. That, in the above context I had advised him to submit an application stating the above grievance to the Chief Election Officer, Bhubaneswar requesting to direct the Election Officer to recount the votes and declare him as the elected Chairman, if no action will be taken by the authorities.
>
> 5. That, he should file writ petition before the honourable High Court praying for a direction to the authorities to dispose the matter within a stipulated time, accordingly I had drafted the application to submit the Chief Election Commissioner, Bhubaneswar and the Collector, District Magistrate, Nayagarh, i.e., on 20.03.2017."

From the above, it surfaces that the Advocate involved had advised the petitioner to lodge a grievance petition and also to file a writ petition seeking direction to dispose of the grievance petition within stipulated time. The evidence of the Advocate does not disclose any admission by him for giving wrong advice or no advice for filing of election dispute. Therefore, the allegation of the petitioner that he was wrongly advised by the Advocate, which delayed in filing the election dispute, could not be corroborated. Further looking to the legal provision involving filing of the election dispute under Section 44(B) of the Orissa Panchayat Samiti Act to avoid delay in undertaking the election dispute exercise the Legislature consciously prescribed fifteen days time for filing the election dispute, however with a rider to condone the delay in filing the election dispute beyond fifteen days does not mean that an election dispute can be filed beyond unreasonable delay. This being an election dispute and for there being no reasonable explanation, as explained herein above, and further as discussed by the trial court, this Court being satisfied that there being no reasonable explanation in filing the election dispute with such delay confirms the view of the Election tribunal in rejecting the limitation petition.

8. The petitioner submitted a grievance petition. The grievance petition was kept pending before some authority resultantly the petitioner moved this Court in filing a writ petition. This Court dismissing the writ petition, as not maintainable, for the petitioner having scope of an election dispute, remedy does not permit the petitioner to file election dispute thereafter. Election dispute filed thereafter, however, subject to law of limitation and merit. For

the statutory restriction, this Court finds, there is no reasonable explanation involving delay in filing the election dispute requiring the election dispute not entertainable.

9. All the decisions referred to herein above were placed during hearing of the matter by the learned counsel for the petitioner and from the facts involving all the decisions referred to above, it appears, none of the decisions involves election dispute where the mandate of law is that there cannot be casual approach in the matter of condonation of delay involving the election dispute, as there should not be any attempt to interfere in the election dispute. This Court finds, in the meantime, more than two years and seven months have already passed after the election is over.

10. This Court here takes note of the decision of this Court in ***Maharagu Naik vrs. Civil Judge (Sr.Divn.)-cum-Election Commissioner, Boudh & others*** : 2006(Supp.-I) OLR 908 where this Court has observed that gravity of the allegation on merit of the case is not relevant to constitute sufficient cause to condone delay. The delay can only be condoned subject to reasonable explanation of delay. Further law is well settled holding there cannot be casual approach to election disputes.

So far as the election dispute is concerned, five months delay in filing the election to the opinion of this Court is involving inordinate delay, further in the meantime also more than two years of the term meant for the post already lapsed. Condonation of delay after half of the period involved will be amounting to no sanctity involving Section 44(B) of the Orissa Panchayat Samiti Act, 1959 and further affecting a settled situation for over two years and again involving an election dispute.

11. In the circumstance, this Court while finding no infirmity in the impugned order dismisses the writ petition for having no substance.

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2019 (III) ILR-CUT-355

BISWANATH RATH, J.

W.P.(C) NO.12408 OF 2019

LOKANATH PATTANAIK ……. Petitioner

-Vs-

SANJAY KU. RATSINGH & ANR. ……. Opp. Parties

THE ORISSA GRAMA PANCHAYATS ACT, 1964 – Sections 25, 40, 41 – Dispute with regard to election of "Sarapanch" – Election petition filed against the returned candidate on the ground of disqualification U/s.25(l) & on the ground of corrupt practice – Trial Court/Election Tribunal framed the issues – Issue of disqualification proved but corrupt practice could not be proved against the returned candidate – The Election Tribunal merely on the basis of disqualification U/s. 25(l) declared the candidature of returned candidate as invalid and further declared that the election petitioner as "Sarapanch" for securing the next highest votes – Order of the Tribunal confirmed by the Appellate Tribunal – Election petitioner neither raised any question with regard to finding of Tribunal on the issue of corrupt practice nor filed any cross appeal/objection in the Appellate Tribunal – Writ Petition – Petitioner/returned candidate pleaded that, the declaration of Opp.Party (election petitioner) as "Sarapanch" cannot be made unless the corrupt practice is proved against him as mandated in section 40 of the Act rather the order of fresh election would have been passed – Provision U/s. 40 of the Act interpreted – Held, reading the provision of section 40 of the Act, this court finds, to declare a candidate other than the returned candidate as elected, one has to satisfy either of the provisions at clause (a) or (b) involving section 40 of the Act – In the present case, question taken into consideration by both the Tribunal is confined only to the alleged disqualification attached to the returned candidate and there was absolutely no involvement of allegation enumerated in section 40 and 41 of the Act and the case at hand is a case attracting the disqualification provided U/s. 25 of the Act – As the allegation of corrupt practice could not be established and the election petitioner preferred to abandon the said issue as required in section 40 of the Act, the Tribunal's orders failed to appreciate the legal aspect of the matter and thus liable to be set aside. (Para-9)

Case Laws Relied on and Referred to :-

1. AIR 2002 SC 2345 : Prakash Kandre & Ors. Vs. Vijaya Kumar Khandre & Ors.
2. 108(2009) CLT 785 : Smt. Puspalata Parida Vs. The Block Development Officer-cum-Election Officer Sadar Block

3. 1998(II) OLR 690 : Pravakar Pradhan Vs. Bhaktabandhu Sahoo & Ors.
4. 2010 (II) OLR 137 : Bidyutlata Nayak Vs. Smt. Sucheta Samanta
5. AIR 2002 SC 2345 : Prakash Kandre & Ors. Vs. Vijaya Kumar Khandre & Ors.
6. 1998(II) OLR 690 : Pravakar Pradhan Vs. Bhaktabandhu Sahoo & Ors.

For Petitioner : M/s. A.P. Bose, M. Dash, S.S. Pattanaik
For Opp. Parties : M/s. B.P. Das, S.N. Das, S. Samal, A. Mahanta
Additional Standing Counsel

JUDGMENT Date of Hearing : 19.09.2019 : Date of Judgment : 14.10.2019

BISWANATH RATH, J.

This Writ Petition involves a challenge to the order dated 22nd June of 2019 passed by the 1st A.D.J., Khurda in the Election Appeal No.2 of 2019 in confirmation of the order dated 28.2.2019 passed by the Civil Judge (Jr. Divn.), Khurda in the Election Misc. Case No.5 of 2017.

2. Short background involving the case at hand is that the opposite party as the election petitioner filed Election Case under the provisions of Orissa Grama Panchayat Act, 1964 hereinafter in short be called as "The Act, 1964" assailing the election of the present petitioner on the basis of the allegation made in paragraph no.4 involving election of a candidate disqualified U/s.25 of the Act, 1964 and in paragraph no.5 indicating that the result of the return candidate is an outcome of improper admission of votes in his favour as well as improper rejection of the votes casted in favour of the election petitioner, further also adopting corrupt practice by the return candidate. The present petitioner as the opposite party no.1 therein on his appearance contested the election petition on the premises that the Election Petition was not maintainable and further also refuting each and every allegation of the election petitioner more particularly specifically denying the allegation of corrupt practice adopted by the return candidate.

3. On the basis of the pleadings of the respective parties the trial court framed the following issues :

> "(I) Whether the Election Misc. Case is maintainable in the eye of law?
> (II) Whether the Petitioner has got any cause of action to file this Election Misc. Case against the Opp. Parties?
> (III) Whether there was double voting by voters in more than one booth and unfair practice by casting vote in the name of dead persons?

(IV) Whether the Opp. Party No.1 was having any arrear outstanding with Orami Service Co-operative Society as on 23.12.2016 i.e., the date of filing of nomination paper and he failed to repay the same leading to his disqualification for being elected as Sarpanch?"

4. Based on the evidence, the submissions of the parties and taking into account the provisions of law and for the issue nos.III & IV remaining vital, taking up such issues, issue no.III was answered against the election petitioner whereas issue no.IV was answered in favour of the election petitioner. On the basis of the findings on the issue no.IV in favour of the election petitioner the trial court allowed the Election Misc. Case thereby declaring the election of the return candidate as Sarpanch of Orabarsasingh Gram Panchayat invalid for being disqualified U/s.25(1)(1) of the Orissa Gram Panchayat Act and further declaring the election petitioner for his securing next highest votes as elected candidate for the post of Sarpanch of the Orabarsasingh Gram Panchayat with immediate effect. Being aggrieved the return candidate filed appeal relying on the finding on issue no.IV and submitted that for the finding on issue no.IV against of the election petitioner, he should not have been declared as a return candidate and the only option left with the Election Tribunal after declaring the election of the return candidate bad, was to give direction for fresh election for the casual vacancy. On appeal, the Election Appeal was registered as Election Appeal No.2 of 2019 and the appeal was decided on contest thereby while dismissing the appeal confirmed the judgment in the Election Misc. Case.

Appellant being the petitioner filed the Writ Petition challenging the order vide Annexures-2 & 5.

5. Shri A.P. Bose, learned counsel for the petitioner taking this Court to the provisions at Section 40 & 41 of the Orissa Gram Panchayat Act read with finding on issue no.IV by the trial court and the judgment of the Hon'ble apex Court in confirmation of the stand taken by the return candidate submitted that declaring the election petitioner as elected candidate being dependant on the finding on issue No.III, in the event of allowing the election petition, for finding on issue no.III having gone against the election petitioner, there was no occasion on the part of the trial court while declaring the election of the petitioner as bad, except leaving it open to the competent authority holding a fresh election in the Orabarsasingh Gram Panchayat. On the same premises Sri Bose contended that the appellate court also failed in appreciating the above legal aspect thereby resulted in a bad judgment.

Shri A.P. Bose, learned counsel consequently taking this Court to the decisions in the case of ***Prakash Kandre and Ors.*** vrs. ***Vijaya Kumar Khandre and Ors.*** involving Civil Appeal Nos.2-3 of 2002 as reported in **AIR 2002 SC 2345**, in the case of ***Smt. Puspalata Parida*** *vrs.* ***The Block Development Officer-cum-Election Officer Sadar Block*** as reported in **108(2009) CLT 785** and further in the case of ***Pravakar Pradhan*** *Vrs.* ***Bhaktabandhu Sahoo and others*** as reported in **1998(II) OLR 690** and in the case of ***Bidyutlata Nayak*** *Vrs.* ***Smt. Sucheta Samanta*** as reported in **2010 (II) OLR 137** contended that above decisions also support the case of the petitioner and accordingly prayed this Court for interfering in the impugned judgment so far it relates to declaration of the election of opposite party no.1 as elected Sarpanch and issuing necessary direction for going ahead to fill up the casual vacancy.

6. Shri B.P. Das, learned counsel for the opposite party no.1 the election petitioner while opposing the request made by Shri A.P. Bose, learned counsel for the petitioner, taking this Court to the provisions at Section 32, 34 & 38 of the Act, 1964 contended that for the provisions referred to hereinabove, there was no occasion on the part of the election petitioner to make the 3rd candidate in the concerned election as party. Further for the election petitioner having acquired 1132 votes being the second highest voter behind the return candidate getting 1139 votes, it was incumbent on the part of the election tribunal to declare the election petitioner to have been elected as the Sarpanch of the Orabarsasingh Gram Panchayat. Further taking this Court to the findings arrived at by both the trial court as well as the appellate court Shri Das, learned counsel submitted that both the orders remain valid requiring no interference in either of the orders.

Shri B.P. Das, learned counsel also taking this Court to a decision of this Court in the case of ***Smt. Puspalata Parida*** *vrs.* ***The Block Development Officer-cum-Election Officer Sadar Block*** as reported in **108(2009) CLT 785** contended that for the support of the decision to the case of the opposite party no.1, the opposite party no.1 has also the legal support to his case.

7. Considering the pleadings of the parties and the submissions made hereinabove, keeping in view the grounds raised herein, this Court finds, the trial court framed four issues amongst which issue nos.III & IV being vital issues, this Court at the cost repetition takes note of the said issues as herein below:

"(III) Whether there was double voting by voters in more than one booth and unfair practice by casting vote in the name of dead persons?

(IV) Whether the Opp. Party No.1 was having any arrear outstanding with Orami Service Co-operative Society as on 23.12.2016 i.e., the date of filing of nomination paper and he failed to repay the same leading to his disqualification for being elected as Sarpanch?"

