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SHRI JAGANNATH TEMPLE, PURI – Writ petition filed under Article 32 of the Constitution of India seeking a direction for an investigation/enquiry into the disappearance of keys of the Ratna Bhandar of ShrI Jagannath temple with other prayers – Apex court after considering the reports of the District Judge, Puri, amicus curiae and the State Govt. issued the following directions as an interim measure.

Mrinalini Padhi -V- Union of India & Ors. (S.C)

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WORDS AND PHRASES – '*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.

Saroj Kumar Sahu -V- State of Orissa & Ors.

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2019 (III) ILR - CUT- 401 (S.C)

ARUN MISHRA, J, M.R. SHAH, J & S. RAVINDRA BHAT, J.

WRIT PETITION (CIVIL) NO. 649 OF 2018
WITH
WRIT PETITION (CIVIL) NO. 1094 OF 2019

MRINALINI PADHI .....Petitioner

.Vs.

UNION OF INDIA & ORS. .....Respondents

SHRI JAGANNATH TEMPLE, PURI – Writ petition filed under Article 32 of the Constitution of India seeking a direction for an investigation/enquiry into the disappearance of keys of the Ratna Bhandar of Shrl Jagannath temple with other prayers – Apex court after considering the reports of the District Judge, Puri, amicus curiae and the State Govt. issued the following directions as an interim measure.

It is apparent that various aspects have to be gone into and considered by the Temple Managing Committee and wherever the Government role comes in, the Government has to do the needful after taking all the stakeholders into confidence. Let following aspects be considered:

(i) We are very concerned and worried as to the incident dated 28.12.2018, pointed out by the Temple Managing Committee in which one Bhitar-Chhu Sevak, who was entrusted with the duty of opening the door of SanctumSantorum at 4.30 a.m. for daily puja/nitis, did not open the door on the ground of his personal issues with the Police Administration of Puri Town and the door was opened at 4.30 p.m. This is unpardonable. No one has right to obstruct the nitis and rituals of the Deity to be performed and there are approximately 60,000 people visiting the Temple every day. There is absolutely no right with anyone to delay the opening of the Temple for even a minute. There was total maladministration and chaos writ large from the aforesaid incident. There is no disciplinary control available. In the circumstances, we have to authorize the Chief Administrator of the Temple, for the time being, to take appropriate steps against such servitors/incumbents, who create obstruction in seva/puja/niti and are involved in misbehavior and misconduct against the employees of the Temple Administration or with devotees and he may pass appropriate orders considering the nature of indiscipline.

(ii) Srimad Jagadguru Shankaracharya has expressed grave concern about the nitis/rituals which are required to be performed daily, otherwise it would amount to desecration of the Deities. What rituals are to be performed is not for the Court to decide, but when Temple exists due to the Deities, the Deities cannot be permitted to be disregarded by nonperformance of the nitis, puja and ritual in the traditional form as observed by Srimad Jagadguru Shankaracharya of Govardhan Math, Puri in his suggestions, nitis are to be performed as per the traditional rituals laid down in Brahma Purana, Vamdev Samhita, Pancharatra Ishwar Samhita and Vimarsha, which mention consecration, worship and different festivals related to Shri

Jagannath Temple. Let the Temple Management Committee invite Srimad Jagadguru Shankaracharya and other stakeholders including the erstwhile ruler Gajapathi and ensure that nitis, puja and ritual are performed as prescribed. They are performed regularly punctually every day without any remiss and obstruction. At the same time, we request the Temple Managing Committee to ensure that as suggested by Srimad Jagadguru Shankaracharya and also as per Record of Rights, nitis and puja are performed each and every day. The Temple Managing Committee is the best master to ensure the same. Let the Temple Management Committee ensure and supervise that nitis and rituals are performed regularly.

(iii) There is a need for setting up of schools for the children of servitors. We direct the Temple Managing Committee to allot suitable place for the school for children of servitors for their proper education as may be considered necessary. The school should also cater to other members of the public, and not exclusively for children of such servitors. The cost of Rs.5 crores imposed on Kalinga Institute of Medical Sciences (KIMS) in C.A. No. 4914 of 2016, lying in deposit in this Court along with interest, to be utilized for the purpose of setting up the school and its infrastructure. The Chief Architect of the State to ensure that proper plan is produced with the help of the Temple Managing Committee and progress of steps taken in this regard be informed to this Court.

(iv) There are vast immovable properties within and outside the State belonging to the Shri Jagannath Temple. It is stated by learned Amicus Curiae in his report that 60,418 acres of land belong to the Temple and Record of Rights have been prepared for 34200.976 acres so far. Let the remaining Record of Rights be prepared, as far as possible, within 6 months and the same be placed before this Court. With respect to other immovable properties within and outside the State, let inventory be prepared and details be submitted and how they are being utilized also how much income is generated from them.

(v) It is stated by learned Amicus Curiae in the report that there are several quarries and mines of the Temple, which are in operation without payment. A list of quarries and mines be prepared as to how they are being managed, who is operating them, on what basis and what is the income of the Temple from them and the outstanding dues. Let the list of quarries and mines be produced and the income generated/outstanding dues with names with other details.

(vi) There is no proper accommodation at present for pilgrims provided by the Temple Managing Committee. Report of Shri B.D. Sharma, former Governor of Orissa, indicated that there was need of providing accommodation to 60,000 pilgrims. With respect to the accommodation not only the Temple Administration, but the Government can also do the needful as that is for providing shelter to humanity, which is necessary. When there is a vast congregation of people, it becomes the Government's duty to ensure welfare, law and order, hygiene and provide proper amenities and sanitation facilities. The State Government is, therefore, directed to work out and prepare a plan in this regard. The Temple Administration is directed to coordinate with the Government in this regard for providing shelter place and facilities to the pilgrims.

(vii) It appears that there is necessity for qualified servitors in traditional nitis and rituals. It is for the Temple Management Committee to ensure that proper training is imparted to the servitors as they are in very large number and to ensure that only qualified servitors in traditional nitis and ritual, perform seva, puja and nitis.

(viii) Concern has been expressed in various reports with respect to economic welfare of the servitors. It is for the Temple Administration and for the Government as it provides grants to temple to ensure that servitors are looked after properly. At the same time, it is also necessary to ensure that pilgrims are not harassed for obtaining donations and donations are properly accounted. It can only be ensured when servitors are properly looked after including remuneration and health welfare. Likewise, to stop harassment strict control and discipline with suitable and swift mechanism to punish the erring, should be put in place.

(ix) Concern has also been expressed in the report with respect to the subletting of seva/puja. Contracting the seva/puja is improper and the Temple Management Committee is directed to take steps in this regard and ensure that seva/puja is performed by a person to whom it is assigned by it. (x) Concern has been expressed in various reports with respect to hygiene in the Rosaghar. We direct the Temple Administration to maintain hygiene in Rosaghar at all costs. The hygiene of Rosaghar is indispensable as Bhog for Deity is also prepared. The place has to be clean and hygienic. All effective steps to ensure this shall be taken including using proper means for cooking etc.

(xi) It was also pointed out by the learned Amicus Curiae that certain preliminary preparations take place in the open area. This state of affairs is not proper. In case preparation of food take place in an open area, obviously it is bound to be contaminated. The preparation of food should be done in permanently covered area in an absolutely hygienic condition. The ASI shall forthwith clear the plan for construction of sheds/permanent structures which is absolutely necessary.

(xii) Reports have pointed out that prasad, which is sold in Ananda Bazar, is also not sold in hygienic manner. Let such places be improved and made hygienic, prasadam should be kept in fly proof receptacles and it should be sold at proper rates, to be fixed by the Temple Management. The purity of the prasadam also shall be ensured by the Temple Managing Committee.

(xiii) In the report, necessity has been indicated for I-Cards for servitors and staff, which is in the interest of the Temple Administration. The servitors and staff should be provided with I-Cards so that unscrupulous persons are not able to present themselves as servitors or staff members and the people are not misled on the basis of wrong identity.

(xiv) In the report of Shri B.D. Sharma, Ex-Governor, Orissa, necessity of a dairy farm has also been pointed out. It would be ideal for the Temple to have the dairy farm. Let the Temple Management Committee consider the same in coordination with other stakeholders with respect to opening dairy farm.

(xv) It appears from the Managing Committee response that lot needs to be done with respect to having proper darshan by people at large. As a matter of fact, there should not be any commotion and chaos as large number of pilgrims are visiting the Temple every day. It is a pious duty to provide proper darshan in systematic

systematic manner and to take care of the aged, the infirm and children. It is for the experts to suggest what system can be devised without disturbances to the rituals to be performed in Temple and passage required for it and thereafter Temple Management Committee and Administration have to consider it. We direct the Temple Administration and the Chief Administrator including the State Government to prepare a roadmap with the help of experts for having proper darshan by the devotees/pilgrims and to implement it effectively and to ensure that there is no commotion so that everybody is able to have darshan peacefully without any obstruction by anybody.

(xvi) There are certain incidents which have been pointed out in the report relating to the misbehavior with the women, snatching of ornaments, etc. There should not be any room for any such incident in the Sanctum-Santorum and other Temples situated around. If such incidents are taking place, it has to be dealt with all seriousness with firm hand and there should not be any room for such incidents. Unlawful elements are responsible for doing such acts have to be removed out of the premises at all costs. We direct the Temple Administration and also the Temple Police to ensure that let there be a dedicated section of personnel to tighten security inside the temple and only to ensure that no such incident takes place in the Temples and no misbehavior is meted out to women. Those found involved in such acts cannot be said to be believer in the God also. When such an act is performed in the Temple, it is very disrespectful to Shri Jagannath and the Sanskruti. There is no place for such unlawful activities in Temples. The temple authorities and the police are directed to take strict action to avoid such incidents.

(xvii) With respect to valuables of the Temple, let the Temple Management place before this Court, what kind of inventory it has prepared? How it proposes to secure the valuables of the Temple and ornaments offered by the devotees?

(xviii) Learned Amicus Curiae has also pointed out that there is need for an effluent treatment plant and waste management system which is one of the requirements for keeping the area clean and hygienic for devotees. The State Government can also spend money in this regard, as it is a secular activity. Let proper effluent treatment plant and waste management system be set up with the help of experts by the Temple Administration and the State Government as may be considered appropriate.

(xix) Learned Amicus Curiae has also pointed out that there is a necessity for separate toilets for male and female. We direct that let the toilets be provided with modern amenities and should be kept absolutely clean. The number of toilets shall be adequate having regard to the average footfall in the temple, which is large in number.

(xx) There is a necessity pointed out about the cloak rooms. Let steps be taken by the Temple Administration in this regard.

(xxi) As pointed out in the report, there is necessity for motorcycle stand. Let steps be taken to provide motorcycle stand within a period of 4 months, not only for servitors, but also for those who are visiting the Temple on their own vehicle and it is for the local Administration to work out the proper place for such purpose.

(xxii) As there are various reports which have been submitted from time to time containing various suggestions. What steps have been taken with respect to the suggestions pointed out in these reports, shall also be considered by the Temple Management at the first instance and whatever is done by the other stakeholders like State Government and others, should also be considered by respective stakeholders. In case they have taken any action, be also report to this Court.

(xxiii) Considering the overall situation and the facts, we direct the State Government to depute full time Chief Administrator, not by way of additional charge forthwith.

One of the positive developments is that of introduction of E-Portal. Constant endeavor has to be made to improve upon the information made available. It appears from the reports that there are various temples of importance and different systems of having darshan. It is for the Temple Committee to place such information on website. We place on record our appreciation that all the stakeholders are happy with the development which is taking place at the instance of State Government and they are cooperating with each other in restoration of glory of Lord Shri Jagannath Temple. We direct ASI also to cooperate and to permit the activities of improvement which are not prima facie objectionable and are necessary for public hygiene, sanitation and public health and upgradation of the facilities and at the same time it has to ensure that the form of the new structure is maintained in the same manner as the ancient one.

Let the Temple Management Committee consider various other positive aspects for improvement and invite all the stakeholders including the State Government, whose cooperation is necessary in permissible matters, to take care of finance in the various development activities. The Temple Management Committee has to take steps as it is the sole repository of faith. The progress report and the decisions taken shall be submitted in this Court within eight weeks, in the form of an action taken report.

Case Laws Relied on and Referred to :-

2018 (6) SCALE 651 : Sarika Vs. Administrator, Shri Mahakaleshwar Mandir Committee, Ujjain, M.P. & Ors.

For Petitioner : Kush Chaturvedi
For Respondents : V.K.Mongar (R-3 & 4)
Ravi Prakash Mehrotra (R-5)

ORDER Date of Judgment : 4.11. 2019

ARUN MISHRA, J.

1. The petition has been filed under Article 32 of the Constitution of India to direct an investigation/enquiry into the disappearance of the keys to the *Ratna Bhandar* of the *Shri Jagannath Temple, Puri*. It has also been prayed that an inventory of the valuables stored at the *Ratna Bhandar* of *Shri Jagannath Temple, Puri* be taken and to direct appointment of an expert committee to submit a report to this Court for preservation and management of property and valuables of *Shri Jagannath Temple*. Prayer has also been made to provide express *darshan* to all the devotees visiting *Shri Jagannath Temple, Puri*. Reliance has been placed on the decision of this Court in

Sarika v. Administrator, Shri Mahakaleshwar Mandir Committee, Ujjain, M.P. & ors., 2018 (6) SCALE 651 (Civil Appeal No.4676 of 2018).

2. While entertaining the petition, this Court has passed an order on 8.6.2018, directing District Judge, Puri a submit a report. Later on, vide order dated 5.7.2018, in addition to order dated 8.6.2018, some more directions were issued and were summed up as follows:

> "19. We may sum-up our directions in today's orders, in addition to the orders dated 8.6.2018, as follows:
>
> i) Report of the District Judge dated 26.6.2018 is accepted in principle and action to be taken by the temple administration.
>
> ii) District Judge, Puri may send further report, if any by 31.8.2018, preferably by e-mail.
>
> iii) The State Government may submit report of the Committee constituted by it on or before 31.8.2018.
>
> iv) The Central Government may constitute its Committee, as already directed, within two weeks from today and place its interim report on record of this Court on or before 31.8.2018.
>
> v) Copy of the Report of the District Judge may be placed on the websites of the temple management, Ministry of Culture and website of the Supreme Court for two weeks.
>
> vi) The directions in the order dated 8.6.2018 may be complied with by all concerned and noncompliance thereof may be reported to this Court for appropriate action if necessary.
>
> vii) The temple management may consider, subject to regulatory measures, with regard to dress code, giving of an appropriate declaration or compliance with other directions, permitting every visitor irrespective of his faith, to offer respects and to make offerings to the deity.
>
> viii) We have noted that Hinduism does not eliminate any other belief and is eternal faith and wisdom and inspiration of centuries, as noted in earlier judgments of this Court.
>
> ix) Difficulties faced by the visitors, deficiencies in management, maintenance of hygiene, appropriate utilization of offerings and protections of assets with regard to shrines, irrespective of religion is a matter for consideration not only for the State Government, Central Government but also for Courts. Every District Judge throughout India may examine such matters himself or through any court under his jurisdiction and send a report to the concerned High Court so that such report can be treated as PIL on the judicial side and such direction may be issued as may be considered necessary having regard to individual fact situation.
>
> x) Learned amicus is at liberty to engage with all stakeholders and to give suggestions for bringing about improvements and also to give a report to this Court. However, this will not stand in the way of the Committee of the State Government, Committee of the Central Government or any District Judge considering matters in terms of above directions."

3. This Court vide order dated 9.1.2019, has appointed Shri Ranjit Kumar, learned Senior Counsel as *Amicus Curiae* and Ms. Priya Hingorani, learned Senior Counsel was requested to assist him in the matter. Learned *Amicus Curiae* has submitted interim reports pursuant to the orders which have been passed by this Court from time to time. During the pendency of the writ petition, the State Government has decided to make certain land acquisitions so as to provide various facilities to the pilgrims such as building of watch tower, an evacuation plan, widening of roads, etc. A Cabinet of the State Government of Orissa has taken a decision, which has been gazetted on 27.8.2019. Thereafter, as the instructions had been issued by the State Government, there was some unrest for the time being which has been settled. We had requested the *Amicus Curiae* to make a site visit and submit a report. They have submitted their report.

4. We have heard the learned Counsel for the parties and have considered various reports. We are happy to place it on record that the learned Counsel appearing at the Bar expressed satisfaction that the action is being taken by the State Government as per the Resolution dated 27.8.2019.

IN RE: REPORT OF DISTRICT JUDGE, PURI

5. The District Judge, Puri has submitted the report along with various documents pursuant to order dated 8.6.2018. Following Annexures have been filed:

"**ANNEXURES**

A-I Sketch Map of Shri Jagannath Temple, Puri.
A-II Sketch Map of different locations in Shri Jagannath Temple, Puri.
A-III Sketch Map of Shri Jagannath Temple with indication of five rows of queue of Darshan of the Jews in Shri Jagannath Temple.
B. Proposed and Existing C.C.T.V. Cameras.
C. List of cases against Sevaks.
D. Statement of Sanctioned Post, present strength and vacancy position in Shri Jagannath Temple, Puri as on March 2018.
E. Fund Management of Shri Jagannath Temple, Puri.
F. Audit Report of the Accountant General, Odisha of the accounts of Shri Jagannath Temple, Puri for period April 2009 to September, 2015.
G. Relevant Extracts of the RecordofRights prepared under the Puri Shri Jagannath Temple (Administration) Act, 1952 PartI and Part-II.
H. List of Sevaks and Palia Awards.
J. Number of Hundi installed in Shri Jagannath Temple premises, Puri.
K. Relevant extracts of report of Shri Jagannath Temple Administration Improvement Committee.
L. Relevant extracts of report of the Commission of Inquiry by Justice B.K. Patra, Former Judge, Orissa High Court.

M. Recommendations of the Hon'ble Shri Justice P.K. Mohanty, Commission of Inquiry.
N. Recommendations in the interim report dated 20042017 of the Commission of Inquiry into the affairs of the Shri Jagannath Temple, Puri.
P. The Puri Shri Jagannath Temple (Administration) Act, 1952.
Q. Shri Jagannath Temple Act, 1954."

6. The audit report of the Accountant General, Odisha has also been filed as Annexure-F on following various aspects:

1. Fund Management;
2. Estate Management;
3. Project Management;
4. Financial Management;
5. Utilisation of GrantsinAid;
6. Unrealistic Budget;
7. Submission of Inflated Utilization Certificate (UC) in excess of actual expenditure;
8. Contract Management;
9. Human Resource Management;
10. Miscellaneous observations as to jewellery and ornament, non-maintenance of Asset register, non-maintenance of subsidiary Registers, non-preparation of Report on administration of the affairs of *Shri Jagannath* Temple etc.; and
11. Limitation to Audit

7. Annexure-K is the report of the Committee headed by Shri B.D. Sharma, Ex-Governor for the State of Orissa for improvement of the temple in which certain recommendations have been made including accommodation and other facilities to the pilgrims. It was recommended that accommodation for 60,000 pilgrims should be provided by the Temple Administration. To start with, accommodation for 10,000 pilgrims should be provided as early as possible. With respect to the management of the existing properties and augmentation of income of the Temple, certain recommendations were made in Chapter III. Recommendations have also been made with respect to *Sevapuja, Nitis*, appointment of *Sevaks* and their conditions of service and subsidiary shrines. In Part III, recommendations were made as to accommodation and other facilities to the pilgrims and devotees. It was recommended that accommodation for 60,000 pilgrims should be provided by the Temple Administration and to start with, accommodation for 10,000 pilgrims, should be provided as early as possible. With respect to import of the record of rights and daily *nitis*, recommendations were made in Chapters XXIII and XXIV respectively. Main cause for delay in performance of *Nitis* and the remedy therefor had been dealt with in Chapter XXV. Certain irregularities in the preparation of *Kotha Bhog* were dealt with in Chapter

XXVI. In Chapter XXVII, it was recommended that Temple should take possession of *Rosaghar* Ovens. Certain nature of disputes, which hold back *Nitis* were mentioned in Chapter XXVIII. Economic condition of servitors and their numbers to be reduced were mentioned in Chapter XXIX. The aspect with respect to reforms in the system of *puja* and performance of *nitis*, was dealt with in Chapter XXXI of the report. With respect to the constitution of Managing Committee, certain recommendations were made in Chapter XXXII. Appointment of Administrator was dealt with in Chapter XXXIII. *Sarbasadharan Darsan* and the queue system were dealt with in Chapter XXXV. *Paramanik Darsan* and special *sevas* were dealt with in Chapter XXXVII. Suggestions for augmenting the income of the Temple was dealt with in Chapter XXXVIII. In the report, reference was also made to transport, dairy farm, lease of other rights and properties, land and buildings of *Lord Jagannath* situated outside the district of Puri and outside the State of Orissa. Certain other suggestions were made in Chapter XXXIX regarding training of *Sevaks*, sanitation, publicity, etc. In Chapter XL, a summary of recommendations was made, which is as under:

"CHAPTER XL
SUMMARY OF RECOMMENDATIONS

257. The practice of the Charcha staff going to call the Sevaks on their Pali day should be stopped. It should be sufficient if the intimation to the concerned Palia Sevaks is given on the day preceding (Chapter XXIV).

258. Suars should be prevented from offering any Baradi or Bikri Bhog at the time of the four main Dhups. To ensure this, the Merda Roso should be commissioned and utilised for preparation of Kotha Bhog. A collapsible gate should be fixed at a convenient place in the Bhog Bata and that should remain closed throughout, and be opened just before the prescribed time for Bhog Mandap Puja. (Chapter XXV).

259. As many extra Bhog Mandaps as are absolutely necessary should be arranged on payment of extra fee for the purpose (Chapter XXV).

260. A temple Official should physically distribute Khei amongst Palia Sevaks. The system of the Pasarathias taking the Khei of the various Palia Sevaks directly from inside the Bhittar Pokharia should be stopped. (Chapter XXVI).

261. By arrangement with the various Palia Sevaks, the Temple Administration should purchase the Khei of the Sevaks and pay them the price thereof in cash (Chapter XXVI). 262. The Temple Administration should resume possession of the Chulis and lease them out every year by public auction to such Sadhibandha Suars as would be willing to take them on annual lease. (XXVII).

263. After proper discussion with the representative of the Suar Nijog and taking into consideration the current prices of foodstuff and other relevant factors, the Temple Administration should fix the maximum selling prices of Abhada and other

commodities exposed for sale in the Ananda Bazar. There should be periodical revision of such rates. (Chapter XXVII)

264. A responsible Officer of the Administration not below the rank of Assistant Administrator should be present inside the Gambhira at the time of Sahan Mela to exercise effective control over Pindika collections and prevent exploitation of the pilgrims either by the Sevaks or by Jatri Pandas or by Dhulia Gumastas (Chapter XXVIII).

265. Disputes that arise between the Administration and Sevak or Sevaks or between the Sevaks inter se should be disposed of quickly by the Administration. The Managing Committee should immediately constitute an Appeal Sub-Committee and that Sub-Committee should ensure that appeals filed before the Managing Committee against the orders of the Administrator are quickly disposed of. (Chapter XXVIII).

266. A Sevak who fails to turn up to do his duty on any particular day without sufficient reasons should be liable for removal. The number of Sadhibandha Sevaks in each category should be reduced by removing those who do not actually do Seva. (Chapter XXVIII).

267. If the above recommendations are implemented, it is likely to result in the elimination of a number of recorded Savaks in each category leaving in the field only those who actually do the Seva. Consequently, the turn of worship of the remaining Sevaks would be more frequent and the remuneration that they would get per month would be more than what it is at present. If in spite of this, it is found that the Nitis are not performed punctually and regularly, the hereditary rights of the Sevaks should be abolished by Legislation and thereafter the required number of Sevaks should be appointed afresh on the basis of monthly salary (Chapter XXIX).

268. A reserve body of Sevaks should be maintained on salary basis consisting of three Srotriya brahmins wellversed in Puja Padhhati who can act both as Puja Pandas and Pasupalaks; two Supakars to prepare Kotha Bhog; a pratihari or a Brahmin who can be entrusted with the security type of work; a Mekap or a Khuntia type of Sevak or in the alternative a Brahmin; a Bodo Sevak or in the alternative a Brahmin; and two non-Brahmin Sevaks. The expenditure incurred on the reserve Sevaks would not be a waste, because so long as their services are not required in time of emergency, they can be utilized for other purpose as indicated in the report. (Chapter XXX)

269. There is no necessity either to curtail the Nitis or to interfere with the system of Puja prevalent at present. (Chapter XXXI)

270. At present neither the Administrator nor the Assistant Administrators and in fact no other official excepting a few sevaks are entitled to go into the Roso. There appears to be no reason why the Administrator and the Assistant Administrators, provided they are Brahmins, should not have the privilege to go into the Roso to check malpractices if any prevalent there. This should be enforced if necessary after consultation with the Sankaracharya of Gobardhan Pitha and Mukti Mandap Pandit Sabha. (Chapter XXXI).

271. Similarly there appears to be no religious prohibition against having three permanent chariots for the Ratha Jatra. There are great many advantages in having such permanent Chariots. This should be done after necessary consultation with Jagatguru Sankaracharya and the members of the Mukti Mandap Pandit Sabha after taking due note of public opinion in the matter. (Chapter XXXI).

272. The Managing Committee should consist of 10 members, namely –

1. The Raja of Puri, who should be the Chairman.
2. The Collector of Puri, who should be the Vice-Chairman.
3. Administrator.
4. Commissioner of Endowment.
5. Jagatguru Sankaracharya of Gobardhan Pitha or if he is not available any other Sanyasi of Sampradaya.
6. Patajosi Mahapatra or in his absence the person functioning as such.
7. Three persons of learning devoted.
8. to the cult of Lord Jagannath.
9. nominated by the State Government.
10. A nominee of the Advisory Body consisting of persons who donate Rs.5 lakhs or more for the Foundation Fund of the Temple.

The tenure of appointment of nonofficial Members should be three years. Power should be given to the Managing Committee to coopt for any particular meeting, any Sevak or Sevaks whose presence is considered necessary or desirable by the Committee. (Chapter XXXII).

273. The present provision regarding selection of Administrator requires no modification. What however is important is proper selection of the Officer. Not only should he be administratively strong but he should also have a religious bent of mind, and one who can involve himself completely in the administration of the Temple affairs. The minimum period of deputation of an Officer to work as Administrator should be five years. (Chapter XXXIII).

274. Similar procedure should be adopted in the appointment of Assistant Administrators. There should be three Assistant Administrators one – to remain in charge of revenue administration, the office and establishment; the second to remain exclusively in charge of the Nitis and the third in charge of the developmental works and discipline inside the Temple. The period of appointment of Assistant Administrators should also be five years (Chapter XXXIII).

275. As the Administrator is proposed to be drawn from the Orissa Administrative Service, Class (1) controlled by the Political & Services Department and the Assistant Administrators are proposed to be drawn from the Orissa Administrative Service controlled by the Revenue Department, a convention should grow that in matters of posting and withdrawal of these Officers, the concerned Department would do so in consultation with the Law Department, which is in administrative charge of the affairs of the Sree Jagannath Temple. (Chapter XXXIII).

276. Disciplinary power vested in the Administrator under the Act are quite adequate. But in spite of there being innumerable occasions to warrant the exercise

of such powers, no Administrator so far has done so because of the fear that such action may precipitate a strike in which case the public as also the Government, without trying to enter into details, would immediately hold the Administrator responsible for precipitating such crisis. The general attitude of all Administrators is to somehow or other manage affairs peacefully during their limited tenure of office. To enable the Administrator to become effective in the Administration of the Temple affairs, he should not only be given a free hand for such management but he should also be assured by Government that so long as he acts on correct lines, his action would be supported irrespective of any unpleasant consequences, that may ensue. (Chapter XXXIV)

277. Section 21A of the Puri Sree Jagannath Temple Act should be amended to provide for suspension of a Sevak pending initiation and disposal of proceedings against him. (Chapter XXXIV)

278. Order passed by the Administrator under clauses (h) and (i) of Sub-Section 2 of Section 21 should be brought within the purview of Sub-Section 1 of section 24. (Chapter XXXIV).

279. The queue system should be introduced to regulate the entry of pilgrims inside the Temple for Darshan of the deities. Sahan Mela which at present means the pilgrims going into the Bhittar Pokharia to have Darshan of the deities, should continue. But the time allowed for such Sahan Mela should be restricted to one hour in the morning and half an hour during night. At all other times, excluding however such occasions when entry of the pilgrims to Natyamandir (the area between Chandan argali and Jaya Bijoya Dwar) is prohibited, pilgrims should be allowed to go in queue up to Chandan argali to have Darsan of the deities free of charge. If at times other than Sahan Mela a pilgrim wants to enter into the Bhittar Pokharia for Darsan of the deities he should avail himself of the provision for Paramanik Darsan which is at present in vogue. The existing fee for Paramanik Darsan should be slightly increased. (Chapter XXXV)

280. The practice of placing three Jharis in front of the three deities for Pindika collection should be discontinued. Instead of that a strong sealed box with a slit on the top of it should be placed just below the Ratna Sighasan, at the time pilgrims are allowed into the Bhittar Pokharia either at the time of Sahan Mela or at the time of Paramanik Darsan. Such of the Jatris who are inclined to make any offering to the deities may put their offerings in such boxes. A similar box should also be placed near the Chandan argali to enable the Jatris who have Darsan of the deities from that point to place their offerings. Excepting the Palia Pasupalaks who sit on the Ratna Singhasan at the time of Sahan Mela, there should be no other Palia Sevak on duty inside the Bhittar Pokharia at the time of Sahan Mela. It shall be the duty of the Palia Pasupalak on duty who sit on the Ratna Singhasan to distribute Tulasi to the pilgrims. They shall not, on pain of disciplinary action, solicit for any offering from the pilgrims. Similarly, at the time of Darsan by the pilgrims from near the Chandanargali a Sevak should be posted there only to distribute Tulasi to the pilgrims and he should be prohibited from soliciting any offerings from pilgrims. (Chapter XXXV)

281. The adoption of the queue system would not prevent the pilgrims from gathering in the Jaganmohan and to have Darsan of the deities from that place as they are doing at present. It is not necessary to regulate them on ordinary days. But regulation even of such pilgrims would become necessary on festive occasions when there is expected to be rush of pilgrims. (Chapter XXXV)

282. The existing system of collection of Attika money by Jatri Pandas may be allowed to continue only on the specific condition that out of the Attika amount they should pay 25% to the funds of the Temple. Simultaneously Legislation should be undertaken to give power to the Temple Administration to exercise sufficient control over the Jatri business. No person shall be allowed to continue doing business of Jatri Panda without obtaining a licence from the Administrator and no such licence should be given to anyone who does not actually perform Seva in the Temple. Conditions should be embodied in the licence indicating the amount that a Jatri Panda is entitled to take from a pilgrim for services rendered, and the accounts he is to maintain, etc. No Jatri Panda can engage as his Gumasta a person who himself has not obtained a licence from the Administrator. If Jatri Pandas do not agree to contribute 25% of the Attika money to the Temple fund, collection of Attika by Jatri Pandas should be banned by Legislature, and due publicity should be given that if the Jatris wish to make any offerings to the Deities for any purpose whatsoever, the offerings should be put only in the Hundis placed in the Temple and that no offerings made elsewhere will be utilized for the purposes of the Deities. (Chapter XXXVI)

283. There should be complete ban on the activities of Dhulia Gumastas. The Temple should set up an organization of pilgrim guides and in enlisting such guides preference should be given to Dhulia Gumastas who, having regard to their character and antecedents, are found fit for the job. Preference should also be given to the Sevaks who by reason of any reforms brought about by Legislation or otherwise would be displaced from their Seva. Each pilgrim guide should obtain a license from the Administrator. (Chapter XXXVI).

284. Provisions contained in Clauses 18B, 18C, 18D and clauses 18F to 18H in the Sree Jagannath Temple (Amendment) Bill, 1976 are commended for acceptance. (Chapter XXXVI).

285. Even if the present system of Attika is allowed to continue under conditions and restrictions mentioned above, still a Hundi should be placed in a prominent place in the Jagamohan inside a screened enclosure where Jatris may put their offerings. Similarly, in some of the important subsidiary shrines inside the Temple sealed boxes may be placed where pilgrims may put their offerings. (Chapter XXXVI).

286. Existing facilities for Paramanik Darsan should continue, but the fees may be raised slightly. Besides Paramanik Darsan, provision should be made for Ekanta Seva by pilgrims. (Chapter XXXVII).

287. The Temple Administration should undertake construction of a Dharmasala of its own. If possible, at a place as near the Temple as possible. If there is any difficulty to secure such a vacant site it should put up a Dharamsala in Talabania

near the Railway Station. It should initiate the 'own your cottage' scheme and put up cottages either in Talabania or in Ballapanda. Simultaneously it should enter into negotiations with the owners of Dharamsala to secure management of the Dharamsalas situated in the Town of Puri. If that is not feasible the Temple Administration should at least enter into some arrangements with the owners of Dharamsala to ensure that the pilgrims conducted to the Dharamsalas in the Temple buses are accommodated there. (Chapter XXXVIII).

288. The Temple should keep some of its buses at the Railway Station and bus stand to conduct the pilgrims from there to the Dharamsalas. (Chapter XXXVIII)

289. A Foundation Fund of an amount of Rs.10 crores should be constituted. The Governor may be requested, if he has no objection, to issue an appeal on behalf of the people of Orissa inviting donations to the fund. The Fund should be administered by a Board of Trustees consisting of those donors who pay Rs.5 lakhs or more to the Foundation Fund. The fund when collected should be invested in long term deposits. Only the interest accruing from such deposits should be spent for the purpose of the Temple. The Board of Trustees should meet once a year at Puri to review the financial position of the Temple and inter alia to consider proposals to augment the income thereof. The Board of Trustees should elect a person to be the Member of the Managing Committee. (Chapter XXXVIII).

290. The Temple should publish an almanac of its own. It is only this almanac which should receive the approval of the Raja of Puri and of the Mukti Mandap. Such Almanac is likely to be very popular and the sale thereof may yield a sizeable profit to the Temple. (Chapter XXXVIII)

291. The Temple should obtain monopoly for the manufacture and sale of photo pictures of the Deities in several Besas. This is likely to yield a substantial recurring income to the Temple. (Chapter XXXVIII).

292. The Mahalaxmi Bhandar should be run departmentally instead of being leased out as is being done at present. If worked departmentally it is likely to yield annually a net profit of Rs.2 lakhs as against Rs.70,000 which the Management is at present getting by leasing it out. (Chapter XXXVIII).

293. The Management should introduce a scheme whereby pilgrims may at their cost conduct some of the festivals of the deities for which expenditure is at present being incurred from the Temple Funds. Apart from satisfying the devotional urge of the pilgrims, this system is likely to yield a good deal of income to the Temple. (Chapter XXXVIII).

294. By means of due publicity the pilgrims may be encouraged to offer special Bhogs to the Deity. As a portion of such Bhog would be distributed amongst certain categories of Palia Sevaks, their earnings would increase thereby. Sale of the Temple's share of such Bhog would also yield an income to the Temple. (Chapter XXXVIII).

295. As the Transport Service of the Temple is yielding a net profit of about Rs.2 lakhs per year at present, its scope should be widened as far as it is practicable. (Chapter XXXVIIII).

296. A dairy farm should be started. If properly run there is every likelihood of philanthropic people donating cows to the dairy farm. (Chapter XXXVIII)

297. Niladribihar should be worked departmentally, and Dolabedi Kunja should be revived. (Chapter XXXVIII)

298. Besides taking possession of and leasing out Chulis in the Temple Roso, the Administration should also take possession of all the Saraghars inside the Temple premises and utilise them properly. If possible some of the Sargharas situated in the Bahar Bedha can be leased out. (Chapter XXXVIII).

299. As far as it is practicable, lands of Lord Jagannath and Jagir lands held by Sevaks under Lord Jagannath should be kept out of the purview of land Legislations. This principle should also apply to all Debottar lands. If it is not possible to exempt the Estates of Lord Jagannath from the purview of the Estates Abolition Act, the annuity that is going to be fixed, should be on as liberal a scale as possible, making a further provision for periodic upward revision of the annuity amount with the rise in prices. (Chapter XXXVIII).

300. Sincere and urgent efforts should be made by the Temple Administration to obtain a full list of all properties of Lord Jagannath situated inside and outside the State. Excepting properties situated in the district of Puri, which the Temple can directly manage, efforts should be made to dispose of the properties situated outside Puri and the sale proceeds should be invested in long term deposits. The effort to obtain information regarding properties situated outside the State of Orissa should be made at the level of Government. (Chapter XXXVIII).

301. Transfer of Seva rights should be prohibited by Legislation. (Chapter XXXIX)

302. An institution to train Puja Pandas and such other Sevaks for whom training is necessary should be established inside the Temple. (Chapter XXXIX).

303. A concerted drive to keep the Temple premises absolutely clean should be undertaken by the Temple Administration. (Chapter XXXIX).

304. It must be ensured that foodstuff sold in Ananda Bazar are kept in fly proof receptacles. Foodstuff must be sold at places earmarked for the purpose. Ananda Bazar should be cleaned twice a day. (Chapter XXXIX).

305. Asking for alms within the Temple precincts should be strictly prohibited. (Chapter XXXIX).

306. A religious atmosphere should be created inside the Temple premises by periodically holding religious discourses and by arranging for Vedaparayana and reading of Puranas, inside the Temple precincts. (Chapter XXXIX).

307. Practically no publicity arrangements exists in the Temple at present. The Publicity arrangements should be considerably improved for the convenience of the pilgrims. (Chapter XXXIX).

308. Soliciting Dakhina in any form by any person, be he a Sevak or otherwise, inside the Temple premises should be prohibited. (Chapter XXXIX).

309. Mahaprasad Seva Sadan which had been started some time back and which has fallen into disuse now should be revived. (Chapter XXXIX).

310. A Code of Conduct for observance by all Sevaks inside the Temple should be framed and their observance should be strictly enforced. (Chapter XXXIX)."

The CCTV Cameras having night vision was also recommended.

IN RE: REPORT OF LEARNED AMICUS CURIAE

8. Shri Ranjit Kumar, learned *Amicus Curiae* has made inspection of the premises on 2223.2.2019. He has made reference to the Puri Shri Jagannath Temple (Administration) Act, 1952 (for short, 'the 1952 Act') and Shri Jagannath Temple Act, 1954 (for short, 'the 1954 Act'). He has drawn our attention to the definition of *Sevaks* as defined under Section 4(d1) of the 1954 Act, thus:

> "4(d1) "Sevak" means any person who is recorded as such in the Record of Rights or is recognized by a competent authority as a Sevak or his substitute or has acquired the rights of a Sevak by means of any recognized mode of transfer and includes a person appointed to perform any niti or Seva under clause (i) of subsection (2) of Section 21."

9. Learned *Amicus Curiae* has pointed out in his report that 1954 Act has been made to reorganize the scheme of the management of the affairs of the Temple and to provide better administration and governance having regard to the ancient customs and unique and traditional *nitis* and ritual contained in the Record of Rights prepared under the 1952 Act. The Managing Committee has been constituted under the Act, *inter alia,* to ensure proper performance of *Seva*, *Puja* and periodicals *Niti* of temple, arrange for proper collections of offerings, audit of accounts and installation of Hundi.

10. Learned *Amicus Curiae* has pointed out following aspects in his report of inspection:

> (a) There is scope of improvement on various aspects with respect to visits of devotees inside the Temple complex. Suggestion has been made to have *darshan* in a systematic line, which facility is available in *Tirupati*, Golden Temple and *Mata Vaishno Devi* or such other similar places. Learned *Amicus Curiae* was informed that the entire complex is about 10 acres and a very large number of smaller temples were there, approximately 97.
>
> (b) With respect of hygiene more specifically in *Rosaghar*, where all the cooking for the *Mahaprasad* is done, it was found that there was a lot of activities being done on small chabutra open to the air and without proper manner of disposal of waste. Wood fired chullas are used in the main kitchen. Out of 240 chullas, 8 are specifically used for preparation of *Kotha Bhog* of the *Lord Jagannath* and the rest are under the possession of other licensees who pay nominal rent to Temple

administration and are cooking the *Mahaprasad*. The hygiene in the main kitchen is not known. There is no disposal mechanism for waste nor an effluent treatment plant.

(c) With respect to hygiene requirement to Anand Bazar where the sale of *Mahaprasad* takes place, the steps require large scale improvement in terms of hygiene, but Archaeological Survey of India (ASI) seems to be having some issue, if improvement is made.

(d) Donation boxes should be placed at strategic point both within, outside and at all other smaller Temples within the complex.

11. Learned *Amicus Curiae* was informed that 119 types of *Seva/Nitis/*Rituals are performed by the *Sevaks* who are hereditary and the daily requirement is about 85 to 90 *Sevas* from 45 categories of *Sevaks* and the requirement increases in festivals and occasions. The Managing Committee meeting was held to consider the 12 recommendations made by the District Judge. Learned *Amicus Curiae* has reported regarding 12 suggestions thus:

"(i)**Abolition of Hereditary Sevaks / Appointment of Sevaks:** Firstly, in terms of the 1952 Act the hereditary right granted to the *Sevaks* is recognized and is statutory in nature. Therefore the same cannot be abolished because each of the *Sevaks* who belonged to different *Nijog* have been recognized with reference to their right to perform *Rituals/Nitis* of the *Deity,* since it is a practice which has been going on for time immemorial. The same cannot be taken away and those rites stand recognized. However, there are presently about 2300 *Sevaks* belonging to different *Nijogs* and what was suggested was that the number was required to be reduced so that each of the *Sevaks* gets some turn for Seva and thereafter some *Puraskar* for the maintenance and upkeep of the family and their livelihood. The others be given a golden handshake which was being worked out between the administration and the *Nijogs* without losing any of the hereditary practice and requirement qua with *Deity* while having a reserve list also so that in the absence of any *Sevak,* the *Nitis* and *Rituals* are not in any way affected.

(ii) **Prohibition to collection of money by *Sevaks:*** The Administrator along with some others in the Managing Committee suggested, as is also are the requirement under the Act, that additional *Hundis/Donation Boxes* are placed and from out of the money received a certain percentage be disbursed to the *Sevaks.* Over and above, those devotees/visitors who have a specific *Yatri Puja* may do so at a price to be deposited through the office where receipts would be granted and a percentage of the same would be paid to the *Sevak* for performing that *Puja.* In this manner the *Darshan* of the Pilgrim will not be effected and at the same time the *Sevaks* would also be getting certain percentage of the collection. It was my understanding that the percentage being given on some things or the percentage that is being thought of may be on the lower side.

(iii) **The Temple Management to take control of *Rosaghar* and *Chullas*:** I have already dealt with this above and I was informed by the Managing Committee that

they will make sure that hygiene is brought to the standards and all efforts are being made in that direction.

(iv) **Provision of separate toilets for male/female, *Sevaks:*** I was informed that just now there was only two places in the West and the South but 10 more urinals and two toilet complexes were being set up with private maintenance so that hygiene and cleanliness is maintained and cloak rooms will be made in four months time and that a motorcycle stand would also be made for the *Sevaks.*

(v) **Queue in Darshan:** I have already outlined this above and have suggested already to the Managing Committee that how it could be done and will also explain in the Court is well.

(vi) **Surveillance of collection from *Hundis and Donation boxes:*** This has also been dealt with above.

(vii) **Audit of Temple fund by Accountant General:** I was informed that Audit was already being done by the Internal Audit Committee of the Temple Administration, by the Chartered Accountant and that the grants which were made by the State Government were being audited by the CAG. Further the Chartered Accountant, member of the Managing Committee, informed me that the accounts are going to be put online on the website: www.jagannath.nic.in and that more and more activities will now be put therein. He also informed me that the interest earning of the Temple on the corpus fund of the Temple was approximately Rs.30 to Rs.35 crores per year while the expenses are Rs.60 to Rs.70 crores per year. Thereafter the shortfall is met by the State grants and the capital investment requirements are met by the Government. He was also of the suggestion that digital marketing could be done for the Temple for the purpose of donations to be received. I was also informed that the Temple and endowments have a total of 60418.353 acres of land and the Record of Rights have been prepared only with reference to 34200.976 acres and the rest was under preparation.

It must be understood that there are two kind of Records of Rights visàvis the Temple, one is the Record of Rights as is normally understood with reference to property and the revenue entries and the second is Record of Rights (RITES) which is with reference to the *Rites, Rituals and Nitis* to be performed by *Sevaks* who have hereditary rights and recognized under the 1952 Act.

(viii) **Identity Cards for the Sevaks and Staff:** It has been agreed upon that Identity Cards for *Sevaks* would be made with a colour code for *Sevaks,* for employees and for labour so that unwanted element do not come in. This would be implemented in three months time.

(ix) **Guides to be Registered:** It was informed that a *Yatri Panda Sangh* was being made who would act as guide and who will have to be registered with the Administration and this would also be done in three months time and they would be verified by the office of the S.P., Puri so that any criminal element is not recruited.

(x) **Reduction of Administrative Staff:** I was informed that rationalization of the administrative staff was being done and 127 persons had already been retrenched. The main requirement of the administrative staff was with reference to cleaning and sweeping, the internal temple police, th e management of the lands belonging to the

temple as also the management of the Quarries and Mines of the temple. This rationalization would be completed soon.

(xi) **Single Authority for Security of the Temple:** I was informed that the internal police performing the job of security inside the temple was without any police power but now an additional S.P. Rank officer has been assigned to the temple administration with full powers under the control of the Home Deptt.

(xii) **Proposed Amendments in the 1954 Act:** The emphasis on the amendments was with reference to the meaning of the Records of Rights because of the confusion that is created to the hereditary rights of the *Sevaks* for the performance of the *Nitis* and *Pujas."*

12. Learned *Amicus Curiae* has pointed out that no accommodation is made available for any pilgrim by the Temple Administration. The Administrator informed that *Yatri Niwas* and *Bhakt Niwas* were proposed and one was under construction and another, which was available, required lot of repair.

13. References have been made to the demand of *Sevaks* regarding Temple management to provide school, education, Government jobs, etc., for the families of *Sevaks*. There is no proper accommodation for them and for the education of their children. They hardly get one turn in a month for performing *Seva/Puja*, for which they get *Puraskar*, which is not sufficient for their livelihood.

14. Learned *Amicus Curiae* has also pointed out that proper coordination is required. Certain suggestions have been made for revenue generation of the Temple.

15. The opinion of the Chairman of the Managing Committee Shri Gajapati Maharaj has also been noted by learned *Amicus Curiae* that the situation was very difficult as the heart and soul was not dedicated to the Lord. The three grey areas have been pointed, namely, (1) Management with three authorities – the Government, the Managing Committee and the Administrator; (2) Qualified *Sevaks* are not available despite the requirement of having traditional *Nitis* and *Sevas* and Rituals to be performed. *Seva* should be made attractive; and (3) religious monitoring was not proper.

16. Learned *Amicus Curiae* has also pointed out that proper coordination is required between the Administration and the *Sevaks*. The criminal elements were required to be identified and removed and discipline was required to be brought in both for the *Sevaks* and for the pilgrims with regard to the movement inside and outside the complex. The system of subletting is required to be done away with. There was a requirement of four tier of

security within the Temple in such a manner that only one type of police is available so that the pilgrims are not harassed.

17. Learned *Amicus Curiae* has also pointed out with respect to the meeting he had with the stakeholders. Sevaks were of the point of view that their rites cannot be taken away, which were hereditary in nature. Certain restrictions have been imposed on offering during *Rath Yatra* and on the entry of pilgrims inside the *Garbh Griha* (Sanctum Sanctorum). There is no health welfare scheme nor hospitals are provided. The accounts are not being managed properly. The quarries and mines were allotted in the names of minor. Reference has also been made to the report of 1805 of Charles Grome. It has also been pointed out that there was no internal mechanism for complaint to be lodged by women. It has been pointed out that 89 suggestions of District Judge are being implemented. There was scope for improvement and the hygiene is required to be improved without affecting the hereditary rights of *Sevaks*, which in turn improve the conditions of *Sevaks* and hassle free *Darshan*.

18. This Court has directed the learned *Amicus Curiae* and Shri Tushar Mehta, learned Solicitor General of India, to make inspection and submit a report as to suggestions after the Cabinet decision, which has been gazetted on 27.8.2019. Learned *Amicus Curiae* has submitted his report on 27.9.2019, wherein it has been observed that redevelopment plan around the Temple is mainly to decongest the area for the benefit of pilgrims and to make the city of Puri a world heritage city. Some demolition on the entrance of the Temple has already taken place. The Chairman of the Managing Committee informed that nobody was opposing the reforms for the betterment of the place so that it becomes world heritage city. However, the rehabilitation package should be liberal and proper and should provide fair deal.

19. It has also been pointed out that during annual *Rath Yatra*, lakhs of people visit the Temple town, the congregation is such that it is difficult to manage the crowd. It becomes difficult to manage the crowd especially to protect the elderly or the children or if somebody becomes sick. It was informed that *Nagarjuna Besha* to be held in 202021 and the plan has been prepared to rotate the crowd along the dedicated corridors around the Temple and control the same in a peaceful manner. The rehabilitation package has been prepared for the people who are going to be uprooted from their homes, business places, etc. The acquisition is being done on the basis of negotiation. Learned *Amicus Curiae* also met *Srimad Jagadguru Shankaracharya* and *Swami Nishchalanand Saraswati*, who expressed concern of the daily

Rajbhog and *Puja*, which are called "*NEETIS*" to be performed inside the Temple for Deity on daily basis and if the Deities were not worshipped according to the *Neetis*, then it amounted to desecration of the Idol. He has handed over a written note to learned *Amicus Curiae*. The note given would be helpful for deciding the main writ petition about the *Neetis* and daily ritual to be followed in the worship of Deities.

20. It has also been pointed by learned *Amicus Curiae* that there is a necessity to have a better infrastructure outside the Temple than the existing one, that is sought to be achieved by the proposed plan.

21. Ms. Priya Hingorani, learned Senior Counsel has also submitted a separate report. She visited the Temple on 11.10.2019. She has also pointed out certain demolition has taken place. Those structures were in dilapidated state and unsafe for human habitation. However, Temples inside the *Mathas*, their *Gaadis*, *Samadhis* and other artefacts have been preserved. Certain establishments have been relocated and thus, are yet to be resettled.

IN RE: SUGGESTIONS MADE BY SRIMAD JAGADGURU SHANKARACHARYA

22. Suggestions made by *Srimad Jagadguru Shankaracharya* have also been placed on record, wherein the importance of the place has been pointed out thus:

> "By faithfully darshan of *Neelchakra, Shikha Dhwaj, Devalaya, Garuda Stambha, Shri Patit Pavan*, bowing down in front of *Shri Jagannath* placed on *ratha* from the *ratha* premises and outer circumambulation of temple a person will get same fruit as one who is directly involved in service and worship.
>
> The use of *Mantrik, Tantrik and Yantrik* process for expressing all encompassing *Sacchidananda Swaroop Sarveshwar* in the form of traditionally made *Archa Vigraha* is same as the process of expression of electricity present in water, earth and sky through machines.
>
> Like we need to respect this fact that "Electricity shouldn't disappear and it's existence should be beneficial not fatal". In the same manner the fact that "Five deities namely *Surya Vishnu Shiv Shakti Ganapati* and their *avatars* as defined by *Sanatana Shastra* (scripture) which are consecrated and embedded in the *Archa Vigraha* their refulgence should not diminish and their presence should be beneficial not fatal". Reverence to this fact within the limits of propriety is the ultimate responsibility of cultural, social, administrative and constitutional institutes.
>
> The brilliant people who understand *Devata Tatva* (god element) through the effect of their extraordinary infallible power consider the splendid effect cause composed

universal alldeity either at *Aditya* (sun) according to 'एकैव वा महानात्मा देवता स सुर्य इत्याचक्षते' or as *Agni* (Fire) according to 'अग्निः सर्वा देवताः' (Aitareya Brahmana 2.3). He is also known as *Indra* having extraordinary grandeur, *Mitra* who assures safety from fear of death, *Varun* who purifies all sins. *Agni* which is omnipresent, *Garuda* the divine bird, *Yama* who in form of fire governs and *Vayu* who flows freely everywhere in space.

Therefore worship and consecration of *Surya, Vishnu, Shiv, Shakti, Ganpati* and their *vedas* based *avatar* (incarnations) who perform five task namely creation preservation destruction punishment reward in the form of *Archa Vigraha* is possible. Therefore it is the sacred obligation of learned eminent person that they allow this *Sanatana* tradition which is in harmonious compliance with philosophy, science and behaviour to be implemented in the *Sanatana* method."

With respect to servitors appointed in *Sanatana* Temple, they are permitted to carry out their living. Concern has been expressed about their financial condition. To make temple free from exploitation and healthy environment, mutual understanding has to be developed under the aim to free the sacred institution from economic exploitation. Care should be taken that does not result in more economic exploitation by Government in comparison to before. There should not be neglect and disrespect of any element involved in the proper operation of this sacred institution, but neither more or less participation of everyone is required. A High-Level Committee should be formed for which suggestions have been given to have a harmonious dialogue that can remove all discrepancies in *Shri Mandir*. Following suggestions have been made:

"1. Implementation of the endeavour to promote and systemize Shri Mandir as an institution of education, defence, culture, prosperity, service, *dharma* & *moksha.*

2. Implementation of proper system for selection, training and enrolling servitors according to family tradition.

3. Absence of *dharmic* and spiritual leadership should be rectified as per tradition.

4. The books namely *Rigveda*, *Skanda Purana*, *Brahma Purana*, *Vamdev Samhita*, *Neeladrimahoday, Pancharatra-Ishwar Samhita* and *Vimarsha* which mention consecration, worship and different festivals related to Shri Jagannath; based upon these a book named '*ShrimandirSeva-Samarcha-Prakalpa-Paddhati'-Shri Jagannath Samhita*' should be created by wise pundits under the guidance of *Shrimad Jagadguru Shankaracharya*, *Shri Govardhan Math*, *Puri Peeth* so that blind traditions are negated appropriately and a healthy tradition that is in accordance to *Shastra* (scriptures) is fixed and implemented.

5. '*Mukti Mandapa'* should be restored to its original form and the natural right of establishment, upkeep and management accorded to *Shrimad Jagadguru Shankaracharya*, *Shri Govardhan Math, Puri Peeth* by tradition should be restored.

6. King Gajapati Ji should be recognised as *Yajamana* in a position of King *Indradyumna*.

7. The rights and liabilities of *Shankaracharya*, *Gajapati*, *'Mukti Mandapa'*, servitors and administration should be decided such that they are neither more or less; then the determination and execution of service roles of *Kumbhakar* etc. according to old settled traditions.

8. Determination of tradition of servitors in accordance to *Shastra* (scriptures). The endeavour to make them well educated, cultured, trained, deserving and self-sufficient should be identified and undertaken. A residential school must be established and run accordingly for children of servitors and brahmin family belonging to *solahshasan*. They should receive knowledge and skills training according to their family tradition.

In systemizing Shri Mandir it is expected that due consideration must paid to proper following of traditions, establishing eligibility of servitors according to daily schedule, appointment of servitors within the limits of service required, their training and determination of source of livelihood for extra servitors. In independent Bharat through directionless government this sacred institution has been removed faraway from spiritual guidance and turned just into a hub of money and fame. The implementation of divide and rule policy is heights of short sightedness. Therefore rectification of this discrepancy is highly desired.

With the aim to keep the divine powers of Shri Jagannath Ji in *Archa Vigraha* intact so that worshippers and devotees get benefiter by it not harmed, we need to follow injunctions and prohibitions prescribed in *Sanatan Shastra* (scriptures) just like we follow injunctions and prohibitions regarding electricity. By declaring Shri Mandir as equivalent to *Samadhi* and museum of Gandhi Ji, its sacredness and safety is bound to get extinct.

9. There should be adeptness in securing the sacredness and beauty of temple, protection of decency and ornaments of devotees and management of temple. The service projects run by temple should be determined and implemented.

It is essential to make this sacred institution a center of devotion and of participation of hindus all over world who are devotees of Shri Jagannath and belong to *Sanatan, Vedic, Arya* tradition.

The first consecration of Shri Jagannath Ji was done by *Shri Brahma Ji* on *Vaisakh Shukl Ashtami* and second consecration was done by *Shri Shankaracharya* on *Vaisakh Shukl Dashmi* so annual festival should be held on that day.

10. During the reign of idol destroyers for 144 years Shri Jagannath Ji was not visible; according to *Bhasmajabala Upanishad* on *Vaishakha Shukl Dashmi* 483 BC, *Shri Bhagwatpad Adi Shankaracharya* reconsecrated *Mukti Mandap*. This fact should be illustrated in history of Shri Mandir as a token of gratitude.

11. Through the method specified by *Shri Bhagwatpad Adi* Shankaracharya and his disciple Emperor Sudhanwa the way of managing *Shri Govardhan Math, Puri Peeth* should be cleared; then *Shri Jagannath Mahaprabhu* should be reestablished as the

worship deity of this *peeth* and Puri situated in *Purushottam* region should be popularized as a *dharmic* and spiritual capital and the *Acharya* of *peeth* should be mentioned as it's overlord.

Reckon this fact that without *Devguru Brihaspati Ji*, *Indra* and other *devatas* had to suffer a lot. In modern perspective the infallible cause behind the preeminence of Christians worldwide is the concurrence between both parts of christianty namely alternative governance system and Pope. By keeping this fact in mind a path must be cleared for in principle concurrence between traditional *Vyaspeeth* and government.

12. Most of servitors are financially vulnerable due to less quantity of service in Shri Mandir, a way for their economic welfare must be found out and some adequate arrangements for their medical and other expenses must be made.

13. Government of Odisha should appoint a chief manager adept in complying and making others comply with *dharmic* and spiritual activities in Shri Mandir; but he shouldn't be administrator of *dharmic* and spiritual area.

14. The competent person to be appointed as Chief of Shri Mandir Management Committee must first undergo *dharmic* and spiritual training for a month then he should be appointed to this post so that he is able to keep this sacred institution away from the grips of directionless business class.

15. The determination and execution of standards of sacredness, beauty, grandeur and orderliness in Shri Mandir must be done as soon as possible.

16. The details of property and budget of Shri Mandir must be decided and presented in proper manner.

17. Travellers must receive warm and pleasant behaviour.

18. The service and worship of *DeviDevata* consecrated in Shri Mandir must be done according to *Shastra* (scriptures) at appropriate timing.

19. The selection of members of management committee must be done in *dharmic* and spiritual way with the participation of Shankaracharya, Gajapati, *'Mukti Mandapa', Mukti Mandapa Pandit Sabha'*, Servitors and Government administration.

20. The selection of office bearers of '*Mukti Mandapa'* and '*Mukti Mandapa Pandit Sabha'* must be done under the divine aegis and guidance of *Shrimad Jagadguru Shankaracharya*, *Shri Govardhan Math, Puri Peeth* who is the chief of institution.

21. The publication of annual *Panchang* from Shri Mandir must be done in an authentic and optimal method.

22. The endeavour to organize monasteries, temples of 'Sanatana dharma' in Odisha as *dharmic* and spiritual fortress and divine temples must be determined and implemented.

23. The office bearers of management committees of Shri Jagannath temples built all over nation and world must be contacted in good faith and every year a convention must be organized for them in '*Acharya Peeth', Puri*.

24. An authorised scholar should recite '*Shrimad Bhagwat'* and stories of greatness of *Purushottam* region from *Skanda Purana* in Shri Mandir regularly in morning and evening.

25. Proper arrangements for the security of *Purushottam* area and Shri Mandir situated there must be done.

26. The required reformation between *Garbhagriha* (sanctum sanctorum) of Shri mandir and the attached *Mandapa* must be determined and implemented based upon *Shastra* (scripture).

27. The inordinate secrecy and misconduct in service and worship of *Shri Mandir* is due to addition of different dimensions by many eminent persons from time to time; while elaboration leads to increase in tribulation but brevity leads to assuagement विस्तराः क्लीशसंयुक्ताः संक्षोपास्त् सुखावहाः। (Mahabharata Shanti Parva, 297.20, 37) Therefore, it is necessary to determine and implement practices which are unopposed and in accordance to *Sanatana* tradition and which will not lead this sacred institute to become directionless.

28. While any person and organization related to this institution should be taken care of appropriately, nobody must exploit this *dharmic* and Spiritual institution.

31…..Therefore it's an established principle that *Shri Govardhan Math* and the sacred institution of it's *Aradhya Dev Shri Jagannath Ji* must be managed as per the code of conduct given by *Shri Bhagwatpad Adi Shankaracharya*."

IN RE: RESPONSE OF STATE OF ORISSA, RESPONDENT NO.2

23. The State of Orissa, respondent no.2 has filed an affidavit on 29.6.2018, wherein it has been stated that State of Orissa as per the order dated 8.6.2018 passed by this Court, has constituted a Committee to study the management schemes of other important Shrines such as *Vaishno Devi*, *Somnath Temple*, Golden Temple, Amritsar, *Tirupati Temple* and *Dharmsthala* (Karnataka) Temple. The Committee was directed to submit an interim report. Notification has been issued on 12.6.2018.

24. An additional affidavit has been filed on behalf of State of Orissa on 30.9.2019, in which it has been pointed that a Commission headed by Shri Justice B.P. Das, retired Judge of the High Court of Orissa, was constituted, which has recommended for widening of road outside the Temple for crowd management, movement of emergency vehicles such as fire tenders, ambulances, etc. and the Works Department has submitted a proposal to the Collector for acquisition of land within 75 meters from *Meghanad Pacheri* of *Shree Jagannath Temple* under the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ('the Act of 2013'). A Resolution has been passed by the Cabinet, which has been gazetted on 27.8.2019. It is stated that steps are

being taken in accordance with the provisions contained in the Act of 2013, to acquire and rehabilitate. Three highly unsafe structures have been removed, details of which have been given. It is further stated that 26 commercial establishments have been relocated temporarily till final rehabilitation takes place. The Deities and the *Gaadis* of affected *Maths* have been preserved. The Redevelopment Plan will focus on heritage architecture, complementary affiliation between *Shri Jagannath Temple* and the *Maths* concerned. Adequate parking shall be provided for the use of *Maths* in the redevelopment plan. Shopping units will be constructed as per the Rehabilitation and Resettlement Scheme and provided at common market complexes. The Rehabilitation and Resettlement Package has been filed as Annexure-C along with Heritage City Project of Puri as Annexure-D. Due process of law is being followed and the District Administration has no intention to remove the temples and *gaadies*, etc.

25. Additional Status Report has been filed on 21.10.2019 by the State of Orissa. The State Government has taken a policy decision in consultation with the *Mahant* and the Administrators of the *Matha*. Following five steps have been taken by the State Government:

> "7.That the above referred steps would ensure that –
>
> (i) The long felt need of clearing the nearby area of Shree Jagannath Temple is achieved so as to avoid any stampede, incident of fire, taking care of emergency situation by providing ingress/egress to fire brigade and ambulance and taking the security concerns of the temple and the safety of the devotees into consideration.
>
> (ii) While doing so, the deities, sanctum santorum, gaadi, samadhi of the Matha, relics of the Matha will not be disturbed and remain at their current place with better beautification in line with Kalinga style architecture.
>
> (iii) The properties of the Matha which are used for shops/ commercial activities/ lodges etc will be acquired and cleared and the compensation would be paid at the rate mutually agreed in consonance with the Rehabilitation and Resettlement Policy. Every shopping unit will be eligible for allotment of a shop unit in the market complexes to be developed.
>
> (iv) In view of redevelopment of Matha with accommodation of Mahanta, and other relevant structure as applicable, an alternate site would be made available at the nearest available vicinity of the place where it existed earlier. Structure cost as per law would be paid to the Mahanta of the respective Mathas with construction assistance as prescribed in the Rehabilitation & Resettlement Policy.
>
> (v) Till the time such alternate site is made available, the State Government would pay compensation/ rent on a monthly basis at a rate as per the Rehabilitation & Resettlement policy and based upon the request of the Mahants which is calculated based upon their actual requirement."

The Minutes of Consultation Meeting with various *Mahants* of *Maths* have also been placed on record as Annexures -A to H.

IN RE: SUBMISSION OF INTERVENOR

26. One of the intervenors – *Daitapati Nijog* has pointed that the *Daitapatis* have a hereditary right to perform secret *sevapuja* of *Lord Jagannath* and same is mentioned in Record of Rights under the Act of 1954. Any reduction in number of *Daitapatis* would lead to difficulties in performing the *nitis/rituals*.

IN RE: RESPONSE OF TEMPLE MANAGING COMMITTEE

27. The Temple Managing Committee has filed its first response on 24.4.2019, as to the suggestions made by learned *Amicus Curiae*. It has been pointed that the Temple Administration is neither averse to the implementation of the recommendations/suggestions of learned *Amicus Curiae* on the issue after holding discussions with all the stakeholders on 23.2.2019.

28. It is further submitted that Temple Administration is open to carry out improvements in the Temple as may be directed by this Court in the larger interest of the public, however, improvement should be carried out without hurting the religious sentiments of the people of Orissa, the devotees, religious traditions, the rights of *Sevaks* and the *Jagannath Sanskruti*. Since, it does not wish to have chaotic surroundings around the Shrine or to hurt the religious faith of its devotees, which are spread all over the world. The queue system has been introduced by installing steel railings with covers for all the devotees. Queue is controlled by the police personnel of the Temple Police. Police Officials are monitoring the CCTV footage round the clock. Railings at the *Singhadwar* i.e., main entry, have been installed from 1st week of October, 2019, which was strongly opposed by some groups claiming to be *Jagannath Sena* and called for *Puri Bandh* on 3.10.2019. During which the members of the group vandalized and ransacked the Temple Administration, which is causing huge loss to the property of the Temple Administration. Thus, Temple Administration was forced to abandon the execution at the main entrance to the Shrine.

29. It is further pointed out that large scale improvement for managing the crowd inside the Shrine is not possible considering the fact that the Shrine being protected religious monument is under the control of Archaeological Survey of India (ASI) and without its express permission, no further construction or renovation is possible.

30. As to the abolition of hereditary rights of *Sevaks*, the Temple Administration is in respectful agreement, however, it is submitted by the Temple Administration that Record of Rights has been conferred on such *Sevaks/Sebayats* recognizing their rights under the 1952 Act. The abolition of the system would require amendment of the Act. It has also been pointed out that in the event of such amendment to the existing provisions abolishing the age-old rights of the *Sevaks*, the same would have serious ramifications on the daily *rituals/nitis/pujas* of *Shri Lord Jagannath* as all *Pujaries* cannot perform *seva/puja* of the Deities, which requires special skills and expertise and the present *Sevaks* are well versed with the traditional style of *seva/puja* of the Deities. The abolition of the system may evoke widespread protest. The Temple Administration is contemplating to reduce the number of *Sevaks*, who are large in number and have been enjoying such rights as against the actual number of *Sevaks* for performing the daily ritual and additional *Sevaks* are required on festive occasions only. There are about 2500 *Sevaks* at present and number can be cut down to sizeable level as per actual requirements. Shri B.D. Sharma, Ex-Governor of State of Orissa as also suggested improvement in his report in this regard. He has also suggested employment of *sevayats* for *nitis* shall be rationalized and kept within the limits of actual requirement. The Temple Administration is not in favour of total abolition of ROR of *Sevaks*. *Sevaks* may create serious problems by stopping daily rituals in the event of such steps being taken for reduction of their numbers. Thus, matter has been left at that and they will abide by the directions and the orders which may be issued by this Court.

31. An incident dated 28.12.2018 which took place in the Shrine has also been highlighted by the Temple Administration in which one *BhitarChhu Sevak*, who was entrusted with the daily duty of opening the door to the Sanctum Santorum at 4.30 a.m. for daily *puja/nitis*, did not open the door on the ground of his personal issues with Police Administration of Puri Town, leading to delay in performance of *seva* and *puja*, the door was opened at 4.30 p.m. in the evening with the intervention of Chief Administrator. The Chief Administrator may be directed to take disciplinary action in accordance with law against those *Sevaks*, who are found indulged in ant temple activities including stopping of *nitis/pujas/seva* and misbehavior/misconduct against the employees of the Temple Administration and also the devotees. In case of misconduct with devotees and pilgrims, to debar such *Sevaks* permanently from their ROR and benefits/facilities enjoyed by them under the law. The Committee has also agreed with the collection of donations by *Sevaks* as suggested by learned *Amicus Curiae* in Para 9 of his report. The

Temple Administration has passed a resolution on 18.8.2018 and has formed a Sub-Committee. It has drafted a regulation in this regard and the same was awaiting approval of the Managing Committee in accordance with the procedure provided under Section 31 of the Shri Jagannath Temple Act, 1955.

32. It is pointed out that suggestions have been made by the Chief Administrator to the Managing Committee to develop the *Mathas* located in the periphery of the Shrine for providing low cost accommodation to the poor and needy devotees/pilgrims.

33. The Temple Administration has taken initiative for launching Eservices of the Shrine. The website would cover all relevant information with regard to Shrine like details of *seva/puja*, accommodations for the devotees, the pricechart for sale of *Prasad/Bhog*. The website was likely to be launched on 7.5.2019, on the auspicious day of *Akshya Tritiya*.

34. With respect to hassle free *darshan* to the devotees, the Temple Administration has initiated steps for providing facility of *Parikarma* around the Shrine with covered roof, safe drinking water facility at suitable points, sitting arrangements for old, aged and differently bled persons.

35. For providing safe drinking water to devotees and pilgrims, water purifiers have been installed at several places including *Anand Bazar* for pilgrims/Servitors.

36. With respect to improvement in the hygiene conditions around *Rosaghar*, the matter has been taken up with ASI to take steps including providing cover for pandal where all initial preparations for cooking takes place.

37. With respect to waste disposal, treatment plant is in place at southern gate. Other wastes are being collected by the employees of the Puri Municipality on day to day basis. The Temple is exploring further possibility in view of the report of learned *Amicus Curiae* for installing effective waste management system.

38. With respect to the welfare measures, the Temple Administration has pointed out that they are giving following benefits:

> "14. That so far as the grievances of the sevaks as highlighted in the Report of the Ld. Amicus are concerned, the following welfare measures have already been provided by the Temple Administration for their benefits;

a. Monthly pension for old, senior sevaks, differently abled and widows of the sevaks;

b. Mediclaim policy to all the sevaks.

c. Scholarship to the children of the sevaks to promote education.

d. Dispensary providing free medical facilities to the sevaks and their family members.

e. FirstAid centre inside the Shrine for all.

f. Financial helps to sevaks in case of marriage, thread ceremony and to meet the funeral expenses.

g. Accidental Death Insurance coverage to all sevaks and devotees in case of death inside the shrine;"

39. It is further submitted that the Temple Administration is concerning about setting up of school for the children of servitors where priority is to be given to equip the children with the *Jagannath Sanskruti* and the rites and rituals attached to *seva/puja*.

40. Another affidavit has been filed on behalf of Temple Managing Committee, wherein it is stated that Managing Committee has passed a resolution on 27.9.2018, which is to the following effect:

'(i) Abolition of Hereditary Sevaks/ appointment of Sevaks.

The Managing Committee considered the recommendations submitted by the SubCommittee constituted under the Chairmanship of the Chairman of the Managing Committee to examine this issue; and after thorough discussions unanimously approved the recommendations of the said Sub-Committee after some amendments. A copy of the proceedings of the said Sub-Committee dated 18.09.2018 incorporating the said amendments is annexed hereto as **Annexure: R3/** 41 and may be treated as part of this affidavit. I wish to respectfully add here that the daily and periodical rituals of the Deities are performed according to religious practices, customs and traditions well established since more than 800 years as per the dictates of scared scriptures. The sevaks are performing their respective sevas hereditarily since time immemorial. As the seva is hereditary, the Temple Administration has liberally permitted the descendants of the hereditary right holders sevaks to perform seva as a result of which the number of sevaks has increased considerably over the centuries. It is necessary now to streamline and rationalize the hereditary rights system by redefined it and implementing it correctly. With regard to Puri Shri Jagannath Temple, the hereditary right of a Sevak is not an absolute right to appointment. Rather it is a preferential right to be considered for appointment subject to availability of post, eligibility and fitness. On this basis, it is proposed to select and appoint the number of sevaks actually required from each category of hereditary right holder sevaks for the smooth performance of the daily rituals, periodical nitis and festivals. The number of sevaks actually required and the procedure for selection will be determined after thorough discussion and deliberation with Sevak Nijogs and the State Government. Hereditary right holder sevaks not selected/appointed through this process will be

generously compensated. The State Government will be requested to constitute a committee under the Chairmanship of a senior Judicial Officer for determination of compensation to be paid to each sevak who has not been selected/appointed. However, those who will not be selected will not lose their status as sevak and they or their successors may be considered for selection/appointment in case of vacancy arising in future in their category of seva. If a selected sevak, fails to report in time or neglects in performing his duty, he is liable to be dismissed from seva through appropriate disciplinary proceeding under Sec. 21A of the said Act and a new sevak engaged to perform the seva from among the same category of sevaks in accordance with the R.0.R.. Except handful of sevaks most of the sevaks are performing their seva with sincerity and dedication. Many sevaks are not financially sound which is apparent from the socioeconomic survey conducted by the Temple Administration. Handsome remuneration will be paid to those who will be selected for performing seva puja of the Deities so that they will not face any difficulty in maintaining themselves and their family in a reasonable decent manner.

That, learned Amicus Curiae in his report has suggested to reduce the number of sevaks as per requirement so that each of the sevaks gets some turn for seva and thereafter some Purshakar for the maintenance and upkeep of the family and their livelihood. The others be given a golden handshake to be worked out between Administration and Nijog. The learned Amicus Curiae has also suggested for having a reserve list of sevaks so that in absence of any sevak, the rituals and nities are not in any way affected.

That, it may be considered to exclude those Sevaks who are involved in criminal activity and in forcible possession of Temple land while selecting required number of sevaks. Besides that the retirement age of the sevaks may be fixed.

(ii) Prohibition to collect money from Annadan Atika by Sevak. Ban on placing Thali and pitchers by Sevaks to receive offering :

As regards the prohibition to collect money from Annadan Atika by Sevaks, the Managing Committee has resolved to close Annadan Atika offices run by various sevak nijogs inside the Temple premises. It has been decided that the Temple Administration shall take over the possession of these offices and collect Annandan Atika money directly from the devotees. The Annadan Atika system will however be regulated by appropriate Regulation framed by the Managing Committee under the said Act to ensure fair and proper operation of this practice to the complete satisfaction of the devotee/pilgrims. This regulation will also appropriately regulate the smooth functioning of traditional Jatri Panda seva carried by the Sevaks and ensure that no devotee pilgrim is put to any harassment or inconvenience whatsoever. The Yatri Pandas serving the pilgrims as guide in the Temple premises will be granted license, under specific terms and conditions by the Temple Administration to work as guides.

That, the Temple Managing Committee in its meeting held on 18.08.18 has constituted a subcommittee under the Chairmanship of Chief Administrator to draft a regulation for the purpose of collection of Atika Money by Temple Administration and for its proper utilization with a view to save the pilgrims from exploitation. A draft regulation has been prepared and it is in active consideration.

As regards Ban on placing Thali and pitchers by Sevaks to receive offerings, it has been contemplated, to replace the Thali and pitchers with well designed donation boxes to be kept in suitable places accessible to the devotees for placing of offerings.

(III) Temple Management to take control of Rosaghar and Chuli (Hearth):

In this connection, it is submitted that there are 240 chulis (traditional hearths for cooking bhoga) within the Rosaghara (Temple kitchen). 8 chulis are dedicated for preparation of 'Kothabhoga' (which is distributed among the Sevaks as per ROR); the cost of which is borne by the Temple Administration. The balance 232 chulis are used by the Supakars (traditional Temple cooks) for preparing "Baradibhoga" (bhoga for sale to devotees) and the respective Supakars bear the expenses in this regard. The Managing Committee has decided that the said 232 chulis will be letout to the Supakars on annual license basis on specific terms and conditions. An appropriate Regulation under the said Act is being framed for comprehensively regulating all activities in the Rosaghara as well as in the Anandabazar (where Mahaprasad is sold to the devotees) to ensure hygienic and proper preparation of the bhoga and its sale to devotees at reasonable rates in a systematic, organised and hygienic manner.

That, Mahaprasad is being sold in Anandabazar of the Temple. Dry Mahaprasad and mementos of Lord Jagannath are being sold in shop rooms constructed within the Anandabazar. For sale of Anna Mahaprasad by Supakars sheds have been set up within Anandabazar. Steps has been taken to fix the rate of Mahaprasad in consultation with the Suar Mahasuar Nijog and the rate chart will be displayed within Ananda Bazar. A control room will be opened within Ananda Bazar to address the grievances of the purchasers of Mahaprasad. A separate place will be identified and selected for storing and dispatching of "Baradi Bhog" (Bhoga prepared on orders of devotee).

The learned Amicus Curiae, has suggested to make the courtyard near Roshaghar where vegetables are chopped and spices are grinded for preparation of Bhog more hygienic. In this regard Temple Administration has decided to reconstruct the dilapidated structures standing on said courtyard and to repair the floor of the courtyard by replacing stones in consultation of the A.S.I.

(IV) Provision of separate toilets for male and female members of the public and for Sevaks:

That, a Toilet has been constructed outside West Gate of the Temple for use by the Sevaks and another toilet has been constructed outside south gate of the Temple for use by the pilgrims. A committee was constituted consisting of the Collector, Puri, S.P., Puri and Administrator (Development), Shree Jagannath Temple, Puri to identify other suitable places at the outer periphery of "Meghanada" Pracheri for construction of separate toilets for male and female pilgrims. After identification of the land, steps have been taken to construct toilet blocks for male, female and differently abled person at one of the location near West Gate of the Temple.

(V) Queue system for hasslefree darshan :

As regards the queue system for hassle free Darshan, it is submitted that queue system has been introduce experimentally from 1st Oct, 2018. Arrangement have been made for entry of devotees through Lion's Gate exit through other three gates. The devotees are being allowed to main temple batch by batch through 'Sata Pahacha' (on the northern side) and exit through 'Beheran Dwar'. Since it is a very old temple and limited space and has several rituals which requires to be performed without any obstacles, no permanent barricades from Sata Pahacha to Beheran Dwar can be set up to allow the devotees to go through in a queue. However, steps will be taken to deploy additional Temple Police and District Police Staff to manage the Crowd. It is pertinent to mention here that for hassle free Darshan of Deity by differently abled persons, special arrangements are being made. The differently abled persons will enter the Temple through North Gate, and will have Darshan of Deity from 'Bahara katha' (Inside Nata Mandap near Jay Bijay Dwar). For this purpose a ramp is under construction.

(VI) Surveillance of collection from Hundis and receptacles:

As regards the surveillance of collection from Hundis and receptacles, it is submitted that the collection from Hundi and donation boxes are being counted by designated Temple Officers & Staff in the presence of representative of Sevaks in the Branch Office of the Temple located within the Temple precincts. For effective surveillance of the counting process, five closed-circuit cameras have been installed at the counting place monitored by senior Temple officials and the counting process is also displayed through a large L.E.D. monitor installed outside the said Branch Office.

(VII) Audit of Temple Funds by Accountant General :

As regards the Audit of Temple Funds by Accountant General, it is submitted that as per section 27(1) the said Act read with Shri Jagannath Temple Audit Rules, 1968, the audit of Shri Jagannath Temple Accounts is being conducted by Local Fund Auditors as appointed by the Government of Odisha from time to time. The Managing Committee moreover appoints a reputed Chartered Accountant for internal audit and special audit of income and expenditure of the Temple funds. All expenditure of Government grants (which are required to be placed before the State Legislature) are audited by the Account General Auditors appointed by the State Government. It has been proposed to introduce online account system from the current financial year.

(VIII) & (IX) Identity Cards for Sevaks and Staff & Guides to be registered in Temple Office:

As regards issue of identity cards for Sevaks and staff and registration of Guides, it is submitted that multicoloured identity cards with smart chips will be issued by the Temple Administration to all officers and employees of the Temple. Besides, all Sevaks, agents of hereditary Yatripandas, employees of Sevaknijogs including those engaged in the Rosaghara and Anandabazar (such as, porters and kitchen assistants, namely, tunia, jogania etc.) will also be provided identity cards. With the introduction the new identify cards all identity cards issued earlier will be cancelled.

(X) Reduction of overstaff :

In this regard, it is submitted that a professional agency will be hired to design the staff structure of various categories of Temple staff. It may be stated here that the staff strength of Temple Administration at present is 547 which is substantially less than the staff strength in other important shrines of India. On the other hand, the number of devotees visiting Puri Temple on any normal day is much more than other shrines of India. On festive occasions, there is a manifold increase in the number of visitors to the Temple.

(XI) Single authority for security management in Temple premises:

As regards appointment of a single authority for security management in the Temple premises, it is submitted that the State Government was requested to appoint an officer of the rank of Additional Superintendent of Police who will be the Administrator (Security) of the Temple and will also hold charge of Singhadwara Police Station located near the main entrance gate of the Temple. Accordingly the State Govt. has appointed Addl. S.P. Puri as incharge Administrator (Security) Shree Jagannath Temple, Puri.

The copy of Notification dtd.5.02.19 is annexed hereto and marked as **ANNEXURE:R3/**of the Paper Book)

(XII) Proposed amendments to Shri Jagannath Temple Act, 1955:

As regards suggestions for amendments to Shri Jagannath Temple Act, 1955, A draft amendment is under preparation which will be placed before the Temple Managing Committee and State Govt. for necessary orders."

41. The District Judge along with his report has also filed the relevant extracts of the report of the Commission of Inquiry headed by Shri B.D. Sharma, Ex-Governor, Orissa as Annexure-K and that of Mr. Justice B.K. Patra, former Judge, High Court of Orissa as Annexure-L. The recommendations in the interim report dated 20.4.2017 of the Commission of Inquiry into the affairs of *Shri Jagannath Temple* has also filed as Annexure-N. We have carefully perused the various reports submitted including the one by Shri Ranjit Kumar, *Amicus Curiae* and Ms. Priya Hingorani, learned Senior Counsel as well as the Audit Report of Accountant General, Orissa; suggestions given by *Srimad Jagadguru Shankaracharya* and *Swami Nishchalanand Saraswati*; and the response filed by the Temple Managing Committee.

42. It is apparent that various aspects have to be gone into and considered by the Temple Managing Committee and wherever the Government role comes in, the Government has to do the needful after taking all the stakeholders into confidence. Let following aspects be considered:

(i) We are very concerned and worried as to the incident dated 28.12.2018, pointed out by the Temple Managing Committee in which one

Bhitar-Chhu Sevak, who was entrusted with the duty of opening the door of SanctumSantorum at 4.30 a.m. for daily *puja/nitis,* did not open the door on the ground of his personal issues with the Police Administration of Puri Town and the door was opened at 4.30 p.m. This is unpardonable. No one has right to obstruct the *nitis* and rituals of the Deity to be performed and there are approximately 60,000 people visiting the Temple every day. There is absolutely no right with anyone to delay the opening of the Temple for even a minute. There was total maladministration and chaos writ large from the aforesaid incident. There is no disciplinary control available. In the circumstances, we have to authorize the Chief Administrator of the Temple, for the time being, to take appropriate steps against such servitors/incumbents, who create obstruction in *seva/puja/niti* and are involved in misbehavior and misconduct against the employees of the Temple Administration or with devotees and he may pass appropriate orders considering the nature of indiscipline.

(ii) *Srimad Jagadguru Shankaracharya* has expressed grave concern about the *nitis/*rituals which are required to be performed daily, otherwise it would amount to desecration of the Deities. What rituals are to be performed is not for the Court to decide, but when Temple exists due to the Deities, the Deities cannot be permitted to be disregarded by nonperformance of the *nitis, puja* and ritual in the traditional form as observed by *Srimad Jagadguru Shankaracharya* of Govardhan Math, Puri in his suggestions, *nitis* are to be performed as per the traditional rituals laid down in *Brahma Purana*, *Vamdev Samhita*, *Pancharatra Ishwar Samhita* and *Vimarsha*, which mention consecration, worship and different festivals related to *Shri Jagannath Temple.* Let the Temple Management Committee invite *Srimad Jagadguru Shankaracharya* and other stakeholders including the erstwhile ruler Gajapathi and ensure that *nitis, puja* and ritual are performed as prescribed. They are performed regularly punctually every day without any remiss and obstruction. At the same time, we request the Temple Managing Committee to ensure that as suggested by *Srimad Jagadguru Shankaracharya* and also as per Record of Rights, *nitis* and *puja* are performed each and every day. The Temple Managing Committee is the best master to ensure the same. Let the Temple Management Committee ensure and supervise that *nitis* and rituals are performed regularly.

(iii) There is a need for setting up of schools for the children of servitors. We direct the Temple Managing Committee to allot suitable place for the school for children of servitors for their proper education as may be

considered necessary. The school should also cater to other members of the public, and not exclusively for children of such servitors. The cost of Rs.5 crores imposed on Kalinga Institute of Medical Sciences (KIMS) in C.A. No. 4914 of 2016, lying in deposit in this Court along with interest, to be utilized for the purpose of setting up the school and its infrastructure. The Chief Architect of the State to ensure that proper plan is produced with the help of the Temple Managing Committee and progress of steps taken in this regard be informed to this Court.

(iv) There are vast immovable properties within and outside the State belonging to the *Shri Jagannath* Temple. It is stated by learned *Amicus Curiae* in his report that 60,418 acres of land belong to the Temple and Record of Rights have been prepared for 34200.976 acres so far. Let the remaining Record of Rights be prepared, as far as possible, within 6 months and the same be placed before this Court. With respect to other immovable properties within and outside the State, let inventory be prepared and details be submitted and how they are being utilized also how much income is generated from them.

(v) It is stated by learned *Amicus Curiae* in the report that there are several quarries and mines of the Temple, which are in operation without payment. A list of quarries and mines be prepared as to how they are being managed, who is operating them, on what basis and what is the income of the Temple from them and the outstanding dues. Let the list of quarries and mines be produced and the income generated/outstanding dues with names with other details.

(vi) There is no proper accommodation at present for pilgrims provided by the Temple Managing Committee. Report of Shri B.D. Sharma, former Governor of Orissa, indicated that there was need of providing accommodation to 60,000 pilgrims. With respect to the accommodation not only the Temple Administration, but the Government can also do the needful as that is for providing shelter to humanity, which is necessary. When there is a vast congregation of people, it becomes the Government's duty to ensure welfare, law and order, hygiene and provide proper amenities and sanitation facilities. The State Government is, therefore, directed to work out and prepare a plan in this regard. The Temple Administration is directed to coordinate with the Government in this regard for providing shelter place and facilities to the pilgrims.