8. Taking into account the findings of the trial court on these two issues, this Court finds, the trial court while holding the issue no.III dealt with illegal rejection and or illegal acceptance of the votes went against the election petitioner, which finding has not been challenged by the party aggrieved more particularly by the election petitioner in higher forum. This Court here observes that once the appeal involving the election dispute is filed for their being no cross objection/ appeal by the election petitioner at least challenging the findings on issue no.III, it appears, the election petitioner chose to abandon the findings on issue no.III given by the trial court. Accordingly, issue no.IV only remains to be considered by the appellate authority. It is, at this stage of the matter taking into consideration the legal provisions required to be considered here, this Court takes note of the provisions at Section 40 & 41 of the Act, 1964, which reads as follows :

"**40. Grounds for which a candidate other than the returned candidate may be declared to have been elected** - If any person who has lodged a petition, has in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the [Civil Judge (Junior Division)] is of opinion-

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by a corrupt practice the petitioner or such other candidate would have obtained a majority of the valid votes;

he shall after declaring the election of the returned candidate to be void declared the petitioner or such other candidate, as the case may be, to have been duly elected.

41. Corrupt practices – The following shall be deemed to be corrupt practices for the purposes of this Chapter, namely;

(i) with the object, directly or indirectly of inducing –

(a) a person to stand or not to stand as or to withdraw from being a candidate, or to retire from contest at such election; or

(b) an elector to vote or refrain from voting at such election; or

(ii) as a reward to-

(a) a person for standing or refraining from standing as a candidate, or for having withdrawn his candidature or for having retired from contest; or

(b) an elector for having voted or for refraining from voting."

(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of a candidate or any other person on his behalf, with the free exercise of the electoral right of any person:

Provided that-

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein, who-

(i) threatens any candidate or any elector or a person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and ex-communication or of expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested will become or will be rendered an object of divine displeasure or spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause; and

(c) a declaration of public policy or, a promise of public action or the mere exercise of a legal right without intent to interfere within an electoral right shall not be deemed to be interference within the meaning of this clause;

(3) The systematic appeal by a candidate or by any other person on his behalf to vote or refrain from voting on grounds of caste, race, community or religion or of the use of national symbols such as the National Flag or the National Emblem, for the furtherance of the prospects or the candidate's election.

(4) The publication by the candidate or by any other person on his behalf of any statement of fact which is false and which he either believes to be false or does not believe to be true in relation to the personal character or conduct of any candidate, or in relation to the candidature or withdrawal or retirement from contest of any candidate, being a statement reasonably calculated to prejudice the prospect of that candidate's selection.

(5) The hiring or procuring whether on payment or otherwise, of any vehicle or vessel by a candidate or by any other person on his behalf for the conveyance of any elector, other than the candidate or any member of his family to or from any polling station or place fixed for the poll."

9. Reading the provision at Section 40 of the Act, 1964 this Court finds, to declare a candidate other than the return candidate to have been elected, one has to satisfy either of the provisions at Clause (a) or Clause (b) involving Section 40 of the Act, 1964. For the allegation involving the election case made in paragraph no.4 and the allegation made in paragraph no.5 appears to have been closed by virtue of the finding on issue no.III but however looking to the pleadings made in paragraph no.4 and the findings on issue no.IV, question taken into consideration by the trial court as well as lower appellate court is confined only to the alleged disqualification attached to the return candidate and there was absolutely no involvement of allegation involving Section 40 of 41 of the Act, 1964. As such the case at hand is a case only attracting disqualification U/s.25 of the Act, 1964.

Under the circumstance it clearly appears, there remains no involvement of allegation of corrupt practice for consideration either in the trial court or in the lower appellate court and for the election petitioner abandoning to challenge the findings on issue no.III, ingredients involving Section 40 of the Act, 1964 to declare the candidate other than the return candidate to have been elected, could not be satisfied. It therefore appears, both the trial court as well as the lower appellate court appears to have failed to appreciate this legal aspect of the matter and thus both of them arrived at wrong finding and declaration so far it relates to declaring the election petitioner as elected candidate, which must be interfered with and set aside.

Considering the submission of Shri A.P. Bose, learned counsel for the petitioner that for not making the 3rd candidate as a party to the election petition, the relief claimed in terms of the provision at Section 40 was otherwise not maintainable. Taking into consideration the submission of Shri B.P. Das, learned counsel for the opposite party no.1 that for the provision at Section 32 read with Section 34 and Section 38 of the Act, 1964, this Court finds force in the submission of the Shri B.P. Das, learned counsel for the opposite party no.1 that there was no need for involving the 3rd candidate as a party to the election petition, as such submission of Shri Das is well protected under the provisions of Section 32(2) of the Act, 1964.

10. This Court going through the other provisions of the Act, 1964 finds the provision at Section 38(2) of the Act, 1964 reads as follows:

> "**38. Decision of [Civil Judge (Junior Division)]**
>
> (2) If the [Civil Judge (Junior Division)] finds that the election of any person was invalid, he shall either-
>
> (a) declare a casual vacancy to have been created; or
>
> (b) declare another candidate to have been duly elected; whichever course appears, in the circumstances of the case to be more appropriate and in either case, may award costs at his discretion."

11. Looking to the observation made hereinabove and finding of this Court that there is no attraction of provision at Section 40 of the Act, 1964 to the case at hand, this Court observes, in the circumstance, the only scope available to the Civil Judge (Jr. Divn.) in terms of provision at Section 38 after holding the election of the return candidate in question as bad, was to give a declaration U/s.38(2) (a) of the Act, 1964 and thereby directing the competent authority to proceed for fresh election to fill up the casual vacancy so occurred.

12. It is, at this stage of the matter, taking into account the decision of the Hon'ble apex court in the case of ***Prakash Kandre and Ors.*** vrs. ***Vijaya Kumar Khandre and Ors.*** involving Civil Appeal Nos.2-3 of 2002 as reported in **AIR 2002 SC 2345** this Court finds, for the glaring difference in between the provision at Section 82 of the Representation of People Act and the provision at Section 32 of the Act, 1964 where the later provision did not require the candidate securing less votes than the return candidate to be made as a party, the decision involving the Representation of People Act has no application to the case at hand. So far as the decision in the case of ***Smt. Puspalata Parida*** *vrs.* ***The Block Development Officer-cum-Election Officer Sadar Block*** as reported in **108(2009) CLT 785** is concerned, this Court finds, the decision vide **108(2009) CLT 785** rather supports the view of this Court. It is, at this stage of the matter, taking into account the decision in the case of ***Pravakar Pradhan*** *Vrs.* ***Bhaktabandhu Sahoo and others*** as reported in **1998(II) OLR 690** this Court finds, for the observation and finding of this Court made hereinabove, this decision need not require consideration. So far as the decision cited by Shri Das vide **108(2009) CLT 785** is concerned, this Court observes, for the application of the provision at Section 40 of the Act, 1964 to the case involved therein and for the clear finding involving the case at hand that there is no application of provision at Section 40 of the Act, 1964 to the case at hand, this decision has no support to the case of the opposite party no.1.

13. For the observations and findings of this Court holding the orders of both the Courts below declaring election petitioner to have been elected, being contrary to the provision at Section 38(2)(a) & 40 of the Act, 1964, this Court interfering in both the orders, sets aside the direction so far it relates to declaring the election petitioner to have been elected as Sarapanch and modifies the orders vide Annexures-2 & 5, thus while maintaining the declaration that the return candidate was disqualified to contest and setting aside the direction declaring the opposite party no.1 as elected candidate, modifies the relief part to the extent directing the competent authority to proceed for fresh election of the Sarpanch of the Orabarsasingh Gram Panchayat with immediate effect.

14. The writ petition succeeds, however to the above extent only. Parties to bear their own cost.

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2019 (III) ILR-CUT-363

BISWANATH RATH, J.

W.P.(C) NO. 11707 OF 2006

NIRMAL KUMAR DAS ……..Petitioner

-Vs-

GRID CORPORATION OF ORISSA LTD. & ORS. ……..Opp. Parties

SERVICE LAW – Adverse confidential Report (ACR) – Entry in Performance Appraisal Report (PAR) – Down-gradation of the petitioner – Neither opportunity of hearing provided to the petitioner nor objection considered – Action of the authority challenged – Held, the matter is remitted back to the employer to re-visit & prepare the appraisal report in accordance with the rule and materials available on record, within two months from the date of communication.

Case Law Relied on and Referred to :-

1. (2008) 8 SCC 725 : Dev Dutt Vrs. Union of India & Ors.

For Petitioner :Mr. U.K. Samal
For Opp. Parties :M/s.B.K.Pattnaik, S.S.Parida & K.Mohanty

JUDGMENT Date of Hearing : 14.10.2019 : Date of Judgment : 29.10.2019

BISWANATH RATH, J.

This is a writ petition issuing Writ of Certiorari quashing the adverse remarks under Annexure-13 series, the consequential rejection orders at Annexures-15 & 17 and the office order dated 8.9.2004, vide Annexure-N.

2. Factual background involving the case is that the petitioner joined as a Junior Engineer in the O.P.-Establishment in the year, 1979. In the year 1981 the petitioner was promoted as an Assistant Engineer after clearance by the Departmental Promotion Committee as well as Orissa Public Service Commission. In 1981 itself the petitioner was sent on deputation to the Orissa State Electricity Board, in short called as "OSEB". Despite refusal by the petitioner to exercise his option for permanent absorption in the GRIDCO, the petitioner was absorbed during 1997 in the service of GRIDCO resulting the petitioner bringing a writ petition bearing O.J.C. No.7483/1998 claiming to be pending disposal of this Court. The petitioner while working under the GRIDCO, O.P.1 during March, 2001, for his kidney suffering on the advice of the doctor, the petitioner did ultrasound test where it was revealed that the petitioner was suffering on account of mild degree of hydronephrotic changes

and both ureters were abnormally dilated in proximal area resulting malfunctioning of kidney. While he was under treatment of the competent doctor, the petitioner was transferred on 13.6.2001 to Talcher Thermal by the GRIDCO Authorities. As a consequence the petitioner relinquished the charges on 9.7.2001. It is at this point of time for his kidney suffering the petitioner applied for leave from 10.7.2001 to 30.7.2001 as he was under medical observation. It is at this point of time, the petitioner also made a representation to the C.M.D., GRIDCO for modification of his transfer order. For no consideration by the competent authority on the request of the petitioner involving his transfer and as he continued with acute suffering, the petitioner submitted number of leave applications. On 30.3.2002 the petitioner again requested for considering the cancellation of order of transfer. The request of the petitioner was all through given a cold treatment. It is at this point of time, on 7.8.2003 the petitioner was directed to appear before the Medical Board of the GRIDCO Dispensary on 12.8.2003, pursuant to which the petitioner appeared before the Medical Board through a panel of doctors. The petitioner alleged that there was no preparation of Medical Board report. However, Dr.P.K.Nayak, one of the members of the Medical Board of GRIDCO Dispensary wrote to the Manager (HRD), GRIDCO that the Medical Board could not discover any abnormality on physical and mental disability involving the petitioner in spite of the fact that said doctor was not a Psychiatric. It is on the basis of such medical report, the petitioner was charge-sheeted for overstaying/unauthorised leave on medical ground. Consequently a Departmental Proceeding was also initiated. The petitioner alleged that in spite of sufficient materials to support the claim of the petitioner, he was illegally dismissed from service on 30.8.2005 involving the Departmental Proceeding, which order was challenged in W.P.(C) No.10824/2006 also pending disposal. It is during pendency of the above writ petition, the petitioner was communicated by D.O. No.360 dated 10.9.2004 and D.O. No.362 dated 10.9.2004 with the adverse remark. Both the communications were received by the petitioner on 30.9.2004 and upon such receipt, the petitioner submitted a representation to O.P.2 to supply him the material documents on the basis of which such adverse remark has been made on 30.9.2004/1.10.2004. O.P.2 intimated the petitioner that he has been directed to intimate that sharing of confidential document with the petitioner did not arise thereby rejecting the petitioner's request for supply of necessary information. These documents are appearing at Annexures-13, 14 & 15. After finding the communications, vide Annexures-13, 14 & 15, it alleged by the petitioner that he was surprised to know that though as per the guidelines of

EPARS, the Manager is the Reporting Officer, Assistant General Manger acts as Reviewing Officer and the Senior General Manager acts as Accepting Officer yet such power has been delegated to the Senior General Manger and vide Communication dated 11.3.2003 one Manas Chandra Mohapatra became the Accepting Officer. Said Manas Chandra Mohapatra was then functioning as General Manger. However, vide Communication dated 8.9.2004 (Annexure-N), it was intimated that the Chief General Manager (Operation & Maintenance) will act as the Accepting Authority/Officer with retrospective effect from 9.9.2003. Prior to 9.9.2003, the Chairman-cum-Managing Director used to act as the Accepting Authority in absence of the Senior General Manager (Telecommunication) and the power delegated to Manas Chandra Mohapatra was also withdrawn by the same letter. The petitioner, therefore, alleged that there has been no proper maintenance of the EPAR (Executive Performance Appraisal Report) involving the petitioner. It was all maintained through not only ineligible persons but there appears, there have been some tampering and illegal incorporations. Furthermore there is even downgrading of the petitioner drastically without affording of opportunity to the petitioner. The petitioner, however, made a representation against such adverse remarks, vide Annexures-16 series on 18.10.2004, which representation was rejected, vide Annexure-17. The petitioner alleged that for allowing the leave application involving the petitioner during the period involved, the petitioner had not worked with the full knowledge of the Department. The petitioner, therefore, alleged that the EPAR of the petitioner for this period has been prepared mechanically. The petitioner also alleged that preparation of EPAR also contravenes the provision at Regulation-10 of the GRIDCO Officers Service Regulations, 1997. The petitioner on the premises of authorised leave during the period from 1.10.2003 to 31.3.2004 contended that the adverse remarks indicating negative remarks involving the petitioner are outcome of non-application of mind. The petitioner also alleged that when the authorities downgraded the remarks given by the Reporting Officer, an opportunity before downgrading the same should have been offered.