(vii) It appears that there is necessity for qualified servitors in traditional *nitis* and rituals. It is for the Temple Management Committee to ensure that proper training is imparted to the servitors as they are in very large number and to ensure that only qualified servitors in traditional *nitis* and ritual, perform *seva, puja and nitis.*

(viii) Concern has been expressed in various reports with respect to economic welfare of the servitors. It is for the Temple Administration and for the Government as it provides grants to temple to ensure that servitors are looked after properly. At the same time, it is also necessary to ensure that pilgrims are not harassed for obtaining donations and donations are properly accounted. It can only be ensured when servitors are properly looked after including remuneration and health welfare. Likewise, to stop harassment strict control and discipline with suitable and swift mechanism to punish the erring, should be put in place.

(ix) Concern has also been expressed in the report with respect to the subletting of *seva/puja*. Contracting the *seva/puja* is improper and the Temple Management Committee is directed to take steps in this regard and ensure that *seva/puja* is performed by a person to whom it is assigned by it.

(x) Concern has been expressed in various reports with respect to hygiene in the *Rosaghar*. We direct the Temple Administration to maintain hygiene in *Rosaghar* at all costs. The hygiene of *Rosaghar* is indispensable as *Bhog* for Deity is also prepared. The place has to be clean and hygienic. All effective steps to ensure this shall be taken including using proper means for cooking etc.

(xi) It was also pointed out by the learned *Amicus Curiae* that certain preliminary preparations take place in the open area. This state of affairs is not proper. In case preparation of food take place in an open area, obviously it is bound to be contaminated. The preparation of food should be done in permanently covered area in an absolutely hygienic condition. The ASI shall forthwith clear the plan for construction of sheds/permanent structures which is absolutely necessary.

(xii) Reports have pointed out that *prasad,* which is sold in *Ananda Bazar,* is also not sold in hygienic manner. Let such places be improved and made hygienic, *prasadam* should be kept in fly proof receptacles and it should be sold at proper rates, to be fixed by the Temple Management. The purity of the *prasadam* also shall be ensured by the Temple Managing Committee.

(xiii) In the report, necessity has been indicated for I-Cards for servitors and staff, which is in the interest of the Temple Administration. The servitors and staff should be provided with I-Cards so that unscrupulous persons are not able to present themselves as servitors or staff members and the people are not misled on the basis of wrong identity.

(xiv) In the report of Shri B.D. Sharma, Ex-Governor, Orissa, necessity of a dairy farm has also been pointed out. It would be ideal for the Temple to have the dairy farm. Let the Temple Management Committee consider the same in coordination with other stakeholders with respect to opening dairy farm.

(xv) It appears from the Managing Committee response that lot needs to be done with respect to having proper *darshan* by people at large. As a matter of fact, there should not be any commotion and chaos as large number of pilgrims are visiting the Temple every day. It is a pious duty to provide proper *darshan* in systematic manner and to take care of the aged, the infirm and children. It is for the experts to suggest what system can be devised without disturbances to the rituals to be performed in Temple and passage required for it and thereafter Temple Management Committee and Administration have to consider it. We direct the Temple Administration and the Chief Administrator including the State Government to prepare a roadmap with the help of experts for having proper *darshan* by the devotees/pilgrims and to implement it effectively and to ensure that there is no commotion so that everybody is able to have *darshan* peacefully without any obstruction by anybody.

(xvi) There are certain incidents which have been pointed out in the report relating to the misbehavior with the women, snatching of ornaments, etc. There should not be any room for any such incident in the Sanctum-Santorum and other Temples situated around. If such incidents are taking place, it has to be dealt with all seriousness with firm hand and there should not be any room for such incidents. Unlawful elements are responsible for doing such acts have to be removed out of the premises at all costs. We direct the Temple Administration and also the Temple Police to ensure that let there be a dedicated section of personnel to tighten security inside the temple and only to ensure that no such incident takes place in the Temples and no misbehavior is meted out to women. Those found involved in such acts cannot be said to be believer in the *God* also. When such an act is performed in the Temple, it is very disrespectful to *Shri Jagannath* and the *Sanskruti.* There is no place for such unlawful activities in Temples. The temple authorities and the police are directed to take strict action to avoid such incidents.

(xvii) With respect to valuables of the Temple, let the Temple Management place before this Court, what kind of inventory it has prepared? How it proposes to secure the valuables of the Temple and ornaments offered by the devotees?

(xviii) Learned *Amicus Curiae* has also pointed out that there is need for an effluent treatment plant and waste management system which is one of the requirements for keeping the area clean and hygienic for devotees. The State Government can also spend money in this regard, as it is a secular activity. Let proper effluent treatment plant and waste management system be set up with the help of experts by the Temple Administration and the State Government as may be considered appropriate.

(xix) Learned *Amicus Curiae* has also pointed out that there is a necessity for separate toilets for male and female. We direct that let the toilets be provided with modern amenities and should be kept absolutely clean. The number of toilets shall be adequate having regard to the average footfall in the temple, which is large in number.

(xx) There is a necessity pointed out about the cloak rooms. Let steps be taken by the Temple Administration in this regard.

(xxi) As pointed out in the report, there is necessity for motorcycle stand. Let steps be taken to provide motorcycle stand within a period of 4 months, not only for servitors, but also for those who are visiting the Temple on their own vehicle and it is for the local Administration to work out the proper place for such purpose.

(xxii) As there are various reports which have been submitted from time to time containing various suggestions. What steps have been taken with respect to the suggestions pointed out in these reports, shall also be considered by the Temple Management at the first instance and whatever is done by the other stakeholders like State Government and others, should also be considered by respective stakeholders. In case they have taken any action, be also report to this Court.

(xxiii) Considering the overall situation and the facts, we direct the State Government to depute full time Chief Administrator, not by way of additional charge forthwith.

One of the positive developments is that of introduction of E-Portal. Constant endeavor has to be made to improv e upon the information made available. It appears from the reports that there are various temples of importance and different systems of having *darshan*. It is for the Temple

Committee to place such information on website. We place on record our appreciation that all the stakeholders are happy with the development which is taking place at the instance of State Government and they are cooperating with each other in restoration of glory of *Lord Shri Jagannath Temple*. We direct ASI also to cooperate and to permit the activities of improvement which are not *prima facie* objectionable and are necessary for public hygiene, sanitation and public health and upgradation of the facilities and at the same time it has to ensure that the form of the new structure is maintained in the same manner as the ancient one.

Let the Temple Management Committee consider various other positive aspects for improvement and invite all the stakeholders including the State Government, whose cooperation is necessary in permissible matters, to take care of finance in the various development activities. The Temple Management Committee has to take steps as it is the sole repository of faith. The progress report and the decisions taken shall be submitted in this Court within eight weeks, in the form of an action taken report.

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2019 (III) ILR - CUT- 440

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

W.P.(C) NO. 7917 OF 2009

M/S. TATA STEEL LTD. & ANR. .....Petitioners

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the "Explanation" to Sub-rule (2) of Rule 10 of the Customs Valuation (Determination of Price Imported Goods) Rules, 2007 with a prayer to declare it to be *ultra vires* the provisions of Section 14 of the Customs Act, 1962 – Petitioner, a Company, imports certain machineries and other items to be used for manufacture of iron and steel products at its plants – Imports raw materials in bulk quantities by chartered vessels which is assessed to Duty of Customs under Section 14 of the Act – Petitioner contended that the provisions of principal Act does not include the cost of demurrage charges in the cost of transportation but by subsequent Rules framed there under, has travelled beyond the scope of the Act – Therefore, the same is

required to be declared *ultra vires* – Plea considered – Court held that the explanation to Sub Rule-(2) of Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is held to be bad and hence declared *ultra vires* the Constitution/ provision of Section 14 of the Customs Act, 1962, and hence the same is struck down.

"We have heard learned counsel for the parties. It is well-settled principle of the statute that while interpreting a statute, one has to go by the scope and object of the principal Act. Under the principal Act, while amending it on 10th October, 2007, proviso has included the costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the Rules. The demurrage has not been included as a part of cost envisaged by the legislation. Further, it is a kind of penalty. Therefore, it could not have been envisaged by the legislation to be included in the definition of Section 14 of the Act. However, in view of the clarifications by way of judgments of the Hon'ble Supreme Court, more particularly in the cases of Wipro Ltd. (supra), Essar Steel Ltd. (supra) and Mangalore Refinery & Petrochemicals Ltd. (supra), it is made clear that demurrage cannot be included for the purpose of valuation under the Customs Act, 1962. In that view of the matter, we are of the considered opinion that the contentions raised by the petitioner that the relevant provisions in the Principal Act is silent about the 'demurrage'; thus, it was beyond the the legislative power to include it in the Rules is accepted and thus the explanation to Sub Rule-(2) of Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is held to be bad and hence declared ultra vires the Constitution/ provision of Section 14 of the Customs Act, 1962, and hence the same is struck down." (Para 13)

Case Laws Relied on and Referred to :-

1. 2000 (122) ELT. 615 (Tri-LB) : Indian Oil Corporation Limited .Vs Commissioner of Customs, Calcutta
2. 2017 (348) ELT 3 (SC) : Rasiklal Kantilal & Co. Vs. Board of Trustees of Port of Bombay.
3. 2015 (325) E.L.T. 214 (S.C.) : C.C.E., Mangalore Vs. Mangalore Refinery & Petrochemicals Ltd.
4. 2015 (319) ELT 202 (SC) : Commissioner of Customs Vs. Essar Steel Ltd.
5. 2015 (319) ELT 177 (SC) : Wipro Ltd. .Vs. Assistant Collector of Customs.
6. (1997) 5 SCC 516 : Agricultural Market Committee Vs. Shalimar Chemical Works Ltd.
7. 1999 (113) E.L.T. 358 (SC) : Garden Silk Mills Ltd. .Vs. Union of India.

For Petitioners : Mr.Samir Chakraborty, Sr. Adv.
M/s.Sarada Prasanna Sarangi, B.C.Mohanty,
P.P.Mohanty, A.Pattnaik & K.K.Acharya.

For Opp. Parties: M/s. Choudhury Satyajit Mishra, Sr. Standing Counsel.

JUDGMENT Heard and Disposed of on 30.01.2019

BY THE COURT

By way of this writ petition, the petitioners have approached the Court challenging the "Explanation" to Sub-rule (2) of Rule 10 of the Customs Valuation (Determination of Price Imported Goods) Rules, 2007 and prayed to declare it to be *ultra vires* the provisions of Section 14 of the Customs Act 1962 (for short, 'the Act').

2. Fact of the case is that the petitioner herein being a Company registered under Companies Act, 1956, imports certain machineries and other items to be used for manufacture of iron and steel products at its plants at Jamshedpur in Jharkhand. The Petitioner imports raw materials in bulk quantities by chartered vessels through the Paradeep Port located in the district of Jagatsinghpur, Odisha and Haldia Port in West Bengal. Such import into the country is assessed to Duty of Customs under Section 14 of the Act.

3. In exercise of powers conferred under Section 156 of the Act read with Section 14 thereof, the Government of India, Ministry of Finance-opposite party No.1, promulgated the Customs Valuation (Determination of Value of Imported Goods) Rules, 1988 (for short, "Rules, 1988"), which was notified vide Notification No.51/1988-Cus (N.T.) dated 18.07.1988.

3.1 While Section 14 of the Act and the Rules, 1988 were in force, the Ministry of Finance-opposite party No.1, clarified vide its Circular F.No.467/21/89-Cus.V dated 14.8.1991 (Annexure-1) that post-dispatch money would not constitute elements of value since element for the carriage. 'Demurrage' and 'dispatch' money being in the nature of penalties or rewards by virtue of a contracted charterer agreement between the carrier and charterer and this in no way could be conceived as being part of the freight or for that matter part of the price actually paid or payable for the goods. Hence, 'demurrage' and 'dispatch money' may not form a part of freight or for that matter part of the price paid or payable for the goods and assessable under Section 14 of the Customs Act, 1962.

3.2 While the issue regarding inclusion of 'demurrage' and 'dispatch' money as a part of assessable value under Section 14 of the Act was being agitated in different forums and was pending resolution by the Hon'ble Supreme Court, the Ministry of Finance, Opposite party No.1, vide its Circular No.14/2001-Cus dated 02.03.2001 (Annexure-2), withdrawn the Circular dated 14.08.1991, under Annexure-1 and clarified that by virtue of Rule 9(2) of the Rules, 1988, ship demurrage charges paid are required to be included in the assessable value of goods under Section 14 of the Act. The aforesaid clarification is not in consonance with the provisions of Section 14 of the Act and Rule 9 of the Rules, 1988 and the same was evidently issued in an arbitrary attempt of the Ministry of Finance, Opposite party No.1 to change its view and illegally directed for inclusion of demurrage charges in the cost of transportation to form part of the assessable value.

4. The issue regarding inclusion of demurrage charges to the assessable value of imported goods was decided by the Larger Bench of the Customs Excise and Service Tax Appellate Tribunal (CESTAT) (for short, 'the Tribunal') in the case of ***Indian Oil Corporation Limited vrs. Commissioner of Customs, Calcutta***, reported in 2000 (122) ELT. 615 (Tri-LB) by holding that if demurrage charges would form a part of the assessable value, the goods covered by the same contract would be assessed to duty at different assessable values and such a situation is not envisaged in the provisions of Section 14 of the Act. The Union of India, Opposite Party No.1 challenged the aforesaid decision of the Tribunal in appeal before the Hon'ble Supreme Court and the appeal was dismissed as reported in 2004 (165) ELT 257 (SC) and the decision of the Tribunal, as above, was upheld.

4.1 A review petition filed by the Union of India-Opposite party No.1 against the said decision of the Hon'ble Supreme Court, which was also dismissed both on the grounds of limitation as well as on merits, as reported in (2005) ELT A 119 (SC). Consequent upon dismissal of aforesaid review petition, the Ministry of Finance issued Circular No.5/2006-Cus. dated 12.01.2006 clarifying therein that demurrage charges are not included as a part of assessable value under Section 14 of the Customs Act, 1962, for imports prior to 02.03.2001, i.e., the date of issue of circular vide Annexure-2.

4.2 Subsequently, Ministry of Finance-Opposite party No.1, vide Circular No.26/2006-Cus., dated 26.09.2006 (Annexure-4) clarified that pending assessments after 02.03.2001 should be finalized by including ship demurrage charges in the assessable value of the imported goods.

5. Under Section 14 of the Act, as was in force till 09.10.2007, duty of customs was chargeable on the 'deemed price' of the imported goods. As against above provision in the Act, the Rules, 1988 as was in force during the above period, provided that the value of the imported goods for assessment to duty shall be "transaction value". In order to overcome the practical difficulties faced due to inherent contradiction between 'deemed price' in Section 14 of the Act and 'transaction value' as referred to in the Rules, 1988, Section 14 of the Act was amended by the Finance Act, 2007, with effect from 10.10.2007. Simultaneously, with effect from the same date, i.e., 10.10.2007, the Ministry of Finance, Government of India, Opposite party No.1 rescinded the Rules, 1988 and formulated in its place a new Valuation Rules, 2007.

5.1 Even though the Rules, 1988 was substituted, Rule 9 of the said Rules, 1988 and Rule 10 of the new Valuation Rules, 2007 which deals with the inclusion of "Cost and Services" to the assessable value of imported goods remained *mutates-mutandis* the same, except for explanation added to sub-Rules (2) of Rule 10 of the Valuation Rules, 2007, wherein it was provided that demurrage charges shall be included in the cost of transport, so as to form a part of assessable value of imported goods.

5.2 Section 14 of the Act, 1962, as amended by the Finance Act, 2007 with effect from 10.10.2007 provided that the transaction value in the case of imported goods shall *inter alia* include 'cost of transportation to the place of importation' without any reference to the inclusion of demurrage charges as sought to be included by way of incorporation of the Explanation to sub-Rule (2) of Rule 10 of the Valuation Rules, 2007.

5.3 It will be evident from the provisions of Section 14 of the Act, 1962 that, either prior to or after amendment thereof, with effect from 10.10.2007, the said Section 14 does not authorize inclusion of demurrage charges to the value of imported goods for assessment to duty of customs either directly or by implication.

6. The petitioner imports its raw materials in bulk quantities by chartered vessels through the Paradeep Port from various overseas vendors/suppliers. For such imports, the petitioner places bulk orders for quantities like 5 lakh MTs which is supplied by the Overseas Supplier in smaller lots according to the capacity of the chartered vessels under separate invoices for such smaller lots. Upon arrival of each vessel at the port of importation, the petitioner files bills of entry and other relevant documents

for clearance of the imported goods through Customs. Such bills of entries filed by the petitioner are 'provisionally assessed' by the Deputy Commissioner of Customs, Paradeep Port-Opposite party No.3 for want of ship demurrage details at the time of clearance of the imported goods through Customs and directs the petitioner to submit the ship demurrage details for final assessment of the bills of entries.

6.1 In compliance of such directions of Opposite Party No.3, the Petitioner confirms with the overseas supplier/charterer about the ship demurrage charges, as applicable to the respective vessels and thereafter submit such details to the Deputy Commissioner of Customs, Paradeep Port-Opposite Party No.3, who then finalizes the provisional assessment of the respective bills of entries by including ship demurrage charges to the transaction values of the respective consignment for computation of duties of customs payable thereon, but without granting any benefit/concession in valuation of the consignment in respect of which the Petitioner- Company earns 'dispatch money' as reward/incentives.

7. Under the above circumstances, such goods imported by the petitioner under one purchase order, delivered by the suppliers through a number of vessels over a period of time, got assessed to duties of customs computed on different assessable values purely on account of inclusion of demurrage charges which varies from vessel to vessel contingent upon detention of the vessels either in the port of importation or on the high seas for various reasons such as congestion, non-availability of berth, poor discharge rate, delay in unloading the goods etc., which are beyond the control of the petitioner.

7.1 Hence, this leads to discriminatory assessment of same goods imported by the petitioner under the same purchase order. Indeed, the Larger Bench of the Tribunal in its decision rendered in the case of ***Indian Oil Corporation Limited (supra)*** held that demurrage charges are not includible in the assessable value precisely for the aforesaid discriminatory effect thereof.

8. For finalization of the provisional assessment of the bills of entries, the Deputy Commissioner of Customs, Paradeep Port- Opposite Party No.3 has now directed the petitioner to pay the differential duty which has been arrived at by including ship demurrage charges to the transaction values of the respective consignments. The aforesaid demands vide Annexure-12 series have been raised on the petitioner in only those cases where the petitioner incurred ship demurrage charges.

8.1 But in case, where the petitioner does not pay any ship demurrage charges and instead, earns 'Dispatch Money' as an incentive/reward for having completed unloading of cargo at Paradeep Port within a shorter period of time. Such 'Dispatch Money' is never excluded by the Deputy Commissioner of Customs, Paradeep Port-Opposite Party No.3, from the cost of transport for computing the assessable value of the imported goods. Thus, the goods imported by the petitioner are invariably assessed to duties of customs by including the demurrage charges whenever incurred by the petitioner, but no benefit whatsoever is allowed to the petitioner-Company in respect of those cases, where the petitioner earned dispatch money as a reward/incentive.

9. Learned counsel for the petitioner produced a comparative table of Section 14 of the Customs Act, 1962 before and after its amendment, which is reproduced below for ready reference.

Section 14 of the Customs Act, 1962

Before 10.10.2007	On and from 10.10.2007
14. Valuation of goods for purpose of assessment- (1) For the purpose of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where- (a) the seller and the buyer have no interest in the business of each other; or (b) one of them has no interest in the business of the other, and the price is the sole consideration for the sale or offer for sale: **Provided** that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill or bill of export, as the case may be, is presented under section 50. (1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.	**14. Valuation of goods-** (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the gods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf: **Provided** that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf: **Provided** further that the rules made in this behalf may provide for,- (i) the circumstances in which the buyer and the seller shall be deemed to be related; (ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale of in any other case; (iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section.

(2) Notwithstanding anything contained in sub-section (1) or sub-section (1A), if the Board is satisfied that it is necessary or expedient so to do it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value. (3) For the purposes of this section- (a) "rate of exchange" means the rate of exchange- (i) determined by the Board, or (ii) ascertained in such manner as the Board may direct, for the conversion of India currency into foreign currency or foreign currency into Indian currency; (b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in the Foreign Exchange Management Act, 1999 (42 of 1999).	**Provided** also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50. (2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value. **Explanation** - For the purposes of this section- (a) "rate of exchange" means the rate of exchange- (i) determined by the Board, or (ii) ascertained in such manner as the Board may direct, for the conversion of India currency into foreign currency or foreign currency into Indian currency; (b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).

9.1 Subsequent to amendment of the Customs Act, 1962, corresponding Rules also amended. Petitioner also provided a comparative chart of amendment of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 vis-à-vis Rules of 2007, which is quoted below.

Customs Valuation (Determination of Price of Imported Goods) Rules, 1988	**Customs Valuation (Determination of Value of Imported Goods) Rules, 2007**
Rule 9. Cost and Services – (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, - ……. (2) For the purposes of sub-section (1) and sub-section (1A) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include - (a) the cost of transport of the imported goods to the place of importation; b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and (c) the cost of insurance.	**Rule 10. Cost and services –** In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods,- …… (2) For the purposes of sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include – (a) the cost of transport of the imported goods to the place of importation; (b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and (c) the cost of insurance :

Provided that- (i) Where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods; (ii) The charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c); (iii) Where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods; **Provided** further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods. **Provided** also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii) above. **Provided** also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Deport or Container Freight Station shall not be included in the cost of transport referred in clause (a).	**Provided** that- (i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods; (ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause(c); (iii) where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods. **Provided** further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods. **Provided** also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii). **Provided** also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Deport or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container Freight Station shall not be included in the cost of transport referred to in clause (a). ***Explanation***- The cost of transport of the imported goods referred to in clause (a) includes the ship demurrage charges on charted vessels, lighterage or barge charges.

10. Learned counsel for the petitioner has mainly contended that the provisions of principal Act does not include the cost of demurrage charges in the cost of transportation. However, by subsequent Rules framed thereunder, has travelled beyond the scope of the Act. Therefore, the same is required to be declared *ultra vires*. In this regard, learned counsel for the petitioner has relied upon Section-156 of the Customs Act, 1962, as well as some case laws, which are quoted below for ready reference.

> **"SECTION 156 .General power to make rules.—**
>
> (1) Without prejudice to any power to make rules contained elsewhere in this Act, the Central Government may make rules consistent with this Act generally to carry out the purposes of this Act.
>
> (2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—
>
> (a) the manner of determining the transaction value of the imported goods and export goods under sub-section (1) of section 14;

(b) the conditions subject to which accessories of and spare parts and maintenance and repairing implements for, any article shall be chargeable at the same rate of duty as that article;

(c) xx xx xx

(d) the detention and confiscation of goods the importation of which is prohibited and the conditions, if any, to be fulfilled before such detention and confiscation and the information, notices and security to be given and the evidence requisite for the purposes of such detention or confiscation and the mode of verification of such evidence;

(e) the reimbursement by an informant to any public officer of all expenses and damages incurred in respect of any detention of any goods made on his information and of any proceedings consequent on such detention;

(f) the information required in respect of any goods mentioned in a shipping bill or bill of export which are not exported or which are exported and are afterwards re-landed;

(g) the publication, subject to such conditions as may be specified therein, of names and other particulars of persons who have been found guilty of contravention of any of the provisions of this Act or the rules.

(h) the amount to be paid 3 [for compounding and the manner of compounding] under sub-section (3) of section 137."

10.1 Hon'ble Supreme Court in the case of ***Rasiklal Kantilal & Co. Vs. Board of Trustees of Port of Bombay***, reported in 2017 (348) ELT 3 (SC), held as under:-

"24. The dispute in this case centres around demurrage. Therefore, we deem it appropriate to examine the meaning of the expression "demurrage". The expression "demurrage" is not defined under the Act. Strictly speaking, the expression demurrage in the world of shipping meant-

"DEMURRAGE in its strict meaning, is a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading, generally referred to as the lay-days or lay- time. Where the sum is only to be paid for a fixed number of days, and a further delay takes place, the shipowner's remedy is to recover unliquidated "damages for detention" for the period of the delay. The phrase "demurrage" is sometimes loosely used to cover both these meanings."

The circumstances in which and the nature of demurrage payable in a given circumstance has been the subject matter of considerable legal literature. However, in India, the expression "demurrage" appears to have acquired a different connotation.

Under the Madras Port Trust Act, 1905, certain bye-laws were framed by the Port Trust in exercise of the statutory powers under which "Scale of Rates" payable at the Port of Madras were framed. Chapter IV thereof was headed "Demurrage". Under the said Chapter, it was stipulated that "demurrage is chargeable on all goods left in Board's transit sheds or yards beyond the expiry of the free days.

25. In *Trustees of the Port of Madras v. Aminchand Pyarelal & Others*, (1976) 3 SCC 167, this Court had an occasion to consider the true meaning of "demurrage" occurring in the above mentioned context and opined that the "Board has used the expression "demurrage" not in the strict mercantile sense but merely to signify a charge which may be levied on goods after the expiration of free days.

26. Regulation 2(g) of the International Airports Authority (Storage and Processing of Goods) Regulation, 1980 made under the provisions of the International Airports Authority Act, 1971, defined the expression 'demurrage' to mean, the rate or amount payable to the airport by a shipper or consignee or carrier, for not removing the cargo within the time allowed."

10.2 In the case of ***C.C.E., Mangalore Vs. Mangalore Refinery & Petrochemicals Ltd.,*** reported in 2015 (325) E.L.T. 214 (S.C.), the Hon'ble Supreme Court observed as follows:-

"2 The assessee in these appeals Is M/s. Mangalore Refinery and Petrochemicals Limited. It had imported 94204.425 MTs (ullage quantity measurement of vessel) of Crude Oil vide Bill of Entry No. 0924, dated May 23,2001 and warehoused the same into their shore tanks. The same was cleared under provisional assessment by executing P.D. Bond, pending production of original documents by the assessee and reply to further queries by the Department. The provisional assessment was taken up for finalization based on this Court's decision which upheld the order passed by the CEGAT in the case of M/s. HPCL and M/s. NOCIL, wherein it was held that customs duty should be levied on the quantity that is pumped into the shore tanks in terms of Board's Circular No. 96/2002, dated December 27, 2002. The shore tank quantity of Crude Oil is considered as the relevant quantity for the purpose of assessment. On scrutiny of the documents filed by the assessee, it was found that Bill of Lading quantity was taken as the Cost & Freight (FOB) component of the relevant value for assessment as per Section 14 of the Customs Act, 1962. Therefore, irrespective of the fact whether there is shortage in the quantity received compared with the Bill of Lading quantity or not, the importer has to pay the duty on transaction value, i.e. the full value paid for the Bill of Lading quantity. On that basis, the customs authorities took the view that the declared shore tank quantity is to be corrected, which worked out to 93756.154 Mts.

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4. Insofar as issue involved in these appeals is concerned, we may point out that during this period the goods could not be cleared and it was observed that the assessee had paid demurrage charges of Rs.6,48,094.93 among other fees/charges. As per the Revenue/appellant, these demurrage charges were also to be included in the assessable value for the purpose of levy of duty of customs. Show-cause notice dated June 9,2003 was issued in this behalf, which resulted in passing of order dated March 7, 2005 confirming the demand raised in the show-cause notice. The assessee filed appeal against the order of the Adjudicating Authority before the Commissioner of Customs (Appeals) , which was however dismissed. The assessee, thereafter, approached the Customs, Excise and Service Tax Appellate Tribunal (for short, 'CESTAT') and the CESTAT has passed order dated February 6,2006 [2006 (205) E.L.T. 753 (Tri.-Bang.) holding that the assessee should discharge duty

liability on the transaction value which is actually the amount paid on the Bill of Lading quantity. However, insofar as demurrage is concerned, it has held that the same is includible in the transaction value. In forming this opinion, the Tribunal relied upon its earlier order in the case of this very assessee, which is reported as 2002 (141) E.L.T. 247 (Tri.-Bang.)."

10.3 In the case of ***Commissioner of Customs Vs. Essar Steel Ltd.,*** reported in 2015 (319) ELT 202 (SC), it has been held as under:-

7. We have heard learned counsel for the parties. Section 14 of the Customs Act, 1962 as it stood at the relevant time is as follows:

"14. Valuation of goods for purposes of assessment.-(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where-

(a) the seller and the buyer have no interest in the business of each other; or

(b) one of them has no interest in the business of the other, and the price is the sole consideration for the sale or offer for sale:

Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under Section 46, or a shipping bill or bill of export, as the case may be, is presented under Section 50.

(1-A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.

(2) Notwithstanding anything contained in sub-section (1) or sub- section (1-A), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

(3) For the purposes of this section-

(a) 'rate of exchange' means the rate of exchange-

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of Section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)."

A cursory reading of the Section makes it clear that customs duty is chargeable on goods by reference to their value at a price at which such goods or like goods are

ordinarily sold or offered for sale at the time and place of importation in the course of international trade. This would mean that any amount that is referable to the imported goods post-importation has necessarily to be excluded. It is with this basic principle in mind that the rules made under sub-clause 1(A) have been framed and have to be interpreted.

8. Under the Customs Valuation (Determination of Price of Imported Goods) Rules of 1988, Rule 2(f) defines "transaction value" as the value determined in accordance with Rule 4 of these Rules. Rule 4(1) in turn states that the transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these Rules. Rule 9 of the Rules is set out hereinbelow:-

"9. Cost and services. - (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, -

a) The following cost and services, to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-

i) Commissions and brokerage, except buying commissions;

ii) The cost of containers which are treated as being one for customs purposes with the goods in question;

iii) The cost of packing whether for labour or materials;

b) The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely:-

i) Materials, components, parts and similar items incorporated in the imported goods;

ii) Tools, dies, moulds and similar items used in the production of the imported goods;

iii) materials consumed in the production of the imported goods;

iv) Engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;

c) Royalties and licence fees related to the imported goods that the buyer s required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable.

d) The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;

e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

9 (2) xx xxx

9(3) Additions to the price actually paid or payable shall be made under this on the basis of objective and quantifiable data.

9(4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule."

A reading of Rule 4 and Rule 9 makes it clear that only those costs and services that are actually paid or payable for imported goods pre- import are to be added for the purpose of determining the value of the imported goods. In the present appeal, arguments have veered around the applicability of Rule 9(1)(e). In this appeal, we are concerned only with the first part of Rule 9(1)(e). The narrow question that arises before us is whether the payment made for the technical services agreement is to be added to the value of the plant that is imported inasmuch as such payment has been made as a condition of sale of the imported plant."

10.4 In the case of ***Wipro Ltd. vs. Assistant Collector of Customs*****,** reported in 2015 (319) ELT 177 (SC), Hon'ble Supreme Court observed as under:-

"20. This provision was amended in the year 2007. Though, we are not concerned with this amended provision, we are taking note of the same in order to examine as to whether any change, in principle, is brought about or not. The amended provision reads as follows:

"14. Valuation of goods.- (1) For the purposes of the the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:

Provided further that the rules made in this behalf may provide for,-

the circumstances in which the buyer and the seller shall be deemed to be related;

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

(iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section:

Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value."

21) A reading of the unamended provision would show that the earlier/old principle was to find the valuation of goods "by reference to their value". It introduced a deeming/fictional provision by stipulating that the value of the goods would be the price at which such or like goods are "ordinarily sold, or offered for sale". Under the new provision, however, the valuation is based on the transaction price namely, the price "actually paid or payable for the goods". Even when the old provision provided the formula of the price at which the goods are ordinarily sold or offered for sale, at that time also if the goods in question were sold for a particular price that could be taken into consideration for arriving at the valuation of goods. The very expression "ordinarily sold, or offered for sale" would indicate that the price at which these goods are actually sold would be the price at which they are ordinarily sold or offered for sale. Of course, under the old provision, under certain circumstances, the authorities could discard the price mentioned in the invoice. However, that is only when it is found that the price mentioned in the invoice is not the reflection of the price at which these are ordinarily sold or offered for sale. To put it otherwise, the reason for discarding the price mentioned in the invoice could be only when the said price appeared to be suppressed one. In such a case, the authorities could say that generally such goods are ordinarily sold or offered for sale at a different price and take that price into consideration for the purpose of levying the duty. It could, however, be done only if there was evidence to show that ordinarily the price at which these goods are ordinarily sold or offered for sale is higher than the price mentioned in the invoice. In fact, this fundamental concept is retained even now while introducing the concept of "transaction value" under the amended provision. More importantly, the rules viz. Valuation Rules, 1988 had incorporated this very principle of "transaction value" even under the old provision. No doubt, as per this provision existing today generally the price mentioned is to be accepted as it is the transaction value. However, this very provision stipulates the circumstances under which that price can be discarded. In any case, having regard to the question with which we are concerned in the present appeals, such a change in the provision may not have much effect.

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24) In contrast, in the unamended Section 14, we had provision like sub- section (1A) which stipulated that the price referred to in sub-section (1) in respect of imported goods shall be determined in accordance with rules made in this behalf. Therefore, rules can be made in determining the price. However, these rules have to be subject to the provisions of sub- section (1), the underline principle whereof, as stated above, is to taken into consideration actual price of the goods unless it is impermissible because of certain circumstances stipulated therein. Keeping in mind this fundamental aspect, we have to examine the scheme of the Valuation Rules, 1988."

11. In respect of the explanation, which travels beyond the scope of the Act, learned counsel for the petitioner relied upon decision of the Hon'ble Supreme Court in the case of ***Agricultural Market Committee Vs. Shalimar Chemical Works Ltd.,*** reported in (1997) 5 SCC 516, wherein the Hon'ble Court in paragraphs-26 and 28 observed as under:-

> "26. The principle which, therefore, emerges out is that the essential legislative function consists of the determination of the legislative policy and the Legislature cannot abdicate essential legislative function in favour of another. Power to make subsidiary legislation may be entrusted by the Legislature to another body of its choice but the Legislature should, before delegating, enunciate either expressly or by implication, the policy and the principles for the guidance of the delegates. These principles also apply to Taxing Statutes. The effect of these principles is that the delegate which has been authorised to make subsidiary Rules and Regulations has to work within the scope of its authority and cannot widen or constrict the scope of the Act or the policy laid down thereunder. It cannot, in the garb of making Rules, legislate on the field covered by the Act and has to restrict itself to the mode of implementation of the policy and purpose of the Act.
>
> xx xx xx
>
> 28. The Government to whom the power to make Rules was given under Section, 33 and the Committee to whom power to make Bye-laws was given under Section 34 widened the scope of "presumption" by providing further that if a notified agricultural produce is weighed, measured or counted within the notified area, it shall be deemed to have been sold or purchased in that area. The creation of legal fiction is thus beyond the legislative policy. Such legal fiction could be created only by the Legislature and not by a delegate in exercise of the rule making power. We are, therefore, in full agreement with the High Court that Rule 74(2) and Bye-law 24(5) are beyond the scope of the Act and, therefore ultra vires. The reliance placed by the Assessing Authority as also by the appellate and revisional authority on these provisions was wholly misplaced and they are not justified in holding, merely on the basis of weighment of "Copra" within the notified area committee that the transaction of sale took place in that market area."

Therefore, he contended that the explanation added to the Rules, 2007 travelling beyond the scope of the Act is bad in law and hence deserves to be declared as *ultra vires*.

12. Learned counsel for the opposite parties tried to justify the amended provisions on the ground that the amended provisions emphasized the words "*imported goods shall include in addition to the price"* as under:

> "**Provided** that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:"

12.1 In this regard, judgment of the Hon'ble Supreme Court in the case of ***Garden Silk Mills Ltd. Vs. Union of India,*** reported in 1999 (113) E.L.T. 358 (SC) was relied, wherein it has been observed as under:

> "15. The question as to whether the import is completed when the goods entered the territorial waters and it is the value at that point of time which is to be taken into consideration is no longer res integra. This contention was raised in Union of India Vs. Apar Industries Limited, 1999 (5) J.T. 160. In that case the day when the goods entered the territorial waters, the rate of duty was nil but when they were removed from the warehouse, the duty had become leviable. The contention which was sought to be raised was that what is material is the day when the goods had entered the territorial waters because by virtue of Section 2(23) read with Section 2(27) the import into India had taken place when the goods entered the territorial waters. Following the decision of this Court in Bharat Surfactants (M/s) (Private) Ltd. and Another Vs. Union of India and Another, 1989(4) SCC 21 and Dhiraj Lal H. Vohra and Others Vs. Union of India and Others, 1993 (Supp. 3) SCC 453, this Court came to the conclusion in Apars Private Limited case that the duty has to be paid with reference to the relevant date as mentioned in Section 15 of the Act.
>
> 16. It was further submitted that in the case of Apars Private Limited this Court was concerned with Sections 14 and 15 but here we have to construe the word imported occurring in Section 12 and this can only mean that the moment goods have entered the territorial waters, the import is complete. We do not agree with the submission. This Court in its opinion in Re. The Bill to Amend Section 20 of the Sea Customs Act, 1878 and Section 3 of the Central Excises and Salt Act, 1944, 1964 (3) SCR 787 at page 823 observed as follows:
>
> Truly speaking, the imposition of an import duty, by and large, results in a condition which must be fulfilled before the goods can be brought inside the customs barriers i.e. before they form part of the mass of goods within the country.
>
> It would appear to us that the import of goods into India would commence when the same cross into the territorial waters but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the customs barriers and the bill of entry for home consumption is filed.
>
> 17. It was submitted by the learned counsel for the appellants that in actual effect in the case of CIF contracts like the present, it is the shipper who pays the landing charges and the Indian importer does not incur these expenses in addition to what he has paid on the basis of the CIF contract. In other words the submission was that the landing charges are already included in the CIF value of the goods as they form part of the freight paid to the steamer agent and the said charges are recovered by the Port Trust authorities directly from the steamer agents and, therefore, a second inclusion of such landing charges by loading a flat percentage of the CIF value is uncalled for. In this connection, reliance was placed on clause 15 of the terms and conditions of a sample of a Bill of Lading which deals with loading, discharge and delivery and reads as under:
>
> any expenses, costs, dues and other charges which incur before loading and after discharge of the goods shall be borne by the Merchant.

> Learned Additional Solicitor General is correct in submitting that the aforesaid clause 15 does not in any way indicate that the CIF value includes therein the charges levied by the Port Trust Authorities after the discharge of the goods. It is difficult to imagine that at the time when the contract is entered into, and the CIF price is fixed, as to how the parties could envisage as to what the port charges at the destination are likely to be. It does appear that any expense which is incurred with regard to the loading or un-loading of the goods to and from the ship would be included in the CIF price paid by the importer. But there is nothing on record to show that in actual effect landing charges were collected by the Port Trust Authorities from the shipper. No document in this regard showing the discharge of such a liability by the shipper to the Port Trust Authorities has been produced. There can be little doubt that if the importer is able to establish that the obligation to pay the landing charges was on the seller or by the shipping agent, and not by the buyer, and the said charges have in fact been paid to the Port Trust Authorities not by or on behalf of the importer, then the importer can claim that the landing charges should not once again be added to the price because in such an event, where payment is made of landing charges by the seller or the shipper, the CIF price must be regarded as including the said landing charges. There is however, in these cases, no factual basis for contending that the landing charges were included in the CIF price and, consequently the said obligation was discharged not by the importer or by its agent but by the seller or the shipper."

13. We have heard learned counsel for the parties. It is well-settled principle of the statute that while interpreting a statute, one has to go by the scope and object of the principal Act. Under the principal Act, while amending it on 10th October, 2007, proviso has included the costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the Rules. The demurrage has not been included as a part of cost envisaged by the legislation. Further, it is a kind of penalty. Therefore, it could not have been envisaged by the legislation to be included in the definition of Section 14 of the Act. However, in view of the clarifications by way of judgments of the Hon'ble Supreme Court, more particularly in the cases of *Wipro Ltd. (supra), Essar Steel Ltd. (supra)* and *Mangalore Refinery & Petrochemicals Ltd. (supra)*, it is made clear that demurrage cannot be included for the purpose of valuation under the Customs Act, 1962. In that view of the matter, we are of the considered opinion that the contentions raised by the petitioner that the relevant provisions in the Principal Act is silent about the 'demurrage'; thus, it was beyond the the legislative power to include it in the Rules is accepted and thus the explanation to Sub Rule-(2) of Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is held to be bad and hence declared *ultra vires* the Constitution/ provision of Section 14 of the Customs Act, 1962, and hence the same is struck down.

2019 (III) ILR - CUT- 458

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

W.A NO. 241 OF 2019

SANTOSH KUMAR NANDA .....Appellant

.Vs.

THE ODISHA STATE HOUSING BOARD & ORS. .....Respondents

ORISSA STAMP RULES, 1952 – Rule 2(f) (ii) read with Section 47-A of Indian Stamp Act – Provisions under – Registration of lease deed – Market value vis-à-vis value mentioned in the lease deed – Registering authority demands fee on the basis of bench mark valuation as on the date of registration – Plea of the appellant that the registration fee should be on the value mentioned in the lease deed – The question arose as to on what value the registration fee will be charged? – Held, on the value so indicated in the lease deed and not on the basis of bench mark value – Reasons indicated.

Case Laws Relied on and Referred to :-

1. (2010) 4 SCC 350 : State of Haryana & Ors. Vs. Manoj Kumar.
2. AIR 1992 ORISSA 232 : Gourang Naik Vs. State of Odisha & Ors.
3. (2003) 2 SCC 111 : Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. & Ors.

For Appellant : M/s. Prakash Ranjan Barik, A. Dash, S. Priyadarsini

For Respondents : Mr.K.C. Mishra.

JUDGMENT Date of Judgment: 21.10.2019

S. PANDA, J.

The appellant by means of this Writ Appeal assails the judgment dated 18.04.2019 passed by the learned Single Judge in W.P.(C) No. 12841 of 2016, rejecting the Writ Application filed by the appellant.

2. The learned Single Judge vide judgment dated 18.04.2019 held that the demand of the registering authority is strictly in terms of the provision contained in Rule 2 (f) (ii) of The Odisha Stamp Rules, 1952 and he has taken into consideration the decision of the Apex Court in the case of ***State of Haryana & Others Vs. Manoj Kumar*** reported in ***(2010) 4 SCC 350***.

3. Learned counsel for the appellant submitted that the learned Single Judge did not appreciate the provision contemplated under Rule-2 (f) (ii) in its proper perspective. Rule-2 (f) (ii) of the Odisha Stamp Rules, 1952 mandates that the value of any property, which is the subject matter of conveyance, exchange, gift, partition or settlement by or on behalf of the

Central Government or the State Government or any authority or body incorporated by or under any law for the time being in force 'as shown in the instrument'. He has further submitted that as per the said Rule, the Stamp Duty and Registration Fee is payable on the value of the property mentioned in the instrument, i.e. the Lease Deed dated 29.09.1992, which has been supplied by the Respondent No.1 and not on the Bench Mark Valuation fixed by the District Valuation Committee. He further submitted that the case of ***State of Haryana and others V. Manoj Kumar*** has no application to the case of the appellant since in the said case the dispute was between two private individuals and had arisen out of a suit for specific performance of contract. The said judgment was also rendered keeping in view the provisions contemplated under Haryana Amendment to Stamps Act, 1899.

In the said decision the Apex Court has discussed the scope of interference by the High Court with the concurrent findings of facts while exercising the jurisdiction under Article 227 of the Constitution of India. In the said case the instrument was referred to the authority under Section 47-A of the Haryana Amendment to Stamp Act, which was applicable to the parties in case where the instrument was undervalued how it will be dealt with the same. Accordingly, the District Collector, Faridabad has given a finding which was confirmed by the appellate authority. Thus the dispute in the present case is that the valuation reflected in the document, which was prepared by the Odisha State Housing Board is to be accepted as the valuation of the land or not. In view of such the same is to be accepted in accordance with Rule 2 (f) (ii) of the Odisha Stamp Rules, 1952.

4. In the draft Lease-cum-Sale Deed it has been specifically mentioned that the Stamp Duty and Registration fees are to be assessed on the value of the land and not on the value of the building, since it has been exempted vide Revenue Excise Department Notification No. 55307 dated 30.08.1989. Therefore, the appellant is liable to pay the Stamp Duty and Registration Fees on the value of land mentioned in the instrument, as per the provisions of Rule-2 (f)(ii) of the Odisha Stamp Rules, 1952. According to him, it is respondents who are responsible for not registering the lease agreement in the year 1992. Rather they, for the first time, issued letter on 26.11.2015 for the same. Therefore, no fault can be attributed to the appellant. In view of the above, according to him, the order passed by the learned Single Judge needs to be interfered with.

5. Mr. Mishra, learned Additional Government Advocate, on the other hand while supporting the impugned judgment submits that the learned

Single Judge, by conjoint reading of the provisions of Rule-2 (f)(i) and (ii) and by applying the ratio in the case of Manoj Kumar (supra) has come to the finding that the demand of the registering authority is strictly in terms of the provision of the Rules, 1952 and thus, the same need not be interfered with.

6. The appellant had filed the aforementioned Writ Application challenging the letter dated 13.07.2016 issued by the Sub Registrar, Khandagiri to the appellant indicating therein that the Stamp Duty and Registration Fees will be calculated as per present Market Valuation fixed by District Valuation Committee. It has also been indicated that as per I.G.R. Circular No. 6266 dated 26.09.2011, no registration of a document can be made below the Bench Mark Valuation fixed by the District Valuation Committee. The appellant, therefore, had also prayed to hold that the said Circular dated 26.09.2011 is not applicable to the facts and circumstances of the case of the appellant.

7. Instead of delving into the factual backdrop in detail, which has already been exhaustively narrated by the learned Single Judge in its judgment, in a nut shell, it is the case of the appellant that he was allotted with one HIG house (Plot No. HIG-175) At-Sailashree Vihar, Bhubaneswar-21 under Self Financing Scheme by the Odisha State Housing Board and the possession was handed over on execution of the agreement on 29.09.1992. Since the Odisha State Housing Board ('OSHB' in short), enhanced the cost of the house, despite delayed delivery and defects in the construction, the appellant along with similarly situated persons approached the State Consumer Disputes Redressal Commission, Odisha seeking compensation. By order dated 05.11.1997, the State Commission awarded interest @ 18% per annum for the delayed delivery period i.e. from 31.01.1992 till the actual date of giving possession and also awarded compensation while upholding the price escalation. The OSHB moved the National Commission. The National Commission by order dated 06.12.2006 reduced the rate of interest from 18% to 12% and remanded the matter to the State Commission. The respondent No.1 filed S.L.P (C) No.15214 of 2015 before the Hon'ble Supreme Court challenging the order passed by the National Commission, which was dismissed on 10.07.2015. After dismissal of the Special Leave Petition the State Commission, on remand held that the Respondent No.1 is liable to pay interest @ 9% per annum, besides compensation for the defects which has been assessed at Rs.45,000/-.

8. Respondent No.1 after having complied the order passed by the State Commission, by letter dated 24.11.2015 intimated the appellant to contact the Assistant Administrative Officer (Urban), OSHB-respondent No.3 for execution of the Lease-cum-Sale Deed of the allotted house. The appellant met respondent No.3 and the authority by letter dated 26.11.2015 intimated the appellant to attend his office on 20.12.2015 for execution of the Lease-cum-Sale Deed. In the said letter the copy of the Draft Lease-cum-Sale Deed was also enclosed. Respondent No.3 also requested the appellant to ascertain the required Stamp Duty and registration charges from the Office of the Sub-Registrar.

9. Thereafter, the appellant wrote a letter on 14.12.2015 to the Sub-Registrar, Khandagiri (Respondent No.4) requesting him to give the value of the Stamp papers and Registration cost. Since there was no response, the appellant again wrote a letter on 01.07.2016 to respondent No.4 to confirm the Stamp Duty and registration fees. Respondent No.4 by letter dated 13.07.2016 intimated that Stamp Duty and Registration Fees will be calculated as per Bench Mark valuation fixed by the District Valuation Committee, in terms of I.G.R Circular No.6266 dated 26.09.2011 and no registration of a document can be made below the Bench Mark valuation fixed by the District Valuation Committee. The appellant challenged the said arbitrary action of the respondents in W.P.(C) No.12841 of 2016, demanding the payment of Stamp Duty and Registration Fee, as per Bench Mark valuation, since the same was in clear violation of Rule-2 (f) (ii) of the Odisha Stamp Rules, 1952.

10. Considering the rival submission of the parties and after going through the materials available on record, it appears that the Draft Lease-cum-Sale Deed was supplied by respondent No.3 for its execution, wherein it was reflected the valuation of the land as per the terms and conditions of the agreement for transfer of the property. It was also specifically reflected in the said Deed that the Government of Odisha have decided that the Stamp Duty and Registration Fees are exempted on the value of the building constructed under Self Financing Scheme vide Revenue and Excise Department Notification No.55307 dated 30.08.1989 and registration fees vide G.O. No.55287/R dated 30.08.1989 and whereas such duty and fees on the value of the land are to be borne by lessee. In view of such Government notification, the Stamp Duty is to be assessed as per the Odisha Stamp Rules, 1952.

11. In the present case the Draft Deed was supplied by opposite party No.1, who is an authority and body corporate coming under the provisions of

Rule 2 (f) (ii) of the Odisha Stamp Rules, 1952. For better appreciation Rule 2 (f) (ii) of the Odisha Stamp Rules, 1952 is extracted herein below:

> Rule 2 (f) 'Market Value' means:
>
> the value of any property which is the subject matter of conveyance, exchange, gift, partition or settlement by or on behalf of the Central Government or the State Government or any authority or body incorporated by or under any law for the time being in force as shown in the instrument. (emphasis supplied)

In view of the above provision and as there is no ambiguity in the language appearing in the said Rules, the Stamp Duty should have been calculated as per the valuation reflected in the said Draft Lease-cum-Sale Deed and not as per the information given by the Registering Authority. The Registering Authority erroneously issued the notice fixing another valuation which was under challenge and he has no jurisdiction to fix the valuation in view of Section 47-A of the Indian Stamp Act. Accordingly, the same is without jurisdiction and is liable to be quashed.

12. Learned Single Judge has not taken into consideration the aforesaid fact while passing the impugned order as the lease deed was supplied by the Odisha State Housing Board, which is an authority as well as body incorporated as defined under Rule 2 (f) (ii) of the Odisha Stamp Rules, 1952. This Court in the case of ***Gourang Naik Vs. State of Odisha and others*** reported in **AIR *1992 ORISSA 232*** considered Section 47-A of the Indian Stamp Act as well as the amendment to the said Act by Orissa Act 25 of 1962 and held that:

> "xx xx any guidelines the State Government or the Board of Revenue or associated Department of the Government gives to the registering authority regarding the valuation of the land in a particular area is not the last word in the assessment of market value. Therefore, the State Government has not acted rightly in issuing Annexure-1 fixing the market value of the land in Bhubaneswar Master Plan area and requiring the registering officers to stick on to that valuation while considering the valuation of the property under the document and to impound the document and refer the document to the Collector for determination of the market value when the valuation shown in the document appeared to be low compared with the valuation chart shown by the Government which is Annexure 4. The issuance of Annexure A has the tendency of arbitrarily affecting the opinion of the registering authority and thereby interferes with the jurisdiction given to the registering authority under Section 47-A to reach the satisfaction of the property and will guide him to mechanically refer all the documents to the Collector on being impounded, harassing the general public on the basis of this statement regarding market value of land in Bhubaneswar market area when there is no authenticity in its correctness," as such the same was quashed.

13. In the case of of **Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd., and others** reported in **(2003) 2 SCC 111** the Apex Court taking into consideration the decision in the case of Haryana Financial Corporation and another Vs. M/s Jagdamba Oil Mills and another reported in JT 2002 (1) SC 482 held that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

In the case of State of Haryana and others (supra) the valuation was determined by the authority having jurisdcition as provided under Indian Stamp Act and the same was confirmed by the appellate authority and the transanction was between two private parties. Thus the principle decided in the said decision is not applicable to the case at hand.

14. In view of the discussions made hereinabove and the settled position of law, we set aside the impugned order passed by the learned Single Judge and direct the respondents to execute the Sale Deed as per the valuation reflected in the Draft Lease-cum-Sale Deed, as expeditiously as possible, on production of certified copy of this Judgment. The Writ Appeal is accordingly allowed.

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2019 (III) ILR - CUT- 463

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

W.A NO. 343 OF 2017

UMESH CHANDRA DIGAL .....Appellant

.Vs.

BANK OF INDIA & ORS. .....Respondents

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the order of dismissal from service on the charge of submitting fake caste certificate – Writ petition dismissed on the finding that the writ court cannot interfere with the findings arrived at by the disciplinary authority – Writ appeal – Appellant pleads that his appointment was considered as he is an ex-serviceman – Dismissed for allegedly submitting fake caste certificate – Caste certificate issued by competent authority in 1978 was valid till 1993 – Appeal pending against the order cancelling the caste certificate – Held, the finding that the appellant got the job by furnishing fake caste certificate is not sustainable and that the High court has jurisdiction to interfere with the finding of the disciplinary authority.

"The only question remained to be considered is as to whether the petitioner-appellant furnished a fake "Caste Certificate" at the time of his appointment showing him to be a member of Scheduled Caste even though, he belonged to Christian community. The 2nd charge regarding date of birth has not been proved. In this regard, the undisputed rather admitted facts are that the petitioner-appellant was the sole candidate against the single vacancy, which was not reserved for Scheduled Caste or Scheduled Tribe category. Secondly, the petitioner-appellant did not get his job on the basis of the "Caste Certificate", rather, as it was submitted on behalf of the petitioner-appellant, he was considered for appointment for being an Ex-serviceman. Thirdly, by the time, the charges was served on the petitioner-appellant on 26.06.1991, the Caste Certificate as furnished by him held good having been issued by the competent authority. It was subsequently cancelled by the concerned Tahasildar only on 15.02.1993 and as detailed hereinbefore the said order having been set aside by the appellate authority, the matter was remanded back and the concerned Tahasildar pronounced the final order only on 04.09.2007, that too the appeal preferred against the said order by the petitioner-appellant is still subjidice. Thus, on the stated positions, it can never be said that the "Caste Certificate" furnished by the petitioner-appellant at the time of his appointment was fake. In the worst, it could be said to have been wrongly issued for which it was cancelled subsequently but, can never be said to be fake or false. It was further contended on behalf of the petitioner-appellant in course of hearing of this appeal that a criminal complaint was lodged against the petitioner-appellant before the court of learned Judicial Magistrate First Class, G. Udayagiri and by judgment dated 28.01.1997, the petitioner-appellant was acquitted with the observation that the prosecution failed to establish that the petitioner-appellant as accused fabricated the "Caste Certificate" so as to be liable under Section 420 of the Indian Penal Code. The State approached this Court against the said order of acquittal but, it has been dismissed on 06.12.2001. In the given of circumstances, on admitted positions of the facts, the Caste Certificate issued in favour of the petitioner-appellant is yet to be finally cancelled. Even if it is held that the said Caste Certificate stood cancelled by the competent authority still it can never be said to be a fake certificate to have been furnished by the petitioner-appellant at the time of his appointment in the year 1978 by any stretch of imagination. The dictionary meaning of word 'fake' is 'not real' or 'false' or 'fraudulent'. But on the admitted facts in this case, the Caste Certificate furnished by the petitioner-appellant was duly issued by the competent authority, which was legally valid till it was first cancelled in the year 1993, apart from the fact that the said proceeding of cancellation is yet to reach its finality. Hence, the charge framed against the petitioner-appellant that he produced a fake "Caste Certificate" based on no material and in view of the fact-situations detailed hereinbefore, the finding reached by the opposite parties-authorities that the petitioner-appellant furnished the fake "Caste Certificate" at the time of his appointment in the year 1978 cannot be said to be legally sustainable. In view of the aforesaid positions, we are unable to concur with the findings reached by the learned Single Judge that in the given facts and circumstances, this Court cannot interfere with the finding reached by the disciplinary authority while exercising jurisdiction under Article 226 of the Constitution of India. As discussed hereinbefore,

the charge itself was baseless and the findings reached by the disciplinary authority were completely erroneous. Consequently, therefore, the order of dismissal passed against the petitioner-appellant is liable to be set aside."

For Appellant : M/s. Dr. J.K. Lenka and P.K. Behera,
For Respondents: Smt. G. Rani Dora, For the Respondent no.1)
Mr. G.A.R. Dora, Sr. Adv., (For Respondent nos.2 and 3)

JUDGMENT Date of Hearing : 20.02.2019 : Date of Judgment: 01.03.2019

J.P. DAS, J.

This intra Court appeal is directed against the judgment dated 23.08.2017 passed by the learned Single Judge in W.P.(C) No.11971 of 2006 declining to interfere with the dismissal order passed against the present appellant by the disciplinary authority-respondents.

2. The present appellant as the petitioner filed the writ application with the contentions that he being an Ex-serviceman was appointed as armed guard in the opposite party-Bank on 11.08.1978. The petitioner, while working as Daftari in the opposite party-Bank in the district of Ganjam, was served with two charges alleging that he being a Christian got a job as armed guard in the Bank on the strength of one fake certificate showing him to be a member of Scheduled Caste issued by the Tahasildar, G. Udayagiri on 08.08.1978. The 2nd allegation was that he produced a false transfer certificate showing his date of birth as 01.06.1951 even though his actual date of birth as per School Register was 03.07.1944. The petitioner-appellant denied the charges and an enquiry was conducted. On 15.11.1993, the Enquiring Officer submitted his report holding that both the charges were proved against the appellant and basing on that the disciplinary authority imposed the punishment of dismissal on the appellant, which was confirmed by the Appellate authority by order dated 29.05.1995. The appellant moved this Court in O.J.C. No.3716 of 1996 challenging the order of dismissal and this Court by its judgment dated 16.09.1997 quashed the enquiry report as well as the punishment imposed on the appellant and remitted back the case to the Enquiring Officer to examine the evidence afresh in the light of observations made in the judgment and also to examine some revenue officials and the Headmaster of the school and to give a fresh finding. Although the exercise was directed to be completed within four months still after about lapse of six years on 15.07.2003 Enquiring Officer submitted the fresh report holding that the charge no.1 was proved against the appellant and the charge no.2 was not proved. Basing on the said report, the disciplinary

authority again passed the order of dismissal against the appellant on 19.10.2005 and the appeal preferred by the appellant before the concerned appellate authority was also rejected. Thereafter, the petitioner-appellant filed the W.P.(C) No.11971 of 2006 before this Court assailing the findings of the disciplinary authority and the appellate authority as well as the order of dismissal to be illegal and un-lawful.

3. The appellant as the petitioner contended in the writ application that he was issued the "Caste Certificate" showing him to be a Scheduled Caste by the concerned Tahasildar, the competent authority on 08.08.1978 and by the time, the charge was framed in the year 1991, the "Caste Certificate" was valid. He alleged that subsequent thereto being pressurized by the Bank officials the said "Caste Certificate" was cancelled by the concerned Tahasildar only on 15.02.1993. It was the further case of the petitioner-appellant that he preferred appeal before the Sub-collector, Kandhamal against the cancellation order passed by the Tahasildar and the Sub-collector setting aside the said cancellation order remanded the matter back to the Tahasildar on 22.11.2000 for fresh enquiry. The petitioner-appellant alleged that again the Tahasildar cancelled the "Caste Certificate" on 12.12.2001 but no order was pronounced. The petitioner-appellant moved an application before the concerned Collector, Ganjam and only after his direction, the Tahasildar pronounced the order in the open court on 04.09.2007. It is further case of the petitioner-appellant that he has filed an appeal bearing no.12 of 2007 before the Sub-collector, Kandhamal after pronouncement of the order by the Tahasildar and the said appeal is still pending disposal. Hence, he contended before the learned Single Judge that only charge that has been held to be proved against the petitioner-appellant was that he produced a fake "Caste Certificate" at the time of his appointment, but neither the "Caste Certificate" was cancelled at the time of framing of charge nor any final order has been pronounced in that respect till date. Thus, it was submitted before the learned Single Judge that the findings reached by the opposite parties-authorities were misconceived and illegal.

4. It was the case of the respondents-opposite parties that while the petitioner-appellant was given appointment in the year 1978, the appointment contained the conditions that his service is liable to be terminated with appropriate notice, if it revealed at any time after his appointment that information given and the particulars furnished by him in the application and its enclosures are materially incorrect or false or any particular called for by the Bank therein or thereafter are will-fully suppressed. It was further

contended that although the petitioner-appellant was appointed in the year 1978, subsequently on receipt of complaint regarding "Caste Certificate" of the petitioner-appellant to be fake one, which was subsequently cancelled by the competent authority, the charges were framed followed by the enquiry and the punishment. Thus, it was contended that since the petitioner-appellant, being a member of Christian community, filed a fake certificate to be a Scheduled Caste, he was guilty of furnishing false information and that having been found out on enquiry, he has been rightly awarded with the punishment of dismissal. It was also submitted that after the 1st order of dismissal quashed by this Court, the petitioner-appellant was reinstated in service and continued as such till 19.10.2005, when the subsequent order of dismissal was passed against him. It was submitted that it was not a question of getting appointment by showing him a member of Scheduled Caste but, the question was of integrity and honesty of which the petitioner-appellant was found to be lacking by producing false document and it amounted to gross misconduct calling for major punishment of dismissal.

5. Learned Single Judge accepting the contentions made on behalf of the opposite parties-respondents held that the petitioner-appellant was guilty of misconduct for having furnished fake "Caste Certificate" thereby violating the terms of appointment and this Court while exercising jurisdiction under Article 226 of the Constitution of India cannot again re-assess the evidence as to the finding of facts in course of departmental enquiry as per the settled positions of law. Learned Single Judge further observed that although the petitioner-appellant did not get the appointment under the Scheduled Caste quota still the fact remained that he has misled the authority by furnishing fake "Caste Certificate", which was enclosed along with the application form and has got some weightage for being a Scheduled Caste, which was a gross misconduct. Accordingly, the impugned judgment was passed rejecting the application of the petitioner-appellant.

6. It has been submitted in the appeal that the learned Single Judge erroneously held that the petitioner-appellant furnished a fake "Caste Certificate", which was not correct on the admitted facts on record. It was submitted by learned counsel for the appellant-petitioner that the positions of law is not disputed that the jurisdiction of this Court in exercise of its power under Article 226 of the Constitution of India is limited but at the same time, it is also the position of law that this Court can interfere in exercise of its extra-ordinary jurisdiction, if it is found out that findings reached by the departmental authority are perverse or based on no evidence.

7. Per contra, the learned senior counsel appearing for the respondents reiterated the submissions and contentions as made before the learned Single Judge that since the petitioner violated the terms and conditions of his appointment by furnishing fake "Caste Certificate", his service was rightly terminated.

8. The only question remained to be considered is as to whether the petitioner-appellant furnished a fake "Caste Certificate" at the time of his appointment showing him to be a member of Scheduled Caste even though, he belonged to Christian community. The 2nd charge regarding date of birth has not been proved. In this regard, the undisputed rather admitted facts are that the petitioner-appellant was the sole candidate against the single vacancy, which was not reserved for Scheduled Caste or Scheduled Tribe category. Secondly, the petitioner-appellant did not get his job on the basis of the "Caste Certificate", rather, as it was submitted on behalf of the petitioner-appellant, he was considered for appointment for being an Ex-serviceman. Thirdly, by the time, the charges was served on the petitioner-appellant on 26.06.1991, the Caste Certificate as furnished by him held good having been issued by the competent authority. It was subsequently cancelled by the concerned Tahasildar only on 15.02.1993 and as detailed hereinbefore the said order having been set aside by the appellate authority, the matter was remanded back and the concerned Tahasildar pronounced the final order only on 04.09.2007, that too the appeal preferred against the said order by the petitioner-appellant is still subjidice. Thus, on the stated positions, it can never be said that the "Caste Certificate" furnished by the petitioner-appellant at the time of his appointment was fake. In the worst, it could be said to have been wrongly issued for which it was cancelled subsequently but, can never be said to be fake or false. It was further contended on behalf of the petitioner-appellant in course of hearing of this appeal that a criminal complaint was lodged against the petitioner-appellant before the court of learned Judicial Magistrate First Class, G. Udayagiri and by judgment dated 28.01.1997, the petitioner-appellant was acquitted with the observation that the prosecution failed to establish that the petitioner-appellant as accused fabricated the "Caste Certificate" so as to be liable under Section 420 of the Indian Penal Code. The State approached this Court against the said order of acquittal but, it has been dismissed on 06.12.2001.

9. In the given of circumstances, on admitted positions of the facts, the Caste Certificate issued in favour of the petitioner-appellant is yet to be finally cancelled. Even if it is held that the said Caste Certificate stood

cancelled by the competent authority still it can never be said to be a fake certificate to have been furnished by the petitioner-appellant at the time of his appointment in the year 1978 by any stretch of imagination. The dictionary meaning of word 'fake' is 'not real' or 'false' or 'fraudulent'. But on the admitted facts in this case, the Caste Certificate furnished by the petitioner-appellant was duly issued by the competent authority, which was legally valid till it was first cancelled in the year 1993, apart from the fact that the said proceeding of cancellation is yet to reach its finality. Hence, the charge framed against the petitioner-appellant that he produced a fake "Caste Certificate" based on no material and in view of the fact-situations detailed hereinbefore, the finding reached by the opposite parties-authorities that the petitioner-appellant furnished the fake "Caste Certificate" at the time of his appointment in the year 1978 cannot be said to be legally sustainable.

10. In view of the aforesaid positions, we are unable to concur with the findings reached by the learned Single Judge that in the given facts and circumstances, this Court cannot interfere with the finding reached by the disciplinary authority while exercising jurisdiction under Article 226 of the Constitution of India. As discussed hereinbefore, the charge itself was baseless and the findings reached by the disciplinary authority were completely erroneous. Consequently, therefore, the order of dismissal passed against the petitioner-appellant is liable to be set aside.

11. Accordingly, we allow the writ appeal and setting aside the judgment passed by the learned Single Judge in W.P.(C) No.,11971 of 2006 direct that the order of dismissal passed against the petitioner-appellant is set aside. Since it was submitted that the petitioner-appellant has retired from service in the meantime, he shall be given with all service benefits as per his entitlement till the date of his retirement. The writ appeal is disposed of accordingly. No order as to cost.

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2019 (III) ILR - CUT- 469

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

JCRLA NO. 40 OF 2007

KABASI GANGA ……..Appellant

.Vs.

STATE OF ORISSA ……Respondent

INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction – Accused committed murder of his wife and confessed before the Ward Member and the police – Informant and Investigating Officer have not been examined – Weapon of offence was not produced – Effect of.

"We feel expedient to remind the following observations of the Hon'ble Apex Court made in the case of ***Bablu Kumar and others –vrs.- State of Bihar and another****: reported in (2015) 8 SCC 787*

> *"…… It seems that everyone concerned with the trial has treated it as a farce where the principal protagonists compete with each other for gaining supremacy in the race of closing the case unceremoniously, burying the basic tenets of fair trial, and abandoning one's duty to serve the cause of justice devoutly. It is a case where the prosecution has played truant and the learned trial judge, with apathy, has exhibited impatience."*

It is also well settled principle of law that any confession made by the accused in presence of the police is not admissible in evidence unless it is made in the immediate presence of a Magistrate. In this case, it is not the case of the prosecution that the accused has made confession in presence of a Magistrate. On the basis of the inadmissible evidence, conviction against the appellant has been recorded. Therefore, we have no hesitation to set aside the impugned judgment of conviction and order of sentence passed by the learned Additional Sessions Judge, Malkangiri." (Paras 7 & 8)

Case Laws Relied on and Referred to :-

1. (2015) 8 SCC 787 : Bablu Kumar & Ors. Vs. State of Bihar & Anr.

For Appellant : Mr. Pravat Ku. Mohanty.
For Respondent : Mr. J. Katikia, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment : 18.03.2019

S. K. MISHRA, J.

In this JCRLA, the convict/ appellant (Kabasi Ganga) has assailed the correctness of the judgment of conviction and order of sentence dated 08.02.2007 passed by the learned Additional Sessions Judge, Malkangiri, in Criminal Trial No.42 of 2004, whereby he has been convicted and sentenced to undergo imprisonment for life for commission of offence under Section 302 of the I.P.C. But, no fine has been imposed.

02. The case of the prosecution in short is that the appellant on 05.03.2004 at about 12.00 P.M. at village Gathanpalli committed murder of his wife Kabasi Nande by assaulting her by means of handle of a Tangia on her left ear region and she died due to profuse bleeding from her left ear.

03. The defence took the plea of denial and false implication.

04. In order to prove its case, prosecution examined as many as six witness. Prosecution also placed reliance on the documents marked Exts.1 to 4.

No defence evidence, oral or documentary, was adduced.

05. It may be noted here that the Investigating Officer and the informant have not been examined in this case. P.W.1 (Pravat Majumdar) has stated that he was the Ward Member of the village and the accused confessed before him that he had dealt two stick blows on his wife in previous night causing her death. However, P.W.2 (Udayanath Kawasi) has stated that when son of the appellant was crying, he and other villagers went there and on being asked, the appellant confessed that being intoxicated, he assaulted his wife causing her death. In the cross-examination, he has categorically stated that the appellant confessed his guilt in presence of the police. The Sarapanch of the village was also present there by the time. He has also stated that by the time I reached the spot, the police had already arrived.

06. On an appraisal of evidence on record more particularly the evidence of P.Ws.1 and 2 before whom the appellant has made his confession regarding commission of murder of his wife, the learned Additional Sessions Judge, Malkangiri has proceeded to convict the appellant.

07. Learned Additional Sessions Judge, Malkangiri has mentioned in the impugned judgment of conviction and order of sentence that the memo declining the charge-sheet witnesses was accepted by him as defence had not objected. The fact remains that on behalf of the accused, State defence counsel was engaged. As a result of acceptance of the memo, the informant and the Investigating Officer amongst others could not be examined. The weapon of offence was not produced in the trial. We feel expedient to remind the following observations of the Hon'ble Apex Court made in the case of **Bablu Kumar and others –vrs.- State of Bihar and another**: reported in (2015) 8 SCC 787

> "…… It seems that everyone concerned with the trial has treated it as a farce where the principal protagonists compete with each other for gaining supremacy in the race of closing the case unceremoniously, burying the basic tenets of fair trial, and abandoning one's duty to serve the cause of justice devoutly. It is a case where the prosecution has played truant and the learned trial judge, with apathy, has exhibited impatience."

08. It is also well settled principle of law that any confession made by the accused in presence of the police is not admissible in evidence unless it is made in the immediate presence of a Magistrate. In this case, it is not the case

of the prosecution that the accused has made confession in presence of a Magistrate. On the basis of the inadmissible evidence, conviction against the appellant has been recorded.

09. Therefore, we have no hesitation to set aside the impugned judgment of conviction and order of sentence passed by the learned Additional Sessions Judge, Malkangiri.

10. Accordingly, the appeal is allowed. The impugned judgment of conviction and order of sentence dated 08.02.2007 passed by the learned Additional Sessions Judge, Malkangiri in Criminal Trial No.42 of 2004 convicting the appellant for commission of offence under Section 302 of the I.P.C. and sentencing him to undergo imprisonment for life without imposing separate sentence of fine, are set aside. The appellant is acquitted of the said charge. Since the appellant, namely, Kabasi Ganga is in jail custody, he be set at liberty forthwith, unless his detention is required in any other case.

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2019 (III) ILR - CUT- 472

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

JCRLA NO. 42 OF 2004

PUNIA NAIK ……..Appellant

.Vs.

STATE OF ORISSA ……Respondent

CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code – No eye witness – Conviction based on circumstantial evidence – Chain of circumstances – Factors to be considered – Held, the following:

"It is well-settled principle of law that cases based on circumstances evidence should be accepted only if the following conditions are fulfilled:- First, the circumstances must be established by cogent and clear evidence. Second principle is that the circumstances so established must be consistent only any theory of guilt of the accused and should not be capable of explanation in favour of the defence. But, most vital principle is that though each circumstance by itself is not sufficient to prove the guilt of the accused, all the circumstances taken together must form an complete chain of circumstances unerringly pointing to the guilt of the accused. In this case, we have noticed that two of the circumstances i.e. the recovery of the bow and its non-production has resulted in failure of the prosecution to prove that the bow seized in the case was actually used in the commission of the offence. The non-determination of the blood group of the appellant also raises a doubt. Hence, a complete chain of event is not made out in this case. So, it will be improper and inexpedient to upheld the conviction recorded by the learned Additional Sessions Judge, Keonjhar." *(Para 10)*

For Appellant : Mr. Akshya Ku. Nayak
For Respondent : Mr. J. Katikia, Addl. Gov. Adv.

JUDGMENT Date of Hearing and Judgment : 25.07.2019

S. K. MISHRA, J.

In this JCRLA, the convict/ appellant (Punia Naik) has assailed the correctness of the judgment of conviction and order of sentence dated 29.03.2004 passed by the learned Adhoc Additional Sessions Judge, Fast Track Court, Keonjhar, in Sessions Trial No.202/23 of 2002/03, whereby he has been convicted and sentenced to undergo imprisonment for life for commission of offence under Section 302 of the Indian Penal Code,1860 (hereinafter referred to as the 'I.P.C.' for brevity).

2. Prosecution case in short is that on 20.05.2002 at about 5 P.M. the informant, who is the son of the deceased lodged a F.I.R. at Ghotagaon Police Station that the deceased has been to the weekly market and has not returned. When the informant asked one Mangulu Naik and Parikhita Dalei about missing of his father, they told that they along with deceased had been to take Handia together and then they went to Dukhabahari tank for bath and while returning they were coming in a row. The deceased was at a little behind. All on a sudden, it was found that the deceased was lying in the road with an arrow pierced on his body through the right side of his chest, and they also found the accused Punia Naik trying to shoot them with an arrow. Hence, they fled away from the scene out of fear. The informant after coming to know about the incident, informed his mother went to the spot and he found his father lying dead on the road. Then, he lodged a written F.I.R. before the O.I.C., Ghatgaon Police Station. The police took up investigation and on completion of the same, submitted charge sheet against the accused under Section 302 of the IPC.

3. Defence in this case took the plea of simple denial. The prosecution, in order to bring whom its case examined 12 witnesses and led certain documents as exhibits but no material objects were produced by the prosecution.

4. On the other hand, the defence has neither examined any witness nor led any document in defence to prove its case. Out of the 12 witnesses examined, P.W.2-Mangulu Naik and P.W.3-Parikhita Dalei are two witnesses on whose evidence the prosecution relies heavily. P.W.1 is the informant, P.W.11 and 12 are the Doctors, who examined the accused and conducted postmortem examination on the dead body of the deceased. P.W.9 is the Investigating Officer of the case. Rests of the witnesses are formal witnesses.

5. The defence does not dispute that the death of the deceased was homicidal in nature and could have been caused by pierced injury by shot of arrow. However, the learned defence counsel seriously disputed the complicity of the appellant in the commission of the crime on the ground that there is no sufficient evidence to fasten guilty on the convict appellant. The learned counsel for the State on the other hand though admitted that there is no direct evidence in the shape of narration of eyewitnesses, he submits that he circumstantial evidence on record are sufficient to prove the case of the prosecution. He relies on the circumstance of P.Ws.2 and 3 finding the deceased lying on the row with a arrow come to his body and the accused standing a bow and arrow. The second circumstance is recovery of the bow and one arrow on the discloses statement made by the accused under Section 27 of the Evidence Act and the 3rd circumstance being the death of the deceased caused by a shot of arrow. Lastly, the learned counsel for the State submits that on chemical examination arrow was found to be stained with blood and the grouping of blood match with the blood grouping of the deceased, which is determined from the wearing apparels of the deceased.

6. Admittedly, in this case, no eyewitnesses is available. The main witnesses examined on behalf of the prosecution is P.W. 2 & 3. P.W.2-Mangulu Naik has stated on the court that he is well acquainted with accused and deceased-Gananath Naik. The occurrence took place a year, prior to his deposition, at about 3 P.M. He further stated that at about 2 P.M. he returned from the Temple and went to Dukhabahari tank to take bath. He saw Barikha and Gananath sitting in the Handia shop. They also accompanied him to the tank. At about 3 P.M. when they were returning from taking bath, Gananath was following them. They saw near the Badaghata hoodi that the deceased Gananath fell on the ground. They further saw that an arrow has pierced in the body of the deceased. The accused coming towards them with a bow and arrow. Hence, they fled away from the spot out of fear. He further stated that Gananath died at the spot. In the cross-examination, he has stated that Parikhita was at a distance of about 20 to 25 feet away from them. The deceased-Gananath was not visible to him. He further stated that when the villagers of that locality go to the forest they usually carry bow and arrow with them. He has stated that he has not gone to see the deceased Gananath and straight returned to home. He disclosed the incident to the son of Gananath one hour after the occurrence but he denied the suggestion that he has no knowledge about the occurrence and deposing falsely.

7. P.W.3-Parikhita Dalei, who was at a distance of 20 to 25 feet from Mangulu Nayak as deposed by P.W.2, has stated that the occurrence took place in the year 2002 in the month of Baisakha at about 3 P.M. On the day of occurrence he along with Mangulu Naik and Gananath Naik were going to Dukhabahali tank to take bath. After taking bath, while they were returning home, the deceased Gananath Naik on the way, all of a sudden raised a feeble sound. The witness turned and saw that an arrow has pierced to the body of the deceased. The accused showed them bow and arrow for which they fled the spot. The deceased Gananath died at the spot. In the cross-examination, P.W.3 has stated that he has not gone to see the deceased Gananath. He was not examined by the police. He has met son of Gananath at about 5 P.M. and denied the suggestions that he was deposing falsehood. A carefully examination of evidence of these two witnesses reveals that they have not seen the actual shooting of Gananath by the appellant by means of a bow and arrow. They have also not stated whether the arrow has pierced to the chest of the deceased either from the backside or from the front side. In fact, they have not examined on the dead body of the deceased Gananath Naik. Moreover, Parikhita Dalei was at a distance of 20 to 25 feet from the spot of occurrence and both the witnesses have not disclosed about the incident immediately after reaching the village but have described the incident about one hour after the occurrence. Thus, the only feeble evidence coming out in this regard is that these two witnesses while returning with Gananath from the tank, Gananath lying with an arrow pierced his body and accused was standing with bow and arrow. They do not know what are the distances between the dead body of the deceased and place where the accused was standing.

8. The second circumstance as pointed out by the learned Additional Government Advocate is recovery of a bow on the disclosed statement given by the appellant while he was in police custody. Though, the bow has been recovered from the custody of the police, the same has not been produced in the court and there is no material on the record connecting the bow with commission of the crime. Section 27 of the Evidence Act provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Thus, the Section 27 of the Evidence Act is an exception to the rule of exclusion of hearsay evidence but such discovery statement and the fact so discover must

distinctly relate to the offence committed. In this case, there is no material on record to show that the same bow was used by the appellant to shoot the deceased an arrow, resulted the death of the deceased. It was not produced in the court or marked as a material object. So, the circumstance of recovery of a bow in this case has no bearing in the case and cannot be considered as a circumstance in furtherance of the prosecution case.

9. It is true, the arrow that was seized after the postmortem examination was found to be stained with human blood of group-B, which was also the human blood of the same grouping found in the lungi, baniyan ganji and gamuchha of the deceased but such a circumstances by itself will not take the case of prosecution any further because the blood group of the accused has not been determined to exclude the possibility of the accused-appellant being that of group-B. So, this circumstance alone will not in any way support the prosecution. The blood group of accused could not be determined in this case as sample drawn was deteriorated at the time of chemical examination. So, there is no material on record to exclude the possibility of the blood of the appellant belonging to group-B. The last circumstance is the homicide nature of the death of the deceased that by itself will not prove the case of the prosecution.

10. It is well-settled principle of law that cases based on circumstances evidence should be accepted only if the following conditions are fulfilled:- First, the circumstances must be established by cogent and clear evidence. Second principle is that the circumstances so established must be consistent only any theory of guilt of the accused and should not be capable of explanation in favour of the defence. But, most vital principle is that though each circumstance by itself is not sufficient to prove the guilt of the accused, all the circumstances taken together must form an complete chain of circumstances unerringly pointing to the guilt of the accused. In this case, we have noticed that two of the circumstances i.e. the recovery of the bow and its non-production has resulted in failure of the prosecution to prove that the bow seized in the case was actually used in the commission of the offence. The non-determination of the blood group of the appellant also raises a doubt. Hence, a complete chain of event is not made out in this case. So, it will be improper and inexpedient to upheld the conviction recorded by the learned Additional Sessions Judge, Keonjhar.

11. In the result, on the basis of the aforesaid discussion and on conspectus evidence on record we come to the conclusion that the order of conviction of the appellant under section 302 of the IPC is not unsustainable and liable to be set aside.

12. Accordingly, we set aside the conviction of the appellant under Section 302 of the IPC and sentence of imprisonment for life. The accused is on bail. The bail-bond be cancelled. However, the learned Sessions Judge, Keonjhar should verify the record whether he has availed the bail granted to him by the High Court.

13. The JCRLA is allowed.

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2019 (III) ILR - CUT- 477

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

JCRLA NO. 105 0F 2004

DASARA MUNDA …….Appellant

.Vs.

STATE OF ORISSA ……Respondent

CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code – Conviction – No eye witness to the occurrence – Prosecution based on evidence like extra judicial confession made by the accused and the leading to discovery of the weapon of offence – Extra judicial confession made before different witnesses revealed that the accused on his own volition has made an extra judicial confession – But from the materials available on record in the shape of extra judicial confession as stated to different witnesses discussed above, it is clear that the occurrence took place as the deceased caught hold the neck of the appellant and a quarrel ensued between them and all on a sudden, the appellant picked up a stone and dashed the same on the head of the deceased – Secondly, there is no pre-meditation for committing the offence and the occurrence took place in a spur of moment – Conviction altered to one under 304- Part I of IPC.

For Appellant : M/s.Mrs. Namita Chakravarty, Mr.B.B.Routray, L. N.Raitsing & C.Kasturi.
For Respondent : Addl. Govt. Adv.

JUDGMENT Date of Judgment: 01.8.2019

S.K. MISHRA,J.

In this appeal, the convict-appellant-Dasara Munda has challenged his conviction for the offence under Section 302 of the I.P.C. (hereinafter referred to as "I.P.C." for brevity) passed by the learned Ad hoc Addl.

Sessions Judge(F.T.), Keonjhar on 27.8.2004 in S.T. Case No.54/34 of 2003-2004. He has been sentenced to undergo imprisonment for life.

2. Bereft of all unnecessary details, the case of the prosecution in short is that the Ward Member of Barogoda village orally reported before the Nayakote Police Station that accused Dasara Munda informed Keshab Rana the village Sarapanch on 6.11.2002 at 7.00 A.M. that he had a quarrel with his brother-in-law deceased Kanhu Munda at 7 A.M. on the previous day while he was on his way to Gangeibadi farm near Katurughar jungle. It is the case of the prosecution that the said accused further informed that in course of the quarrel when the deceased caught hold of the neck of the accused, the accused in his turn crushed the head of the deceased by means of a stone causing instant death and the dead body was lying at the spot. Getting this information the informant and the Grama Rakhi went to the spot and verified at the Kuturughar Jungle that the deceased was lying dead near Gangeibadi farm having his head crushed which was visible from the bleeding injuries on the head. The informant stated that the incident occurred in the previous night. After that it was reduced into writing and police case was registered. Thereafter, the I.O. took up investigation and after taking all usual and necessary steps for investigation he placed the charge sheet against the accused under section 302 of the I.P.C.

3. The defence took the plea of simple denial and false implication.

4. Admittedly, in this case there are no eye witnesses to the occurrence and the prosecution relied heavily on evidence like extra judicial confession made by the accused and the leading to discovery of the weapon of offence.

5. The prosecution in order to prove its case examined as many as ten witnesses. P.W.1being he informant. P.W.2 is the brother of the Grama Rakhi(P.W.4). P.W.3 is the Sarapanch of the village. P.W.5 is the Ward Member of the village.P.W.6 is the seizure witness. P.Ws.7 and 8 are the Investigating Officers, P.W.9 is the doctor who has examined the accused and P.W.10 is the another doctor who had conducted post mortem examination on the dead body of the deceased.

6. No witnesses were examined on behalf of the defence to prove its case.

7. Learned counsel for the appellant does not dispute the homicidal nature of the death of the deceased which is well established from the evidence of P.W.10-Dr. Duryanarayan Behera and the post mortem

examination report which has been exhibited in this case i.e. Ext.15. Learned counsel for the appellant also submits that the extra judicial confession and the leading to discovery are sufficient to fasten the guilt of the accused, but keeping in view the facts of the case i.e. the quarrel between the deceased and the accused and the absence of premeditation on the part of the appellant, he very emphatically submitted that the conviction of the appellant under section 302 of the I.P.C. is erroneous and at best offence under Section 304(1) of the I.P.C. is made out. Therefore, he submits that the Court should convert the conviction into 304(1) of the I.P.C. and acquit the accused for the offence under Section 302 of the I.P.C.

8. Learned Addl. Government Advocate, on the other hand, supports the findings recorded by the learned Adhoc Addl. Sessions Judge (F.T.), Keonjhar and urges that the Court should dismiss the appeal.

9. Admittedly, in this case, the death of the deceased was homicidal in nature. Secondly, the extra judicial confession made before different witnesses revealed that the accused on his own volition has made an extra judicial confession. In this case the evidence of certain witnesses are very important which should be discussed. We propose to do so in the following paragraph.

10. P.W.1, the informant, has stated that the accused came to him at 7 A.M. on 6.11.2002 and stated that he has killed the deceased because while he was going to Gangeibadi(a horticultural farm) he found the deceased on his way who wanted to assault the accused, but before anything could be done by the deceased the accused dashed a stone to the head of the deceased as a result the deceased died at the spot. The deceased happened to be the brother in law of the accused. This witness has further stated that since P.W.1 is the village gentleman, being the Ward Member of the village, the accused wanted to inform him in detail of the occurrence. Nothing substantial has been brought out by the defence in the cross-examination. P.W.2 the brother of the Grama Rakhi has stated that the accused Dasara came to him in the morning on the next date to the date of the occurrence and informed regarding the whereabouts of his brother. Since his brother was not there he waited for him. At about 9 A.M. his brother came and the accused went to the spot. A cross reference to the statement of P.W.7, the I.O., revealed that P.W.2 Bhagaban Khanda had stated before him that the accused told him that while he was going to guard the Gangeibadi farm on 5.11.2002 in the night he met the deceased Kanhu who caught hold of the neck of the appellant and as a reaction to the same the appellant took up a stone and killed the deceased

by assaulting the head of the deceased with the stone. P.W.4 is the Grama Rakhi of the village. He has stated that on 6.11.2002 he was absent from his residence in the morning. He came back at 9 A.M. After he came to his house he saw that the accused Dasara Munda was waiting for him. On enquiry the accused told him that he has assaulted the deceased and then the accused carried him to the spot and found that the dead body of the deceased was lying there.