3. Sri U.K.Samal, learned counsel for the petitioner however made a fair submission that the petitioner has already been superannuated and in the event the petitioner succeeds, there is proper entry in his EPAR, the petitioner at best gets some notional benefit and as a consequence, such benefit may add to the pensionary benefit of the petitioner. In the circumstance, Sri Samal, learned counsel for the petitioner submitted that this Court should interfere with the communication dated Annexure-17. Sri Samal, learned

counsel for the petitioner to substantiate his claim and to support his contentions took support of the decision of the Hon'ble apex Court in ***Dev Dutt vrs. Union of India & others*** : (2008) 8 SCC 725 and contended that for the support of the decision therein to the case of the petitioner, the writ petition should succeed and the matter ought to be relegated back for re-consideration in the matter of proper grade in the confidential report involving the petitioner.

4. O.Ps.1, 2 & 5 sailing in one boat in a common submission through the common counter affidavit, while refuting each and every allegation of the petitioner, attending to the allegation of downgrading of the career assessment involving the petitioner by the Officer incompetent and without affording of opportunity, taking this Court to the provisions contained in Clause-10 of the of the GRIDCO Officers Service Regulations, contended that for the functional arrangement at the relevant point of time the situation remained as follows :-

> "For E-4 Grade (Dy.Manager) Asst. Executive Engineer)
> 1. Reporting Officer : Manager/Executive Engineer
> 2. Reviewing Officer : Asst. General Manager
> 3. Accepting Officer : Sr. General Manager"

Mr. B.K.Pattnaik, learned counsel for O.Ps.1, 2 & 5 taking aid of the same provision contended that it is permissible to man the above functions through the next higher Officer in the case the specified level Officer/Officers noted above are not available in the respective positions. Sri Pattnaik also contended that at the relevant point of time, Mr. M.C.Pattnaik (GMTC) was delegated with the power of Senior General Manager (TC), which was subsequently withdrawn and vested with the C.G.M. (O & M) in absence of Senior General Manager (TC) with effect from 9.9.2003. He further contended that the C.G.M. (O & M), therefore, acted as the Accepting Authority for the Telecom Engineers. Mr.M.C.Pattnaik, being the Reporting Officer of the petitioner at the relevant point of time could not act as Reviewing Officer leaving no other option than to review the EPARS of the petitioner through the C.G.M. (O & M). So far as the allegation of non-compliance of natural justice in the matter of downgrading the EPARS of the petitioner, Sri Pattnaik, learned counsel for O.Ps.1, 2 & 5 contended that on the own submission of the petitioner, he has been provided with opportunity on the entry made in the EPARS of the petitioner and there has been consideration of the same with communication of result to the petitioner, vide the impugned order. Taking this Court to the decision taking support by the

learned counsel for the petitioner, Sri Pattnaik, learned counsel for O.Ps.1, 2 & 5 contended that for the compliance of natural justice involving the entry in the EPARS of the petitioner, the decision cited on behalf of the petitioner has no application to the case at hand. Sri Pattnaik, learned counsel in the above circumstance prayed for dismissal of the writ petition for having no merit.

5. Considering the rival contentions of the parties, this Court finds, the writ petition involves decision on four aspects.

> I. If the EPAR involving the petitioner has been maintained by the competent person ?
> II. If the EPAR involving the petitioner has been maintained in terms of Regulation 10 of the GRIDCO Officers Service Regulations ?
> III. If there has been compliance of natural justice involving the entry of the EPARS of the petitioner before acting upon the same ?
> IV. If there has been appropriate consideration of the show cause submitted by the petitioner, vide the impugned order ?"

6. Keeping the above in view but however, coming back to the fact involving this case, this Court finds as follows :-

While the petitioner was under treatment for his kidney suffering and engaged with Doctors, he was transferred to Thermal at Talcher, as a consequence he was also relinquished from duty on 9.7.2001. It is at this stage he applied for leave from 10.7.2001 to 30.7.2001. Petitioner for his continued suffering applied for re-transfer and faced departmental proceeding involving which a Writ Petition in this Court appears to be pending. Petitioner claimed to be on authorized leave during the period from 1.10.2003 to 31.3.2004. The Executive Performance Appraisal Report (EPAR), the appraisal period in the EPAR included 1.0.2003 to 31.3.2004 as clearly appearing at page-163 of the brief filed as Annexure-A/1 in the counter affidavit by O.Ps.1 & 5 to the rejoinder of the petitioner. EPAR at Annexure-A/1 at pages-164 to 165 indicates marking adverse against the petitioner. Similarly at page-167/168 therein the petitioner has been awarded marks against same items. In the net result the petitioner has been given 25 marks and outstanding rating as clearly appearing at page-171 of the brief. In the same page, however, it is not known as to how there have been adverse recordings by the General Manager, the signatory therein which appears to be contrary to whole material/disclosure therein. It is at this stage, looking to the allegation involving downgrading of EPAR of the petitioner by the persons

incompetent, this Court looking to the provision governing the field and binding on both the sides from Regulation 10(7) particularly so far as the Deputy Manager Grade-E-4 is concerned, finds, the "EPARS" is required to be maintained and controlled as follows :-

CONFIDENTIAL CHARACTER ROLL

Executive Grade and Title		Controlling Officer	Counter Signing Officer	Accepting Officer	Authority competent to decide on representation against adverse remark
Xx	Xx	Xx	Xx	Xx	Xx
E-4	Deputy Manager	Manager	Assistant General Manager	Senior General Manager	Director

Regulation 10 deals with appraisal at Clause (1) deals as follows :-

> "10.(1)- It shall be the policy of the Company to introduce an open appraisal system for the Officers which will be applied in a fair and equitable manner and designed to help :
> (a) improve the performance of the individual Officer and the performance of the Company as a whole ;
> (b) recognize the contribution of each Officer ; and
> (c) identify opportunities for growth and development of the individual Officer."

Regulation 10(4) deals as follows :-

> "10(4)- The appraisal process will involve a proactive review by the officer concerned and his controlling officer of the work related activities and standards of performance relating to both the job and the behavior of the officer. In doing so the appraisal process will provide :
> (a) a measure of the performance against standard in each of the key areas and the action plan for the officer concerned agreed at the previous appraisal ;
> (b) an overall assessment of each officer's performance ;
> (c) an identification of training needs of the officer concerned, if any, to enable him to do his current job better ;
> (d) an identification of development needs of the officer concerned, if any, to progress his career ;
> (e) identification of impediments to performance and the action needed to remove them ;
> (f) agreement between the officer concerned and his Controlling officer of an action plan aimed at improving the performance of the individual and of the unit."

Regulation-10(5) deals as follows :-

> "Where the performance of the individual during the year is unsatisfactory, but not warranting disciplinary action the following course shall be adopted :
> (a) the Officer may be counseled by his Controlling Officer and a course of action agreed to correct or prevent the situation recurring ;
> (b) if after such counseling the performance does not improve to the required standard the Officer is given a formal warning letter, which sets out the circumstances, the action agreed to improve performance and the date by which this must be achieved ;
> (c) the Controlling Officer signs the warning letter and a copy is sent to the Counter Signing Officer and to the HR Department to be placed on the Officer's personal life ;
> (d) failure to improve performance as set out in the warning letter may lead to the initiation of disciplinary action."

7. Now dealing with question no.1 as to whether the EPARS of the petitioner has been maintained as per Regulation 10(7) of the GRIDCO Officers Service Regulations. It is at this stage, taking into account the allegation of the petitioner in the above regard and the response of O.Ps.1, 2 & 5 in paragraph-9, this Court finds O.Ps.1, 2 & 5, the main contestants have the following response :-

> "9. That the averments made in Paragraph-9 with regard to tampering the EPARS and mala fide intention of the Management in changing the Reviewing & Accepting Officer is not correct. The fact is that as per GRIDCO Officer's Service Regulation, the Reporting Officer, Reviewing Officer & Accepting Officer which was prevailing at that time is as follows :-
>
> "<u>For E-4 Grade (Dy.Manager) Asst. Executive Engineer)</u>
> 1. Reporting Officer : Manager/Executive Engineer
> 2. Reviewing Officer : Asst. General Manager
> 3. Accepting Officer : Sr. General Manager"
>
> In spite of that, there is also provision that in case the specified level of officers noted above are not in position, the next higher officer will evaluate in his place. It is a fact that, Sri M.C.Pattnaik, G.M.(TC) was delegated with the power of the Sr.G.M. (T) (Annexure-M) and subsequently it is withdrawn and vested with C.G.M. (O & M) in absence of Sr. G.M.(TC) w.e.f. 09-9-2003 (Annexure-N). Accordingly C.G.M. (O & M) acts as the Accepting Authority for the Telecom Engineers. As per erstwhile OSEB Lr. No.7057 (301) dated 22.3.1994, one Officer cannot act as Reporting and Reviewing Officer simultaneously (Annexure-O). Under the above background, Mr. M.C.Pattnaik who was the reporting officer of the petitioner at that period of time cannot act as Reviewing Officer. Therefore, C.G.M. (O & M) had reviewed EPARSS of the petitioner for the said period basing on the decision of the management indicated at Annexure-N. Therefore, the action taken in the case of the petitioner was not involved with any mala fide intention and legally tenable."

In the above background, this Court finds, the EPARS of the petitioner has been maintained by competent person that too following the provisions of the Regulations. Question no.1 is answered accordingly.

8. Taking into consideration question no.2, this Court reading the provision of the Regulation-10 finds, the appraisal report has several components. Intention of maintaining such appraisal report is to provide/facilitate the persons concerned to improve his performance and the performance of the Company as a whole, as provided in Regulation-10(1)(a). Similarly for the provision at Regulation-10(4), the appraisal process shall involve a proactive review by the Officer concerned and his controlling officer of the work related activities and standards of performance relating to both the job and the behaviour of the officer. Following Regulation-10(5) where the performance of the individual during the year is unsatisfactory but not warranting disciplinary action, this provision has provided the officer concerned may be counselled by his controlling officer and a course of action agreed to correct and prevent the situation recurring. If after such counseling the performance does not improve to the required standard the officer is given a formal warning letter, which sets out the circumstances, the action agreed to improve performance and the date by which this must be achieved. It is further provided that in the event the officer has done particularly well a letter of commendation will be issued by the controlling officer and this should be placed in the Officer's personal file.

9. Reading all the above as a whole, this Court finds, maintenance of the Confidential Character Roll or otherwise known as "EPARS" is not a mere formality. It is naked truth from the copy of the documents involving appraisal report involving the petitioner available at pages-162 to 171 of the brief filed through the counter affidavit of O.Ps.1, 2 & 5 that the petitioner was given at the initial stage the rating "outstanding" accordingly given 25 marks and the Accepting Officer after making his endorsement as appearing therein has downgraded the rating of the petitioner to "below average". Even assuming that the Accepting Officer has a reason to downgrade and even provided an opportunity to show cause, in response of which the petitioner filed his show cause at Annexure-16 series and the matter ended with a response to the show cause, vide the impugned order at Annexure-17, this Court not only finds, admittedly there has been favouring reports in the EPAR further it also appears, petitioner was also on authorized leave from 1.10.2003 to 31.3.2004, the whole period involved therein which clearly establishes that there has been no application of mind in preparing the EPAR

of the petitioner. Again for the provision at Regulation-10, unless the requirements under the whole Regulation-10 through Clause-4 and Clause-5 are achieved, no such entry in the EPAR of the petitioner could have been acted upon by the Disciplinary Authority in the matter of promotion of the petitioner. It is at this stage again looking to the show cause submitted by the petitioner, vide Annexure-16 series, as appears, there are so many reasons objecting to such entry in the EPARS of the petitioner, which have not been taken into consideration by the competent authority in rejecting his claim, vide the impugned order at Annexure-17. There is also no disclosure as to whether such representation has been disposed of by the order of the Director, as the order of rejection, vide Annexure-17 involves merely a communication by the G.M.(HRD) with no indication of decision of the Director. Otherwise it was also required to send communication of the G.M, vide Annexure 17 accompanying therein a copy of order of rejection by the Director. From the manners of disposal of the representation/objection of the petitioner to such entry and acting upon the same, there is absolutely no disclosure as to the decision on the allegation/objection of the petitioner, vide Annexure-16 series. For the adverse entry of a person having far-reaching consequence in his service career, this Court finds, there is serious lapse in following the procedures pursuant to such entry. Question nos.2 & 3 are accordingly answered in favour of the petitioner.

10. Now answering question no.4, this Court finds, admittedly there is no opportunity of show cause to the petitioner before downgrading the rating except there is consideration of a representation by way of objection, vide Annexure-16 series onwards at the instance of the petitioner after his grade was downgraded and taking into account the objection and disposing of the same, vide Annexure-17, this Court finds, there is lapse in considering the objection of the petitioner apparent from the impugned order at Annexure-17. This Court thus while declaring the entry in the EPAR for the above period and setting aside the impugned order at Annexure-17 remits the matter back to the Employer for re-visiting the preparation of the EPAR involving the petitioner in terms of the Rule and in terms of the materials available on record within two months from the date of communication. It is further directed that dependent on development, if necessary, to decide on the consequential benefits and release the same in favour of the petitioner within further one month.

11. The writ petition succeeds to the extent indicated herein above. No cost.

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2019 (III) ILR-CUT-372

S. K. SAHOO, J.

CRLA NO. 32 OF 2012

MANOJ KUMAR PANIGRAHI .....Appellant

-Vs-

STATE OF ORISSA .....Respondent

(A) CRIMINAL TRIAL – Offence under the NDPS Act – Fair investigation of the case – Search & seizure made by the informant/officer, after receiving the information from reliable source – Power of such officer(informant) to investigate the case – Legality of such investigation questioned – Held, in all fairness of things, who has carried out search and seizure, should not have investigated the case and submitted the prosecution report without any exigencies of the situation and more particularly when the prosecution has not come forward with any explanation as to why any other empowered officer did not carry out the investigation or at least the investigation was not supervised by some other superior officer and thereby giving scope to the defence to raise finger that the investigation is not impartial, unbiased and unmotivated – However on such ground entire prosecution case cannot be discarded though it is one of the aspect which is to be kept in mind along with other lacunas, if any, in the prosecution case. (Para - 8)

(B) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Sections 42 & 57 – Power of entry, Search, Seizure without authorization and report of such seizure – In the present case, P.W.3 (informant) stated that, after receiving the information about illegal transportation of contraband articles, he intimated to higher authority and moved for workout of the information – But in the cross examination, he stated that, neither he reduced the reliable information into writing nor sent the extract of the recorded grounds of his belief to the immediate authority – No re-examination of such witness to clarify the ambiguity which cropped up in the cross-examination – Non compliance of the procedures/mandatory provisions of the Act pleaded – Held, in absence of any re-examination, since the chief-examination and cross-examination of P.W.3 on the vital point cannot stand together, the prosecution case at the threshold is shrouded in mystery, the benefit of which would enure in favour of the accused/appellant. (Para - 9)

Case Laws Relied on and Referred to :-

1. (2016) 65 OCR 702 : Panchanan Das -Vrs.- State of Odisha.
2. (2018) 71 OCR 413 : Ghadua Muduli & Anr. -Vrs.- State of Odisha.

3. (2019) 75 OCR 387 : Haren Mandal -Vrs.- State of Orissa.
4. (2018) 72 OCR (SC) 196 : Mohan Lal -Vrs.- State of Punjab.
5. (2009) 44 OCR 183 : Karnail Singh -Vrs.- State of Haryana.
6. (2008) 2 SCC 370 : Directorate of Revenue -Vrs.- Mohammad Nisar Holia.
7. (2018) 72 OCR (SC) 437 : Sk. Raju -Vrs.- State of West Bengal.
8. (2019) 73 OCR (SC) 946 : Varinder Kumar -Vrs.- State of Himanchal Pradesh.

For Appellant : Mr. V. Narasingh, R.L. Pradhan, G. Das
For Respondent: Mr. Jyoti Prakash Patra, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment : 08.08.2019

S. K. SAHOO, J.

The appellant Manoj Kumar Panigrahi faced trial in the Court of learned Sessions Judge -cum- Special Judge, Ganjam, Berhampur in 2(a) C.C. No.01 of 2011 (N) (T.R. No. 02 of 2011) for the offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 29.01.2011 at about 11.00 a.m. at the first gate of Berhampur Town, he was found in illegal and unauthorized possession of forty six kilograms of contraband ganja (cannabis) in two gunny bags.

The learned trial Court vide impugned judgment and order dated 13.12.2011 found the appellant guilty of the offence charged and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh), in default, to undergo further rigorous imprisonment for three years.

2. The prosecution case, in short, is that on 29.01.2011 at about 10.30 a.m. Sri Sibaprasad Gantayat (P.W.3), the Inspector of Excise, E.I. & E.B., Berhampur received information from reliable sources that on the same day some unknown persons were likely to transport contraband ganja (cannabis) from Digapahandi to Berhampur Town. On receipt of such information, P.W.3 intimated the said fact to his higher authority, i.e. the Deputy Commissioner of Excise, Berhampur and as per the direction of his authority; he proceeded to the first gate area of Berhampur Town along with his staff for performing patrolling duty. While he was performing patrolling duty at the first gate, he noticed the appellant standing there with two gunny bags. On suspicion, he detained the appellant and disclosed his identity to him in presence of the witnesses and enquired about the contents of the gunny bags. Since the appellant remained silent, P.W.3 suspected that the gunny bags might be containing contraband articles. He offered an option in writing to the appellant as to whether he wanted to be searched before an Executive

Magistrate or a Gazetted Officer, in response to which the appellant also submitted in writing that he had no objection to be searched by P.W.3. Accordingly, after observing all formalities of search, in presence of the witnesses, P.W.3 searched the appellant and the two gunny bags and recovered contraband ganja (cannabis) inside the gunny bags. P.W.3 burnt some portion of ganja, rubbed it in his palm and by virtue of his twenty four years of service experience, he became confirmed the articles to be ganja. On weighment, one jerry gunny bag was found to be containing twenty four kilograms of ganja and the other gunny bag was found to be containing twenty two kilograms of contraband ganja, in total, it came to be forty six kilograms of ganja. P.W.3 seized the ganja contained in two gunny bags at the spot, sealed the gunny bags using his personal brass seal. After sealing, the brass seal was given in the zima of P.W.2 Janardan Mangaraj, the Excise Constable who had accompanied him under zimanama with a direction to produce the same in the Court as and when required. P.W.3 prepared the seizure list, read over and explained the contents of the seizure list to the appellant and the witnesses, made over a copy of the seizure list to the appellant and obtained his signature on the reverse of the seizure list in token of receipt of the copy. P.W.3 arrested the appellant on the spot informing him the grounds of arrest and produced him along with the seized articles, original seizure list and other connected papers before the Court of learned Special Judge, Berhampur with a prayer to draw the sample from the seized ganja for sending it for chemical analysis. The appellant was remanded to the jail custody. As per the direction of the learned Special Judge, P.W.3 produced the seized contraband ganja in two gunny bags before the learned S.D.J.M., Berhampur, who drew the sample from each of the gunny bags and sealed the sample packets Ext.A and Ext.B under his personal seal. Duplicate sample ganja packets marked Ext.A/1 and Ext.B/1 was also collected. The gunny bags containing the rest of the seized ganja were re-sealed under the personal seal of the Court. The broken seal of P.W.3 was kept in a separate packet and sealed under the personal seal of the Court. The sealed sample packets Ext.A and Ext.B along with copy of forwarding report were kept in another packet and sealed under the personal seal of the Court and it was handed over to the Excise Constable for taking it to the Assistant Chemical Examiner, Divisional Excise Chemical Testing Laboratory, Berhampur at Chatrapur. According to the prosecution, the broken personal seal of the Excise Inspector and duplicate sample ganja packets marked Ext.A/1 and Ext.B/1 and the rest of the seized ganja in gunny bags were deposited in the Court Malkhana vide

CMR No. 3 of 2011 dated 29.01.2011. On completion of investigation, P.W.3 submitted the prosecution report against the appellant.

3. The appellant was charged under section 20(b)(ii)(C) of the N.D.P.S. Act to which he pleaded not guilty and claimed to be tried.

4. The defence plea of the appellant was one of denial.

5. In order to prove its case, the prosecution examined three witnesses.

P.W.1 Jalandhar Sahu is an independent witness who did not support the prosecution case for which he was declared hostile by the prosecution and cross-examined by the Public Prosecutor.

P.W.2 Janardan Mangaraj was the Excise Constable and he accompanied the Inspector of Excise (P.W.3) on patrolling duty. He stated about the search and seizure of contraband ganja in two gunny bags from the possession of the appellant and preparation of seizure list. He took zima of the brass seal from P.W.3 under zimanama and produced it in Court at the time of trial.

P.W.3 Sri Siba Prasad Gantayat was the Inspector of Excise who stated about the search and seizure of contraband ganja in gunny bags from the possession of the appellant, preparation of the seizure list, sealing of the gunny bags using his personal brass seal, arresting the appellant and producing him in Court. He is also the investigating officer who on completion of investigation submitted prosecution report.

The prosecution exhibited seven documents. Exts.1/1 is the seizure list, Ext.2 is the zimanama, Ext.3 is the option of the appellant, Ext.4 is the information to higher authority, Ext.5 is the experience certificate of P.W.3, Ext.6 is the letter of the I.O. to the learned Special Judge with a prayer for drawal of sample and Ext.7 is the chemical examination report.

The prosecution also proved five material objects. M.O.I is the brass seal, M.Os. II & III are the sample packets and M.Os. IV and V are the gunny bags containing ganja.

No witness was examined on behalf of the defence.

6. The learned trial Court after analysing the evidence on record and discussing the contention raised by the learned defence counsel relating to the non-compliance of the provision under section 42 of the N.D.P.S. Act, has been pleased to hold that the Excise Officer had informed his immediate

superior authority i.e. the Deputy Commissioner of Excise in his letter dated 29.01.2011 regarding illegal transportation of ganja to Berhampur and has recorded the grounds of his belief, which has been marked as Ext.4 and therefore, the Court did not find any force in the contention advanced by the defence counsel in that regard. Coming to the contention raised by the learned defence counsel relating to non-compliance of the mandatory provision under section 50 of the N.D.P.S. Act, it was observed that the information was conveyed to the appellant vide Ext.3 in clear and categorical terms and therefore, the contention was repelled. The learned trial Court found the evidence of the official witnesses to be credible and above reproach and held that merely because P.W.2 and P.W.3 are departmental witnesses, their evidence cannot be discarded as it did not suffer from any inherent infirmity or improbability. The evidence of the official witnesses inspired confidence of the learned trial Court as it got corroboration from all possible details from other evidence on material aspects. The learned trial Court further held that no explanation whatsoever has been offered by the appellant as to how and under what circumstances the gunny bags containing ganja came to his possession and therefore, there would be valid presumption that the appellant was in conscious possession of the contraband articles. Since the chemical examination report proved the seized articles to be flowering and fruiting tops of cannabis plant, which is commonly known as ganja and the appellant failed to produce/prove any document or authority in support of the possession of the contraband ganja, the learned trial Court held that the appellant was found in illegal and unauthorized possession of contraband ganja and accordingly found him guilty under section 20(b)(ii)(C) of the N.D.P.S. Act.