11. Thus, form the materials available on record in the shape of extra judicial confession as stated to different witnesses discussed above, it is clear that the occurrence took place as the deceased caught hold the neck of the appellant and a quarrel ensued between them and all on a sudden, the appellant picked up a stone and dashed the same on the head of the deceased. Secondly, there is no pre-meditation for committing the offence and the occurrence took place in a spur of moment.

12. Exception-4 of Section 300 of the I.P.C. provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. In the explanation, it is provided that it is immaterial in such cases which party offers the provocation of commits the first assault.

13. In this case, it is seen that the quarrel was started by the deceased and there was no pre-mediation on the part of the appellant. So, we are of the opinion that the case is squarely covered under the Exception 4 of Section 300 of the I.P.C. and the offence that has been proved against the appellant is culpable homicide not amounting to murder and it is punishable under Section 304 Part-1 of the I.P.C. No offence under Section 302 of the I.P.C. has been established in this case.

14. Accordingly, we allow the appeal in part, set aside the conviction under Section 302 of the I.P.C. recorded by the learned Adhoc Addl. Sessions Judge (F.T.), Keonjhar and convert the same to conviction under Section 304 Part-1 of the I.P.C. and sentence the accused to undergo R.I. for a period of ten years. The period undergone as U.T.P. and conviction be set off against the substantive sentence imposed by us under Section 428 of the Cr.P.C. It is submitted by the learned counsel for the appellant that the appellant is in custody for almost seventeen years. If that be so, the appellant should be set at liberty forthwith, if his detention is not required in any other case. In the result, the JCRLA is allowed in part to the extent as mentioned above. L.C.R. be returned to the lower court immediately.

2019 (III) ILR - CUT- 481

DR. A.K. RATH, J.

S.A.NO. 375 OF 2001

SUDAM CHARAN SAHU ……Appellant

.Vs.

THE ANGUL UNITED CENTRAL CO-OPERATIVE BANK LTD. & ORS. ……Respondents

CODE OF CIVIL PROCEDURE,1908 – Section 100 – Second Appeal – Plaintiffs' appeal against confirming judgment in a suit for permanent injunction – Plaintiffs not in possession over the suit land – Whether a suit for injunction simplicitor is maintainable without praying for any declaration of title when injunction is sought for not against the true owner but against the trespassers? – Held, No, a cloud is raised over the plaintiffs' title – They are not in possession over the suit land – In view of the same, the simple suit for permanent injunction is not maintainable.

Case Laws Relied on and Referred to :-

1. (2004) 1 SCC 769 : Rame Gowda (Dead) by Lrs. Vs. M. Varadappa Naidu (Dead) by Lrs. & Anr.
2. AIR 2007 SC 900 : Ramji Rai & Anr Vs. Jagadish Mallah (Dead) through L.Rs. & Anr.
3. AIR 2008 SC 2033 : Anathula Sudhakar Vs. P.Buchi Reddy (Dead) By Lrs & Ors.
4. 2017(I) ILR-Cut-303 : Kalitirtha Kalipuja Committee .Vs. Sri Balunkeswar Mahesh Bije, Attopur (Badasasan),
5. AIR 1968 SC 1165 : Nair Service Society Ltd. Vs. K.C.Alexander.

For Appellant : Mrs.Supriya Patra
For Respondents : None

JUDGMENT Date of Hearing:10.01.2019 : Date of Judgment:21.01.2019

DR. A.K. RATH, J.

This is a plaintiffs' appeal against confirming judgment in a suit for permanent injunction.

2. The case of the plaintiffs is that they came to Angul in the year 1944 and purchased Ac.0.12 dec. of land appertaining to Holding No.1/265. There was a dilapidated house on the Government land appertaining to sabik plot no.590/683, which corresponds to hal plot no.1267. Plaintiff no.1 repaired the building and occupied the same. Thereafter he constructed the house and

used the same as godown and cattle shed to the knowledge of the Government. Plaintiff no.2, his son-in-law, is in possession of the house after plaintiff no.1. While matter stood thus, the Tahasildar initiated Encroachment Case No.86/88-89. The same is sub-judice. The defendants, a Cooperative Bank, had no semblance of right, title and interest over the suit land. But then the defendants created disturbance in their possession on 2.10.1988. With this factual scenario, they instituted the suit.

3. The defendants entered contest and filed written statement denying the assertions made in the plaint. According to them, the suit is hit under Section 127 of the Orissa Cooperative Societies Act and Sec.38 of Specific Relief Act. The suit land has been leased out in their favour by the Government in Misc.Case No.314 of 1941-42. The land has been recorded in their favour. The defendants are in possession of the suit land. In order to garb the suit property, the plaintiffs, with the help of R.I., initiated encroachment case.

4. Stemming on the pleadings of the parties, learned trial court struck eleven issues. Parties led evidence, oral and documentary. The suit was dismissed. Unsuccessful plaintiffs filed T.A.No.1 of 1997/12 of 2001 before the learned Additional District Judge, Angul, which was eventually dismissed. It is apt to state here that during pendency of the appeal proforma respondent no.3 died.

5. The Second Appeal was admitted on the following substantial question of law. The same is :

> "Whether a suit for injunction simplicitor is maintainable without praying for any declaration of title when injunction is sought for not against the true owner but against the trespassers?"

6. Heard Mrs. Supriya Patra, learned Advocate on behalf of Mr.Bibekananda Bhuyan, learned Advocate for the appellant. None appeared for the respondents.

7. Mrs.Patra, learned Advocate for the appellant submitted that learned appellate court committed a manifest illegality in dismissing the suit after coming to the conclusion that "it is true that the evidence of P.Ws. 1 and 2 reveals that they are in possession of the suit land and also receive the support from the written statement filed by the defendants in para 31 of the written statement." The defendants admitted that the plaintiffs used to tie cow in the damaged house and made temporary thatching. This shows that the plaintiffs are in possession over the suit land. The suit for permanent

injunction is maintainable. The defendants are trespassers. To buttress submissions, she places reliance on the decisions of the apex Court in the case of Rame Gowda (Dead) by Lrs. v. M. Varadappa Naidu (Dead) by Lrs. and another, (2004) 1 SCC 769, Ramji Rai and another v. Jagadish Mallah (Dead) through L.Rs. and another, AIR 2007 SC 900, Anathula Sudhakar v. P.Buchi Reddy (Dead) By Lrs and others, AIR 2008 SC 2033 and this Court in the case of Kalitirtha Kalipuja Committee v. Sri Balunkeswar Mahesh Bije, Attopur (Badasasan), 2017(I) ILR-Cut-303.

8. The apex Court in Anathula Sudhakar held that where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

9. On an anatomy of the pleadings and evidence on record, learned appellate court came to hold that the suit land belongs to the Government. Ext.B, the order passed in the mutation case, shows that the land was allotted in favour of the bank in the year 1941-42. In the R.O.R., Ext.A, the note of possession of the defendants has been reflected. Exts. A & B taken together shows that the defendants were in possession of the suit land. The same belongs to them. Both parties claimed possession over the suit land. The defendants claimed title over the suit land. Without declaration of title, mere suit for permanent injunction is not maintainable. There is no perversity in the findings of the courts below.

10. A cloud is raised over the plaintiffs' title. They are not in possession over the suit land. The plaintiffs' title is in dispute. In view of the same, the simple suit for permanent injunction is not maintainable. The substantial question of law is answered accordingly.

11. In Rame Gowda, the apex Court quoted with approval the earlier decision in the case of Nair Service Society Ltd. v. K.C.Alexander, AIR 1968 SC 1165 and held that *"Possessio contra omnes valet praeter eur cui ius sit possessionis* (he that hath possession hath right against all but him that hath the very right)". "A defendant in such a case must show in himself or his predecessor a valid legal title, or probably a possession prior to the plaintiff's and thus be able to raise a presumption prior in time." There is no quarrel over the proposition of law.

12. Ramji Rai is of no help to the plaintiffs. The apex Court held that an injunction restraining disturbance of possession will not be granted in favour of the plaintiff who is not found to be in possession. In the case of a permanent injunction based on protection of possessory title in which the plaintiff alleges that he is in possession, and that his possession is being threatened by the defendant, the plaintiff is entitled to sue for mere injunction without adding a prayer for declaration of his rights. In the suit for permanent injunction restraining the defendants from interfering with the possession of land in dispute, the plaintiffs fail to prove that they are in possession, the suit is liable to be dismissed only on that ground. In the instant case, the plaintiff has no title over the suit land. The defendants claim title over the land. Both parties claim that they are in possession of the land. In Kalitirtha Puja Committee, this Court relied upon Anathula Sudhakar.

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

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2019 (III) ILR - CUT- 484

DR. A.K. RATH, J.

R.S.A.NO. 322 OF 2009

MADAN MOHAN PATRA ……..Appellant

.Vs.

COLLECTOR, CUTTACK & ORS. ……...Respondents

CODE OF CIVIL PROCEDURE, 1908 – Section 80 – Notice under, before filing of the suit against the Govt. – Mandatory requirement – Neither the notice nor postal receipts had been marked as exhibits – The acknowledgment due (A.D.) cannot be said to be sufficient compliance of Sec. 80(1) CPC in absence of notice.

"The apex Court in the case of the State of Madras v. C.P. Agencies and another, AIR 1960 SC 1309 held that Sec.80 CPC is express, explicit and mandatory and admits of no implications or exceptions. Sec.80 peremptorily requires that no suit shall be filed against the Government or a public officer in respect of anything done in his official capacity until after the expiry of two months from the service of a notice in the manner therein prescribed stating the cause of action, the name, description and place of residence of the plaintiff and the reliefs which he claims. The object of Sec.80 is manifestly to give the Government or the public officer sufficient

notice of the case which is proposed to be brought against it or him so that it or he may consider the position and decide for itself or himself whether the claim of the plaintiff should be accepted or resisted. In order to enable the Government or the public officer to arrive at a decision it is necessary that it or he should be informed of the nature of the suit proposed to be filed against it or him and the facts on which the claim is founded and the precise reliefs asked for."

Case Laws Relied on and Referred to :-

1. 1975 (1) C.W.R.366 : Manmohan Das .Vs. Madhunagar Powerloom Weavers Cooperative Society and Ors.

For Appellant : Mr.A.C.Mohapatra
For Respondents: Ms.Samapika Mishra, A.S.C.

JUDGMENT Date of Hearing & Judgment:10.01.2019

DR. A.K. RATH, J.

Plaintiff is the appellant against confirming judgment in a suit for mandatory injunction directing the defendants 1 and 2 to correct the consolidation map of the suit plot.

2. The case of the plaintiff was that he had purchased an area ad-measuring Ac.0.50 dec. appertaining to plot nos.1801, 1803 and 1804, khata no.431 of mouza Dharina, P.S. Kishannagar from Chanda Bewa by means of a registered sale deed on 13.11.1971. Since then he is in possession of the same. Consolidation operation in the area, wherein the land falls, started. The consolidation R.O.R. was published in his name in the year 1987. At the time of measurement in Demarcation Case No.33 of 1996, it was detected that the purchased area had been correctly recorded in the consolidation R.O.R., but the same had been reduced to Ac.0.03 dec. in the consolidation village map. The area had been included in the adjoining plot nos.1767, 1768 and 1769 belonging to defendant no.3, one Ranga Dei and Prasanna Patra. When they threatened to occupy the suit property, the plaintiff filed T.S.No.44 of 1998. The said suit was set ex parte. Thereafter, he approached the Tahasildar for correction of the consolidation map. As the Tahasildar expressed his inability to correct the map, he filed the present suit after serving notice under Sec.80 CPC seeking the reliefs mentioned supra.

3. The defendants 1 and 2 were set ex parte. The defendant no.3 entered contest and filed written statement pleading inter alia that the suit is hit under Order 2 Rule 2 CPC. Her land has been demarcated and separated by a permanent boundary wall from the land of the plaintiff. The suit land has

been recorded in her name in the consolidation R.O.R. and the map is in conformity with her possession.

4. Stemming on the pleadings of the parties, learned trial court struck nine issues. Parties led evidence, both oral and documentary. Learned trial court held that the plaintiff instituted T.S.No.44 of 1998 for the self-same cause of action. The instant suit is hit under Order 2 Rule 2 CPC. Held so, it dismissed the suit. Felt aggrieved, the plaintiff filed appeal before the learned District Judge, Cuttack, which was subsequently transferred to the Court of the learned Ad hoc Additional District Judge, FTC I, Cuttack and renumbered as R.F.A.No.141 of 2007. Learned Appellate Court held that the suit is not hit under Order 2 Rule 2 CPC, but then no notice was served on defendants 1 and 2 under Sec.80 CPC. Held so, it dismissed the appeal.

5. Mr.A.C.Mohapatra, learned Advocate for the appellant submits that before institution of the suit, the plaintiff had issued notice under Sec.80 CPC to defendants 1 and 2. The acknowledgement receipts of the notice had been marked as Exts.3 and 3/a. The finding of the learned appellate court that no notice had been issued to defendants 1 and 2 is perverse.

6. Per contra, Ms. Samapika Mishra, learned Additional Standing Counsel submits that no notice under Sec.80 CPC was issued to the defendants before institution of the suit. Neither the notice, nor registered postal receipts had been exhibited. The A.D. forms, vide Exts.3 and 3/a, cannot be said to be sufficient for compliance of notice under Sec.80 CPC. To buttress the submission, she relies on a decision of this Court in the case of Manmohan Das v. Madhunagar Powerloom Weavers Cooperative Society and others, 1975 (1) C.W.R.366.

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

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

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

9. In Manmohan Das(supra), this Court held that Sec.80 prescribes that the plaint itself would mention that the notice was served. Service of such notice is mandatory in law and the suit is to fail if no notice has been served. The obligation has been cast on the plaintiff to serve the notice under Sec. 80 and mention that fact in the plaint. Defendants are under no duty to the plaintiff to point out his error in the plaint. A defendant may be negligent in his own interest in not raising the objection at an earlier stage but negligence would not amount to waiver or estoppel unless there is a duty of care. On the aforesaid analysis even if a defendant did not raise the objection in the written statement or in the first appellate court, he can raise the objection at a later stage. Absence of notice touches the root of the matter and affects the jurisdiction of the court unless there is waiver. (Emphasis laid)

10. The submission that notice under Sec.80(1) CPC has been delivered to or left at his office against whom the suit had been instituted and the said notice was received by the defendants 1 and 2, is difficult to fathom. Neither the notice nor postal receipts had been marked as exhibits.The acknowledgment due (A.D.) cannot be said to be sufficient compliance of Sec.80(1) CPC in absence of notice.

11. Resultantly, the appeal is dismissed, as the same does not involve any substantial questions of law. There shall be no order as to costs.

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2019 (III) ILR - CUT- 488

DR. A.K. RATH, J.

CMP NO.19 OF 2019

SMT. PANCHEI SAHOO & ORS. ……Petitioners

.Vs.

MANORANJAN SUBUDHI & ORS. ……..Opp. Parties

CIVIL SUIT – Plaintiff filed suit – Defendants filed written statement-cum-counter claim – Suit dismissed counter claim allowed – Party entrusted the case to lawyer where after appeal was filed against the dismissal of the suit and no appeal was filed against the order allowing the counter claim – Subsequently appeal was filed against the order allowing the counter claim along with a petition for condonation of delay and a petition seeking analogous hearing of both the appeals – Appellate court rejected the application of the petitioners-appellants for analogous hearing of the appeal – Writ petition challenging such rejection order – Defendants objects – Fault of the party considered – Held, the matter of delay be considered, if condoned, the appeals may be heard analogously.

"In Rafiq, the apex Court held that the disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job".

"Inherent powers under Section 151 CPC can be exercised by the Court to redress only such a grievance, for which no remedy is provided for under CPC."

Case Laws Relied on and Referred to :-

1. (2013) 11 SCC 296 : Prakash Agarwal & Anr. .Vs. Gopi Krishan (dead through LRs) & Ors.

For Petitioners : Mr.Ganeswar Rath, Senior Adv.

For Opp.Parties: Mr.Siddharatha Mishra

JUDGMENT Date of Hearing & Judgment:16.01.2019

DR. A.K.RATH, J.

This petition challenges the order dated 24.12.2018 passed by the learned 2nd Additional District Judge, Bhubaneswar in R.F.A.No.15 of 2016, whereby and whereunder, learned appellate court rejected the application of the petitioners-appellants for analogous hearing of the appeal with R.F.A.No.123 of 2008.

2. The dispute lies in a narrow compass. Facts need not be recounted in detail. Pithily put, the petitioners as plaintiffs instituted Civil Suit No.411 of 2007 in the court of the learned Civil Judge (Sr.Division), Bhubaneswar for declaration of title and permanent injunction. The defendants-opposite parties entered contest and filed written statement-cum-counter claim. The suit was dismissed. Counter claim was allowed. Assailing the judgment and decree passed in the suit, the plaintiffs filed R.F.A.No.15 of 2016 before the learned 2nd Additional District Judge, Bhubaneswar. In course of hearing of the appeal, they filed an application for analogous hearing of the appeal along with R.F.A.No.123 of 2018. It was stated that inadvertently they could not file appeal against counter claim. Learned appellate court came to hold that conduct of the appellants appears to be unfair and unreasonable. R.F.A. No.15 of 2016 has not been admitted. There is no express provision in the CPC for analogous hearing of the appeal. The respondents shall be seriously prejudiced if hearing of the appeal is deferred. Held so, it rejected the petition.

3. Heard Mr.Ganeswar Rath, learned Senior Advocate for the petitioners and Mr.Siddharth Mishra, learned Advocate for the opposite parties.

4. Mr.Rath, learned Senior Advocate for the petitioners submits that petitioner no.1 is an old pardanasini illiterate lady. Petitioners 2 and 3 are the daughters of petitioner no.1. Both are married and residing in the house of their in-laws. They were depending on their lawyer. The previous lawyer was instructed to file appeal. Inadvertently one appeal was filed. During hearing of the appeal, it was found that no appeal was preferred against the decree passed in counter-claim. Thereafter, R.F.A.No.123 of 2018 was filed, which is sub-judice. In the event both appeals are not heard analogously, the judgment in R.F.A.No.15 of 2016 will operate as res judicata in the second appeal. The plaintiffs shall suffer irreparable hardship. To buttress submissions, he places reliance on the decisions of the apex Court in the case of Rafiq and another v. Mushilal and another, AIR 1981 SC 1400.

5. Per contra, Mr.Mishra, learned Advocate for the opposite parties submits that the plaintiffs have not filed appeal against the decree passed in the counter claim. Against the judgment and decree passed in the suit, the plaintiffs filed R.F.A.No.15 of 2016. Thereafter, R.F.A.No.123 of 2018 along with an application for condonation of delay was filed. There was inordinate delay in filing R.F.A.No.123 of 2018. In course of hearing of R.F.A.No.15 of 2016 an application was filed for analogous hearing of R.F.A.No.123 of 2018. This is a clever ruse. The defendants shall suffer irreparable hardship if the part-heard appeal is deferred.

6. In Rafiq, the apex Court held that the disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job.

7. In Ram Prakash Agarwal and another v. Gopi Krishan (dead through LRs) and others (2013) 11 SCC 296, Section 151 CPC was the subject matter of consideration before the apex Court. The apex Court, in paragraphs 13, 14 & 28.2 of the said report, held :

> "13. Section 151 CPC is not a substantive provision that confers the right to get any relief of any kind. It is a mere procedural provision which enables a party to have the proceedings of a pending suit conducted in a manner that is consistent with justice and equity. The court can do justice between the parties before it. Similarly, inherent powers cannot be used to re-open settled matters. The inherent powers of the Court must, to that extent, be regarded as abrogated by the legislature. A provision barring the exercise of inherent power need not be express, it may even be implied. Inherent power cannot be used to restrain the execution of a decree at the instance of one who was not a party to suit. Such power is absolutely essential for securing the ends of justice, and to overcome the failure of justice. The Court under Section 151 CPC may adopt any procedure to do justice, unless the same is expressly prohibited.

14. The consolidation of suits has not been provided for under any of the provisions of the Code, unless there is a State amendment in this regard. Thus, the same can be done in exercise of the powers under Section 151 CPC, where a common question of fact and law arise therein, and the same must also not be a case of misjoinder of parties. The non-consolidation of two or more suits is likely to lead to a multiplicity of suits being filed, leaving the door open for conflicting decisions on the same issue, which may be common to the two or more suits that are sought to be consolidated. Non-consolidation may, therefore, prejudice a party, or result in the failure of justice. Inherent powers may be exercised ex debito justitiae in those cases, where there is no express provision in CPC. The said powers cannot be exercised in contravention of, or in conflict with, or upon ignoring express and specific provisions of the law.

xxx xxx xxx

28.2. Inherent powers under Section 151 CPC can be exercised by the Court to redress only such a grievance, for which no remedy is provided for under CPC."

8. The ratio in the case of Rafiq and Ram Prakash Agarwal, proprio vigore apply to the facts of this case.

9. Resultantly, the impugned order is quashed. Learned appellate court shall take up the application for condonation of delay in filing R.F.A.No.123 of 2018 and proceed with the matter. In the event delay is condoned, then both the appeals shall be heard analogously. The petition is allowed. There shall be no order as to costs.

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2019 (III) ILR - CUT- 491

DR. A.K. RATH, J.

FAO NO. 426 OF 2018

SENIOR DIVISIONAL MANAGER,
NATIONAL INSURANCE COMPANY LTD. .....Appellant

.Vs.

SHAIBARANI MOHANTA & ORS. .....Respondents

EMPLOYEES COMPENSATION ACT, 1923 – Section 30 – Appeal against the award passed by the Commissioner for Employee's Compensation-cum-Deputy Labour Commissioner, Cuttack whereby the Commissioner awarded compensation and directed the insurance company to pay the same – Driver of a Truck parked the vehicle and directed the helper to take Tiffin – While he was crossing the road, all of a sudden, an unknown vehicle dashed him and fled away, as a result

of which he sustained grievous injuries resulting in death while under treatment – Insurance company pleads that the accident did not arise in course of and out of the employment of the deceased and as such, the insurer is exonerated from its liability – There was no casual connection between the employment and the accident – Under Sec.147(1) of the Motor Vehicles Act the insurer is not liable to pay any compensation – Points that falls for consideration are (i) What is the true meaning of the expressions "arising out of and in the course of employment" appearing in Sec.3(1) of the Employee's Compensation Act, 1923, and (ii) Whether the doctrine of notional extension can be applied in the facts and circumstances of the case ? – Held, Yes – There was casual connection between the employment of the workman and his accident – The doctrine of notional extension is applicable to the facts scenario – Reasons indicated.

For Appellant : Mr. Subrat Satapathy
For Respondents : Mr. Pradeep Kumar Mishra,

JUDGMENT Date of Hearing : 08.02.2019 : Date of Judgment : 18.02.2019

DR. A.K.RATH, J.

This appeal by the insurance company is directed against the award dated 7.11.2017 passed by the Commissioner for Employee's Compensation-cum-Deputy Labour Commissioner, Cuttack ('Commissioner') in E.C Case No.342-D/2014 whereby and whereunder the Commissioner awarded an amount of Rs.5,56,775/- as compensation and directed the insurance company to pay the same within thirty days, failing which, the same shall carry interest @ 12% per annum from the date of accident till payment.

2. The brief facts of the case, which are relevant to dispose of the appeal, are :

One Dillip Kumar Mohanta was working as a helper in a Bolero Pick-up bearing registration number OR-04-L-2555. On 6.6.2014, the vehicle was proceeding from Kendrapara to Cuttack. On the way near Chandolgada at about 6.30 P.M, the driver parked the vehicle and directed the helper to take tiffin. While he was crossing the road, all of a sudden, an unknown vehicle dashed him and fled away, as a result of which he sustained grievous injuries on his person and shifted to SCB Medical College and Hospital, Cuttack for treatment. While undergoing treatment, he died in the hospital. Post-mortem was conducted over the dead body. Mangalabag Police Station U.D Case No.848 of 2014 was registered. With this factual scenario, the claimants-

respondents filed E.C Case No.342-D of 2014 before the Commissioner for Employee's Compensation-cum-Deputy Labour Commissioner, Cuttack claiming compensation of rupees eight lakhs. It was pleaded that the deceased was 20 years old at the time of accident.

3. Opposite parties 1 and 3 entered appearance and filed separate written statements. Opposite party no.1 in his written statement admitted the employment and accidental death of the deceased Dillip Kumar Mohanta. It was stated that the deceased was getting Rs.5,000/- per month towards wages. Offending vehicle was validly insured with the opposite party no.3. Opposite party no.3 insurer filed a written statement denying the assertions made in the petition.

4. Stemming on the pleadings of the parties, the Commissioner struck three issues. To substantiate the case, the claimants adduced evidence. No evidence was adduced by the opposite parties. On an anatomy of the pleadings and the evidence, the Commissioner came to hold that the deceased was a workman. He was 21 years old at the time of death. He was earning Rs.5000/- per month. Held so, it awarded an amount of Rs.5,56,775/- and directed the insurer to pay the same to the claimants within thirty days, failing which, the same shall carry interest @ 12% per annum from the date of accident till payment.

5. Heard Mr. Subrat Satpathy, learned counsel for the appellant and Mr. Pradeep Kumar Mishra, learned counsel for the respondents 1 to 3.

6. Mr. Satpathy, learned counsel for the appellant submitted that the accident did not arise in course of and out of the employment of the deceased and as such, the insurer is exonerated from its liability. There was no casual connection between the employment and the accident. Under Sec.147(1) of the Motor Vehicles Act (in short, "the M.V Act"), the insurer is not liable to pay any compensation. To buttress the submission, he placed reliance on the decisions of the Apex Court in the case of General Manager, B.E.S.T Undertaking, Bombay v. Mrs. Agnes, AIR 1964 SC 193**,** Mackinnon Machenzie and Co. (P) Ltd. v. Ibrahim Mahmmed Issak, (1969) 2 SCC 607, Mamtaj Bi Bapusab Nadaf and others v. United India Insurance Company and others, (2010) 10 SCC 536 and Leela Bai & another v. Seema Chouhan & another, Civil Appeal No(s). 931 of 2019 arising out of SLP(C) No.5576 of 2017).

7. Per contra Mr. Mishra, learned counsel for the respondent nos.1 to 3 submitted that the accident occurred in course of and out of the employment of the deceased. The claimants are entitled to interest @ 12% per annum from the date of accident. He placed reliance on the decisions of the Apex Court in the case of State of Rajasthan v. Ram Prasad and another, (2001) 9 SCC 395, Manju Sarkar and others v. Mabish Miah and others, (2014) 14 SCC 21, Saberabibi Yakubbhai Shaikh and others v. National Insurance Co. Ltd. and others, (2014) 2 SCC 298 and the decision of this Court in the case of the Divisional Manager, M/s. New India Assurance Co. Ltd. v. Smt. Sagarika Bhoi & others (FAO No.135 of 2017 disposed of on 9.8.2017).

8. An identical matter came up for consideration before this Court in the case of Senior Divisional Manager, National Insurance Company Ltd. V. Suresh Kumar Behera and another (FAO No.526 of 2018 disposed of on 18.02.2019). This Court held :

> "**8.** The seminal points that falls for consideration are (i) What is the true meaning of the expressions "arising out of and in the course of employment" appearing in Sec.3(1) of the Employee's Compensation Act, 1923, and (ii) Whether the doctrine of notional extension can be applied in the facts and circumstances of the case ?
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> **9.** Section 3(1) of the Employee's Compensation Act, which is the hub of the issue, is quoted hereunder;
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> "If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter."
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> **10.** Proviso appended thereto provides for exclusion of the liability of the employer specified therein.
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> **11.** Proviso to Sec.147 of the M.V Act was the subject-matter of consideration before the Apex Court in the case of Oriental Insurance Company Ltd. v. Sorumai Gogoi and others, 2008 (2) TAC 5 (SC). The Apex Court held :
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> "15. Section 147 of the Motor Vehicles Act, 1988, however, mandatorily provides for obtaining insurance cover by the owner of a vehicle. Proviso appended thereto reads as under :
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> "Provided that a policy shall not be required –
>
> (i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee"
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> (a) engaged in driving the vehicle, or
>
> (b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or
(ii) to cover any contractual liability.

16. The sine qua non for invoking the proviso appended to Section 147 is that the employee must be engaged in driving the vehicle. Death or bodily injury must occur arising out of or in the course of his employment. The 1923 Act or the 1988 Act, therefore, would be applicable only if the conditions precedent laid down thereunder are satisfied."

12. Mrs. Agnes is a locus classicus on the subject. The Apex Court held that under Section 3(1) of the Workmen's Compensation Act (in short, "W.C Act"), the injury must be caused to the workman by an accident arising out of and in the course of his employment. The question, when does an employment begin and when does it cease, depends upon the facts of each case. But the Courts have agreed that the employment does not necessarily end when the "down tool" signal is given or when the workman leaves the actual workshop where he is working. There is a notional extension at both the entry and exit by time and space. The scope of such extension must necessarily depend on the circumstances of a given case. As employment may end or may begin not only when the employee begins to work or leaves his tools but also when he used the means of access and, egress to and from the place of employment. It was further held that though the doctrine of reasonable or notional extension of employment developed in the context of specific workshops, factories or harbours, equally applies to such a bus service the doctrine necessarily will have to be adapted to meet its peculiar requirements.

13. Sec.3(1) of the Employee's Compensation is pari materia to Sec.3(1) of the Workmen's' Compensation Act. Sec.3(1) of the W.C Act was the subject-matter of consideration before the Apex Court in Mackinnon Mackenzie and Co. Pvt. Ltd. The Apex Court held :

"5. To come within the Act the injury by accident must arise both out of and in the course of employment. The words "in the course of the employment" mean "in the course of the work which the workman is employed to do and which is incidental to it." The words "arising out of employment" are understood to mean that "during the course. of the employment, injury has resulted from some risk incidental to the duties of the service, which unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered." In other words there must be a causal relationship between the accident and the employment. The expression "arising out of employment" is again not confined to the mere nature of the employment. The expression applies to employment as such to its nature, its conditions, its obligations and its incidents. If by reason of any of these factors the workman is brought within the scene of special danger the injury would be one which arises 'out of employment'. To put it differently if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act. In Lancashire and Yorkshire Railway Co. v. Highley Lord Sumner laid down the following test for determining whether an accident "arose out of the employment":

There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real

assistance. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because, what it was not part of the employment to hazard, to suffer, or to do, cannot well be the cause of an accident arising out of the employment. To ask if the cause of the workman was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment, that the workman should have acted as he was acting or should have been in the position in which he was, whereby in the course of that employment he sustained injury.

6. In the case of death caused by accident the burden of proof rests upon the workman to prove that the accident arose out of employment as well as in the course of employment. But this does not mean that a workman who comes to court for relief must necessarily prove: it by direct evidence. Although the onus of proving that the injury by accident arose both out of and in the course of employment rests upon the applicant these essentials may be inferred when the facts proved justify the inference. On the one hand the Commissioner must not surmise, conjecture or guess; on the other hand, he may draw an inference from the proved facts so long as it is a legitimate inference."

14. In Ram Prasad, the accident took place on account of lightning. The contention put-forth on behalf of the appellant was that the mishap of death of Smt. Gita due to lightning is an act of God and therefore, the appellant was not liable to pay compensation. The contention was repealed by the Commissioner for Workmen's Compensation. The State of Rajasthan filed appeal before the High Court. Learned Single Judge affirmed the award of the Commissioner. The Division Bench affirmed the judgment. The matter travelled to the Apex Court. Taking a cue from Ibrahim Mohammed Issak, the Apex Court held that the view taken is that the concept of the liability under the Act is wide enough to cover a case of this nature inasmuch as death had taken place arising as a result of accident in the course of employment.

15. In Manju Sarkar, Sajal Sarkar, husband of the appellant no.1 was the driver of the truck bearing registration number TR-01-B-1689 under the employment of respondent nos.1 and 2. On the way the driver noticed some mechanical trouble in the truck and got down to make arrangement for repair of the vehicle. He met with an accident and sustained grievous injuries. While he was taken to hospital, he succumbed to the injuries. The Apex Court applied the principle of notional extension and held that the Sajal Sarkar met with an accident in course of his employment.

16. In Leela Bai, the deceased was a bus driver of the bus. He met with an accidental death while he was coming down the roof of the bus after taking dinner at about 8.30 p.m. The deceased had returned to bus terminus at 7.30 p.m. The question arose before the Apex Court was whether the death occurred during the course of, and arising out of the employment. Taking a cue from Agnes and Sanju Sarkar, the Apex Court applied the doctrine of notional extension and accordingly compensation was awarded.

17. On a survey of the decisions of the various High Courts and the Apex Court, this Court in the case of the General Superintendent, Talcher Thermal Station v. Smt. Bijuli Naik, 76 (1993) CLT 699, succinctly stated the principles. This Court held :

"4. The pre-conditions for attracting the provisions of Section 3(1) of the Act are that death or injury must be caused to a workman; the said injury must have been caused by accident; and the accident must have arisen out of and in the course of his employment. A causal connection between the employment and the injury caused by the accident must exist. If after looking at the entire facts, a fair inference can be drawn that the employment caused the injury, then the employer would be liable to pay the compensation. The liability under Section 3(1) of the Act would accrue, if it is established that an injury has been caused to a workman and the accident arose out of and in course of his employment.

xxx xxx xxx

The general principles are that (i) there must be a causal connection between the injury and the accident and the work done in the course of employment; (ii) the onus is upon the applicant to show that it was the work and the resulting strain which contributed to, or aggravated, the injury; (iii) it is not necessary that the workman must be actually working at the time of his death or that death must occur while he was working or had just ceased to work; and (iv) where the evidence is balanced, if the evidence shows a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed. But where the accident involved a risk common to all humanity and did not involve any peculiar or exceptional danger resulting from the nature of the employment, or where the accident was the result of an added peril to which the workman, by his own conduct, exposed himself and which peril was not involved in the normal performance of the duties of his employment, then the employer will not be liable under Section 3 of the Act."

18. In Smt. Sagarika Bhoi, the workman died due to snake bite. This Court held that the accident arose out of and in course of the employment of the deceased.

xxx xxx xxx

20. The next question crops up as to whether Commissioner is justified in awarding interest @ 12% per annum ?

21. In Oriental Insurance Company Limited v. Siby George and others, (2012) 12 SCC 540, the short question that arose for consideration before the Apex Court that when the payment of compensation under the Workmen's Compensation Act, 1923 becomes due and consequently what is the point in time from which interest would be payable on the amount of compensation as provided under Section 4-A(3) of the Act ? The Apex Court held :

"9. Now, coming back to the question when does the payment of compensation fall due and what would be the point for the commencement of interest, it may be noted that neither the decision in Mubasir Ahmed nor the one in Mohd. Nasir can be said to provide any valid guidelines because both the decisions were rendered in ignorance of earlier larger Bench decisions of this Court by which the issue was concluded. As early as in 1975 a four Judge Bench of this Court in Pratap Narain

Singh Deo. Vs. Shrinivas Sabata directly answered the question. In paragraphs 7 and 8 of the decision it was held and observed as follows:-

"7. Section 3 of the Act deals with the employer's liability for compensation. Sub-section (1) of that section provides that the employer shall be liable to pay compensation if "personal injury is caused to a workman by accident arising out of and in the course of his employment." It was not the case of the employer that the right to compensation was taken away under sub-section (5) of Section 3 because of the institution of a suit in a civil court for damages, in respect of the injury, against the employer or any other person. The employer therefore became liable to pay the compensation as soon as the aforesaid personal injury was caused to the workman by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due until after the Commissioner's order dated May 6, 1969 under Section 19. What the section provides is that if any question arises in any proceeding under the Act as to the liability of any person to pay compensation or as to the amount or duration of the compensation it shall, in default of agreement, be settled by the Commissioner. There is therefore nothing to justify the argument that the employer's liability to pay compensation under Section 3, in respect of the injury, was suspended until after the settlement contemplated by Section19. The appellant was thus liable to pay compensation as soon as the aforesaid personal injury was caused to the appellant, and there is no justification for the argument to the contrary.

8. It was the duty of the appellant, under Section 4- A(1) of the Act, to pay the compensation at the rate provided by Section 4 as soon as the personal injury was caused to the respondent. He failed to do so. What is worse, he did not even make a provisional payment under sub-section (2) of Section 4 for, as has been stated, he went to the extent of taking the false pleas that the respondent was a casual contractor and that the accident occurred solely because of his negligence. Then there is the further fact that he paid no heed to the respondent's personal approach for obtaining the compensation. It will be recalled that the respondent was driven to the necessity of making an application to the Commissioner for settling the claim, and even there the appellant raised a frivolous objection as to the jurisdiction of the Commissioner and prevailed on the respondent to file a memorandum of agreement settling the claim for a sum which was so grossly inadequate that it was rejected by the Commissioner. In these facts and circumstances, we have no doubt that the Commissioner was fully justified in making an order for the payment of interest and the penalty."

The Apex Court further held :

"12. The decisions in Pratap Narain Singh Deo was by a four Judge Bench and in Valsala by a three Judge Bench of this Court. Both the decisions were, thus, fully binding on the Court in Mubasir Ahmed and Mohd. Nasir, each of which was heard by two Judges. But the earlier decisions in Pratap Narain Singh Deo and Valsala were not brought to the notice of the Court in the two later decisions in Mubasir Ahmed and Mohd. Nasir."

22. In Saberabibi Yakub Bhai Shaikh, the Commissioner awarded compensation of Rs.2,13,570/- with interest 12% per annum from the date of accident and penalty.

Aggrieved and dissatisfied with the award the Insurance Company filed first appeal before the High Court. The High Court directed the Insurance Company to pay interest on the amount of compensation from the date of adjudication of claim application. A further direction was issued that the excess amount towards interest, if any, deposited by the Insurance Company be refunded to it. The award of the Commissioner was modified to that extent. The claimants filed SLP before the Apex Court. A contention was raised by the appellant that the judgment of the High Court is contrary to the law laid down by the Apex Court in the case of Oriental Insurance Company Limited v. Siby George and others (2012) 12 SCC 540. Taking a cue from the celebrated judgment in the case of Pratap Narain Singh Deo v. Srinivas Sabata, (1976) 1 SCC 289, the Apex Court held :

"10. We have perused the aforesaid judgment. We are of the considered opinion that the aforesaid judgment relied upon by the learned counsel for the appellants is fully applicable to the facts and circumstances of this case. This Court considered the earlier judgment relied upon by the High Court and observed that the judgments in the case of National Insurance Co. Ltd. v. Mubasir Ahmed [(2007) 2 SCC 349] and Oriental Insurance Co. Ltd. v. Mohd. Nasir [(2009) 6 SCC 280] were per incuriam having been rendered without considering the earlier decision in Pratap Narain Singh Deo v. Srinivas Sabata [(1976) 1 SCC 289]. In the aforesaid judgment, upon consideration of the entire matter, a four-judge Bench of this Court had held that the compensation has to be paid from the date of the accident.

11. Following the aforesaid judgments, this Court in Oriental Insurance Company Limited versus Siby George and others (supra) reiterated the legal position and held as follows:

"11. The Court then referred to a Full Bench decision of the Kerala High Court in United India Insurance Co. Ltd. v. Alavi and approved it insofar as it followed the decision in Pratap Narain Singh Deo.

12. The decision in Pratap Narain Singh Deo was by a four-judge Bench and in Valsala K. by a three-judge Bench of this Court. Both the decisions were, thus, fully binding on the Court in Mubasir Ahmed and Mohd. Nasir, each of which was heard by two Judges. But the earlier decisions in Pratap Narain Singh Deo and Valsala K. were not brought to the notice of the Court in the two later decisions in Mubasir Ahmed and Mohd. Nasir.

13. In the light of the decisions in Pratap Narain Singh Deo and Valsala K., it is not open to contend that the payment of compensation would fall due only after the Commissioner's order or with reference to the date on which the claim application is made. The decisions in Mubasir Ahmed and Mohd. Nasir insofar as they took a contrary view to the earlier decisions in Pratap Narain Singh Deo and Valsala K. do not express the correct view and do not make binding precedents."

9. Admittedly the deceased was a helper in the Bolero Pickup bearing registration number OR-04-L-2555. The driver parked the vehicle and instructed him for taking tiffin. At about 6.30 P.M, while he was crossing the road, an unknown vehicle dashed him.There was casual connection between

the employment of the deceased workman and his accidental death. The doctrine of notional extension is applicable to the facts scenario.

10. In view of the authoritative pronouncement of this Court in the case of Suresh Kumar Behera, the irresistible conclusion is that there was casual connection between the employment of the deceased and his accidental death. The accident arose in course of and out of employment of the deceased. The claimants are entitled to interest @ 12% per annum from the date of accident.

11. Resultantly the appeal is dismissed, since the same does not involve any substantial question of law. There shall be no order as to costs.

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2019 (III) ILR - CUT- 500

DR. B.R. SARANGI, J.

W.P.(C) NO.17479 OF 2016

SAROJ KUMAR SAHU .....Petitioner

.Vs.

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

(A) DEPARTMENTAL ENQUIRY – Notice of show-cause issued on 20.09.2016 calling upon the petitioner to explain by 20.10.2016 with regard to proposed punishment of compulsory retirement – Reply submitted on 20.10.2016 and the order awarding punishment of compulsory retirement was passed on the very same day – Order of punishment appears to have been passed with undue haste without compying the principle of natural justice – Effect of – Held, the petitioner should have been given an opportunity of hearing. (Para 6)

(B) DEPARTMENTAL ENQUIRY – Award of punishment of compulsory retirement – Plea that the petitioner has alternative remedy of appeal and as such writ petition was not maintainable – The punishment has been imposed in accordance with Rule 9(C)(iii)(h), but as per Rule 9(D) the said punishment can be imposed only on a regular enquiry with reasonable opportunity within the meaning of principles of natural justice to the delinquent – No opportunity given – Held, the case is clearly covered under exception to bar of alternative remedy.

(Paras 9 to 11)

"The apex Court time and again held that personal hearing is a part of "reasonable opportunity of being heard". Therefore, the Court has always insisted that the opportunity of hearing as insisted in the article must be an effective opportunity and not a mere pretence. In view of such position, even if there is availability of alternative remedy of preferring appeal against the order of punishment imposed by the disciplinary authority, due to non-compliance of principles of natural justice this Court can entertain the writ application and as such the same is maintainable."

(C) WORDS AND PHRASES – '*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. (Para 15)

Case Laws Relied on and Referred to :-

1. AIR 1958 SC 86 : State of Uttar Pradesh Vs. Md. Nooh.
2. (1993) 3 SCC 259 : D.K. Yadav Vs. J.M.A. Industries Ltd.
3. (2008) 16 SCC 276 : Nagarjuna Construction Company Limited Vs. Government of Andhra Pradesh.
4. AIR 1985 SC 1416 : Union of India Vs. Tulsiram Patel.
5. AIR 1990 SC 1480 : Charan Lal Sahu Vs. Union of India.
6. AIR 1967 SC 361 : Bharat Barrel & Drum Mfg. Co. Vs. L.K. Bose.
7. AIR 1960 SC 415 : Fedco (P) Ltd. Vs. S.N. Bilgrami.

For Petitioner : Mr. A.K. Mishra, Sr. Adv.
M/s. D.K. Panda, G. Sinha & A. Mishra,

For Opp. Parties : Mr. R.K. Mohanty, Sr. Adv.
M/s. G.P. Dutta, S.K. Mohanty, K. Sahoo & S. Perween.

JUDGMENT Decided On : 19.06.2019

DR. B.R. SARANGI, J.