7. Mr. V. Narasingh, learned counsel appearing for the appellant challenging the impugned judgment and order of conviction contended that it is a case where P.W.3, the Inspector of Excise after conducting search and seizure has also investigated the matter and on completion of investigation submitted prosecution report. Relying on the decision of this Court in the case of **Panchanan Das -Vrs.- State of Odisha reported in (2016) 65 Orissa Criminal Reports 702**, **Ghadua Muduli and another -Vrs.- State of Odisha reported in (2018) 71 Orissa Criminal Reports 413**, **Haren Mandal -Vrs.- State of Orissa reported in (2019) 75 Orissa Criminal Reports 387** and of the Hon'ble Supreme Court in the case of **Mohan Lal -Vrs.- State of Punjab reported in (2018) 72 Orissa Criminal Reports (SC) 196**, he argued that the investigation of a case under the N.D.P.S. Act is

required to be carried out by a person, who is absolutely impartial, unbiased or unmotivated and when P.W.3 himself received reliable information and conducted the search and seizure of the contraband articles, in all fairness of things, he should not have investigated the matter and submitted the prosecution report without any exigencies of the situation which creates doubt in the fairness in the process of recovery and investigation. Learned counsel further argued that though P.W.3 has come up with a case that there was earlier reliable information relating to the transportation of ganja (cannabis) from Digapahandi to Berhampur and that he intimated the fact to his higher authority i.e. the Deputy Commissioner of Excise, Berhampur and as per his instruction, he proceeded on patrolling duty with his staff to work out the information and he also proved Ext.4 to be such written intimation but in the cross-examination, he categorically stated that neither he reduced the reliable information into writing and nor he sent the extract of the recorded grounds of his belief to the immediate authority which is contrary to the examination-in-chief. It is contended that since the version given by P.W.3 in the chief-examination vis-a-vis the cross-examination are contradictory to each other relating to reducing the reliable information into writing and intimating the higher authority vide Ext.4 and the prosecution has not made any attempt to clarify the ambiguity by way of re-examination, it creates doubt about the authenticity of the version of P.W.3. The learned counsel further submitted that even though P.W.2 and P.W.3 are the two official witnesses examined on behalf of the prosecution relating to the search and seizure, the evidence of P.W.2 reflects that while he along with P.W.3 was in patrolling duty, they saw the appellant with two bags, whereas P.W.3 stated that after receipt of the reliable information and getting necessary instruction from the higher authority, he along with P.W.2 proceeded for the patrolling duty. It is further contended that even though Ext.4 bears the seal impression of the Deputy Commissioner of Excise but there is no evidence as to who took Ext.4 to the Office of the Deputy Commissioner of Excise and neither any official from that Office has been examined nor any register from that office has been produced to prove the receipt of Ext.4. It is argued that even though the brass seal with which the seized contraband ganja in two gunny bags were sealed is stated to have been handed over to P.W.2 under zimanama Ext.2 but neither the brass seal nor the specimen seal impression was produced before the learned S.D.J.M., Berhampur at the time of production of the contraband articles for verification. The brass seal was produced for the first time in Court when P.W.2 was examined on 21.09.2011. It is further contended that since section 54 of the N.D.P.S. Act

raises presumption against the appellant to have committed the offence under the Act, if he is found in possession of the contraband articles and fails to account it satisfactorily, it was the bounden duty of the prosecution to prove the search and seizure of such articles from the possession of the appellant with compliance of all legal formalities beyond all reasonable doubt which is lacking in the case. Learned counsel further argued that section 57 of the N.D.P.S. Act states that within forty eight hours next after any arrest or seizure made under the Act, the person effecting such arrest or seizure has to make a full report of all the particulars of such arrest and seizure to his immediate official superior but the evidence of P.W.3 is completely silent relating to the compliance of such provision. Even though such provision is held not to be mandatory but an officer effecting search and seizure cannot totally ignore such a provision otherwise adverse inference is to be drawn against the prosecution. While concluding his argument, the learned counsel contended that since the sole independent witness being examined as P.W.1 has not supported the prosecution case and the version of the two official witnesses are contradictory and there are lacunas in prosecution case relating to search and seizure, it is a fit case where benefit of doubt should be extended in favour of the petitioner. He placed reliance in the cases of **Karnail Singh -Vrs.- State of Haryana reported in (2009) 44 Orissa Criminal Reports 183** and **Directorate of Revenue -Vrs.- Mohammad Nisar Holia reported in (2008) 2 Supreme Court Cases 370**.

Mr. Jyoti Prakash Patra, learned Addl. Standing Counsel on the other hand vehemently argued that even though the independent witness (P.W.1) has not supported the prosecution case, on that score the entire prosecution case cannot be discarded. He contended that the evidence of P.W.2 and P.W.3 is clear that the contraband ganja in two gunny bags were seized from the possession of the appellant while he was standing in a public place. Relying on the decision of the Hon'ble Supreme Court in the case of **Sk. Raju -Vrs.- State of West Bengal reported in (2018) 72 Orissa Criminal Reports (SC) 437**, it is submitted that since the seizure and arrest was conducted in a public place, section 42 of the N.D.P.S. Act has got no application and section 43 of the N.D.P.S. Act would be attracted. Learned counsel for the State further argued that the defence has not brought anything on record to show that investigation is impartial, biased or has caused prejudice to the accused and therefore, no fault can be found with the investigation of the case by P.W.3. He placed reliance in the case of **Varinder Kumar -Vrs.- State of Himanchal Pradesh reported in (2019)**

73 Orissa Criminal Reports (SC) 946 wherein it is held that the law laid down in the case of **Mohan Lal** (supra) cannot be allowed to become a spring board for acquittal in prosecutions prior to the same, irrespective of all other considerations and all the pending criminal prosecutions, trials and appeals prior to the law laid down in **Mohan Lal** (supra) shall continue to be governed by the individual facts of the case. It is argued that the learned trial Court has rightly assessed the evidence on record and came to a categorical finding that the evidence of the official witnesses inspired confidence as it got corroboration from all possible details from other evidence on material aspects and therefore, the learned trial Court was quite justified in holding the appellant guilty and as such the appeal should be dismissed.

8. Adverting to the first contention raised by the learned counsel for the appellant relating to the unfairness on the part of P.W.3 in conducting search and seizure as well as investigation of the case and in submitting the prosecution report on completion of investigation, it appears that the prosecution has not come forward with any explanation as to why any other empowered officer did not carry out the investigation or at least the investigation was not supervised by some other superior officer. It is not on the case of the prosecution that there was any paucity of competent empowered officers to investigate such type of cases at the relevant point of time or that such officers were otherwise pre-occupied with some other important assignments for which they could not investigate the case. It is of course correct that the defence has not brought anything on record to show that investigation of the case by P.W.3 is in any way impartial, biased or has caused prejudice to the accused.

In the case of **Panchanan Das** (supra), it is held in a case under the N.D.P.S. Act, where stringent punishment has been prescribed, ordinarily if a police officer is the informant in the case, in the fairness of things, the investigation should be conducted by some other empowered police officer or at least the investigation should be supervised by some other senior police officer as the informant police officer is likely be interested in the result of the case projected by him. However, if the informant police officer in the exigencies of the situation conducts investigation and submits final form, it cannot be per se illegal. The defence has to prove in what way such investigation is impartial, biased or has caused prejudice to the accused.

In case of **Ghadua Muduli** (supra), it is held that since the investigation of a case under the N.D.P.S. Act is required to be carried out by a person who is absolutely impartial, unbiased and unmotivated, when P.W.4

received the reliable information, searched the vehicle and seized the contraband articles and lodged the first information report, in all fairness of things, he should not have investigated the matter without any exigencies of the situation.

In the case of **Haren Mandal** (supra), it is held that P.W.4 being the officer, who after conducting search and seizure has also investigated the matter and submitted prosecution report which creates doubt in the fairness in the process of recovery and investigation.

In the case of **Mohan Lal** (supra), the Hon'ble Supreme Court held as follows:-

> "14. In a criminal prosecution, there is an obligation cast on the investigator not only to be fair, judicious and just during investigation, but also that the investigation on the very face of it must appear to be so, eschewing any conduct or impression which may give rise to a real and genuine apprehension in the mind of an accused and not mere fanciful, that the investigation was not fair. In the circumstances, if an informant police official in a criminal prosecution, especially when carrying a reverse burden of proof, makes the allegations, is himself asked to investigate, serious doubts will naturally arise with regard to his fairness and impartiality. It is not necessary that bias must actually be proved. It would be illogical to presume and contrary to normal human conduct, that he would himself at the end of the investigation submit a closure report to conclude false implication with all its attendant consequences for the complainant himself. The result of the investigation would therefore be a foregone conclusion."
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> 25.....It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof."

In the case of **Varinder Kumar** (supra), however, the Hon'ble Supreme Court held as follows:-

> "18. The criminal justice delivery system cannot be allowed to veer exclusively to the benefit of the offender making it uni-directional exercise. A proper administration of the criminal justice delivery system, therefore requires balancing the rights of the accused and the prosecution, so that the law laid down in ***Mohan Lal*** (supra) is not allowed to become a spring board for acquittal in prosecutions prior to the same, irrespective of all other considerations. We therefore hold that all pending criminal prosecutions, trials and appeals prior to the law laid down in ***Mohan Lal*** (supra) shall continue to be governed by the individual facts of the case."

Therefore, even though in all fairness of things, P.W.3 who has carried out the search and seizure, should not have investigated the case and submitted prosecution report without any exigencies of the situation and more particularly when the prosecution has not come forward with any explanation as to why any other empowered officer did not carry out the investigation or at least the investigation was not supervised by some other superior officer and thereby giving scope to the defence to raise finger that the investigation is not impartial, unbiased and unmotivated, I am of the humble view that on such ground the entire prosecution case cannot be discarded, however, it is one of the aspects which is to be kept in mind along with other lacunas, if any, in the prosecution case in the end to see whether the appellant is to be held guilty of the offence charged or not.

9. Coming to the next point which was canvassed by the learned counsel for the appellant is that P.W.3 stated to have received the reliable information on 29.11.2011 at about 10.30 p.m. that some persons were to transport ganja (cannabis) from Digapahandi to Berhampur and he stated to have intimated the fact to his higher authority i.e. the Deputy Commissioner of Excise, Berhampur and as per the instruction of his authority, he proceeded with his staff on patrolling duty to work out the information. P.W.3 proved Ext.4 as such information to the higher authority. In the cross-examination, however, P.W.3 stated that he has not reduced the reliable information into writing and he went to the spot after receipt of the information. He further stated that he has not sent the extract of the recorded grounds of his belief to the immediate authority. Therefore, not only the version of P.W.3 given in the chief examination is contradictory to what he has stated in the cross-examination but also if the version of P.W.3 in the cross-examination is taken into account, then the existence of Ext.4 itself becomes doubtful.

P.W.3 has not been re-examined by the prosecution to clarify the ambiguity which has cropped up in the cross-examination when he stated he did not reduce the reliable information to writing and did not send the extract of the recorded grounds of belief to the immediate authority. Section 138 of the Indian Evidence Act, 1872 clearly states that the re-examination shall be directed to the explanation of the matters referred to in the cross-examination. Therefore, if any ambiguity cropped up during cross-examination of a witness or a witness stated completely contrary to what he has deposed in the chief-examination, it is nonetheless the duty of the prosecution to make a prayer before the learned trial Court for re-examination of such witness and to explain the matters. The object is to give an opportunity to reconcile the

discrepancies, if any, between the statement made in the examination-in-chief and cross-examination or to explain any statement inadvertently made in cross-examination or to remove any ambiguity in the deposition or suspicion cast on the evidence by cross-examination. Where there is no ambiguity or where there is nothing to explain, question put in re-examination with the sole object of giving a chance to the witness to undo the effect of the previous statement should not be permitted during re-examination. Recall and re-examination of any person already examined must appear to the Court to be essential for the just decision of the case and exercise of such power should be made judicially and also with extreme care and caution.

In absence of any re-examination, since the chief-examination and cross-examination of P.W.3 on the vital point cannot stand together, the prosecution case at the threshold is shrouded in mystery, the benefit of which would enure in favour of the appellant.

P.W.2 stated that while he along with P.W.3 was performing patrolling duty, they saw the appellant standing near the first gate and two bags were kept on the ground in front of him. The evidence of P.W.2 is completely silent relating to the receipt of any reliable information by P.W.3 or intimation of such information being sent to the higher authority in writing. Therefore, the version of these two official witnesses create doubt as to where the reliable information was received by P.W.3 and if it is received at all or not. Whereas P.W.3's evidence shows the receipt of reliable information prior to proceeding to the patrolling duty and then while on patrolling duty detecting the appellant standing near the first gate of Berhampur with gunny bags, the evidence of P.W.2 is completely silent relating to receipt of any reliable information rather it indicates as if while on patrolling duty, they per chance found the appellant with the gunny bags.

In the case of **Sk. Raju** (supra), the Hon'ble Supreme Court has held that an empowered officer under section 42(1) is obligated to reduce to writing information received by him, only when an offence punishable under the N.D.P.S. Act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or an enclosed place. Compliance with section 42, including recording of information received by empowered officer, is not mandatory, when an offence punishable under the Act is not committed in a building, conveyance or an enclosed place. Section 43 is attracted in situations where the seizure and arrest are conducted in a public place, which includes any

public conveyance, hotel, shop or other place intended for use by, or accessible to, the public. In that case, the Hon'ble Supreme Court took note of the fact of the case that the appellant was walking along the Picnic Garden Road and he was intercepted and detained immediately by the raiding party in front of Falguni Club, which was not a building, conveyance or an enclosed place. The place of occurrence was accessible to the public and fell within the ambit of the "public place" as appears in the explanation to section 43 and therefore, it was held that section 42 had no application.

In the case of **Karnail Singh** (supra), the Hon'ble Supreme Court has held that the material difference between the provisions of sections 42 and 43 of the N.D.P.S. Act is that section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, section 43 does not contain any such provision and as such while acting under section 43 of the Act, the empowered officer has the power of seizure of the article, etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful.

In the case of **Directorate of Revenue** (supra), the Hon'ble Supreme Court has held as follows:-

> "14. Section 43, on plain reading of the Act, may not attract the rigours of section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under Sub-section (1) of Section 42, need not be complied with, only because the place where at search is to be made is a public place. If section 43 is to be treated as an exception to section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance of section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance of the said provision would not render the search a nullity. A distinction therefore must be borne in mind that a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance. It is also possible to hold that rigours of the law need not be complied with in a case where the purpose for making search and seizure would be defeated, if strict compliance thereof is insisted upon. It is also possible to contend that where a search is required to be made at a public place which is open to the general public, section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefore coupled with the fact that the

> place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission."

In this case, the prosecution through P.W.3 has come up with a case that search is being made on receipt of prior reliable information and there was even enough time for compliance of reducing the information to writing vide Ext.4, informing the same to the superior officer and obtain his permission before proceeding on patrolling duty with P.W.2 though the version of P.W.2 is different. Even if the compliance of section 42 of the N.D.P.S. Act is held to be not necessary as the search is required to be made at a public place which is open to the general public but when the prosecution comes up with the compliance of a provision on which there is diametrically opposite statement of a witness and it also runs contrary to the statement of another witness then the Court cannot shut its eyes to the glaring infirmities as it creates doubt about the sanctity of the prosecution version.

10. Ext.4 which is stated to have been sent by P.W.3 to his official superior, no doubt contains the seal of the Office of Deputy Commissioner of Excise but no evidence is forthcoming as to who carried the same to the Office of Deputy Commissioner of Excise. No official from such office has been examined and no register of such office has been produced to prove the receipt of such letter. Thus the receipt of such document by the immediate official superior has not been proved by adducing cogent evidence.

11. It is the prosecution case that P.W.2 kept the personal brass seal of P.W.3, which was utilized for sealing the two gunny bags. Neither the brass seal nor the specimen seal impression was forwarded to the Court at the time of forwarding of the gunny bags in the sealed condition. No paper slip containing the signatures of the witnesses was utilized while sealing the gunny bags. No sample was collected at the spot in presence of the witnesses. No requisition has been sent to any Executive Magistrate to remain present at the time of search and seizure. On verification of the part file opened by the learned S.D.J.M., Berhampur as per the order of the learned Special Judge, Ganjam, it reveals that the learned Magistrate simply verified that the two gunny bags were under seal and he found it to be intact and he opened the seal and collected the samples and then resealed the gunny bags as well as the samples with his personal seal and the broken seal of the I.O. was kept in a separate packet and sealed under his personal seal. Thus it is apparent that neither the brass seal nor the specimen seal impression was produced before

the learned Magistrate at the time of production of the gunny bags. A duty is cast upon the official conducting search and seizure to instruct the person who is given zima of the brass seal to produce it before the Court so that necessary verification can be made by the Court with reference to the seal which would be there on the packet containing bulk quantity of contraband articles or sample packets before sending it for chemical analysis. The Court is also required to insist for the production of brass seal or at least verify the specimen seal impression with the seal attached to the seized bags or the sample packets, if the samples are collected by the officer conducting search and seizure before production of the contraband articles in Court. In absence of such procedure being strictly followed, there is every chance of tampering with the articles or with the seal. It is the duty of the prosecution to prove by way of unimpeachable evidence that the contraband article which was seized at the spot is the very article which was produced in Court and sent for chemical examination and the entire path is to be covered by the prosecution by adducing cogent and reliable evidence as in a case of this nature the punishment is stringent in nature otherwise there would be every chance of prejudice being caused to the accused.

12. Section 57 of the N.D.P.S. Act states that if an officer makes any arrest or seizure under this Act then he has to make a full report of all the particulars of such arrest and seizure to his immediate official superior within forty-eight hours next after such arrest or seizure. The evidence of P.W.3 is completely silent relating to compliance of section 57 of the N.D.P.S. Act. No such full report has also been proved during trial. Even though section 57 of the N.D.P.S. Act is held not be mandatory but the official conducting search and seizure cannot totally ignore such a provision which is directory in nature as the same has got a salutary purpose and if he ignores such a provision then adverse inference should be drawn against the prosecution.

13. Section 54 of the N.D.P.S. Act deals with the presumption which is to be raised against the accused that he has committed an offence under the Act, if any contraband articles is found from his possession and he fails to account it satisfactorily. The burden will shift to the accused only when the prosecution proves the search and seizure of the contraband articles being conducted in strict compliance of all the mandatory provisions and other directory provisions as far as possible. An illegal search cannot entitle the prosecution to raise a presumption under section 54 of the Act. If the search and seizure becomes doubtful or illegal, the question of raising presumption against the accused under section 54 of the N.D.P.S. Act does not arise.

14. In the present case, when the independent witness has not supported the prosecution case, the version of the two official witnesses like P.W.2 and P.W.3 are contradictory to each other and the version of P.W.3 who is an important witness for the prosecution is full of ambiguities, the brass seal stated to have been given in the zima of P.W.2 or the specimen seal impression was not produced before the Court at the time of production of the seized articles, the provisions under section 57 of the N.D.P.S. Act has not been complied with and moreover when P.W.3 being the officer who not only carried out the search and seizure but also conducted the investigation and submitted the prosecution report, I am of the humble view that it cannot be said that the prosecution has successfully established the charge under section 20(b)(ii)(C) of the N.D.P.S. Act beyond all reasonable doubt against the appellant and therefore, the impugned judgment and the order of conviction cannot be sustained in the eye of law.

Accordingly, the Criminal Appeal is allowed. The impugned judgment and order of conviction passed by the learned trial Court in convicting the appellant under section 20(b)(ii)(C) of the N.D.P.S. Act and the passing the sentence thereunder is hereby set aside. The appellant is acquitted of such charge and he be set at liberty forthwith, if his detention is not required in any other case.

Lower Court records with a copy of this judgment be sent to the learned trial Court forthwith for information.

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2019 (III) ILR-CUT-386

S. K. SAHOO, J.

CRLMC NO. 424 OF 2018

DILLIP DAS .....Petitioner

-Vs-

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Quashing – Offence U/s. 52(a) of the Odisha Excise Act, 2008 – Illegal transportation of liquor – Seizure of vehicle – Application U/s 457 of Cr.P.C filed before the trial court to release vehicle – Application rejected on the ground of the bar provided under sections 71 & 72 of the Odisha Excise Act – Order of trial court challenged in the revisional

court and the same was confirmed – Nothing in record to show that the confiscation proceeding has been initiated – Held, since no confiscation proceeding has yet been initiated in accordance with the law, the vehicle in question cannot be left in a state of damage being exposed to sun, rain and without proper maintenance – Therefore the impugned orders are quashed and the vehicle be released in favour of the owner subject to fulfilment certain conditions indicated.

Case Laws Relied on and Referred to :-

1. (2012) 52 OCR 634 :Narayan Tripathy -Vrs.- State of Orissa
2. (2003) 26 OCR 729 : Smt. Jasoda Das -Vrs.- State of Orissa
3. 2003 (II) OLR 530 : Jugal Kishore Nayak -Vrs.- The Authorised Officer -cum-Divisional Forest Officer
4. CLT (2008) Suppl. (Crl.) 1260 : Rajkishore Das@ Baidhar -Vrs.- State of Orissa
5. (2003) 24 OCR (SC) 444 : Sunderbhai Ambala Desai -Vrs.- State of Gujarat

For Petitioner : Mr. Nityananda Behuria N. Behuria, R.K. Rath & P.K. Rout

For Opp.Party: Mr. Priyabrata Tripathy, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 25.09.2019

S. K. SAHOO, J.

In this application under section 482 of the Cr.P.C., the petitioner Dillip Das has prayed for quashing the impugned order dated 18.12.2017 passed by the learned 1st Addl. Sessions Judge, Sambalpur in Criminal Revision No. 21/05 of 2017, whereby the learned revisional Court dismissed the revision petition and thereby confirmed the order dated 11.09.2017 passed by the learned S.D.J.M., Sambalpur in C.M.A. No.218 of 2017 which arises out of G.R. Case No.2166 of 2017.

The facts of the case is that the petitioner who is an accused in G.R. Case No.2166 of 2017 was transporting 150 numbers O.S. liquor pouch each containing 200 ml. liquor in an auto rickshaw bearing registration No.OD-15-G-9457, chassis no.NDX0000ZFUL385299 and engine no.H6A8643058 on 21.08.2017 and he was intercepted by the complainant who was the S.I. of Police, Burla police station. Since the petitioner failed to produce any authority for transporting the OS liquor pouch, those were seized along with the auto rickshaw. The petitioner after being released on bail filed a petition under section 457 of Cr.P.C. before the learned S.D.J.M., Sambalpur to release the auto rickshaw and vide order dated 11.09.2017, the learned Magistrate held that since the case has been instituted under section 52(a) of the Odisha Excise Act and in view of sections 71 and 72 of the said Act, he

lacks jurisdiction to release the seized vehicle and accordingly, he rejected the petition under section 457 of Cr.P.C. The petitioner being aggrieved by the aforesaid order approached the revisional Court in Criminal Revision No. 21/05 of 2017 and the learned Addl. Sessions Judge, Sambalpur exercising his revisional power held that since Odisha Excise Act prescribes for confiscation proceeding, the provision under section 457 of Cr.P.C. is not applicable and accordingly, rejected the revision petition.

Mr. Nityananda Behuria, learned counsel for the petitioner contended that even though the auto rickshaw was seized with the 150 numbers of O.S. liquor pouch each containing 200 ml. on 21.08.2017 but till today no confiscation proceeding has been initiated as enumerated under the Odisha Excise Act and therefore, the observation of the learned Courts below that the power under section 457 of Cr.P.C. cannot be invoked is not proper. It is further contended that a person cannot be left remediless and the entire thing cannot be left in the mercy of the authority to initiate the confiscation proceeding and the vehicle being left under the open air being exposed to sun and rain, its condition is deteriorating day by day and therefore, it is a proper case where the power under section 457 of Cr.P.C. should be exercised and since there is no dispute that the petitioner is the registered owner of the seized auto rickshaw in question, it should be released in favour of the petitioner with suitable terms and conditions. He placed reliance in the cases of **Narayan Tripathy -Vrs.- State of Orissa reported in (2012) 52 Orissa Criminal Reports 634, Smt. Jasoda Das -Vrs.- State of Orissa reported in (2003) 26 Orissa Criminal Reports 729, Jugal Kishore Nayak -Vrs.- The Authorised Officer -cum- Divisional Forest Officer reported in 2003 (II) Orissa Law Reviews 530 and Rajkishore Das @ Baidhar -Vrs.- State of Orissa reported in CLT (2008) Suppl. (Crl.) 1260**.

On going through the aforesaid decisions, it is very clear that if confiscation proceeding has not been initiated before the competent authority, the Magistrate is not precluded from exercising jurisdiction under section 457 of Cr.P.C. for delivery of the property seized to the person entitled for possession thereof.

Mr. Priyabrata Tripathy, learned Addl. Standing Counsel for the State was asked to obtain instruction as to whether any confiscation proceeding has been initiated or not, who after obtaining instruction produced the letter from the S.I. of Police, Burla police station which indicates that no confiscation proceeding has been initiated against the seized vehicle.