The petitioner, who was working as Assistant Manager (System) under Orissa State Police Housing and Welfare Corporation Limited, Bhawanipatna Division, Bhawanipatna in the district of Kalahandi, has filed this writ petition to quash the charges framed against him vide Proceeding No.2/2016 dated 30.04.2016 in Annexure-3 and show-cause notice issued about the proposed punishment vide letter dated 20.09.2016 in Annexure-10 and consequential final order of punishment of compulsory retirement from service passed by the appointing authority-cum-disciplinary authority (Chairman-cum-Managing Director) in Annexure-12 dated 20.10.2016. He further seeks for direction to allow him to continue in service by granting all financial benefits as admissible to him retrospectively.

2. The fact of the case, in brief, is that Orissa State Police Housing and Welfare Corporation Limited (hereinafter referred to as "Corporation") is a public sector undertaking of the Government of Odisha having its registered office at Bhoi Nagar, Janapath, Bhubaneswar. It is committed to build Police Buildings innovatively to enhance police efficiency and thereby improve Police-Community relations. The Corporation undertakes to construct buildings for housing of the employees of the Government of Orissa in the Police, Prisons, Home Guards, Fire Force Department and also Judicial Department. The Corporation floated an e-tender proposal, having bid identification No.21/OPHWC/ 2015-16, for selection of brands which were originally given for four numbers of commonly reputed brands, i.e., Bijay, Crompton Graves, Philips & GE. The said e-tender was tampered/altered by adding the word "or equivalent". The allegation was made against the petitioner of committing serious misconduct by adding the word "or equivalent" to the e-tender with a willful and mala fide intention to accommodating some unbranded firms which might not be having adequate quality control. Such action of the petitioner was unauthorized and amounted to serious dereliction of duty and mala fide intention of harming the credibility and reputation of the Corporation, for which he was called upon to submit his explanation pursuant to letter dated 11.03.2016 within six days. On receiving the said letter, the petitioner submitted his explanation on 14.03.2016 specifically contending that incorporation of word "or equivalent" in the tender documents for procurement and installation of High Mast lights was in consultation with the Joint Manager(Elect.) and Dy. Manager I/C (Elect.) during document preparation before floating of the tender with an objective to participate more firms or other reputed companies complying all specifications as per the Detailed Tender Call Notice (DTCN) and denied the allegation of willful intention with mala fide motive on his part to accommodate unbranded firms. Further, the bid document was prepared taking references from the CVC guidelines and similar type of tender notices flashed by other governmental organizations in Odisha viz. IDCO, H & UD Dept., GoO & CESU etc. As such, the petitioner had nothing to do with the addition/ alterations of tender documents by adding the word "or equivalent" and there was no willful act to malign the reputation of the Corporation, therefore, he claimed for exoneration of the charges.

2.1 Having dissatisfied with the explanation submitted by the petitioner, on 30.04.2016, the opposite party no.2 issued charge-sheet and memo of evidence and called for submission of explanation within one month from the

date of receipt of the letter in support of his defence. The petitioner submitted his explanation to the charges levelled against him on 27.05.2016 vide Annuxure-4 denying the allegations made against him. Consequentially, the disciplinary authority-opposite party no.2 having dissatisfied with the explanation, vide Annexure-5 dated 28.05.2016 appointed Mr. G.H. Pradhan, Joint Manager, Berhampur Division as Enquiry Officer, and Mr. Subash Ch. Sahoo, Sr. Steno-cum-Asst. to Chief Engineer, OSPH & WC, Bhubaneswar as Marshalling Officer to proceed with the enquiry. On 12.07.2016, the copies of statements were supplied to the petitioner with a direction to submit his defence by 22.07.2016. In compliance of the same, the petitioner submitted his explanation on 22.07.2016 reiterating the earlier facts stating, inter alia, that the word "or equivalent" had been incorporated in DTCN and the same was discussed with Joint Manager (Elect.) and Assistant Manager (Elect.) and as such, the tender document was not prepared solely and unilaterally by him but jointly with the concurrence of other senior officers. On the receipt of the same, the enquiry was concluded and report was submitted on 31.07.2016 suggesting imposition of suitable punishment as deemed appropriate for gross negligence in duty against the petitioner.

2.2. On receipt of the enquiry report, opposite party no.2, vide letter dated 05.08.2016, called upon the petitioner to submit his written explanation/comment by 31.08.2016. In response to the same, the petitioner submitted his reply on 29.08.2016 reiterating the same fact which had been mentioned in earlier explanation. Having not satisfied with the explanation, on 20.09.2019, opposite party no.2 issued show-cause notice about proposed punishment in disciplinary proceeding against the petitioner and he was called upon to explain by 20.10.2016 as to why proposed punishment of compulsory retirement under Rule-9 (C)(h) of the Amended Bye-Laws (Annexure-II) of the Corporation (vide Annexure-9 of Operation and Accounts Manual) shall not be awarded to him. In response to the said show-cause notice, the petitioner submitted his explanation on 20.10.2016 at 10.20 AM, which was received by opposite party no.2 on the very same day, and on receipt of the same opposite party no.2 passed the order immediately on 20.10.2016 holding that the charges have been fully and conclusively proved against the petitioner and awarded the punishment of compulsory retirement from temporary-cum-ad hoc service with immediate effect, i.e., 20.10.2016 PM. Accordingly, the same was given effect to, on being served on the petitioner, at 6.00 P.M. on the very same day. Hence this application.

3. Mr. A.K. Mishra, learned Senior Counsel appearing along with Mr. D.K. Panda, learned counsel for the petitioner contended that the notice of show-cause for proposed punishment was issued on 20.09.2016 calling upon the petitioner to explain by 20.10.2016. On 20.10.2016, the petitioner at 10.20 AM submitted his reply by Gmail, which was received by opposite party no.2 on the very same day, and the order impugned was passed immediately on 20.10.2016 PM giving effect on that date itself. Thereby, opposite party no.2 has shown undue haste in the matter of imposition of penalty of compulsory retirement from service without affording adequate opportunity of hearing to the petitioner, which has resulted in gross violation of the principles of natural justice. It is contended that mere receipt of show-cause reply is not sufficient when the authority proposed to impose penalty of compulsory retirement, rather for fair trial personal hearing to the petitioner was necessary and in absence of the same the order of punishment imposed on the petitioner cannot sustain in the eye of law and the same has to be quashed.

To the question raised that there is availability of alternative remedy, it is contended by learned counsel for the petitioner that as per Rule-9(E) the Chairman of the Corporation is the appellate authority with regard to punishment imposed by the Managing Director or any other authority specified under Rule-9(D), but in the instant case the punishment having been imposed by the Chairman-cum-Managing Director, there is no availability of alternative remedy for the petitioner. Therefore, the petitioner has approached this Court by filing this writ petition. On the other hand, the punishment imposed by opposite party no.2 suffers from personal prejudice and bias because of the hastiness of passing of the impugned order.

4. Mr. R.K. Mohanty, learned Senior Counsel appearing along with Mr. G.P. Dutta, learned counsel for the opposite parties raised preliminary objection with regard to maintainability of the writ petition due to availability of alternative remedy under the rules of the Corporation. It is contended that the petitioner has been awarded with punishment of compulsory retirement from temporary-cum-ad hoc service under Rule-9(C)(h) of the Bye-Laws of the Corporation. As per Rule-9(E) of the Bye-Laws of the Corporation, the alternative remedy is available. The petitioner, without exhausting the said remedy, has filed the present writ petition, which is thus not maintainable. It is further contended that in course of enquiry proceeding with regard to charges framed against the petitioner, in Annexure-7 dated 22.07.2016, the petitioner has admitted his guilt to the extent that it was a great mistake on his

part for involvement in preparation of electrical works tender document and has begged excuse for such mistake. Once the petitioner admitted his guilt, no other requirement is to be followed. Therefore, the authority is justified in passing the order impugned by imposing punishment of compulsory retirement from service against the petitioner.

5. This Court heard Mr. A.K. Mishra, learned Senior Counsel appearing along with Mr. D.K. Panda, learned counsel for the petitioner; and Mr. R.K. Mohanty, learned Senior Counsel appearing along with Mr.G.P. Dutta, learned counsel for opposite parties no.2 and 3. Pleadings have been exchanged between the parties and with their consent, the matter is being disposed of finally at the stage of admission.

6. The facts narrated above are not in dispute. Admittedly, on the basis of notice of show-cause issued by opposite party no.2 on 20.09.2016 calling upon the petitioner to explain by 20.10.2016 with regard to proposed punishment of compulsory retirement imposed under Rule-9(C)(h) of the Amended Bye-Laws (Annexure-II) of OSPH&WC (vide Annexure-9 of Operation and Accounts Manual), the petitioner submitted his reply on 20.10.2016 at 10.20 AM, which was received by opposite party no.2 on the very same day, i.e., 20.10.2016 and as such, the order was passed on the very same day, i.e. 20.10.2016 awarding punishment of compulsory retirement from temporary-cum-ad hoc service with immediate effect from "20.10.2016 PM". This award of punishment of compulsory retirement appears to have been passed by opposite party no.2 with undue haste, as because on receipt of the explanation to the show-cause notice of proposed punishment, the petitioner, in compliance of the principle of natural justice, would have been given an opportunity of hearing to the petitioner.

7. This Court called upon the opposite parties to produce the service rules applicable to the employees of the Corporation. Instead of producing the entire rules, the opposite parties produced a letter dated 08.04.2013 titled as office order for amended Rule (9)(C) of the Bye-Laws of OSPH&WC, which has been annexed as Annexure-9 in the Operation and Accounts Manual of the Corporation. The said office order is extracted hereunder:

"***THE ODISHA STATE POLICE HOUSING AND WELFARE CORPN. LTD.***

(A Government of Odisha Undertaking)
BHOINAGAR, BHUBANESWAR-7510122
Ph.:0674-2541545/2542921.Fax:0674-541542/2541542/
2541206,Email: policehousing@rediffmail.com.

Web.: ophwc.ori.nic.in

No. 4463/OPHWC *Date:08-04-2013*

OFFICE ORDER FOR AMENDED RULE 9(C) OF THE BYE-LAW OF OSPH&WC

The text of the amended Rule 9(C) of the Bye-Laws(Annexure-II) of the Odisha State Police Housing & Welfare Corporation Limited is as follows:

9(C) PUNISHMENT

(i) The appointing authority is competent to dismiss/remove/ discharge/ reduce in rank and compulsorily retire any subordinate employee of the corporation other than those on deputation to this corporation.

(ii) A temporary sub-ordinate officer who has not been declared permanent or who has served the Corporation for less than 3 years can be discharged by the appointing authority without showing any reason.

(iii) The following punishments can be awarded by the competent officers explained below;

(a) Dismissal, removal
(b) Censure in the service book
(c) Warning in the service book
(d) Forfeiture of increment with or without cumulative effect.
(e) Reduction in rank.
(f) Monetary penalty.
(g) Recovery for loss, dues, damage caused to the Government properties.
(h) Compulsory retirement.

(D) A regular enquiry with reasonable opportunities within the meaning of the principles of natural justice shall be afforded while penalties specified at (a), (d), (e) and (h) of rule 9(C)(iii) are imposed on the delinquent by the Chairman-cum-Managing Director, being the appointing authority. All other penalties as at (b), (c), (f) and (g) of Rule 9(C)(iii) are imposable by the CMD or Managing Director of the Corporation or by any other authority as may be specified in writing by the CMD in that behalf.

(E) ***APPEALS***

(i) Chairman of the Corporation will be the appellate authority with regard to the punishment imposed by the Managing Director or any other authority specified under Rule 9(D.

Any Corporation employees aggrieved with the finding(s) of the appellate authority i.e. chairman of the corporation, may prefer a mercy petition to the Board of directors against the appellate order.

When the Chairman-cum-Managing Director is a single entity, being the appointing and disciplinary authority, the appeal will lie to the Board of Directors of the corporation comprising of only three Directors, other than the Chairman-cum-Managing director, against the punishment/penalty awarded by the Chairman-cum-Managing director.

Any corporation employee aggrieved with the finding(s) of the said appellate committee of three directors may prefer a mercy petition to the Board of directors against the appellate order.

When the post of Chairman of the Corporation remains vacant for any reason whatsoever, all the powers vested and exercisable by him under this BYE-LAWS shall be deemed to have been vested upon the Managing Director or any other person as may be decided by the Board and shall accordingly be exercisable by him.

(ii) In such an event the appeal will lie to the Board of Directors of the Corporation comprising of only three Directors thereof other than the Managing director, against the punishment/penalty awarded by the Managing director.

(iii) All appeals/mercy petitions filed by the affected employee shall be preferred positively within 30 days from the date of communication of the order intended to be impugned in appeal or under mercy petitions, as the case may be.

The above amendment shall come into force with immediate effect.

Sd/-

Chairman-cum-Managing Director"

8. As per sub-clause (i) of Rule 9(C) mentioned above, the appointing authority is competent to dismiss/ remove/discharge/reduce any rank and compulsory retire any subordinate employee of the Corporation other than those on deputation to the Corporation. Under sub-clause (iii)(h) of Rule 9(C) the punishment of compulsory retirement has been mentioned. As mentioned above, under Rule 9(D) a regular enquiry with reasonable opportunities within the meaning of the principles of natural justice shall be afforded, while penalties specified at (a), (d), (e) and (h) of Rule 9(C)(iii) are imposed on delinquent by the Chairman-cum-Managing Director being the appointing authority. Since punishment of compulsory retirement, as specified under Rule 9(C)(iii)(h) has been prescribed, the regular enquiry with reasonable opportunities within the meaning of principles of natural justice has to be afforded to the petitioner. As per Rule 9(E) provisions for appeal have been prescribed where under Clause (i) of Rule 9(E) the Chairman of the Corporation would be the appellate authority with regard to punishment imposed by the Managing Director or any other authority specified under Rule 9(D).

9. The objection raised by Mr. R.K. Mohanty, learned Senior Counsel appearing for the opposite parties was that due to availability of alternative remedy of preferring appeal against the order of punishment imposed on the petitioner, the writ application is not maintainable. But fact remains that the punishment has been imposed in accordance with Rule 9(C)(iii)(h), but as per Rule 9(D) the said punishment can be imposed only on a regular enquiry with

reasonable opportunity within the meaning of principles of natural justice to the delinquent, the petitioner herein. This case is clearly covered under exception to bar of alternative remedy.

10. In ***State of Uttar Pradesh v. Md. Nooh***, AIR 1958 SC 86 the apex Court held that the doctrine of availability of alternative remedy has no application where the impugned order has been passed in violation of principles of natural justice.

11. The apex Court time and again held that personal hearing is a part of "reasonable opportunity of being heard". Therefore, the Court has always insisted that the opportunity of hearing as insisted in the article must be an effective opportunity and not a mere pretence. In view of such position, even if there is availability of alternative remedy of preferring appeal against the order of punishment imposed by the disciplinary authority, due to non-compliance of principles of natural justice this Court can entertain the writ application and as such the same is maintainable.

12. On the materials available on record it reveals that show cause notice was issued on 20.09.2016 calling upon the petitioner to file his reply on the proposed punishment of compulsory retirement on 20.10.2016 ,and the petitioner submitted his reply on 20.10.2016 at 10.20 AM which was received by opposite party no.2 on the very same day and the final order was passed also on the very same day giving immediate effect on 20.10.2016 PM.

13. 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.

14. 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.

15. '*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.

16. 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….."*

17. It is a common saying: "*One tale is good till another is told*". And hence comes the advice: "*hear the other side*". In every cause, each of the opposite parties thinks he has a right on his side and that wrong abides with his adversary.

18. In Shakespeare's play Henry VI, Act II, Sc IV, just like the way Richard/Platagenet and Duke of Somerset conversed when they plucked the white and red roses in the Temple garden thus:

> *"Platagenet -The truth appears so naked on my side, That any purblind eye may find it out.*
>
> *Somerset - And on my side it is so well apparell'd So clear, so shining, and so evident, That it will glimmer through a blind man's eye.*
>
> *Coke took from Seneca's Medea the saying: qui aliquid statuerit parte inaudita altera, aquum licet statuerit, haud aquus fuerit. Translated in simple English, it means: whoever may have decided anything, the other side remaining unheard, granted that his decision may have been just, will not have been just himself. In other words, he who decides anything, one party being unheard, though he decides rightly, does wrong. This is not only poetry but it is sound juristic sense and it is the essence of this doctrine which has passed into a maxim, viz., Audi alteram partem."*

19. 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."*

20. 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."*

21. Where the opportunity of being heard is required to be reasonable, it does not in that event depend upon the sweet will of the authority concerned. The matter in such case being justiciable, it is judicially settled that the question whether the opportunity given is reasonable or not will be a matter for interpretation of the Court and not by the authority itself granting the opportunity.

22. In ***Fedco (P) Ltd. v. S.N. Bilgrami***, AIR 1960 SC 415, the apex Court held as follows:-

> *"There can be no invariable standard for 'reasonableness' in such matters except that the Court's conscience must be satisfied, that the person against whom an action is proposed has had a fair chance of convincing the authority who proposes to take action against him, that the grounds on which the action is proposed are either non-existent or even if they exist they do not justify the proposed action. The decision of this question will necessarily depend upon the peculiar facts and circumstances of each case, including the nature of the action proposed, the grounds on which the action is proposed, the material on which the allegations are based, the attitude of the party against whom the action is proposed in show cause against such proposed action, the nature of the plea raised by him in reply, the request for further opportunity that may be made, his admissions by conduct or otherwise of some or all the allegations in all other matters which help the mind in coming to a fair conclusion on the question."*

23. The concept of reasonable opportunity is essentially objective in the sense that the opportunity must be reasonable in the context of the totality of the circumstances in which the person required to show cause is placed.

24. In view of Rule 9(D) read with the office order discussed above and examining the same keeping in view the factual matrix of the case in hand, this Court is of the considered view that undue haste has been shown by opposite party no.2 while passing the order impugned on 20.10.2016 imposing penalty of compulsory retirement from service without affording reasonable opportunity within the meaning of the principles of natural justice, and as such, the petitioner has not been given any opportunity of personal hearing, which is the requirement under the Bye-Laws of the Corporation before imposing punishment of compulsory retirement. Thereby, the order impugned in Annexure-12 dated 20.10.2016 imposing penalty of compulsory retirement from service cannot sustain in the eye of law. Accordingly, the same is liable to be quashed and hereby quashed. The matter is remitted back to the appointing authority, who is the disciplinary authority in the present case, namely, opposite party no.2 to proceed, in compliance of the principles of natural justice by affording opportunity of hearing to the petitioner, from the stage of receiving show cause reply to the proposed punishment from the petitioner, which was done on 20.10.2016. The entire exercise shall be completed within a period of two months from the date of communication of this judgment.

25. The writ application is thus allowed with the above direction. There shall be no order as to costs. The file produced for perusal of this Court is returned to Mr. G.P.Dutta, learned counsel for the opposite parties.

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2019 (III) ILR - CUT- 511

DR. B.R. SARANGI, J,

W.P.(C) NO. 18183 OF 2008

ORISSA RURAL HOUSING & DEVELOPMENT CORPORATION LTD. .....Petitioner

.Vs.

DEPUTY DIRECTOR (REVENUE), EMPLOYEES STATE INSURANCE CORPORATION, BBSR. .....Opp. Party

EMPLOYEES' STATE INSURANCE ACT, 1948 – Section 1 (4) & (5), 45-A, 75, 82 and 88 – Provisions under – Writ petition – Challenge is made to the action of the opposite party in demanding the ESI (Employee State Insurance) contribution and also exercising power compelling it to

accede to the demand without deciding the applicability of the Employees' State Insurance Act, 1948 to the petitioner-establishment – Petitioner, Orissa Rural Housing and Development Corporation Ltd., a Government of Orissa Undertaking, which is coming under the administrative control of H & UD Department and guided by the Rules and Regulations of Public Enterprises Department of Government of Orissa – Notice of show cause by ESI – Reply raising the question of applicability of the ESI Act – Not decided – Opposite party went on demanding the ESI (Employee State Insurance) contribution and also exercising power compelling it to accede to the demand without deciding the applicability of the Employees' State Insurance Act, 1948 – Effect of – Held, In view of such position, when a reply to the notice of show cause was filed by the petitioner raising a specific issue, the opposite party should have considered the same and directed the petitioner to approach the appropriate forum seeking relief, as claimed in the notice of show cause – Instead of doing so, keeping the reply of the petitioner to the show cause notice pending, the opposite party went on demanding the petitioner for payment of ESI dues for different spells, which cannot sustain in the eye of law.

Case Laws Relied on and Referred to :-

1. (1997) 1 SCC 625 : Employees' State Insurance Corporation v. F. Fibre Bangalore (P) Ltd.
2. (1997) 11 SCC 234 : Regional Director, Employees' State Insurance Corporation v. Narayan Chandra Rajkhowa & Ors.
3. AIR 2008 SC 1449 : Bharat Heavy Electricals Ltd. V. ESI Corporation.

For Petitioner : M/s. Somanath Mishra & G. Tripathy.

For Opp.Party : M/s. P.P. Ray, D. Ray,T.R. Jena and A. Ray.

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

DR. B.R. SARANGI,J.

The Orissa Rural Housing and Development Corporation Ltd., a Government of Orissa Undertaking, which is coming under the administrative control of H & UD Department and guided by the Rules and Regulations of Public Enterprises Department of Government of Orissa, has filed this application challenging the action of the opposite party in demanding the ESI (Employee State Insurance) contribution and also exercising power compelling it to accede to the demand without deciding the applicability of the Employees' State Insurance Act, 1948 to the petitioner-establishment.

2. The factual matrix of the case, in hand, is that the Deputy Director (Revenue), ESI Corporation issued a letter on 11.03.2002 demanding ESI contribution for the period from 01.01.2001 to 30.09.2001 on ad hoc basis and called upon the petitioner to show cause within a period of 15 days as to why the assessment should not be made, as proposed, and fixed the hearing of the case to 02.05.2002. In response to the said letter, the petitioner submitted its reply on 27.03.2002 stating inter alia that it is a government owned undertaking coming under the administrative control of H & UD Department, Government of Orissa and payment of salary, other allowances etc., inclusive of medical reimbursement benefit, to its employees are guided and made, vide Public Enterprises Department resolution dated 16.08.1995, therefore, the provisions of Employees' State Insurance Act, 1948 (for short "ESI Act, 1948") are not applicable to it. Without considering the said aspect, the opposite party went on issuing letters demanding ESI contribution for the periods from 10/2001 to 9/2002 and 10/2002 to 3/2005 on ad hoc basis, similar to 11.03.2002, and as per the letter dated 03.11.2005 fixed the personal hearing to 09.12.2004 on Section 45-A of the ESI Act, 1948. In response to the said letter dated 03.11.2005, the petitioner reiterated the facts, vide its letter dated 08.12.2005, and requested to waive the demand and exempt the petitioner-Corporation from the purview of the ESI Act, 1948.

2.1 On 09.12.2005, to which date the hearing was fixed, the petitioner also produced letter dated 08.12.2005 and, after considering the same, the opposite party directed the petitioner to produce certain documents for the purpose of deciding the issues, i.e., applicability or exemption and also payment of ESI contribution on actual basis and adjourned the matter to 18.01.2006. The hearing on Section 45-A was fixed to 13.02.2006, on which date the petitioner appeared before the opposite party and produced certain documents, as required, along with its letter dated 13.02.2006. But the opposite party, as per letter dated 31.01.2008, referring to letter dated 13.02.2006 of the petitioner along with enclosures, directed the petitioner to furnish month wise statement of the employees and wages paid to them for the period from 01.01.2001 to 31.03.2005. The opposite party, without considering the stand of the petitioner that the ESI Act, 1948 has no application to it and/or to exempt it from the purview of the said Act as its employees are enjoying medical benefits at par with the State Government employees, vide letter dated 04.11.2008, directed the petitioner to produce the month wise statement of the employees and wages paid to them from 01.01.2001 to 31.03.2005.

2.2 Thereafter, on 04.11.2008, when the opposite party issued Annexure-8, on the very same day issued two other letters demanding ESI contribution for the period from 01.04.2005 to 31.03.2008 on ad hoc basis fixing the hearing to 17.12.2008, and simultaneously issued a letter on 04.11.2008 to show cause as to why criminal prosecution would not be launched against it for non-payment of ESI dues for the period from 01.04.2005 to 31.03.2008 in Annexure-10 series, when the same has not been finalized. Due to change of top management, the petitioner in its letter dated 25.11.2008 requested the opposite party to grant 15 days time to do the needful. Hence this application.

3. Mr. S. Mishra, learned counsel appearing for the petitioner contended that the ESI Act, 1948 has no application to the petitioner corporation since it is not coming under sub-section (4) and (5) of Section-1 of the said Act and more over the employees of the corporation are enjoying the medical facilities as provided to the government employees substantially similar or superior to the benefits provided under the ESI Act, 1948. It is further contended that when a specific plea was taken before the opposite party with regard to applicability of the ESI Act, 1948 to the petitioner establishment and/or regarding exemption, as contemplated under the statute, the opposite party proceeded with the matter under Section 45-A of the ESI Act, 1948. It is contended that the petitioner corporation is a State owned undertaking and is not a "factory" or "establishment" as mentioned in the statute, as such the ESI Act, 1948 has no application to the petitioner corporation, when its employees are getting benefits as per the government rules without subscribing anything, therefore, it is to be exempted from the purview of the said Act. It is thus contended that the opposite party was duty bound to decide that issue before proceeding with the matter further under Section 45-A of the ESI Act, 1948 and, having not done so, the action taken by the opposite party is arbitrary, unreasonable and contrary to the provisions of law and violative of principles of natural justice.

4. Mr. A. Ray, learned counsel for opposite party contended that as per the provisions contained under Section 75 of the ESI Act, 1948 the matter, which is in dispute between the principal employer and the corporation, in the first instance, to be exclusively adjudicated by the Employees' Insurance Court as per the procedure laid down under the Orissa Employees' Insurance Court Rules, 1951 by receiving written statement, framing issues, recording evidence and pronouncing final order upon each of the issues separately, unless the finding upon one or more issues is sufficient for decision of the case. In case of raising of such dispute, the principal employer is required to

deposit 50% of the amount claimed by the Corporation and either party aggrieved by the order of the Employees' Insurance Court can appeal to this Court under sub-section (2) of Section 82 of the ESI Act, 1948, if the said order involves a substantial question of law. Since the petitioner has not approached the Employees' Insurance Court, due to availability of alternative remedy, the writ petition is not maintainable. It is further contented that the contention raised by learned counsel for the petitioner, that ESI Act, 1948 has no application to the petitioner corporation since it is not coming under sub-section (4) and (5) of Section 1 of the said Act, is not correct in view of the fact that the petitioner corporation is covered under sub-section (5) of Section 1 of the said Act w.e.f. 01.01.2001 on the basis of the inspection report prepared by the Inspector, who took extract of records and submitted the same to the Regional Office of the Corporation. On the basis of such report, the petitioner was issued with a notice on 11.03.2001 informing that its establishment falls within the purview of sub-section (5) of Section-1 of the ESI Act, 1948 w.e.f. 01.01.2001, allotting a code number with a request to make necessary compliances and to avail necessary assistance from the local office of the corporation at Bhubaneswar.

It is further contended that if the petitioner claims for exemption, then the appropriate government may, by notification in the official gazette and subject to such conditions as it may deem fit to impose, exempt any persons or class of persons employed in any factory or establishment or class of factories or establishments to which the Act applies, from the operation of the Act under Section 88 of the ESI Act, but the petitioner approached neither the appropriate forum under Section 75 of the ESI Act, 1948 nor under Section 88. It is further contended that the Government of Orissa, vide notification issued under Section 1(5) of the ESI Act, 1948, bearing letters dated 09.09.1976 and 22.06.1976, extended the provisions of the Act to other establishments, therefore, the petitioner establishment has been rightly covered under sub-section (5) of Section 1 of the ESI Act, 1948 as per the notification issued by the State Government. Therefore, non-compliance of the provisions contained under the ESI Act, 1948 not only attracts the prosecution action under Section 85 of the said Act, but also liable for simple interest under Regulation 31-A of the ESI (General) Regulations, 1950 and damages to the extent of arrear amount under Section 85 of the ESI Act, 1948. It is thus contended that no illegality or irregularity has been committed by the opposite party in raising the demand against the petitioner under the provisions of the ESI Act, 1948. Therefore, he seeks for dismissal of the writ petition.

To substantiate his contention, he has relied upon the judgments of the apex Court rendered in ***Employees' State Insurance Corporation v. F. Fibre Bangalore (P) Ltd.,*** (1997) 1 SCC 625 and ***Regional Director, Employees' State Insurance Corporation v. Narayan Chandra Rajkhowa and others,*** (1997) 11 SCC 234.

5. This Court heard Mr. Somanath Mishra, learned counsel for the petitioner and Mr. A. Ray, learned counsel for the opposite party, and perused the record. Since pleadings have been exchanged, with the consent of learned counsel for the parties, the matter is disposed of finally at the stage of admission.

6. For just and proper adjudication of the case, in hand, relevant provisions of the Employees' State Insurance Act, 1948 are quoted below:-

> ***"Sub-Sections (4) and (5) of Section-1:-***
>
> *xxx xxx xxx*
>
> *(4) It shall apply, in the first instance, to all factories including factories belonging to the Government other than seasonal factories:*
>
> *Provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.*
>
> *(5) The appropriate Government may, in consultation with the Corporation and where the appropriate Government is a State Government, with the approval of the Central Government], after giving one month's notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Act or any of them, to any other establishment, or class of establishments, industrial, commercial, agricultural or otherwise.*
>
> *Provided that where the provisions of this Act have been brought into force in any part of the State, the said provisions shall stand extended to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of establishments in another part of the State.*
>
> ***"45-A. Determination of contributions in certain cases.*** *(1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any Social Security Officer or other official of the Corporation referred to in sub-section (2) of section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment.*

Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.

Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45-B 2 or the recovery under section 45-C to section 45-I."

"75. Matters to be decided by the Employees' Insurance Court. *— (1) If any question or dispute arises as to —*

(a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or

(b) the rate of wages or average daily wages of an employee for the purposes of this Act, or

(c) the rate of contribution payable by a principal employer in respect of any employee, or

(d) the person who is or was the principal employer in respect of any employee, or
(e) the right of any person to any benefit and as to the amount and duration thereof, or

(ee) any direction issued by the Corporation under section 55-A on a review of any payment of dependants' benefits, or

(g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act, or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act, such question or dispute subject to the provisions of sub-section (2A) shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (2A), the following claims] shall be decided by the Employees' Insurance Court, namely : —

(a) claim for the recovery of contribution from the principal employer;

(b) claim by a principal employer to recover contributions from any immediate employer ;

*[* * *]*

(d) claim against a principal employer under section 68 ;

(e) claim under section 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto ; and

(f) If any claim for the recovery of any benefit admissible under this Act.

(2A) If in any proceedings before the Employees' Insurance Court a disablement question arises and the decision of a medical board or a medical appeal tribunal

has not been obtained on the same and the decision of such question is necessary for the determination of the claim or question before the Employees' Insurance Court, that Court shall direct the Corporation to have the question decided by this Act and shall thereafter proceed with the determination of the claim or question before it in accordance with the decision of the medical board or the medical appeal tribunal, as the case may be, except where an appeal has been filed before the Employees' Insurance Court under sub-section (2) of section 54-A in which case the Employees' Insurance Court may itself determine all the issues arising before it.

(2-B) No matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the Employees' Insurance Court unless he has deposited with the Court fifty per cent. of the amount due from him as claimed by the Corporation :

Provided that the Court may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this sub-section.

(3) No civil Court shall have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which by or under this Act is to be decided by 1 [a medical board, or by a medical appeal tribunal or by the Employees' Insurance Court."

***"82. Appeal.** — (1) Save as expressly provided in this section, no appeal shall lie from an order of an Employees' Insurance Court.*

(2) An appeal shall lie to the High Court from an order of an Employees' Insurance Court if it involves a substantial question of law.

(3) The period of limitation for an appeal under this section shall be sixty days.

(4) The provisions of sections 5 and 12 of the 1 [Limitation Act, 1963 (36 of 1963)] shall apply to appeals under this section."

***"88. Exemption of persons or class of persons.** — The appropriate Government may, by notification in the Official Gazette and subject to such conditions as it may deem fit to impose, exempt any person or class of persons employed in any factory or establishment or class of factories or establishments to which this Act applies from the operation of the Act."*

7. In view of the statutory provisions governing the field, when the letter was issued on 11.03.2002 by the opposite party demanding ESI contribution for the period from 01.01.2001 to 30.09.2001 on ad hoc basis and calling upon to show cause within 15 days as to why assessment should not be made, as proposed, the petitioner submitted reply on 27.03.2002 stating inter alia that the petitioner corporation is a Government owned undertaking under the administrative control of Housing and Urban Development Department and payment of salary and other allowances, inclusive of medical reimbursement to its employees, are guided and made vide Public Enterprises Department resolution dated, 16.08.1995, therefore the provision of the ESI Act, 1948 is not applicable. When the petitioner raised preliminary objection with regard

to applicability of the ESI Act, 1948 to it, without considering the same in proper perspective, subsequent demands were raised for different periods in determination of contribution against the petitioner.

8. In ***Bharat Heavy Electricals Ltd. V. ESI Corporation,*** AIR 2008 SC 1449, the apex Court held that in the process of Section 45-A, an immediate employer or principal employer may also show that they are not liable to deposit any contribution on behalf of the employees, as the establishment in question did not come within the purview thereof. The purpose of the proceedings, both under the Employees' State Insurance Act, 1948 and also the Employees Provident Act is to determine the amount due from any employer in respect of the employees under the statutory schemes. Both the Acts envisage compliance of principles of natural justice.

9. In view of the aforesaid law laid down by the apex Court, a duty is caste on the opposite party to decide first the question of applicability of the ESI Act, 1948 to the petitioner, on the basis of the reply to show cause filed by it, and that too in compliance of principles of natural justice. Without doing so, the opposite party proceeded with the matter by issuing demand notices for different periods, as mentioned above, by initiating proceeding under Section 45-A of the ESI Act, 1948.

10. Learned counsel for the opposite party stated that if any question and dispute arises, as contemplated under sub-clause "(a)" to "(ee)" of Section 1 of the ESI Act, 1948, then the petitioner has to approach the Appellate Employee Insurance Court and, further, if the petitioner claims exemption then it has to approach the appropriate Government under Section 88 of the ESI Act, 1948, but, instead of doing so, the petitioner approached this Court by filing the present application, which is not maintainable. But that question cannot be taken into consideration at this stage, because the petitioner is grossly aggrieved by initiation of proceeding under Section 45-A of the ESI Act, 1948 in determination of contribution, pursuant to demand notice, against the petitioner, though the petitioner raised preliminary objection by filing show cause reply that the ESI Act, 1948 is not applicable to it, but the opposite party without deciding that issue went on demanding for different periods by issuing notices.

11. The contention, as has been raised, that by virtue of the notification issued under Section 1(5) of the ESI Act, 1948 bearing letters dated 09.09.1976 and 22.06.1976, the petitioner establishment is covered under the ESI Act, 1948 was never brought to the notice of the petitioner at any point

of time. Whether the petitioner will avail the remedy under Section 75 or 88 of the ESI Act, 1948, the same depends only on consideration of its reply to show cause by the competent authority. Unless the opposite party decides that question, the remedy under Section 75 or 88 of the ESI Act, 1948 cannot be invoked.

12. In ***F. Fibre Bangalore (P) Ltd.,*** (supra), on which reliance was placed by the opposite party, the issue involved was that in case of dispute between the ESI Corporation and the employer in matters other than those covered under Section 45-A, who should approach the ESI Court, the apex Court held that where the employer denied the liability under or applicability of the Act or the quantum of the contribution, the employer and not the ESI corporation has to approach the ESI Court. That is not the issue here, therefore, it has no application to the case in hand.

Similarly, in ***Narayan Chandra Rajkhowa*** (supra), which was relied upon by the opposite party, the apex Court held that the dispute as to whether the benefits available to the employees under the rules of the establishment prior to the application of ESI scheme, were more advantageous than the benefits under the ESI scheme, the ESI Court is the competent forum to adjudicate upon the same and, as such, it has got jurisdiction to entertain the application raising such dispute and the ESI Court ought to have examined whether the rules of the establishment were really more advantageous, and should not have accepted such allegation without scrutiny.

13. In view of such position, when a reply to the notice of show cause was filed by the petitioner raising a specific issue, the opposite party should have considered the same and directed the petitioner to approach the appropriate forum seeking relief, as claimed in the notice of show cause. Instead of doing so, keeping the reply of the petitioner to the show cause notice pending, the opposite party went on demanding the petitioner for payment of ESI dues for different spells, which cannot sustain in the eye of law.

14. In view of the fact and law discussed above, this Court is of the considered view that interest of justice would be best served if the issue raised in the reply of the petitioner to show cause notice filed before the opposite party is decided first, so that the petitioner can have an opportunity to move the appropriate forum on the basis of the decision taken thereon in compliance of the principles of natural justice. Consequentially, the matter is remitted back to the opposite party to decide the issue raised in reply to the

notice of show cause filed by the petitioner on 27.03.2002, and pass a reasoned and speaking order by affording opportunity of hearing to all the parties as expeditiously as possible, preferably within a period of four months from the date of communication of this judgment.

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

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2019 (III) ILR - CUT- 521

DR. B.R. SARANGI, J.

O.J.C. NO. 2599 OF 2001

AKSHAYA KUMAR ROUTRAY .....Petitioner

.Vs.

STATE BANK OF INDIA, BHUBANESWAR & ORS. .....Opp. Parties

DISCIPLINARY PROCEEDING – Removal from service – Order of punishment as well as the order of appellate authority confirming the order of punishment – Not reasoned – Effect of – Held, orders not sustainable under law.

"On perusal of both the orders it appears that neither the disciplinary authority nor the appellate authority has passed a reasoned and speaking order. More particularly, the disciplinary authority, while passing the order impugned on 21.08.1999, has categorically stated that he had gone carefully through the proceedings, findings of the inquiry officer together with the relevant papers, and the contention of the petitioner in reply to the show cause and after detailed personal hearing, he was not fully convinced regarding the stand taken by the petitioner in reply to the show cause and in personal hearing, that cannot be construed to be a reasoned or a speaking order.

In ***Union of India v. M.L. Capoor****, AIR 1974 SC 87, the apex Court considered the reasons as follows:*

> *"Reasons" are links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinion and decisions recoded be shown to be manifestly just and reasonable."*

Similar view has also been taken in ***Gurdial Singh Fijji v. State of Punjab,*** *(1979) 2 SCC 368.*

Now, coming to the question of speaking order, which means an order which contains matter which is explanatory or illustrative of the mere direction which is given by it is sometimes thus called, or an intelligible order; an order that tells its own story and is clear-cut. The apex Court time and again held that the appellate or revisional authorities must dispose of the appeals or revisions under 'speaking orders' and the High Court or the Supreme Court, while scrutinizing the order, should be in a position to known the reasons that prevailed with the appellate or the revisonal authorities. No particular form or scale of the reasons can be prescribed and the extent and the nature of the reasons depend upon each case. The order should be speaking either in itself if its conclusion is different from the conclusion of the lower authority or it can even speak through the order of the lower authority, if it is in affirmation of or concurrence with the order of the lower authority and the order of the lower authority contains the reasons of the conclusions. What is essential is that from the appellate or revisonal order it should be clear that the authority passing the order applied its mind effectively and that the order is not passed in a mechanical or routine way.". (Paras 7 to 9)

Case Laws Relied on and Referred to :-

1. 2015(I) OLR 568 : Santosh Kumar Mohaty Vs. State of Orissa.
2. 2018 (II) OLR 467 : Union of India Vs. Bishnu Charan Mallick.
3. 2018 LabIC 99 : Mitra Bhanu Rout, Vs. Utkal Gramya Bank, Bolangir.
4. AIR 1974 SC 87 : Union of India Vs. M.L. Capoor.
5. (1979) 2 SCC 368 : Gurdial Singh Fijji Vs. State of Punjab.

For Petitioner : Mr. S.S.Das, Sr. Adv.
M/s B.R. Das,R.R. Mohanty, (Ms) K.Behera,
M. Mohapatra.

For Opp.Parties: Mr. P.V. Balakrishna.

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

DR. B.R. SARANGI, J.

The petitioner, who was working as Electronic Accounts Machine Operator (EAMO) under the State Bank of India, has filed this application seeking to quash order dated 21.08.1999 passed by Asst. General Manager, Region-I and Disciplinary Authority in Annexure-12, finding the petitioner guilty of charges levelled against him constituting gross misconduct in terms of paragraph 521(4)(j) of the Shastry Award read with paragraph 18:28 of the Desai Award and inflicting punishment, in terms of paragraph 21(iv)(b) of the Sixth Bipartite Settlement dated 14.02.1995, of removal from service and the period of suspension to be treated as not on duty, and consequential order of confirmation dated 17.02.2000 passed by the Deputy General Manager and the Appellate Authority in Annexure-14.

2. The factual matrix of the case, in hand, is that the petitioner joined as a cashier under the State Bank of India in the year 1979 and during his 18 years of career was promoted to the posts of Assistant Head Cashier, Deputy Head Cashier and Electronic Accounts Machine Operator (EAMO). While posted at Puri Branch as EAMO, on 22.02.1996, he was served with an order of transfer, directing him to join at Balugaon Branch, and was relieved with immediate effect, pursuant to which he joined at Balugaon Branch on the very same day. But opposite party no.3, Assistant General Manager, Region-I and Disciplinary Authority, on 08.04.1996, placed the petitioner under suspension in terms of paragraph 525(10)(b) of the Shastry Award read with paragraph 18:28 of the Desai Award pending finalization of departmental enquiry on the allegation of two serious irregularities, which amount to committing fraud, while he was working at Puri Branch. The petitioner, who was working at Balugaon Branch, was placed under suspension fixing his headquarters at Puri. As the petitioner was District Secretary of the State Bank of India Staff Association, Bhubaneswar Circle, in order to do away with his presence in Puri Circle, such action was taken.

2.1 The petitioner was served with memorandum of charges on 12.03.1996 by the Branch Manager of State Bank of India-opposite party no.5 directing him to submit explanation within a week, on the allegation that he had fraudulently withdrawn a sum of Rs. 60,660/- in the shape of over drawal and also some more charges were levelled against him involving very small quantum of money, which was received by the petitioner on 20.03.1996. In response to the same, on 26.03.1996 the petitioner intimated that he had referred the matter to the Circle Association and after getting response he would submit his reply. Instead of giving opportunity to the petitioner, during the period of suspension, the petitioner was served with a charge-sheet by the Assistant General Manager, Region-I and Disciplinary Authority on 30.04.1996 alleging certain irregularities, while he was functioning as EAMO at Puri, which are highly prejudicial to the interest of the bank and tantamount to gross misconduct on his part in terms of paragraph 521(4)(j) of the Shastry Award, calling upon him to show cause within a period of 15 days as to why disciplinary action shall not be taken against him.