Since no confiscation proceeding has yet been initiated in accordance with law and the auto rickshaw has been seized since 21.08.2017 and there is no dispute that the petitioner is the registered owner of the vehicle in question and its condition is likely to deteriorate being exposed to sun and rain and without proper maintenance, therefore, taking into account the ratio laid down in the aforesaid decisions as well as in the decisions of the Hon'ble Supreme Court in the case of **Sunderbhai Ambala Desai -Vrs.- State of Gujarat reported in (2003) 24 Orissa Criminal Reports (SC) 444**, I am inclined to accept the prayer made in this application and direct release the auto rickshaw bearing registration No. No. OD-15-G9457 in favour of the petitioner subject to the following conditions:-

(i) the petitioner shall produce the original registration certificate, insurance papers before the concerned police station which shall be verified properly and true attested copies thereof shall be retained by the authority;

(ii) the petitioner shall furnish property security worth of Rs.20,000/- (rupees twenty thousand);

(iii) the petitioner shall keep the vehicle insured at all times till the conclusion of the trial and produce the insurance certificates before the trial Court as and when required;

(iv) the petitioner shall not change the colour or any part of the engine and chasis numbers of the vehicle;

(v) the petitioner shall furnish two photographs of the vehicle before taking delivery of the same;

(vi) the petitioner shall not transfer the ownership of the vehicle in favour of any other person;

(vii) the petitioner shall produce the vehicle before the Court as and when called upon;

(viii) the petitioner shall not allow the vehicle to be used in the commission of any offence.

Accordingly, the CRLMC application is disposed of.

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2019 (III) ILR-CUT-390

P. PATNAIK, J.

W.P.(C) NO. 22344 OF 2013

NARAHARI PARIDA ……. Petitioner

-Vs-

PARADIP PORT TRUST & ANR. ……. Opp.Parties

SERVICE LAW – Claim of service benefits for the post-in-charge of Headmaster – Departmental Promotion Committee convened – Petitioner secured 3rd position – Other two incumbents securing better position than the petitioner given promotion and retired from their services respectively – Petitioner kept in charge of Head master till his retirement but regular promotion denied without any sufficient reason – Action of the authority challenged – Entitlement of petitioner to receive the service benefits in the officiating post considered – Principle of quantum merit considered – Held, the petitioner is entitled to receive the scale of pay of Headmaster with all service benefits till attaining the age of superannuation. (Para 8)

Case Laws Relied on and Referred to :-

1. AIR 1999 SC 838 : Selva raj Vrs. Lt.Governor of Island Port Blair & Ors.
2. 2008 (I) OLR 162 : Dillip Kumar Sahoo Vrs.State of Orissa
3. W.P.(C) No.11295/2010 (disposed of on 17.01.2011) : Murari Mohan Patnaik Vrs.State of Orissa
4. 1990 Suppl. SCC 165 : Kishanlal Kalar Vrs. State of Bihar & Ors.

For Petitioner : Mr.Manoj Kumar Mohanty, M.R.Pradhan & T.Pradhan

For Opp.Parties : Mr.Surendra Kumar Patri & P.K.Tripathy

JUDGMENT Date of Hearing :12.07.2019 :: Date of Judgment: 16.08.2019

P.PATNAIK, J.

In the accompanied writ application, the petitioner has sought for a direction to the opposite parties to give promotion to the post of Headmaster of Port Trust High School, Paradip with effect from 01.03.2011 and for payment of Headmaster scale of pay with effect from the said date with all consequential financial and service benefits.

2. Shorn of details, the petitioner having B.Sc M.Ed qualification was appointed as a Trained Graduate Teacher in Port Trust High School, Paradip. The petitioner after the appointment continued to render unblemished

services in the said school. While continuing as such Departmental Promotion Committee was constituted which recommended a panel of three names for the post of Headmaster and the name of the petitioner was at sl.no.3 of the said panel. Though the petitioner was kept in charge of the Headmaster of the School, but the case of the petitioner was not considered for regular promotion. Being aggrieved by the inaction of the opposite parties, the petitioner submitted series of representations. It has been averred in the writ application that the post of Headmaster fell vacant on 01.03.2011, but no D.P.C. was conducted in advance to promote one of the senior most Teacher of the Port Trust High School to the post of Headmaster. It has been further averred that though the post of Headmaster is existing in Class-II post, but no regular appointment to the said post was given by the opposite parties. Being aggrieved by the inaction of the opposite parties, the petitioner has been constrained to approach this Court under Articles 226 and 227 of the Constitution of India for redressal of his grievance.

3. Controverting to the averments a counter affidavit has been filed by the opposite parties wherein it has been submitted that the petitioner has been working as Headmaster-in-charge of Port Trust High School, Paradip with effect from 09.03.2011. But much prior to his appointment the Departmental Promotion Committee was held on 12.01.1990, who had recommended Sri Satrughana Pradhan, Assistant Teacher for promotion to the post of Headmaster and further recommended to keep the names of (1) Sri Gopinath Sahoo, Assistant Teacher (2) Sri B.B.Biswal, Assistant Teacher and (3) Sri Narahari Parida in the panel in order of merit. In this respect the copy of the D.P.C. held on 22.01.2010 relating to the promotion of the Headmaster in Port Trust High School has been annexed as Annexure-A to the counter affidavit. It has further been averred that said Satrughna Pradhan, Gopinath Sahoo and Sri B.B. Biswal were promoted to the post of Headmaster in order of merit, but unfortunately before the retirement of Sri B.B.Biswal on 28.02.2011 a representation was received on 22.02.2011 from Ex-M.P. and President of Paradip Port Trust Schedule Caste and Schedule Tribe Employees Welfare Association, Paradip for filling up the post of Headmaster by Schedule Caste candidate against the backlog vacancies with a copy to Chairperson, National Commission for Schedule Caste. Accordingly the issue for promotion to the post of Headmaster was disputed. A decision was taken to the effect that the petitioner, the senior most Assistant Teacher would take the charge of Headmaster from Sri B.B.Biswal,

Ex-Headmaster of the School. Accordingly, Office Order dated 09.03.2011 the petitioner was retained as Headmaster-in-charge until further order.

It has further been averred that as the petitioner could not be promoted to the post of Headmaster on regular basis for want of live post, the payment of all consequential service benefits or even accrual of the same do not arise, in view of the rules and regulation of the Government of India. It has been further averred that in the post based roster, no reservation principle is applicable to single cadre post and also the National Commission for S.C., Kolkota by letter dated 07.09.2012 intimated that there is no need to comply the reservation rule/roaster in single cadre post, but by that time the post of Headmaster which had fallen vacant on 01.03.2011 was abolished as per the instruction of Ministry of Shipping dated 16.09.2009 as the said post remained vacant for more than one year. Under such circumstance, the Paradip Port Trust was compelled to initiate action for revival the post of Headmaster by sending a proposal to the Ministry of Shipping vide letter dated 08.11.2013. Therefore, it was not possible to fill up the post of Headmaster on regular basis. However, the post of Headmaster would be filled up as per the prevailing Rules and Regulation after receiving clearance from the Ministry of Shipping only.

4. A rejoinder has been filed by the petitioner wherein it has been submitted that the petitioner having rendered service as Headmaster-in-charge is entitled to Headmaster scale of pay while discharging the duty.

5. Learned counsel for the petitioner has submitted vehemently that admittedly the petitioner though was selected in the D.P.C. for the post of Headmaster as disclosed from Annexure-A to the counter affidavit, but he was kept in charge of Headmaster with effect from 01.03.2011 till his superannuation without being given regular promotion though his case was recommended by the D.P.C. held on 12.01.2010. Learned counsel for the petitioner submits that since the petitioner has continued in the post of Headmaster from 01.03.2011 till his superannuation, he is entitled to financial and other service benefits.

6. The decision reported in AIR 1999 S.C. 838 (Selva raj –vrs. Lt.Governor of Island Port Blair and others), in the case of Dillip Kumar Sahoo-vrs.State of Orissa reported in 2008 (I) OLR 162 and in the case of Murari Mohan Patnaik -vrs. State of Orissa in W.P.(C) No. 11295 of 2010 disposed of on 17.01.2011 have been referred to. It has been further

submitted that though the National Commission for S.C. finally communicated a decision dated 07.09.2012, but the petitioner was given regular promotion even the petitioner was holding the post on in charge basis. Further it has been submitted that the petitioner ought to be given promotion to the Port Trust High School, Paradip with effect from 12.01.2010 on the recommendation of the D.P.C. dated 12.01.2010.

7. Learned counsel for the opposite parties apart from reiterating the submissions made in the counter affidavit strenuously urged that though the petitioner was recommended by the D.P.C. for promotion, but due to certain fortuitous circumstances, the petitioner could not be promoted on regular basis to the post of Headmaster and he retired as a in-charge Headmaster. Learned counsel for the opposite parties further submits that the post of Headmaster shall be filled up as per the prevailing Rules and Regulation only after receipt of the Clarification/clearance from the Ministry of Shipping.

8. Having heard learned counsel for the respective parties at length and on perusal of the records it appears that the petitioner has been able to make out a case for interference due to the following facts, reasons and judicial pronouncements.

i) Indisputably the petitioner having rendered almost three decades of service as Assistant Teacher was considered by the D.P.C. held on 12.01.2010 and the name of the petitioner found place in the panel in the order of merit at sl.no.3. Two persons namely, Gopinath Sahoo and Sri B.B.Biswal, who are at sl.nos.1 and 2 in the said panel got promotion to the post of Headmaster, the petitioner for no fault of his own was debarred to hold the post of Headmaster because of fortuitous circumstances. But the authorities allowed him to hold the post of Headmaster-in-charge after retirement of Sri B.B.Biswal vide Office Order dated 09.03.2011 and the petitioner continued to hold the post of Headmaster-in-charge till attaining the age of superannuation. Therefore, the petitioner has held the post of Headmaster-in-charge having been found suitable by the D.P.C. in the panel prepared as per Annexure-A to the counter affidavit. Therefore, the petitioner by virtue of discharging the higher responsibility is entitled to the salary admissible for the post of Headmaster from the date he assumed the charge of Headmaster-in-charge till the date of his superannuation.

ii) It would be profitable to refer the decision reported in AIR 1999 SC 838 wherein the Hon'ble apex Court has been pleased to hold that on the principle of quantum merit the respondents should have paid to the appellant as per the emolument in the aforesaid higher scale during the time he

actually received salary in an officiating capacity and not as a regular promotee.

In the decision of Hon'ble apex Court reported in 1990 Suppl. SCC 165 Kishanlal Kalar-vrs.-State of Bihar and others, the benefit of retrospective promotion has been given.

iii) There is no denial of the fact that the petitioner was kept in charge of the Headmaster from 09.03.2011 uninterruptedly till attaining the age of superannuation. But on legally untenable and flimsy ground the petitioner was deprived to get regular promotion though duly selected and recommended by the D.P.C. on 12.01.2010 and the action of the opposite parties appears to be facetious without any rhyme or reason. Therefore, the petitioner is entitled to Headmaster scale of pay from 09.03.2011 with all service benefits till attaining the age of superannuation.

In view of the reasons stated in the foregoing paragraphs, this Court is inclined to accede to the prayer of the petitioner with a direction to the opposite parties that the petitioner be treated to have retired as regular Headmaster with effect from 01.03.2011 till the date of his superannuation and entitled to the Headmaster scale of pay with effect from the said date along with other consequential financial and service benefits and the opposite parties are directed to complete the exercise within a period of eight weeks from the date of communication of the order.

Resultantly, the writ petition stands allowed.

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2019 (III) ILR-CUT-394

P. PATNAIK, J.

W.P.(C) NO. 10328 OF 2014

SMT. (DR.) SANJUKTA PADHI …….Petitioner

-Vs-

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

SERVICE LAW – Seniority and promotion – Petitioner promoted and joined in the post of Associate Professor on 14.11.2012 – O.P. No. 6 joined in the same post as a direct recruit on 07.11.2012 – Petitioner seeks seniority over O.P. No. 6 on the ground that the promotes shall en bloc be senior to the direct recruitee for the same year – Whether can be accepted – Held, No – Reasons indicated.

So far as the petitioner is concerned, the petitioner completed five years as Assistant Professor on 18.7.2012 and was recommended by the Selection Committee on 16.10.2012 for promotion to the post of Associate Professor and the petitioner was given promotion to the post of Associate Professor in Radiation Oncology as the order dated 14.11.2012 and the petitioner joined the said post on the same day. Therefore, there is no dispute with regard to joining of the opposite party no.6 on 07.11.2012 and the petitioner on 14.11.2012.

Admittedly there is no rule with regard to determination of inter se seniority amongst the different posts in AHRCC. Therefore, in the absence of any rule usually the date of joining is the criteria for determination of inter se seniority. The view of this Court gets fortified by the decision of the Hon'ble Apex Court referred to supra. Apart from the date of joining, other factors which weighed in favour of opposite party no.6 is due to the experience of opposite party no.6 in the post of Associate Professor, Radiotherapy in M.K.C.G. Medical College since 30.06.2005 vis-à-vis the petitioner's promotion to the post of Associate Professor on 14.11.2012. Therefore, in the impugned order dated 25.04.2014 issued by the Health & Family Welfare Department, the Government of Odisha has taken into consideration, the more teaching experiences of opposite party no.6, apart from earlier date of joining. Though the learned Senior Counsel of the petitioner has made an impassioned plea about the fortuitous circumstances and such circumstances are part and parcel of service conditions and this Court would be loath to accede to the submissions advanced by the learned Senior Counsel for the petitioner.

Case Laws Relied on and Referred to :-

1. 1996(2) SLR 892 : Pilla Siatram Patrudu & Ors v. Union of India & Ors.
2. (2015) 1 SCC (L & S) 56 : Asis Ku. Samanta & Ors. v. State of W.B & Ors.
3. (2011) 3 SCC 267 : Pawan Pratap Singh & Ors. v. Reevan Singh & Ors.

For petitioner : Mr. G.A.R. Dora, Senior Advocate
For Opp.Parties : Mr. K.P. Mishra (for O.P. No. 6)
Mr. B. Mohanty (for O.P. No.4)

JUDGMENT Date of Hearing : 16.08.2019 : Date of Judgment : 11.09.2019

P. PATNAIK, J.

In the accompanied writ application, the petitioner has inter alia prayed for quashing of the order dated 25.04.2014 issued by the Health & Family Welfare Department, Government of Odisha (Annexure-5) and for direction to the opposite party nos.1 to 5 to fix the seniority of petitioner in the post of Associate Professors, Radiotherapy in Acharya Harihar Regional Cancer Centre, Cuttack (in short, 'AHRCC') with effect from 17.07.2012 or 16.10.2012.

2. The brief facts as delineated in the writ application is that the petitioner was selected through a process of selection and joined the post of lecturer in Radiotherapy in the Acharya Harihar Regional Cancer Centre,

Cuttack on 23.10.2004. Thereafter, on the recommendation of the Departmental Promotion Committee, she was promoted to the post of Assistant Professor on 18.07.2007. She was further promoted to the post of Associate Professor in Radiotherapy. She challenges unilateral decision of the authority rejecting her claim and showing opposite party no.6 as senior to her in the post of Associate Professor without giving any opportunity.

The petitioner made a representation on 01.11.2013 with a prayer to treat her as promotee and grant her seniority with effect from 17.07.2012. She has also prayed in the representation not to finalise the seniority list till a decision is taken in the grade of Associate Professor, but till date no decision has been taken on her representation and steps have been taken to issue the final gradation list. Due to the above illegality and arbitrariness shown to her she has filed W.P.(C) No.665 of 2014 and vide order dated 29.01.2014 this Court was pleased to dispose of the writ petition directing the opposites party no.2 to take a decision on her representation. Notwithstanding, the order of this Court, the opposite party no.2 on 25.04.2014 rejected the claim of the petitioner, which is sought to be impugned being in breach of principle of natural justice.

3. Opposite party no.4 has filed counter affidavit controverting averments made in the writ application. It is stated in the counter affidavit that the petitioner was appointed after due recommendation by the Selection Committee and joined as lecturer, Radiation Oncology and her appointment was confirmed with effect from 23.10.2005 against the said post. She was promoted to the post of Assistant Professor, Radiation Oncology as per the recommendation of the selection committee and she joined on 18.07.2007 against the vacant post of Assistant Professor.

It is also disclosed in the counter affidavit that on 12.05.2012 an advertisement was published for filling of the post of Associate Professor, Radiation Oncology, since the petitioner was only available candidate having no requisite eligibility criteria for promotion. Opposite party no.6, Dr. Niharika Panda was selected for the post of Associate Professor, Radiation Oncology by the selection committee on 16.10.2012 and she joined the said post on 07.11.2012. The petitioner, who has completed the eligibility criteria for five years as Assistant Professor on 18.07.2012 was considered and recommended by the selection committee on 16.10.2012 for promotion to the post of Associate Professor, Radiation Oncology. It is also submitted in the counter affidavit that after obtaining the opinion from the Law Department,

Government of clarified that opposite party no.6 is considered senior to the petitioner. To reconsider such decision, the petitioner made a representation before the opposite party no.2. Since no action has been taken on her representation, the petitioner moved this Court in W.P.(C) No.665 of 2014 and the same was disposed of on 29.01.2014 with a direction to consider the representation as expeditiously as possible, preferably within a period of four weeks. With the aforesaid submission, the opposite party no.4 prays for dismissal of the writ application.

4. The petitioner in reply to the counter affidavit filed by the opposite party no.4 has filed rejoinder stating that the method adopted by the opposite party no.4 in giving appointment to opposite party no.6 on the post of Associate Professor is actuated by malafide intention.

5. Learned Senior counsel on behalf of the petitioner has submitted with vehemence that as per the Clause 22.2(b) of the Memorandum of Bye-laws of the AHRCC, which governs the service condition of the employees, inter alia envisages that the appointment to the post of Associate Professor shall be made by the selection committee from open advertisement, if no eligible candidates are available from the Centre. The post of Associate Professor in Radiotherapy fell vacant on 05.09.2007 and for reasons best known to the authorities the said post was not filled up and advertisement was made on 12.05.2012. Though the petitioner was eligible for promotion to the post of Associate Professor in Radiotherapy w.e.f. 17.07.2012 and had the authorities waited for two months more, then the petitioner would have become eligible to be promoted as per the aforesaid provisions, however, the case of the petitioner's promotion was taken up by the DPC held on 16.10.2012 and finally the order of promotion was given on 14.11.2012. Opposite party no.6 joined the post of Associate Professor in Radiotherapy on 07.11.2012 and had the recommendation of Selection Committee/DPC in case of petitioner been given effect to immediately after 16.10.2012, the petitioner would have stolen a march over the opposite party no.6.

Learned Senior counsel further submits that in view of the decisions of the Hon'ble Apex Court reported in ***1996(2) SLR 892 : Pilla Siatram Patrudu & Ors v. Union of India and Ors*** and **(*2015) 1 SCC (L & S) 56 : Asis Kumar Samanta &others v. State of West Bengal and others,*** the petitioner being a promotee shall be en bloc senior to the direct recruitee of the same year. He further by referring to paragraph-6 of the rejoinder affidavit submitted that there was no justification in issuing appointment

order dated 14.11.2012, after a delay of 28 days, but for this delay of 28 days, the petitioner would have joined as Associate Professor much earlier than the opposite party no.6, who was relieved from the different services on 5.11.2012 and joined on 7.11.2012. After selection, the opposite party no.6 applied for VRS on 16.10.2012 and was relieved on 5.11.2012 and joined on 7.11.2012.

Learned Senior Counsel by referring to various rules, such as Rule-22(1) of the Orissa Finance Service Rules,1951, Rule-26 of the Orissa Service of Engineers Rule,1941, Rule-20 of the Orissa Education Service of Engineers Rule,1941, Rule-20 of the Orissa Education Service, Rule-22(ii) of the Orissa Labour Factories and Boiler's Inspection Service Rules,1972, Rule-9 of the OAS-II Recruitment Rules,1978 and Rule 19 of the Orissa Administrative Tribunals Rules,1999, Labour Officer's Rule and the Orissa Auditor's Service Recruitment and conditions of Service Rules,1987, as has submitted that the promotes shall en bloc be senior to the direct recruitee for the same year.

6. As against the submission, learned Senior Counsel for the petitioner, the counsel for opposite party no.6 submitted that admittedly, the opposite party no.6 joined the post of Associate Professor, Radiotherapy on 07.11.2012 and the petitioner joined on the said post on 14.11.2012 as promotee. Therefore in the absence of statutory rule the date of joining will be the determining factor for inter se seniority. Moreover, the petitioner has not challenged the advertisement, therefore, the petitioner now at this belated stage is estopped to challenge the seniority of the opposite party no.6.

7. Learned counsel for the opposite part no.6 has referred to the decision reported in ***(2011) 3 SCC 267 : Pawan Pratap Singh and others v. Reevan Singh and others.***

Learned counsel for opposite party no.6 further submits that the opposite party no.6 was promoted to the post of Assistant Professor on 01.02.2001 in MKCG Medical College, Berhampur whereas the petitioner was promoted to the post of Assistant Professor on 18.07.2007 and further the opposite party no.6 was promoted to the post of Associate Professor Radiotherapy in M. K. C. G. Medical College, Berhampur on 30.06.2005 and whereas the petitioner has been promoted as Associate Professor on 14.11.2012, after seven years of promotion of the opposite party no.6 to the post of Associate Professor and while the opposite party no.6 was continuing as Associate Professor, Radiation Oncologist under M. K. C. G. Medical

College, Berhampur, AHRCC invited application for the post of Associate Professor, Radiation Oncology, after being duly selected joined the said post prior to the date of joining of the petitioner.

Learned counsel for opposite party no.4 by reiterating the submissions made in the counter affidavit has empathetically submitted that with regard to inter se dispute of the Associate Professor between the petitioner and opposite party no.6, the matter was placed before the Governing Body meeting of AHRCC held on 18.06.2013 and as per the decision of the Governing Body to endorse the proposal to Law Department for their views regarding fixation of seniority of Associate Professors, Radiation Oncology in AHRCC and after obtaining views/opinion from the Law Department, it was clarified by the Government of Odisha, H & FW Department that opposite party no.6 is considered senior to petitioner and the petitioner made a representation to the authorities for consideration. Being aggrieved by the non-consideration, the petitioner approached this Court in W.P.(C) No.665 of 2014, which was disposed of on 29.1.2014 with a direction to opposite party no.2 to consider the representation, as expeditiously, as possible preferably within a period of four weeks. After examination by the Law Department and in absence of any specific rule regarding seniority to the post of Class-I and Class-II and after joining of the petitioner and having more service experience has been recommended above the petitioner, the petitioner's representation has been rejected by the opposite party no.2 vide order dated 25.04.2014 under Annexure-5 to the writ application.

Learned counsel for opposite party no.4 submitted that the rejection of representation is neither illegal and arbitrary nor there is any violation of Articles 14 & 16 of the Constitution of India.

8. After giving my anxious consideration to the rivalised submission and on perusal of the records, this Court is of the considered view that the petitioner has not been able to make out a case for interference due to the following facts and reasons and the judicial pronouncements.

9. As per the service rule and regulation of the AHRCC, the post of Associate Professor is to be filled up by way of selection-cum seniority amongst the Associate Professor there having a minimum five years of Experience or by way of open advertisement, if no eligible candidates are available from the Centre on the date of advertisement, i.e., on 12.05.2012. Admittedly, the petitioner did not have requisite experience of five years. Therefore, as per the relevant regulations, the post in question was filled up

by way of direct recruitment, accordingly the opposite party no.6 was selected for the post of Associate Professor in the discipline of Radiation Oncology by the selection committee on 06.07.2012 and she was appointed on 16.10.2012 and joined the post on 07.11.2012.

So far as the petitioner is concerned, the petitioner completed five years as Assistant Professor on 18.7.2012 and was recommended by the Selection Committee on 16.10.2012 for promotion to the post of Associate Professor and the petitioner was given promotion to the post of Associate Professor in Radiation Oncology as the order dated 14.11.2012 and the petitioner joined the said post on the same day. Therefore, there is no dispute with regard to joining of the opposite party no.6 on 07.11.2012 and the petitioner on 14.11.2012.

10. Admittedly there is no rule with regard to determination of inter se seniority amongst the different posts in AHRCC. Therefore, in the absence of any rule usually the date of joining is the criteria for determination of inter se seniority. The view of this Court gets fortified by the decision of the Hon'ble Apex Court referred to supra. Apart from the date of joining, other factors which weighed in favour of opposite party no.6 is due to the experience of opposite party no.6 in the post of Associate Professor, Radiotherapy in M.K.C.G. Medical College since 30.06.2005 vis-à-vis the petitioner's promotion to the post of Associate Professor on 14.11.2012. Therefore, in the impugned order dated 25.04.2014 issued by the Health & Family Welfare Department, the Government of Odisha has taken into consideration, the more teaching experiences of opposite party no.6, apart from earlier date of joining. Though the learned Senior Counsel of the petitioner has made an impassioned plea about the fortuitous circumstances and such circumstances are part and parcel of service conditions and this Court would be loath to accede to the submissions advanced by the learned Senior Counsel for the petitioner.

11. In view of the aforementioned discussion, as a logical sequitur to the reasons stated in the foregoing paragraphs, this Court is not inclined to accede to the prayer of the petitioner.

Accordingly, the writ petition sans merit is dismissed.

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