2.2 On receipt of charge-sheet, the petitioner requested to allow him to inspect the records for the purpose of submission of reply, but no such opportunity was given to the petitioner to have access to the documents to give effective reply to the charges levelled against him. On the other hand,

opposite party no.6 was appointed as Inquiry Officer, who, on 08.11.1996, issued notice to the petitioner calling upon him to appear on 26.11.1996 to participate in the process of enquiry. Thereby, the petitioner was not provided with opportunity to submit his reply to the charge-sheet in compliance of principles of natural justice. The petitioner, on 26.11.1996, requested the Inquiry Officer to grant some time to produce a defence counsel, but, instead of doing so, the Inquiry Officer readout the charges to the petitioner, who denied the same, and as such, no document was produced by the bank to vindicate the stand against him and the Presenting Officer was directed to produce the documents and list of witnesses on the next date. On 05.02.1997 the opposite party-bank could not produce the relevant documents along with the list of witnesses. On subsequent dates, although the Presenting Officer filed documents in phased manner, copy of which had not been provided to the petitioner, and did not submit any list of witnesses, as directed by the Inquiry Officer. Though the bank produced 109 documents and examined two computer operators as witnesses on its behalf, but did not produce opposite party no.4, on whose evidence the charges rest, as a witness. The petitioner's request for supply of documents having not been acceded to, he could not be able to defend his case in compliance of the principles of natural justice. Without affording any opportunity of hearing by supplying all documents and list of witnesses to the petitioner, the Inquiry Officer proceeded with the matter.

2.3 On conclusion of enquiry, out of 8 charges the Inquiry Officer found that charges no. 1, 3, 4, 5 and 6 are not proved, whereas charges no.2, 7 and 8 are proved. But, on the basis of such finding of the Inquiry Officer, the Assistant General Manager, Region-I and Disciplinary Authority, without affording any opportunity of hearing to the petitioner, made a self-assessment vide Annexure-7, and finally on 21.08.1999 passed order in Annexure-12 that he, after carefully going through the proceedings, findings of the Inquiry Officer together with the relevant papers, contention of the petitioner in reply to the show cause and details of the personal hearing granted to him, was not fully convinced regarding the views recorded by the petitioner in reply to the show cause and the personal hearing and, therefore, found the petitioner guilty of the charges levelled against him which constitute an act of gross misconduct in terms of paragraph 521(4)(j) of Shastri Award read with paragraph 18:28 of the Desai Award, and accordingly decided to inflict the punishment in terms of paragraph 21(iv)(b) of the Sixth Bipartite Settlement dated 14.02.1995 of removal from service and the period of suspension to be

treated as not on duty. Against the said order of punishment imposed by the disciplinary authority, the petitioner preferred an appeal before the appellate authority, who, vide order dated 17.02.2000 in Anenxure-14, confirmed the punishment of removal from service inflicted by the disciplinary authority on 20.08.1999 and rejected the appeal. Hence, this application.

3. Mr. S.S. Das, learned Senior Counsel appearing along with Mr. P.K .Ghose, learned counsel for the petitioner contended that the order of punishment imposed by the disciplinary authority-opposite party no.3 is in gross violation of the principle of natural justice, inasmuch as, no opportunity of hearing was given to the petitioner, meaning thereby, the petitioner sought for documents and list of witnesses but neither the documents were supplied to him nor the list of witnesses, but the Inquiry Officer gave a finding that charges no. 1, 3, 4, 5 and 6 are not proved whereas charges No.2, 7 and 8 are proved against the petitioner. Copy of such enquiry report was not supplied to the petitioner, but the disciplinary authority gave a self- contend finding, without giving an opportunity to the petitioner, and as such, in order dated 21.08.1999 nothing has been indicated with regard to finding arrived at by the disciplinary authority by application of mind independently, and it has been simply stated that only after going through the proceedings and findings of the Inquiry Officer together with relevant papers he has imposed major penalty of removal from service. It is further contended that such action of the disciplinary authority is contrary to the provisions of law and non-furnishing of reasons is fatal, which vitiates the ultimate order of removal from service.

It is further contended that the order of punishment imposed by the disciplinary authority was challenged in appeal, but the appellate authority, without application of mind, passed an unreasoned and non-speaking order on 17.02.2000 confirming the punishment imposed by the disciplinary authority, which should be quashed. It is further contended that on the basis of the allegation made against petitioner, since the opposite parties have failed to establish five charges out of eight charges levelled against him, for three charges the imposition of major penalty of removal from service is harshest punishment, therefore, the same should be quashed. The disciplinary authority differed with the finding of the inquiry officer with regard to two charges, without noting down the disagreement thereof, thereby, the order of punishment cannot sustain.

To substantiate his contention he has relied upon the judgments of the apex Court in ***Punjab National Bank v. Kunj Behari Misra,*** AIR 1998 SC 2713; ***S.B.I. and others v. Arvind K. Shukla,*** AIR 2001 SC 2398; and ***Asst. General Manager, SBI, V. Thomas Jose,*** (2000) 10 SCC 280.

4. Mr. P.V. Balkrishna, learned counsel for opposite party-bank argued with vehemence justifying the order passed by the disciplinary authority as well as appellate authority and contended that the allegation that there was non-compliance of principle of natural justice is absolutely wrong, inasmuch as, when the disciplinary authority differed with the finding of the inquiry officer with regard to two charges, called upon the petitioner to submit his explanation, pursuant to which the petitioner submitted his explanation and thereafter called upon him for personal hearing, and then only the punishment was imposed. Thereby, no illegality or irregularity has been committed by the authority concerned while passing the order of removal from service, which has been confirmed by the appellate authority.

It is further contended that as the petitioner was working at Balugaon, his headquarters was fixed at Puri to facilitate him to participate in the disciplinary proceeding, and as such, no illegality or irregularity has been committed by the opposite parties. The allegation, that being the Secretary of the State Bank of India Staff Association he has been penalized for his Union activities, has been denied. It is further contended that since the proceeding has been conducted in compliance of the parameters of the natural justice, the action of the opposite parties does not warrant interference of this Court at this stage.

To substantiate his case, he has relied upon the judgments rendered in ***Santosh Kumar Mohaty v. State of Orissa,*** 2015(I) OLR 568; ***Union of India v. Bishnu Charan Mallick,*** 2018 (II) OLR 467; and ***Mitra Bhanu Rout, v. Utkal Gramya Bank, Bolangir,*** 2018 LabIC 99.

5. This Court heard Mr. S.S. Das, learned Senior Counsel appearing along with Mr. P.K. Ghose, learned counsel for the petitioner and Mr. P.V. Balakrishna, learned counsel for 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. The facts delineated above are not in dispute. Instead of delving into the contention raised by learned counsel for the parties, as mentioned above,

this Court perused the order dated 21.08.1999 passed by the disciplinary authority in Annexure-12, which reads as follows:-

> *"I refer to the Show cause No. DGM/DPS/145 dt.28.06.1999 served on you and your reply dt.28.7.99 thereto and the personal hearing granted to you on 18.8.99. I have carefully gone through the proceedings, findings of the Enquiry Officer together with the relevant papers, your contention in reply to the Show Cause and details of the personal hearing granted to you. In this connection, I am not fully convinced regarding the views stated by you in reply to the Show Cause and in the personal hearing.*
>
> *02.Therefore, taking an overall view of the case, I find you guilty of the charges leveled against you which constitute acts of gross misconduct in terms of paragraph 521(4)(j) of Sastry Award read with paragraph 18.28 of Desai Award. Accordingly, I have finally decided to inflict upon you the following punishment in terms of paragraph 21(iv)(b) of the Sixth Bipartite Settlement dt.14.02.95 :-*
>
> *"REMOVAL FROM SERVICE AND THE PERIOD OF SUSPENSION TO BE TREATED AS NOT ON DUTY."*
>
> *03. Please acknowledge receipt of this memorandum on the duplicate thereof with date."*

Against such order of punishment, the petitioner preferred appeal and the appellate authority, on 17.04.2000, passed the following order:-

> *"An undated appeal preferred by Shri Akshaya Kumar Routray, Ex-EAMO, against the order of "DISMISSAL" dated 20.08.99 passed by the Disciplinary Authority (Asst. General Manager, Region-I) was received at our end on 18.12.99 beyond the statutory period for preferring an appeal. However, keeping in view the interest of justice and equity, I deemed it fit and proper to offer an opportunity of personal hearing to the appellant on 17.02.2000. Accordingly, the appellant was present before me and I have heard him at length carefully and have also gone through the grounds of appeal. During the course of personal hearing, the appellant admitted before me that he had committed some mistakes such as overdrawing in his Cash-key, Festival and Consumer loan accounts without any evil intention for which the Bank has not suffered any loss and the image of the Bank has also not been affected. In this connection, I have perused the entire proceedings of the enquiry, findings of the Enquiry Officer as well as the decisions of the Disciplinary Authority and I found that the charges have been fully proved except one. I did not find any cogent material to differ from them.*
>
> *02. Having carefully examined all these aspects including the contents of the appeal, the submission of the appellant, the proceedings of the enquiry and the findings/decisions of the Disciplinary Authority, I hereby confirm the order of "REMOVAL FROM SERVICE" inflicted by the Disciplinary Authority on 20.08.99 and reject the appeal.*
>
> *03. A copy of this order may be communicated to the appellant Shri Routray."*

7. On perusal of both the orders it appears that neither the disciplinary authority nor the appellate authority has passed a reasoned and speaking order. More particularly, the disciplinary authority, while passing the order impugned on 21.08.1999, has categorically stated that he had gone carefully through the proceedings, findings of the inquiry officer together with the relevant papers, and the contention of the petitioner in reply to the show cause and after detailed personal hearing, he was not fully convinced regarding the stand taken by the petitioner in reply to the show cause and in personal hearing, that cannot be construed to be a reasoned or a speaking order.

8. In ***Union of India v. M.L. Capoor***, AIR 1974 SC 87, the apex Court considered the reasons as follows:

> *"Reasons" are links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinion and decisions recoded be shown to be manifestly just and reasonable."*

Similar view has also been taken in ***Gurdial Singh Fijji v. State of Punjab,*** (1979) 2 SCC 368.

9. Now, coming to the question of speaking order, which means an order which contains matter which is explanatory or illustrative of the mere direction which is given by it is sometimes thus called, or an intelligible order; an order that tells its own story and is clear-cut. The apex Court time and again held that the appellate or revisional authorities must dispose of the appeals or revisions under 'speaking orders' and the High Court or the Supreme Court, while scrutinizing the order, should be in a position to known the reasons that prevailed with the appellate or the revisonal authorities. No particular form or scale of the reasons can be prescribed and the extent and the nature of the reasons depend upon each case. The order should be speaking either in itself if its conclusion is different from the conclusion of the lower authority or it can even speak through the order of the lower authority, if it is in affirmation of or concurrence with the order of the lower authority and the order of the lower authority contains the reasons of the conclusions. What is essential is that from the appellate or revisonal order it should be clear that the authority passing the order applied its mind effectively and that the order is not passed in a mechanical or routine way.

10. Therefore, taking into consideration the efficacy of reason and speaking order, as discussed above, and applying the same to the present context, this Court arrives at a conclusion that neither the disciplinary authority nor the appellate authority has passed reasoned order and, more so, the disciplinary authority, while disagreeing with the findings of the inquiry officer on two charges, has not given any finding whatsoever with regard to disagreement thereof. Therefore, the order dated 21.08.1999 passed by the disciplinary authority in Annexure-12 and consequential order dated 17.02.2000 passed by the appellate authority in Annexure-14 cannot sustain in the eye of law and they are liable to be quashed and are hereby quashed. The matter is remitted back to the disciplinary authority with a direction to proceed from the stage of receipt of enquiry report by affording opportunity of hearing to the petitioner in compliance of principles of natural justice and pass a reasoned and speaking order as expeditiously as possible, preferably within a period of four months from the date of communication of this judgment.

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

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2019 (III) ILR - CUT- 529

D. DASH, J.

CRLA NO. 216 OF 2005

MANORAMA MOHAPATRA AND ANR. .....Appellants

.Vs.

STATE OF ORISSA .....Respondent

INDIAN PENAL CODE, 1860 – Section 498- A read with section 4 of the Dowry Prohibition Act – Offence under – Conviction – Victim lady P.W.3, in her deposition alleges that her husband had illicit relationship with the other accused and she has seen them in objectionable situation – Such fact not mentioned in the FIR – Other evidence with regard to the allegation of demand of dowry and administering medicines not trustworthy – Conviction cannot be maintained.

"For all the above discussion, in my considered view, the evidence of P.W. 3 being taken into consideration with the evidence of other witnesses and upon their cumulative evaluation are not sufficient to hold that the prosecution has established the charges against accused Kartika for offence under section 498-A IPC and section 4 of the D.P. Act and accused Manorama for offence under section 498-A

IPC beyond reasonable doubt. Accordingly, the finding of the trial court holding accused Kartika guilty for offence under section 498-A IPC and section 4 of the D.P. Act and accused Manorama for offence under section 498-A IPC are hereby set aside." *(Para 6)*

For Appellants : M/s. S. Ch. Mohapatra,
M/s. A.P. Bose, D.J. Sahoo, S.K. Hota, S.Dash, N.Rout, N.Swain, P.Mohapatra, P.R. Panda, P.K. Beura & P.K.Prusty.

For Respondent: Mr. K.K. Nayak, Addl. Standing Counsel.

JUDGMENT Date of Hearing : 09.08.2019 : Date of Judgment :13.08.2019

D. DASH, J.

The appellants, by filing this appeal, have assailed the judgment of conviction and order of sentence dated 03.05.2005 passed by the learned Sessions Judge, Bolangir in S.C. No.50-B of 2003.

By the impugned judgment and order, these appellants (accused persons) have been convicted for committing offence under section 498-A IPC and each of them has been sentenced to undergo rigorous imprisonment for a period of two years and pay fine of Rs.3,000/- in default to undergo rigorous imprisonment for three months. Accused Kartika having also been convicted for offence under section 4 D.P. Act, has been sentenced to undergo rigorous imprisonment for a period of one year and pay fine of Rs.2000/- in default to rigorous imprisonment for two months with further stipulation that the substantive sentence as against him would run concurrently.

2. The prosecution case, in short, is that the accused and P.W.3 had married on 22.06.2002. After marriage, they stayed in the house of said accused Kartika situated at Ainthapali, Sambalpur. The sister of P.W.3 i.e. P.W. 5 also stayed with them for three days. The allegation is that P.W.3 found her husband-accused Kartika to be keeping illicit relationship with the other accused who is the co-appellant. So it is said that there was no conjugal relationship between the accused Kartika and P.W. 3. It is next stated that accused Kartika and accused Monorama used to frequently ask P.W. 3 to bring cash of Rs.5.00 lakh from her father imposing that as the condition for establishment of conjugal relationship. Accused Bikram (since acquitted) who happens to be the brother of Kartika was also insisting P.W.3 to bring that amount. It is further stated that though P.W. 3 was suffering from no such disease, the two accused persons, who have been convicted used to give her injections and medicines; when the foster father of the accused (since acquitted) used to give her chanted water. It is further stated that P.W. 3 was not allowed to visit her father's place. In that situation finally on 18.10.2002, her uncle brought her back. So P.W.3 lodged a written report at Bolangir Town Police Station vide Ext. 4. This led to registration of Bolangir Town P.S. Case No. 190 of

2002 and the investigation commenced. On completion of investigation, charge sheet having been submitted, these two accused persons (appellants) along with two others faced the trial. There accused persons stood charged for offence under section 307/498-A IPC and section 4 of the D.P. Act.

During the trial, the accused persons have taken the plea of denial and false implication. It is further stated by the defence that since the daughter of accused Monarama was prosecuting her study by staying in the house of accused Kartika, wife of Kartika i.e. P.W. 3 was very much opposed to it and as her, objection was not paid any heed to, dissention arose and for that finally P.W. 3 went to her father's place.

3. In the trial, the prosecution has examined in total fifteen witnesses, out of whom as already stated P.W.3 is the complainant and P.W. 5 is her sister. P.Ws.1, 4 to 6 and 8 are the relations of P.W. 3. The priest who had performed the marriage is P.W.7. P.W. 11 is the doctor who had treated P.W. 3 when she was with her husband and P.Ws.12 and 13 are the doctors who had examined P.W.3 at Bolangir and P.W.14 is the Professor, Psychiatry who had examined P.W.3. The Investigating Officer of the case has come to be examined at last as P.W. 15.

Besides leading the oral evidence by examining the above witnesses, the prosecution has proved the FIR as Ext.4, discharge certificate of P.W. 3 as Ext.7, injury report of P.W. 3 as Ext.9, the answer given by the doctor to be query made by the Investigating Officer has been admitted in evidence as Ext. 11.

The defence has tendered no evidence.

The trial court upon scrutiny of evidence and on goring through the documents proved from the side of the prosecution has acquitted all the four accused persons of the charge under section 307/34 IPC. Out of the four accused persons facing the trial, these two accused persons who have filed this appeal and another accused namely, Bikram having been charged for offence under section 498-A/34 IPC and section 4 of the D.P. Act; finally these two accused persons have been convicted for offence under section 498-A/34 IPC whereas other accused Bikram has not been convicted also of those charges. The accused Bikram has also not been convicted for offence under section 4 of the D.P. Act. So now the finding of guilt recorded against these two accused persons i.e. the husband and the maternal aunt-in-law of P.W.3 for commission of offence under section 498-A is under challenge in this appeal.

4. Learned counsel for the appellants (accused persons) submitted that here the prosecution has not come up with the case that either at the time of marriage or prior to it, there was any demand of dowry in shape of cash or any other articles. He submitted that the trial court is not right in accepting the evidence of P.W. 3 as gospel truth as regards the demand and torture on account of non-fulfillment of the

same as gospel truth. It was submitted that the trial court having observed that there is prevaricating evidence regarding demand of dowry in shape of cash of Rs.5.00 lakh, ought to have extended the benefit of doubt. He further submitted that without any evidence standing to corroborate the evidence of P.W. 3 on material particulars, the finding of guilt returned by the trial court is unsustainable. He submitted that when the evidence of P.W. 3 in so far as the demand of dowry by the accused persons has not been believed in so far as it is directed against accused Monorama, her evidence in that regard implicating Kartika ought not to have been relied upon as it shakes the foundation of the prosecution case. It was submitted that merely because it has been stated by P.W. 3 that she had marked some objectionable behaviour of her husband i.e. accused Kartika with the other accused, such as their stay in the bed room and accused Kartika being offered food by the other accused, the finding that they had the illicit relationship ought not to have been recorded and that ought not to have been taken as subjection of P.W. 3 to mental cruelty, more particularly, when the evidence stand to show that other male and female members were also residing in the house. Placing the evidence of the witnesses examined on behalf of the prosecution in great detail, he contended that the finding of the trial court is not the outcome of the just and proper appreciation of evidence on record. Referring to Ext.A, the certified copy of the order dated 12.4.2006 passed by the learned Judge Family Court, Rourkela in Civil Proceeding No. 137of 2003, he submitted that on the move of this accused Kartika and on acceptance of the fast pleaded by him constituting the ground that by the conduct of P.W. 3, rather he was subjected to cruelty and there was voluntarily desertion by P.W. 3, a decree for divorce has been passed. He further submitted that said decree has attainted its finality and thereafter P.W. 3 has married and is blessed with a son, having no further grievance. On the basis of the same, he submitted that now the evidence of prosecution witnesses stand for heightened scrutiny and as pointed out since the evidence do not smoothly pass through the scrutiny of that standard, the finding of conviction as has been recorded against these accused persons cannot be sustained.

5. Learned counsel for the State submitted all in favour of the findings of the trial court. According to him, the trial court on detail analysis of evidence and upon their evaluation has rightly gone to hold that accused Kartika is guilty for committing of offence under section 498-A IPC and section 4 of the D.P. Act and accused Manorama as guilty for committing of offence under section 498-A IPC. He further submitted that the evidence of P.W. 3 having been corroborated by the evidence of other witnesses before whom she had disclosed in normal course, the trial court in the absence of any such material to impeach the credibility of P.W. 3 has rightly placed reliance on the same in fastening the guilt upon these accused persons.

6. On the above rival submission, this Court is to judge the sustainability of the finding recorded by the trial court holding the accused Kartika guilty for

commission of offence under section 498-A IPC and section 4 of the D.P. Act and accused Manorama for committing offence under section 498-A IPC. For the purpose the evidence on record has to be gone through.

Admittedly, the marriage between the P.W. 3 and accused Kartika had taken place on 22.6.2002 and thereafter P.W. 3 resided with this accused at his place where other members of the family were also residing.

During her examination, P.W.3 has stated that she had noticed her husband having illicit relationship with the other accused. One instance has been cited stating that on that occasion they were found to be in an objectionable position. However, in the FIR Ext. 4 lodged by P.W. 3, that instance as has been deposed to by her in the trial is conspicuously missing. In the FIR, it has been mentioned in a general manner that accused Kartika was having illicit relationship with the other accused and for that reason P.W.3 was not being treated as a member of the family and rather as a maid. P.W. 3 has stated that when she had raised objection as to such relationship between accused Kartika and the other, then accused Kartika had threatened her. This however does not find place in the narration of the FIR. Having said as above, P.W. 3 has further stated that these accused persons used to threaten her to bring cash of Rs.5.00 lakh from her parents or else to remain deprived of the enjoyment of the marital life. When she stated about the fact that she was subjected to physical torture nothing has been further stated as to how it was so meted out at her. It is her evidence that accused Ranjit who happens to be the foster father of the Kartika also used to insist her to bring a cash of Rs.5.00 lakhs giving that very threat. This part as to the implication of Ranjit has been disbelieved by the trial court. The evidence of P.W. 3 implicating accused Bikram who happens to be the brother of accused Kartika that he was also insisting her to bring dowry has not been accepted by the trial court to be the truthful version of P.W.3. Thus the trial court has discarded the evidence of P.W. 3 in so far as the alleged complicity of accused Ranjit and Bikram are concerned. This itself reveals the tendency of P.W. 3 to rope in as many person as possible through her exaggerated version and that being quite apparent, the same can be lightly brushed aside. It has been the evidence of P.W. 3 that for no reason, these two accused persons were giving her medicines and injunctions. During cross-examination, she has further stated that on no occasion the accused persons had left her at Bolangir and insisted her for payment of money. She has also stated that few days after marriage she with Kartika, Manorama and her daughter had been to the temple of Goddess 'Tarini' at Ghatagaon. She has stated that she with her husband had opened a joint locker in the bank. It has been further stated that about 7 to 8 days after her marriage, they had gone to leave accused Manorama at her house at Keonjhar where her husband Panchanan was staying and during that time her parents and sister had gone to their house and stayed there. So the relationship between the P.W. 3 and her husband accused Kartika was not that bitter during the period. When she says that for no

reason she was being administered medicines and forcibly injunctions were given, she is not stating about any resistance to that from her side. This part of evidence appears to be quite unbelievable. The doctor who had examined P.W. 3 is P.W. 12. It is his evidence that as against such complaint of P.W. 3, he could not evaluate anything in favour of such complaint. The Specialist has been examined as P.W. 13. It is his evidence that P.W. 3 refused to be treated by him. He has not found any cause for the depression. Professor and HOD Department of Psychiatric in SCB Medical College & Hospital having kept her under observation without prescribing any medicines has examined P.W.3. He is not stating it to be a case of prior administration of any medicine. Ext. 8 the report of doctor, P.W. 12 is to the effect that no sign and symptom of administration of medicine could be evaluated from physical examination.

Father of P.W. 3 examined as P.W. 1 has in an omnibus manner stated that P.W. 3 has divulged before her that all the accused persons were demanding cash. There has been development of the case by him that when they had been to the temple at Ghatagaon, the illicit relationship between Kartika and other accused was noticed which her daughter had told. But this is not said by P.W. 3. In the FIR P.W. 3 although has stated that she was brought from her maternal home by her uncle and aunt; yet it reveals from her evidence elicited during cross-examination that they reached Bolangir sometime after midnight on 18.10.2002 and then immediately she went to police station and police came and arrested accused Kartika and Ranjit from their house which shows that accused Kartika and Ranjit had accompanied P.W. 3 to her father's place. When P.W. 1, the father of P.W.3 states that his wife i.e. the mother of P.W. 3 had been to the house of accused Kartika, this P.W. 3 has clearly stated that on no occasion her parents and sister had come to hour house at Ainthapali after her marriage and remained there and only on 27.6.2002 her parents and sister while returning from Cuttack to Bolangir via Sambalpur had halted at their house at Ainthapali for 2 to 3 hours. She has further stated to have not informed anything about the torture upon her. Her further evidence is that she with accused Kartika and Manorama had gone to different places. Though, in the house telephone facility was available, at no point of time neither of the accused had asked her to convey her parents about the demand and the consequences as to its non-fulfillment over phone.

Developments have taken place that after about three and half years of conclusion of the trial, there has been a decree of dissolution of marriage of P.W. 3 and accused Kartika and in that Civil Proceeding, learned Family Court has upheld the case of accused Kartika that it was P.W. 3 who was responsible for creating this disturbance in the family and had voluntarily disserted him which is evident from the certified copy of the order marked as additional evidence (Ext. A) in this appeal. It has also been the report that thereafter P.W. 3 having thereafter married, is blessed with a son and is running her life without further grievance. This finds reflected in the order dated 20.4.2018.

For all the above discussion, in my considered view, the evidence of P.W. 3 being taken into consideration with the evidence of other witnesses and upon their cumulative evaluation are not sufficient to hold that the prosecution has established the charges against accused Kartika for offence under section 498-A IPC and section 4 of the D.P. Act and accused Manorama for offence under section 498-A IPC beyond reasonable doubt.

Accordingly, the finding of the trial court holding accused Kartika guilty for offence under section 498-A IPC and section 4 of the D.P. Act and accused Manorama for offence under section 498-A IPC are hereby set aside.

7. Resultantly, the judgment of conviction and order of sentence passed by the trial court in S.C. No.50-B of 2003 are hereby set aside.

Accordingly, the appeal is allowed. The bail bonds furnished by the appellants shall stand discharged. The LCR be sent back forthwith.

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2019 (III) ILR - CUT- 535

D. DASH, J.

CRA NO. 223 OF 1993

BALESWAR PRASAD GUPTA .....Appellant.

.Vs.

STATE OF ORISSA .....Respondent.

ESSENTIAL COMMODITIES ACT, 1955 – Section 7(1)(a)(ii) – Offence under – Punishment for contravention of clause 3 of the Orissa Food grains Dealers' Licensing Order, 1964, clauses 4 and 6 of the Kerosene (Fixation of Ceiling Price) Order, 1970 clause 3(2) of the Orissa Rice and Paddy Control Order 1965 and clause 3 of the Orissa Declaration of Stocks and Prices of Essential Commodities Order, 1973 – Plea of petitioner that "Particular of the offence with reference to the fact of the case not explained – Effect of – Held, the accused has been seriously prejudiced in the trial.

"*The prosecution report of course finds mention of the contravention of clause 3 (ii) of the Orissa Rice and Paddy Control Order, 1965; clause 3 of the Orissa Food grains Dealers' Licensing Order, 1964; clause 3 of the Orissa Declaration of Stocks and Prices of Essential Commodities Order, 1973 and clause 4 and 6 of the Kerosene (Fixation of Ceiling Price) Order, 1970 and for suchviolations, the prosecution had prayed for holding the accused guilty for commission of offence under section 7(1)(a)(ii) of the Essential Commodities Act*

after trial. But it appears from the above order that except just mentioning that particulars of offence are explained with reference to the fact of the case, nothing has been indicated as regards the violation of any of those Control Order, without any indication as to for what reason such violations are alleged. The accused having been supplied with the copy of the prosecution report on the very day, it is not acceptable for a moment to say that he was well aware of all the allegations levelled against him. In the order of the trial court while explaining the particulars of offence, there has not been any hint as to which control order/s made under section 3 of the Essential Commodities Act has/have been violated. P.W. 5 also in his evidence has not stated as to which order/s have been violated by the accused. In the circumstances as aforesaid, in my considered view the accused has been seriously prejudiced in the trial and therefore, the judgment of conviction and order of sentence cannot be sustained. Having said so, in view of lapse of more than 29 years by now since the date of detection, this Court refrains from directing for retrial."

For Appellant : M/s. M. Mishra, D.S. Mohanty, B. Mishra, P.K. Das, U.C. Patnaik, V. Avtar and D. Sarangi.

For Respondent : Mr. P.Ch. Das, Addl. Standing Counsel.

JUDGMENT Date of Hearing and Judgment: 14.08.2019

D. DASH, J.

The appellant, by filing this appeal, has assailed the judgment of conviction and order of sentence dated 13.07.1993 passed by the learned Special Judge, Koraput, Jeypore in T.R. Case No.27 of 1990.

By the impugned judgment and order, the accused has been convicted for offence punishable under section 7(1)(a)(ii) of the Essential Commodities Act for contravention of clause 3 of the Orissa Food grains Dealers' Licensing Order, 1964; clauses 4 and 6 of the Kerosene (Fixation of Ceiling Price) Order 1970; clause 3(2) of the Orissa Rice and Paddy Control Order 1965 and clause 3 of the Orissa Declaration of Stocks and Prices of Essential Commodities Order 1973 and accordingly, he has been sentenced to undergo rigorous imprisonment for a period of one year and pay fine of Rs.2000/- in default to undergo rigorous imprisonment for three months.

2. The prosecution case in short is that on 18.5.1990 when P.W. 5, the Supply Inspector, Kotpad with the Executive Magistrate and others visited the business premises of accused at Murtahandi i.e. his grocery shop, 172 bags of coarse paddy, 257 bags of fine paddy, 6 bags of super fine paddy and 13 bags of rice were recovered. During that inspection Mohua, edible oil, sugar, oil seeds and pulses of different varieties were also found to have been kept. The accused was a retailer for sale of kerosene. On verification of the stock and sale registers, shortage in the stock of kerosene to the tune of 200 litres was detected which the accused failed to account for. It is stated that the accused had no license for possessing and storing all

those seized essential commodities. Moreover, he had not displayed the stock and price declaration board in respect of those essential commodities in his shop. Prosecution report having been submitted, the accused faced the trial.

The plea of the accused was that he is not guilty.

3. In the trial, prosecution examined five witnesses as against four from the sides of the defence. From the side of the prosecution, the relevant registers, seizure list and zimanamas have been proved. The defence has also proved a number of documents as to the acquisition of landed property and the record of rights pertaining those.

4. Learned counsel for the appellant submits that the accused having not been explained with the accusation with specific reference to the violation of Control Orders promulgated by virtue of the provision of section 3 of the Essential Commodities Act leading to the commission of offence under section 7(1)(a)(ii) of the Act, the entire trial is vitiated and therefore, the finding of conviction and order of sentence cannot be sustained. In this connection, he has relied upon the decision rendered by Hon'ble Justice R.N. Misra as His Lordship then was in case of Tarinisen Maharana (Criminal Revision No. 136 of 1979) and Narayan Das (in Criminal Revision No. 143 of 1979) vs. The State reported in 1980 C.L.R. 227.

5. Learned Addl. Standing Counsel submits that when such factum of contravention of the Control Orders promulgated under section 3 of the Essential Commodities Act have been well indicated in the prosecution report, the trial court while trying the case under the summon procedure having not explained the accusations with specific reference to the violation of the Control Orders insignificant having no such fatal consequence so as to hold the trial to have been vitiated.

6. Proceeding to address the rival submission, I have perused the order sheet of the trial court. Pursuant to the summon issued by order dated 19.12.1990, the accused entered appearance on 2.1.1991. On that day, the copy of the prosecution report was served upon the learned counsel for the accused. The trial court then allowing the prayer for grant of bail to the accused and directing for his release on bail has proceeded to explain the particulars of offence. For proper appreciation, that part of the order is reproduced.

"Particular of the offence under section 7(1)(a)(ii) of the Essential Commodities Act with reference to the fact of the case explained. Accused pleads not guilty and claims trial".

The prosecution report of course finds mention of the contravention of clause 3 (ii) of the Orissa Rice and Paddy Control Order, 1965; clause 3 of the Orissa Food grains Dealers' Licensing Order, 1964; clause 3 of the Orissa Declaration of Stocks and Prices of Essential Commodities Order, 1973 and clause

4 and 6 of the Kerosene (Fixation of Ceiling Price) Order, 1970 and for such violations, the prosecution had prayed for holding the accused guilty for commission of offence under section 7(1)(a)(ii) of the Essential Commodities Act after trial But it appears from the above order that except just mentioning that particulars of offence are explained with reference to the fact of the case, nothing has been indicated as regards the violation of any of those Control Order, without any indication as to for what reason such violations are alleged. The accused having been supplied with the copy of the prosecution report on the very day, it is not acceptable for a moment to say that he was well aware of all the allegations levelled against him. In the order of the trial court while explaining the particulars of offence, there has not been any hint as to which control order/s made under section 3 of the Essential Commodities Act has/have been violated. P.W. 5 also in his evidence has not stated as to which order/s have been violated by the accused.

In the circumstances as aforesaid, in my considered view the accused has been seriously prejudiced in the trial and therefore, the judgment of conviction and order of sentence cannot be sustained. Having said so, in view of lapse of more than 29 years by now since the date of detection, this Court refrains from directing for retrial.

7. In the wake of aforesaid, the judgment of conviction and order of sentence dated 13.7.1993 passed by the learned Special Judge, Koraput, Jeypore which have been impugned in this appeal are set aside.

Accordingly, the appeal is allowed. The bail bonds furnished by the appellant (accused) shall stand discharged. The LCR be sent back forthwith.

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2019 (III) ILR - CUT- 538

BISWANATH RATH, J.

W.P.(C).NO.13039 OF 2018

SASADHAR @ SASHADHAR SAMAL .....Petitioner

.Vs.

PRAMOD DAS AND ANR. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Election dispute – Challenge is made to the order allowing recounting – Application calling for unused ballot papers is not in terms of the allegation in the election dispute – Principles for direction of recounting – Held, looking to the allegation in the election dispute, the petitioner has to give details as to which ballot paper will be called for, for examination and presented as evidence, in absence of which this

Court finds there has been improper consideration of such application by the trial court – This Court observes that election petitioner cannot utilize the trial court to find out evidence for him to support his case and there should be specific allegation supporting any such claim – Impugned order being bad in law, set aside.

Case Laws Relied on and Referred to :-

1. (2009) 10 SCC 170 : Udey Chand Vs. Surat Singh and Anr.

For Petitioner : M/s. Gautam Misra, A.Dash, J.R.Deo , A.Khandal, A Dash, J.R.Deo & A.Khandal
For.Opp.Parties: M/s. Kshirod Ku. Rout
M/s. J.Naik, S.K.Rout & A.K.Dalai

ORDER Date of Order : 18.01.2019

BISWANATH RATH, J.

Heard Sri Mishra, learned counsel for the petitioner and Sri Rout, learned counsel appearing for the contesting opposite party no.1.

Hearing the rival contentions of the parties, this Court finds the writ petition involves an order dated 7.5.2018 involving a petition at the instance of the election petitioner appearing at Annexure-3 herein calling for unused ballot papers from several booths involving an election dispute.

Assailing the impugned order, Sri Mishra, learned counsel for the petitioner submitted that looking to the pleading and prayer involved in the petition involving Annexure-3, there was absolutely no prayer for recounting and unfortunately, it is alleged that the Civil Judge (Junior Division), Bhadrak in improper appreciation of the fact has directed for recounting.

Sri Rout, learned counsel for the contesting opposite party on the other hand taking this Court to the pleading involving the election dispute submitted that there is at least some basis behind calling for production of documents vide Annexure-3 and there has been proper consideration of the application involved leaving no scope for interference.

Reading the application under Annexure-3, this Court finds the application for calling for unused ballot papers in respect of Booth Nos.13, 17, 21 and 22 is not in terms of the allegation in the election dispute. Looking to the allegation in the election dispute, the petitioner has to give details as to which ballot paper will be called for examination and presented as evidence in absence of which this Court finds there has been improper consideration of such application by the trial court. This Court observes that

election petitioner cannot utilize the trial court to find out evidence for him to support his case and there should be specific allegation supporting any such claim. The petitioner's allegation is also got support of the decision rendered in the case of ***Udey Chand v. Surat Singh and Another***, *(2009) 10 Supreme Court Cases 170* where the Hon'ble Supreme Court has observed as follows

> "11. Before adverting to the merits of the issue raised by the parties with reference to the statutory provisions, it would be appropriate to bear in mind the salutary principle laid down in the election law that since an order for inspection and re-count of the ballot papers affects the secrecy of ballot, such an order cannot be made as a matter of course. Undoubtedly, in the entire election process, the secrecy of ballot is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting are made out."

For the observations of this Court and for the settled principle of law of the Hon'ble Apex Court, this Court finds the impugned order dated 7.5.2018 passed by the learned Civil Judge (Junior Division), Bhadrak in Election Misc. Case No.51 of 2017 vide Annexure-5 becomes bad. As a result this Court interfering in the impugned order vide Annexure-5, sets aside the same. Consequently, the writ petition succeeds.

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2019 (III) ILR - CUT- 540

BISWANATH RATH, J.

W.P.(C). NO.19172 OF 2009

RAMGOPAL KHADIRATNA & ANR. .....Petitioners

Vs

STATE OF ORISSA, THROUGH THE PRINCIPAL SECRETARY, REVENUE DEPARTMENT & ORS. .....Opp. Parties

ORISSA SURVEY & SETTLEMENT ACT, 1958 – Section 15(a) – Revision by board of Revenue – Initiation of Suo Motu revision – Such revision initiated after 20 years of publication of final record of rights – Maintainability of revision questioned on the ground of limitation – The Opp.party/Board of revenue pleaded that, there is no prescribed period of limitation in the statute to initiate the proceeding and by virtue of a circular the authority is empowered to initiate the proceeding – Reasonable period of limitation discussed – Held, e ven though the

statute did not prescribe the limitation, law is well settled that no revision should be entertained after expiry of 3 years and the circular if any issued by the Govt. remains contrary to the law of land, can neither override statute nor have any application to invite reopening of settled position – State should act as a role model and be refrained from creating the confusion.

Case Laws Relied on and Referred to :-

1. 2017 (I) OLR-406 : Chaitanya Das (since dead) through L.Rs., Smt.Aladmani Das & Ors. Vs. Bibhuti Charan Das & Ors.
2. 2009 AIR SCW 6305 : Santosh Kumar Shivgonda Patil and Ors. Vs. Balasaheb Tukaram Shevala & Ors.
3. (2001) 9 SCC 550 : Harsh Dhingra Vs. State of Haryana & Ors with Sant Kumar & Ors v. State of Haryana and Anr.
4. AIR 1967 SC 1910 : Sant Ram Sharma Vs. State of Rajasthan & Ors.
5. 2008 (Supp.-II) OLR-779 : Narendra Kumar Mohapatra Vs. Joint Commissioner, Settlement and Consolidation & Ors,

For Petitioners : M/s.S.P.Mishra, S.Sahoo, S.Nanda, S.K.Mohanty and B.Panigrahi.
For Opp.Parties : Mr. U.K.Sahoo, Addl.S.C M/s.S.Das & M.K.Sahu. Miss.Pratyusha Naidu.

JUDGMENT Date of Hearing & Judgment:13.09.2019

BISWANATH RATH,J.

This writ petition involves a challenge to the initiation of suo motu proceeding under Section 15(a) of the Orissa Survey & Settlement Act, 1958 (for short "the Act, 1958"). The core challenge involving the impugned order is for the statutory provision involving Section 15(a) of the Act,1958 though not prescribed any period of limitation but for the series of decisions of this Court and the decisions of the Hon'ble Apex Court, maximum period in initiating a suo motu proceeding should not have exceeded 3 years. For the suo motu proceeding involved herein through Revision Case No.359 of 2004 vide Annexures-3 and 5 initiated after 20 years of preparation of record-of-right, learned counsel for the petitioner drawing the attention of this Court to the series of judgments discussed in the case of ***Chaitanya Das (since dead) through L.Rs., Smt.Aladmani Das & others v. Bibhuti Charan Das & others***, *2017 (I) OLR-406* including that of a judgment of Hon'ble Apex Court in the case of ***Santosh Kumar Shivgonda Patil and Ors. V. Balasaheb Tukaram Shevala and Ors***, *2009 AIR SCW 6305*, contended that the suo motu proceeding initiated becomes bad and therefore, this Court should be interfered in the order at Annexure-3 as well as order at

Annexue-5 and set aside the both. For the involvement of a preliminary objection and the question of maintainability of the suo motu revision involved herein, this Court is not required to go into the merit of the case unless the petitioners fail in their attempt for establishing that the Revision Case No.359 of 2004 is not maintainable on the premises of delay.

2. To the contrary, Sri Das, learned counsel for the opposite party nos.6 and 7 submitted that though there is no time stipulation in Section 15(a) of the Act, 1958 but, however, for a circular of the State Government giving liberty for initiation of suo motu proceeding even after expiry of time under the circumstance stated therein, claimed that the suo motu revision petition in spite of being initiated after 20 years is maintainable. Sri Das also further contended that the circular relied on by him since not contrary to the statutory provision and is intended to avoid the gray area involving the statutory provision. Sri Das, thus contended that the circular has application to the case at hand. Sri Das, learned counsel also referring to a judgment of the Hon'ble Apex Court in the case of ***Harsh Dhingra v. State of Haryana and others*** with ***Sant Kumar and others v. State of Haryana and another***, *(2001) 9 Supreme Court cases 550* submitted that for the decision vide Annexure-7 therein, the suo motu revision is maintainable. Further taking this Court to another decision of Hon'ble Apex Court in the case of ***Sant Ram Sharma v. State of Rajasthan and others,*** *AIR 1967 Supreme Court 1910,* Sri Das again for the decision of the Hon'ble Apex Court in paragraph-7 therein submitted that the suo motu initiation of proceeding after 20 years is maintainable. In the circumstances, Sri Das, learned counsel while justifying the maintainability of the revision even though filed after 20 years, prayed for dismissal of the writ petition.

3. Sri Sahoo, learned Additional Standing Counsel supporting the stand of Sri Das also claimed that for the application of the judgments referred to therein and the circular to the case at hand claimed for dismissal of the writ petition.

4. Miss. Pratyusha Naidu, leaned counsel appearing for the opposite party no.8 apart from taking support of the stand taken by Sri Das also contended that for property of a deity involved therein remaining under the control of the Endowment Commissioner, the Endowment Commissioner should have been made a party to the proceeding and the matter in the lower forum should have been decided involving the Endowment Commissioner in absence of which the writ petition also not maintainable. In the above premises, Miss. Naidu submitted that the settlement of land in favour of the

petitioner in absence of involvement of Endowment Commission, preparation of record-of-right becomes illegal and thus claimed for dismissal of the writ petition.

5. Considering the rival contentions of the parties and taking into account the case and the objection of the parties concerned, this Court finds the moot questions to be decided are (i) As to whether initiation of the suo motu proceeding in exercise of power under Section 15(a) of the Act, 1958 being initiated after 20 years is maintainable? & (ii) For the availability of circular and the decision cited at Bar at the instance of Sri Das, more particularly whether the writ petition suffers and the impugned order is sustainable?

6. Taking into consideration the rival contentions of the parties, this Court finds there is no dispute that the suo motu revision vide Revision Case No.359 of 2004 was initiated after 20 years of the publication of the record-of-right. It is at this stage, taking into account the provision at Section 15 (a) of the Orissa Survey & Settlement Act, 1958 this Court finds Section 15 (a) of the Act, 1958 reads as follows:

> **15. Revision by Board of Revenue. -** The Board of Revenue may in any case direct-
>
> (a) of its own motion the revision of any record-of-rights, or any portion of a record-of-rights, at any time after the date of final publication under [Section 12-B] but not so to affect any order passed by a Civil Court under Section 2[42];"

Reading of the aforesaid provision and due scrutiny, it becomes clear that there is of course no restriction in initiation of suo motu proceedings. Yet this Court observes that there is no restriction does not mean that a revision can be filed after undue delay which will ultimately affect the cardinal principle that no action should be undertaken to affect the already settled issues/matters. It is at this stage, taking into consideration of the decision of the Hon'ble Apex Court rendered in the case of ***Santosh Kumar Shivgonda Patil and Ors. V. Balasaheb Tukaram Shevala and Ors***, *2009 AIR SCW 6305 (supra),* in paragraph-16 this Court finds the Hon'ble Supreme Court in paragraph-16 has made the following observation:

> "[16] It seems to be fairly settled that if a statue does not prescribe the time limit for exercise of revisional power, it does not mean that such power can be exercised at any time; rather it should be exercised within a reasonable time. It is so because the law does not expect a settled thing to be unsettled after a long lapse of time. Where the legislature does not provide for any length of time within which the power of revision is to be exercised by the authority, suo motu or otherwise, it is plain that exercise of such power within reasonable time is inherent therein. Ordinarily, the reasonable period within which power of revision may be exercised

> would be three years under Section 257 of the Maharashtra Land Revenue Code subject, of course, to the exceptional circumstances in a given case, but surely exercise of revisional power after a lapse of 17 years is not a reasonable time. Invocation of revisional power by the Sub- Divisional Officer under Section 257 of the Maharashtra Land Revenue Code is plainly an abuse of process in the facts and circumstances of the case assuming that the order of Tehsildar passed on March 30, 1976 is flawed and legally not correct. Pertinently, Tukaram Sakharam Shevale, during his lifetime never challenged the legality and correctness of the order of Tehsildar, Shirol although it was passed on March 30, 1976 and he was alive up to 1990. It is not even in the case of Respondent Nos.1 to 5 that Tukaram was not aware of the order dated March 30, 1976. There is no finding by the Sub-Divisional Officer either that order dated March 30, 1976 was obtained fraudulently".

Basing on the aforesaid judgment, taking into account similar nature of writ petition vide W.P.(C).No.3651 of 2002, this Court has also taken a view that in a similar circumstance involving a proceeding under Section 37 (c) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, where a revision was preferred after 8 years, this Court taking into account the decision of the Hon'ble Supreme Court and series of decision of this Court and further keeping in view the observation of this Court indicated hereinabove, has come to hold that no revision can be entertained after lapse of 3 years. It is at this stage, taking into account the objection raised by Sri Das, this Court finds even though the statute did not prescribe a time stipulation but for the decision of this Court and Hon'ble Apex Court, law has been fairly well settled that no revision should be entertained after expiry of 3 years. Taking into account the specific case that the statute did not prescribe a time of limitation, the decision of the Hon'ble Apex Court and the decision of this Court are also outcome of consideration of such situation as to whether a party or applicant can raise a revision and a suo motu revision can be entertained after expiry of 3 years. For the settled position of law, this Court finds circular, if any, issued by the State Government remains contrary to the law of the land, can neither override statute nor have any application to invite reopening of settled position settled long since and in such event there will be no end to any litigation. State should act as a role model and refrain it from creating a confusing position. Furthermore, the circular is also opposed to the view of the Hon'ble Apex Court's judgment vide AIR 2009 SCW 6305.

7. Considering the decisions relied on by Sri Das and the submission made by State Counsel as well as Miss. Naidu, this Court from the decision rendered in the case of ***Sant Ram Sharma v. State of Rajasthan and others,*** *AIR 1967 Supreme Court 1910 (supra),* finds the case involved therein is

that there was a challenge to the administrative action not governed in any statute and that further for the observations of the Hon'ble Apex Court that the procedure followed being violative of constitutional guarantees under Articles 14 and 16 of the Constitution of India, the decision does not hit the facts involving the case at hand..Similarly, taking into consideration the submission of Sri Das, this Court finds taking aid of the decision involving ***Harsh Dhingra v. State of Haryana and others*** with ***Sant Kumar and others v. State of Haryana and another***, *(2001) 9 Supreme Court cases 550 (supra),* this decision has application to the cases, which have already been closed and have no application to the cases pending for consideration in higher forum. For the clear application of the judgment of the Hon'ble Supreme Court in the case of ***Santosh Kumar Shivgonda Patil and Ors. V. Balasaheb Tukaram Shevala and Ors***, *2009 AIR SCW 6305 (supra)* and the series of decision of this Court including the decision involving ***Chaitanya Das (since dead) through L.Rs., Smt.Aladmani Das & others v. Bibhuti Charan Das & others***, *2017 (I) OLR-406 (supra),* this Court finds the petitioner has the support of law and further the above decisions also opposed to the contentions raised by the counsel for the opposite parties. So far as the submission of Sri Sahoo, learned State Counsel based on decision in the case of ***Narendra Kumar Mohapatra v. Joint Commissioner, Settlement and Consolidation and others***, 2008 (Supp.-II) OLR-779, this Court observes for the subsequent decision of the Hon'ble Apex Court in the case of ***Santosh Kumar Shivgonda Patil and Ors. V. Balasaheb Tukaram Shevala and Ors***, *2009 AIR SCW 6305 (supra),* the decision of the Single Bench of this Court in the case of ***Narendra Kumar Mohapatra v. Joint Commissioner, Settlement and Consolidation and others***, 2008 (Supp.-II) OLR-779 is no more applicable.

8. In the circumstance, this Court finds the suo motu revision initiated after 20 years was not maintainable. This Court finds the decision at Annexue-3 as well as Annexure-5 both become bad in law and this Court while interfering in the same sets aside both. This Court also observes in the event the proposal of learned counsel for the opposite parties are accepted, then there will be no end to the litigation and further also unsettling the settled position. On the submission of Miss.Naidu on the record of right being bad for preparing such record without involving the Endowment Authority, this Court observes that the Endowment Authority was not prevented to challenge the recording of the competent authority in appropriate time. Not only that this Court also finds the Endowment cannot

be an aggrieved party. Further, no challenge to such action by the parties/deity aggrieved at appropriate level, the Endowment Commissioner is estopped to challenge at this stage.

9. In the result, the writ petition succeeds. However, there is no order as to cost.

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2019 (III) ILR - CUT- 546

BISWANATH RATH, J.

C.R.P. NO. 4 OF 2018

LAXMIDHARA SAMANTASINGHARA & ORS .....Petitioners

.Vs.

THE ALARANATH DHANDA MULAKA MAHAVIDYALAYA MANAGING COMMITTEE & ORS. .....Opp.Parties

LIMITATION ACT, 1963 – Section 5 – Condonation of delay – Delay of more than fifteen years in filing the first appeal – Defendant No.1, an Institution, failed to establish the factum of due diligence in explaining the delay of more than fifteen years and seven months – Order condoning the delay set aside. (***Post Master General & others vrs. Living Media India Ltd. & another, reported in (2012)3 SCC 563 followed.***)

"The petition for condonation of delay in Paragraph-2 clearly indicates in the year 1992, the Principal-cum-Secretary came to know about the ex parte decree and thus filed Misc. Case under Order 9 Rule 13 of C.P.C. for setting aside the ex parte judgment and decree, which application was allowed on 2.4.1997 and the case was further posted for further proceeding. Further, the order sheet at page-16 at Annexure-1 also makes it apparent that the contesting opposite party was provided with sufficient opportunity to file written statement in spite of last chance being provided on 3.10.1997 to file the written statement on 29.10.1997, defendant no.1, the contesting opposite party did not choose to file the written statement. Consequently, again an ex parte judgment was passed on 1.7.2000. From the limitation petition, it also reveals, the allegation of connivance of late Sarat Mohapatra, an employee of the College and defendant no.2 as raised in the appeal, remains contrary to the plea advanced for the reason that in paragraph-2 of the limitation petition clearly stated that the Advocate's Clerk was taking care of the case and again Sarat Mohapatra had already died in the year 2012. Facts involving consolidation proceeding and that the defendant no.1 remains unaware of the said

development are all developments in the year 1994 and has nothing to do to condone the delay taking place after 2000 when the ex parte judgment and decree were passed." *(Para 8)*

Case Laws Relied on and Referred to :-

1. Civil Appeal No.10581/2013 : Manoharan Vs. Sivarajan & Ors. Involving.
2. AIR 1987 SC 1353 : Collector (LA) Vs. Katiji.
3. AIR 1998 SC 3222 : N.Balakrishnan Vs. M.Mrishnamurthy.
4. AIR 2019 SC 492 : Ajit Kr. Bhuyan & Ors. Vs. Debajit Das & Ors.
5. (2012)3 SCC 563 : Post Master General & Ors. Vs. Living Media India Ltd. & Anr.

For Petitioners : M/s. Dayananda Mohapatra, M.Mohapatra, G.R. Mohapatra & A.Dash
For OPP.Parties: M/s. D.N.Misra, S.C.Samantaray, S.K. Panda, U.K.Mishra & S.Swain

JUDGMENT Date of Hearing : 29.8.2019 : Judgment : 18.09.2019

BISWANATH RATH, J.

This is a Civil Revision Petition under Section 115 of the Code of Civil Procedure assailing the order dated 8.2.2018 (Annexure-4) passed by the District Judge, Puri thereby allowing an application under Section 5 of the Limitation Act involving R.F.A. No.31 of 2016 entertaining an Appeal filed after almost one and half decade.

2. Short background involving the case is that parties involved herein entered into a suit for declaration of the gift deed executed by Chandra Sekhar Samantasinghar, defendant no.2 in favour of the Alarnath Dhanda Mulaka Mahavidyalaya, defendant no.1 on 4.1.1978 as void and illegal and also for declaration that the suit land is the joint family property of the plaintiffs and defendant no.2 with award of cost. The suit was registered as Title Suit No.159 of 1989. Brief fact further discloses that even in spite of sufficiency of notice, though the contesting defendant no.1, Secretary-cum-Principal of the College appeared through a Counsel but however, chose not to file written statement and thus the suit was set ex parte on 17.8.1992. Whereafter defendant no.1 filed a Misc. Case under Order 9 Rule 13 of C.P.C. to set aside the ex parte judgment and decree, which was allowed by order dated 24.4.1997. It appears, even after the ex parte decree was recalled on allowing the Misc. Case under Order 9 Rule 13 of C.P.C., the contesting defendant did not prefer to file written statement in spite of repeated adjournments. The trial court finding total non-cooperation of the contesting defendant remained constraint to dispose of the Title Suit ultimately, vide judgment dated 1.7.2000 by allowing the suit. It is after about 15 years 7

months and 25 days, a regular First Appeal was filed along with an application for condonation of delay under Section 5 of the Limitation Act. Defendant no.3 being appellant filed the Appeal. Respondent Nos.1, 2, 4 to 7, 10 & 11 filed objection to the petition for condonation of delay and contended that the appellant has not disclosed sufficient reason to condone the delay. The contesting respondents also pleaded that looking to the conduct of defendant no.1 even after the judgment and decree was set ex parte, not caring to file written statement to contest the suit and filing a regular Appeal after long 15 years 7 months and odd days, there is serious and deliberate neglect by defendant no.1 in conducting the case. Looking to the nature of dispute, it cannot be believed that defendant no.1 can remain so callous in taking up such an important issue and thus the respondents prayed the lower appellate court for dismissing the Section 5 application and thereby also dismissing the First Appeal on the ground of limitation to at least give rest to the judgment and decree passed therein about 15 years back. The application under Section 5 of the Limitation Act was, however, allowed. Hence the Civil Revision Petition involving the impugned order of the lower appellate court in allowing the application under Section 5 of the Limitation Act with such huge delay.

3. Sri D.Mohapatra, learned counsel for the petitioners taking this Court to the objection against the Section 5 application and the pleadings taken note hereinabove contended that looking to the conduct of the parties at the first instance not caring in filing written statement in spite of sufficiency of notice and appearance therein, even after ex parte judgment and decree have been set aside, this defendant even did not choose to contest the matter by filing written statement compelling the trial court to conclude the suit proceeding and deciding only on the basis of plaint averment and evidence as available. Taking this Court to the grounds taken in the Section 5 application, Sri Mohapatra, learned counsel for the petitioners taking to the grounds and the factual background involved herein submitted that the O.P., i.e. defendant no.1, being an educational institution having the Principal as the Secretary, more particularly shifting the burden to the poor Clerk involving the Institution for not bringing to the notice of the Head of the Authority the development involving the suit remained improper and unacceptable. So far as the allegation of defendant no.1 is concerned, there was connivance between the staff of the College so also the plaintiffs claimed to be concocted and there is no evidence to show that the limitation petition was filed. Sri Mohapatra, learned counsel for the petitioners further contended that for the

limitation petition filed with affidavit and the serious objection by the plaintiffs, the contesting O.P. therein, for the interest of justice, burden of proving through evidence to condone such delay ought to have been shifted to the defendant no.1, the petitioner therein. Taking this Court to the decisions of the Hon'ble apex Court in 2012(3) SCC 563, Sri Mohapatra, learned counsel for the petitioners attempting to satisfy the contention raised therein by the petitioners submitted that the impugned decision also remained otherwise contrary to the legal position of the country.

4. Sri S.C.Samantray, learned counsel for the contesting O.P., on the other hand, taking this Court to the development involving the ex parte judgment and recalling the ex parte judgment and decree filing of Appeal along with the application for condonation of delay, the provision at Section 5 of the Limitation Act read with Section-17(b)(c)(d) read with Article 123 of the Act along with decisions involving ***Manoharan vrs. Sivarajan & others*** involving Civil Appeal No.10581/2013, ***Collector (LA) vrs. Katiji,*** AIR 1987 SC 1353, ***N.Balakrishnan vrs. M.Mrishnamurthy,*** AIR 1998 SC 3222 and ***Ajit Kr. Bhuyan & others vrs. Debajit Das & others,*** AIR 2019 SC 492, contended that for the settled position of law through above decisions, the observation and finding of the trial court remained correct and therefore, prayed for rejection of the Civil Revision Petition thereby confirming the impugned order.

5. Taking into account the rival contentions of the parties, this Court finds, admittedly the suit was filed in the year 1989 with contest of O.P.1. For non-cooperation and non-filing of the written statement, the trial court was constrained to close the suit by way of ex parte judgment and decree on 17.8.1992. However, consequent upon an application under Order 9 Rule 13 of C.P.C., the ex parte judgment and decree were set aside on 24.4.1997. From the factual narrations and facts borne in the application involved herein, this Court finds, in spite of restoration of T.S. No.159/1989 on setting aside of the ex parte judgment and decree involved therein, the defendant, i.e., present O.P.1 did not file written statement and did not also contest the suit, resultantly the matter again got closed with an ex parte judgment dated 1.7.2000. This Court here observes, O.P.1 is an Institution and not only that being an Educational Institution also represented through the Managing Committee of intellectuals and an educated Principal involved therein. Despite all resources, no concrete step was taken by the O.P.-Institution to see disposal of the suit on contest even in spite of recalling of the ex parte judgment and decree on allowing the application under Order 9 Rule 13 of

C.P.C. This Court further finds, even though the ex parte judgment involving the Title Suit was passed on 1.7.2000, it is strange to note that the Educational Institution involved herein did not take any interest in knowing the outcome of the Suit for more than fifteen years and ultimately after fifteen years and seven months filed the appeal along with an application under Section 5 of the Limitation Act for condoning such huge delay involving filing of the regular First Appeal. Going through the Section 5 application, this Court again finds, filing the Section 5 application, the O.P.1-Educational Institution has simply pleaded that there was connivance in between the Head-Clerk of the College and the plaintiffs. There has been use of influence by one Chakradhar Samantsinghar and his brother and sons and all of them have connived to see that the matter is kept away from the Management or the Principal of the College. Further a plea was also taken that the Principal since was not well-versed with litigation, he could not be in a position to take care of the limitation. All these pleas appeared to be taking place before the ex parte judgment was passed for the second time. So far as the delay in between the subsequent ex parte judgment and decree and filing of appeal, as stated, in the subsequent portion of paragraph-4 of the petition under Section 5 of Limitation Act at page-27 of the brief, O.P.-1-Institution has taken the plea that while on behalf of the College an attempt was made to construct a mini stadium over a plot by the side of the suit land on 10.2.2016, the present petitioners along with some antisocials came in a body to the spot and threatened the present Principal-cum-Secretary and the staff of the College on the pretext of they are having an ex parte judgment and decree dated 1.7.2000 in their favour. On this plea, this Court observes, in the event there was any threatening by the plaintiffs and antisocial, nothing prevented the Principal or the staff of the College to at least lodge an F.I.R. to that effect. Further for its own saying that the attempt for construction since was undertaken over a different plot therein the suit plot there cannot be any occasion for anybody opposing the same.

6. Reading the averments made in paragraph-3 of the limitation petition, this Court finds, explanations whatsoever have been given in paragraph-3 are all previous to ex parte decree and the only explanation on delay in between the subsequent to ex parte decree and the filing of appeal is the only incident taking place on 10.2.2016, which is admittedly after fifteen years and some months. This Court going through the observations of the lower appellate court finds, the lower appellate court has misunderstood the explanation on delay in the limitation application made in paragraph-3 of the said petition,

which incident had all taken place previous to the subsequent ex parte judgment and decree involving the suit involved herein.

7. Further looking to the discussions on the decisions at the instance of the plaintiffs, vide 1985 (2) OLR 96, 2012(1) CLR SC 799, 2013(1) CLR SC 957 & 2010(2) OLR SC 212, this Court finds, even though all the decisions supported the case of the plaintiffs, the present petitioners, it appears, the lower appellate court has misapplied the decisions indicated herein above. Further looking to the decisions cited by the O.P.1, the appellant therein, 2014 SAR (Civil) 20, it appears, for the answer to point nos.1 & 2 being vital, the Hon'ble apex Court was pleased to answer the point no.2 in favour of the petitioners therein thereby condoning the delay of three years, which decision is absolutely not applicable to the case at hand that too a case instituted long after fifteen years. Thus there appears, there is wrong application of the said judgment to the case of O.P.1 even coming to the decisions cited by O.P.1 in AIR 1987 SC 1353 is concerned, this decision based on an observation of the Hon'ble apex Court that the State, which represents the collective cause of the community, does not deserve a litigant-non-grate status, which position not only has been changed in the meantime because of the decision in the case of ***Post Master General & others vrs. Living Media India Ltd. & another,*** reported in (2012)3 SCC 563, but for the status to O.P.1, this decision does not also not apply to the case at hand. Similarly, the decision, vide AIR 1998 SC 3222 is a case of condonation of delay of two years and six months, whereas the case at hand is a case with delay of fifteen years seven months and odd days. So far as the decision in AIR 2019 SC 492 is concerned, this is a case where the Hon'ble apex Court condoned the delay on the premises that the judgment and decree have been obtained therein by applying fraud, which again is not the case at hand. So far as the decision in 1995 (6) SCC 614 is concerned, this is a decision of the Hon'ble apex Court involving condonation of delay but institution of the litigation on being directed by the Hon'ble apex Court, which is also not the case at hand. For finding the decisions cited by the petitioners supporting the case of the petitioners and opposing the impugned judgment, further for there being no explanation at all for filing the appeal after the delay of fifteen years seven months and odd days and there being no explanation at all on the delay from the subsequent ex parte decree till filing of the appeal, this Court finds, there is no proper consideration of the limitation aspect by the lower appellate court. This Court further observes, for the judgment and decree obtained in the year 2000 and for passage of more than fifteen years of time, the position involving the suit for the judgment and decree has been settled and in the event such huge unexplained delay is entertained, this will be simply

unsettling the settled position taking place one and half decade back. For the Post Master General case has an application to the case hand, this Court feels it appropriate to take note of paragraph-29 of the decision in Post Master General (supra), which is held as follows :-

> "29. In our view, it is the right time to inform all the Government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The Government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the Government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few."

8. The petition for condonation of delay in Paragraph-2 clearly indicates in the year 1992, the Principal-cum-Secretary came to know about the ex parte decree and thus filed Misc. Case under Order 9 Rule 13 of C.P.C. for setting aside the ex parte judgment and decree, which application was allowed on 2.4.1997 and the case was further posted for further proceeding. Further, the order sheet at page-16 at Annexure-1 also makes it apparent that the contesting opposite party was provided with sufficient opportunity to file written statement in spite of last chance being provided on 3.10.1997 to file the written statement on 29.10.1997, defendant no.1, the contesting opposite party did not choose to file the written statement. Consequently, again an ex parte judgment was passed on 1.7.2000. From the limitation petition, it also reveals, the allegation of connivance of late Sarat Mohapatra, an employee of the College and defendant no.2 as raised in the appeal, remains contrary to the plea advanced for the reason that in paragraph-2 of the limitation petition clearly stated that the Advocate's Clerk was taking care of the case and again Sarat Mohapatra had already died in the year 2012. Facts involving consolidation proceeding and that the defendant no.1 remains unaware of the said development are all developments in the year 1994 and has nothing to do to condone the delay taking place after 2000 when the ex parte judgment and decree were passed.

In the circumstance, this Court finds, the appellant, i.e., defendant no.1 failed to establish the factum of due diligence in explaining the delay of more than fifteen years and seven months.

9. In the circumstance, this Court interfering with the impugned order at Annexure-4 involving the application under Section 5 of the Limitation Act involving R.F.A. No.31/2016 sets aside the same. As a consequence, R.F.A. No.31/2016 on the file of the learned District Judge, Puri must also fail.

10. The Civil Revision Petition succeeds. However, there is no order as to cost.

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2019 (III) ILR - CUT- 553

S. K. SAHOO, J.

CRIMINAL APPEAL NO. 481 OF 2012

BUDHA @ SUKRU @ SAMANTA KANHAR ……Appellant

.Vs.

STATE OF ODISHA …….Respondent

(A) INDIAN PENAL CODE, 1860 – Section 376 and 417 – Offence under – Conviction – Accused kept physical relationship with victim and promised to marry her – Victim became pregnant – Consequent upon refusal by the accused to marry, FIR was lodged – Plea of delay – Whether can be accepted? – Held, No.

"Law is well settled that delay in lodging the F.I.R. in an offence of rape is a normal phenomenon as the F.I.R. is lodged after deliberation and consultation among the family members as it is a question of prestige of the family so also the future of the victim. It takes some time to overcome the trauma suffered, the agony and anguish that create the turbulence in the mind of the victim, to muster the courage to expose one in a conservative social media, to acquire the psychological inner strength to undertake a legal battle against the culprit. When the victim herself has come forward with an explanation for not informing the family members about the incident as she was given assurance of marriage by the appellant, I find the explanation to be satisfactory. Therefore, the first contention of the learned counsel for the appellant that on account of delay in lodging the F.I.R., the prosecution case should be viewed with suspicion cannot be accepted." *(Para 8)*

(B) INDIAN PENAL CODE, 1860 – Section 376 and 417 – Offence under – Conviction – Accused kept physical relationship with victim and promised to marry her – Victim is a minor – Plea that she had consent – What is the effect of consent? – Indicated.

"Clause sixthly of section 375 of the Indian Penal Code, as it was before the Criminal Law (Amendment) Act, 2013 indicated that if a man commits sexual intercourse with a woman, with or without her consent, when she is under sixteen years of age, it amounts to rape. Therefore, when the victim is less than sixteen years of age, her consent would be of no consequence. In view of the foregoing discussion, since I have held the age of the victim to be below sixteen years, the question of her being a consenting party cannot be taken into ccount.

Taking into account the clinching evidence of the victim and corroborating ocular and medical evidence on record and that the appellant confessed about his guilt before the villagers, I am of the humble view that the prosecution has successfully established the charge under section 376 of the Indian Penal Code against the appellant beyond all reasonable doubt." *(Para 9)*

Case Laws Relied on and Referred to :-

1. (2018) 69 OCR 622 : Litu Behera @ Jaga . Vs. State of Odisha.

For Appellant : Mr. Bibhuti Ranjan Mohanty
For Respondent : Mr. Priyabrata Tripathy, Addl. Standing Counsel

JUDGMENT Date of Hearing and Judgment: 01.08.2019

S. K. SAHOO, J.

The appellant Budha @ Sukru @ Samanta Kanhar faced trial in the Court of learned Assistant Sessions Judge, Phulbani in S.T. No.19 of 2011 [S.T 136/2011 (DC)] for offences punishable under sections 376 and 417 of the Indian Penal Code.

The learned trial Court vide impugned judgment and order dated 28.06.2012 acquitted the appellant of the charge under section 417 of the Indian Penal Code but found him guilty under section 376 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.5000/- (rupees five thousand), in default, to undergo further rigorous imprisonment for period of three months.

2. The prosecution case, as per the first information report, in short, is that in one evening in the month of Bhadraba of the year 2010, while the victim was returning to her house after purchasing articles from the village shop, the appellant caught hold of her hand on the way near Gramasheni Thakurani and dragged her near a jack-fruit tree and forcibly raped her by closing her mouth by hand and told her to marry as he was loving her. Thereafter the appellant came to the house of the victim on many occasions in the night and use to lift the victim outside the house and commit sexual intercourse with her and on each occasion, he use to give assurance to the victim to marry her. Even after the victim became pregnant, the appellant continued to have sexual intercourse with her and told her not to get panic. For the last time, the appellant came to the house of the victim one evening while she was cooking and asked her regarding her well-being. When the news of the pregnancy of the victim spread in the village, her father, who was staying at Bhubaneswar was called. Prior to arrival of her father, the uncles of the victim asked the appellant regarding the incident, who confessed his guilt before them. After the arrival of the father of the victim, the appellant in presence of the village gentries also admitted to have impregnated the victim. On 11.04.2011 at 3.00 p.m., a meeting was convened by the members of women organization of village Malabhuin in Premajhari School, where the statement of the appellant and the victim were taken. The appellant confessed his guilt of having impregnated the victim. Since no final decision could be taken, the victim lodged the first information report before the Inspector in-charge of Khajuriapada Police Station.

P.W.16 Pithanath Majhi, Inspector-in-Charge of Khajuripada Police Station on receipt of the first information report from the victim, registered Khajuripada P.S. Case No.22 of 2011 on 13.04.2011 under sections 417/376 of the Indian Penal Code and he himself took up investigation of the case. During course of investigation, he examined the victim and other witnesses, visited the spot and prepared the spot map marked as Ext.8. The appellant was arrested on 13.04.2011 and he was sent for medical examination to District Headquarters Hospital, Phulbani and then forwarded to the Court on 14.04.2011. P.W.16 seized the sealed packet containing the vaginal swab, pubic hairs of the victim as per seizure list marked as Ext.9 and he also seized a sealed packet containing saliva, pubic hairs of the appellant under Ext.10. The victim was sent to the F.M.T. Department, M.K.C.G. Medical College and Hospital, Berhampur on 20.04.2011 for ossification test. The Investigating Officer received the medical examination report and ossification test report of the victim so also the medical examination report of the appellant and sent the exhibits in respect of the appellant and the victim to S.F.S.L., Bhubaneswar for chemical examination and on completion of investigation, he submitted charge sheet on 03.07.2011 against the appellant under sections 376/417 of the Indian Penal Code.

3. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned trial Court charged the appellant under sections 376/417 of the Indian Penal Code and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

4. In order to prove its case, the prosecution examined sixteen witnesses.

P.W.1 Sachindra Ghatal is a witness to the seizure of wearing apparels of the appellant as well as the victim as per seizure list Exts.1 and 2 respectively.

P.W.2 Basudeb Digal stated that a meeting was convened in the village when it was detected that the victim was carrying for seven months.

P.W.3 Mania Digal and P.W.4 Rekha Digal did not support the prosecution case and declared hostile by the prosecution.

P.W.5 Dr. Prakash Ch. Mishra was the Asst. Surgeon, District Headquarters Hospital, Phulbani and he examined the appellant on police requisition on 14.04.2011 and he proved his report marked as Ext.3.

P.W.6 Dr. Snehalata Mallick was the Asst. Surgeon, District Headquarters Hospital, Phulbani and she examined the victim on police requisition on 14.04.2011 and found the victim was pregnant and she referred the victim for ossification test to M.K.C.G. Medical College and Hospital and she proved the medical examination report marked as Ext.4.

P.W.7 is the victim who is also the informant in this case. She not only stated about the commission of rape by the appellant but also stated about her pregnancy and the meeting which was held in the village after her pregnancy was detected.

P.W.8 Biprabar Mallik stated about the confessional statement of the appellant being made in the meeting.

P.W.9 Subas Ghatal stated that a meeting was convened in the village school regarding the pregnancy of the victim, where the appellant told to take the victim but later on refused to take her.

P.W.10 Kantheswar Mallik apart from stating that a meeting was convened in the village school stated about the seizure of the school admission register pertaining to the victim as per seizure list Ext.6.

P.W.11 Ambaraj Mallik stated about the confessional statement of the appellant to have impregnated the victim but refused to accept her.

P.W.12 Lilabati Mallik is the mother of the victim, who stated about the pregnancy of the victim and also about the meeting which was held in that connection.

P.W.13 Prasant Mallik is the father of the victim. He also stated to have arranged the meeting in the village after getting information from P.W.12 relating to the pregnancy of the victim.

P.W.14 Sagar Dehury is the scribe of the first information report.

P.W.15 Dr. Sudeepa Das was the Asst. Professor, Department of F.M.T., M.K.C.G. Medical College, Berhampur, who examined the victim on police requisition and found her age to be more than fourteen years and less than sixteen years and she proved her report marked as Ext.7.

P.W.16 Pithanath Majhi was the Inspector-in-Charge, Khajuripada Police Station who is also the Investigating Officer in the case.

The prosecution exhibited as many as eleven documents. Exts.1, 2, 6, 9 and 10 are the seizure lists, Ext.3 is the medical examination report of appellant, Ext.4 is the medical examination report of victim, Ext.5 is the first information report, Ext.7 is the ossification test report, Ext.8 is the spot map and Ext.11 is the zimanama.

5. The defence plea of the appellant was one of denial and it is pleaded that a false case has been foisted against him. Two witnesses were examined on behalf of the defence.

D.W.1 Tulasa Mallik stated that the appellant had no relation with the victim and he did not admit regarding his complicity in the pregnancy of the victim in the meeting.

D.W.2 is the appellant himself, who stated that in the meeting, he told that he had no affairs with the victim but some co-villagers, namely, Akhaya Mallick and Kanhei Kanhar had affairs with the victim.

6. The learned trial Court after assessing the evidence on record, accepted the version of the victim and taking into account the corroborative oral and medical evidence, though acquitted the appellant of the charge under section 417 of the Indian Penal Code but found him guilty under section 376 of the Indian Penal Code.

7. Mr. Bibhuti Ranjan Mohanty, learned counsel appearing for the appellant while challenging the impugned judgment and order of conviction contended that though the incident in question took place sometimes in the month of September 2010 but the victim disclosed about the occurrence after seven months and that is how the first information report was lodged on 13.04.2011 and the prosecution has not satisfactorily explained the delay in lodging the first information report. It is further contended that there is no clinching material to prove the age of the victim at the time of occurrence and the manner in which the victim remained silent in spite of repeated cohabitation with the appellant, if the age of the victim is held to be more than sixteen years then it can be said that she was a consenting party and therefore, the conviction of the appellant under section 376 of the Indian Penal Code cannot be sustained in the eye of law.

Mr. Priyabrata Tripathy, learned Additional Standing Counsel, on the other hand, submitted that delay in lodging the first information report in a case of rape itself cannot be a ground to hold the entire prosecution case suspicious. He argued that the victim remained silent an account of assurance of marriage given by the appellant and when the victim disclosed about her pregnancy, a meeting was convened in the village and when the matter could not be sorted out in the village level, the first information report was lodged. It was argued that the factum of pregnancy of the victim is corroborated by the medical evidence and there is no infirmity in the evidence of the victim and therefore, the learned trial Court has rightly convicted the appellant under section 376 of the Indian Penal Code.

8. Adverting to the first contention raised by the learned counsel for the appellant, it appears that the victim, who has been examined as P.W.7, has categorically stated that the occurrence in question took place in the month of Bhadraba at about 8 p.m. in the year 2010. She stated that while she was returning from the shop, the appellant dragged her near a jack-fruit tree and when she shouted, the appellant gagged her mouth by his hand and committed rape. The appellant also told her not to disclose the matter in the house and he assured to marry her. The victim further stated that when she was carrying for seven months and her mother asked her about the incident, she disclosed the incident before her mother and then her mother called her uncles who enquired about the matter from the appellant, who confessed to have committed the crime. The victim further stated that a meeting was convened in the village where the appellant confessed his guilt but since the matter could not be finalized, she lodged the first information report.

In the cross-examination, the victim has stated nobody had knowledge about the incident till she carried for seven months. A suggestion was given to the victim that she had illicit relationship with Kanhei and Akhaya and that she falsely implicated the appellant to save them, but the victim denied to such suggestion. The victim has specifically stated that since the appellant assured to marry her, she did not disclose regarding the incident to anybody before lodging of the first information report. Nothing has been brought out in the cross examination to discard her evidence.

The mother of the victim having been examined as P.W.12 stated that in the month of April 2011, she came to know from the victim that she was pregnant and the appellant was responsible for that and accordingly, she intimated the same to the brothers of her husband and then they called the appellant to the house where the appellant confessed his guilt. P.W.12 further stated that her husband was staying at Bhubaneswar by then and after his arrival, when he came to know about the same, he went to the house of the appellant with others and after returning from the house of the appellant, he told that the appellant refused to accept the victim. The medical examination report of the victim vide Ext.4 indicates that the victim was pregnant.

Therefore, from the evidence of the victim and her mother, it is very clear that even though the occurrence in question took place in the month of Bhadraba of the year 2010 but since the appellant assured the victim to marry, she did not disclose about the incident to anybody and when she became pregnant for seven months, on being confronted by her mother, she disclosed about the incident and when it was confronted to the appellant by

the father of the victim and others, the appellant also confessed his guilt. A meeting was convened in the village over this issue whereafter the F.I.R. was lodged.

Law is well settled that delay in lodging the F.I.R. in an offence of rape is a normal phenomenon as the F.I.R. is lodged after deliberation and consultation among the family members as it is a question of prestige of the family so also the future of the victim. It takes some time to overcome the trauma suffered, the agony and anguish that create the turbulence in the mind of the victim, to muster the courage to expose one in a conservative social media, to acquire the psychological inner strength to undertake a legal battle against the culprit. When the victim herself has come forward with an explanation for not informing the family members about the incident as she was given assurance of marriage by the appellant, I find the explanation to be satisfactory. Therefore, the first contention of the learned counsel for the appellant that on account of delay in lodging the F.I.R., the prosecution case should be viewed with suspicion cannot be accepted.

9. Coming to the age of the victim, the victim has stated her age to be fifteen years at the time of her deposition, which was recorded on 13.08.2011. She stated that the occurrence took place in last Bhadraba of the year 2010. Nothing has been brought out in the cross-examination to challenge her age. No suggestion has even been given to the victim that she was more than sixteen years of age. The doctor who conducted ossification test of the victim has been examined as P.W.15 and she stated that on the basis of the physical findings, dental examination and development of secondary sexual characteristics and menstrual history and ossification test, she found the age of the victim to be more than fourteen years and less than sixteen years. The father of the victim on being examined as P.W.13 stated that he married since last eighteen years and four years after his marriage, the victim was born. The statement of the victim regarding her age therefore, gets corroboration not only from the evidence of her father (P.W.13) but also from the evidence of the doctor (P.W.15). Learned counsel for the appellant submitted that the mother of the victim being examined as P.W.12 stated that she had three sons and three daughters and she had married since last thirty years and the victim was born four years after her marriage. Relying on such statement made by P.W.12, it is contended that the victim's statement that her age was fourteen to fifteen years at the time of occurrence cannot be accepted. It appears that the age of P.W.12 was thirty five years when she deposed in Court on 14.09.2011 and therefore, her statement that she married

thirty years back appears to be inadvertently made and on the basis of such statement, the unchallenged testimony of the victim, which is corroborated by the medical evidence as well as the evidence of her father cannot be brushed aside.

It further appears that the school admission register pertaining to the victim was seized under seizure list Ext.6 and the same was kept in the zima of the Headmaster of the School. Ext.6, which is a seizure list, also indicates that the date of birth of the victim as per the school admission register is 04.05.1996. Learned counsel for the appellant submitted that since the Headmaster or any teacher of the school where the victim was studying, has not been examined and the school admission register was not produced during trial and neither the victim nor the father of the victim or any of their family members stated about the actual date of birth of the victim, the entry relating to the date of birth as mentioned in the seizure list of the school admission register cannot be accepted.

Learned counsel for the appellant has relied upon a decision of this Court in the case of **Litu Behera @ Jaga -Vrs.- State of Odisha, reported in (2018) 69 Orissa Criminal Reports 622**, wherein it was held as follows :

> "x x x Neither the Headmaster nor any of the teachers of the school where the victim was prosecuting her studies was examined nor was the school admission register proved in the case. When there is no horoscope and birth certificate of the victim and the victim's father was an illiterate person and he had got the victim admitted in the school, it is not known on what basis the date of birth was entered in the school register. When the knowledge of the victim regarding her date of birth was on the basis of the school certificate which has not been produced in Court during trial and her father has not been examined and her mother was unable to say her date and year of birth, it is difficult to accept that the date of birth of the victim was on 02.06.1998 which is stated to have been mentioned in her school certificate x x x"

Even though the exact date of birth as mentioned in the seizure list of the school admission register cannot be taken into account on account of non-examination of the competent witnesses and non-production of the school admission register in the trial Court, but as already discussed above, in view of the statement of the victim, the medical examination report and the evidence of the father of the victim, it can be said that the prosecution has successfully proved that the victim was below sixteen years of age at the time of occurrence.

Clause sixthly of section 375 of the Indian Penal Code, as it was before the Criminal Law (Amendment) Act, 2013 indicated that if a man

commits sexual intercourse with a woman, with or without her consent, when she is under sixteen years of age, it amounts to rape. Therefore, when the victim is less than sixteen years of age, her consent would be of no consequence.

In view of the foregoing discussion, since I have held the age of the victim to be below sixteen years, the question of her being a consenting party cannot be taken into account. Taking into account the clinching evidence of the victim and corroborating ocular and medical evidence on record and that the appellant confessed about his guilt before the villagers, I am of the humble view that the prosecution has successfully established the charge under section 376 of the Indian Penal Code against the appellant beyond all reasonable doubt.

10. During the course of hearing, learned counsel for the State was asked to take instruction about the status of the victim. The Inspector in-charge of Khajuriapada Police Station has given his report dated 29.07.2019 wherein it is mentioned that after the victim became pregnant for seven months, she lodged the first information report and after two months, she gave birth to a male child and after two days, the male child expired and in the year 2015, the victim had married to another person and she is now blessed with two daughters. The statement of the victim in that respect has been annexed to that report.

Learned counsel for the appellant submitted that the appellant is in judicial custody since 14.04.2011 and he was never released on bail either during pendency of the trial or during pendency of this appeal and therefore, he has already undergone the substantive sentence of eight years and three months. It is further submitted that the appellant belongs to a tribal area and very poor and he was a young boy of twenty two years at the time of the alleged incident and there is no criminal antecedent against him and therefore, the substantive sentence be reduced to the period already undergone.

It is the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. In operating the sentence system correctly, the Court should be stern where it should be, and tempered with mercy where it warrants to be. The facts and circumstances of each case, the conduct of the accused, the impact of the crime on the society and all other attending circumstances are to be considered judiciously to impose a punishment befitting to the crime.

Considering the submission made by the learned counsel for the appellant and the sociological backdrop of the appellant and his age, while upholding the order of conviction of the appellant under section 376 of the Indian Penal Code, I reduce the substantive sentence from rigorous imprisonment for ten years to the period already undergone.

In view of the enactment of the Odisha Victim Compensation Scheme, 2012, keeping in view the age of the victim at the time of occurrence and the nature and gravity of the offence committed and the family background, I feel it necessary to recommend the case of the victim to District Legal Services Authority, Phulbani to examine the case of the victim after conducting the necessary enquiry in accordance with law for grant of compensation under the Scheme.

Since I have recommended the case of the victim for compensation, the sentence of fine with default clause as was imposed by the learned trial Court is hereby set aside. The appellant shall be released from jail custody forthwith, if his detention is not otherwise required in any other case

Subject to the modification of sentence, the Criminal Appeal is dismissed. Lower Court Records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

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2019 (III) ILR - CUT- 562

S. K. SAHOO, J.

CRLMC NO. 1108 OF 2018

RAMACHANDRA SAHOO .....Petitioner

.Vs.

STATE OF ODISHA .....Opp. Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent Power – Offence U/s.7 of the Essential Commodities Act & Order involved therein – Quashing of the trial on the ground of delay – Inordinate delay of 26 years in concluding the trial – Delay is not attributable to the petitioner – Delay not explained properly by the State – Denial of the right to speedy trial pleaded – Held, the proceeding against the petitioner pending in the learned trial court should be quashed.

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent Power – Quashing of the trial on the ground of delay in disposing the trial – Principles reiterated – Held, it is very clear that the delay which has occasioned by action or inaction of the State is one of the main features which is to be taken note by the court – A deliberate attempt to delay the trial in order to hamper the accused is weighed heavily against the prosecution in as much such delay violates the constitutional right to speedy trial of the accused – The court while deciding the case has to see whether there is unreasonable and unexplained delay which has resulted in causing serious prejudice to the accused – There is no dispute that there cannot be any straight jacket formula in a particular case to quash the criminal proceeding if the trial is not concluded within a particular time limit – The nature and gravity of the accusation, the qualitative and quantitative materials collected during the course of investigation, the conduct of the accused in causing the delay are also to be considered by the court.

Case Laws Relied on and Referred to :-

1. 2006 (II) OLR 67 : Maheswar Mohanty Vs. State of Orissa.
2. (2012) 53 OLR (SC) 428 : Ranjan Dwivedi Vs. C.B.I. through the Director General
3. (2010) 47 OCR (SC) 650 : Sajjan Kumar Vs. Central Bureau of Investigation.
4. AIR 2002 SC 1856 : P. Ramachandra Rao Vs. State of Karnataka.
5. 1990(1) SCALE 63 : Mangilal Vyas Vs. State of Rajasthan.
6. AIR 2009 SCC 1822 : Vakil Prasad Singh Vs. State of Bihar.
7. 2010 (1) RCR (Criminal) 566 : Dalip Singh alias Deepa Vs. State of Punjab.
8. (2013) 4 SCC 642 : Niranjan Hemchandra Sashittal Vs. State of Maharashtra.

For Petitioner : Mr.A.Tripathy

For Opp. Party : Mr. Prem Kumar Pattnaik, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment: 26.08.2019

S. K. SAHOO, J.

The petitioner Rama Chandra Behera has filed this application under section 482 of the Cr.P.C. seeking to set aside the order dated 21.12.2017 passed by the learned Sessions Judge, Ganjam, Berhampur in Criminal Revision Petition No.11 of 2017 confirming the order dated 20.03.2017 passed by the learned S.D.J.M., Berhampur in 2(c) CC Case No.09 of 2013 wherein the learned Magistrate rejected the prayer of the petitioner to dismiss the proceeding as not maintainable and to award compensation in his favour.

2. The main contention raised by Mr. A. Tripathy, learned counsel for the petitioner is that the criminal proceeding has been initiated in the year

1993 and cognizance of offence was taken on 29.03.1993 and in the meantime twenty six years have passed and the delay in disposal of the criminal case is in no way attributable to the petitioner. He further submitted that even though the Criminal Revision No.33 of 1996 was dismissed by this Court on 15.05.1998 and simultaneously the lower court records were sent back, but till 09.09.2016 no step was taken to dispose of the case. It is further contended that after receipt of the order dated 27.09.2016 of the learned First Addl. Sessions Judge, Berhampur, the learned S.D.J.M., Berhampur received the case records on 27.09.2016 and till today there is no progress in the trial even though no stay order is operating. It is argued that since the petitioner, who is an aged person, has been deprived of his fundamental right to speedy trial and no useful purpose would be served in allowing the criminal proceeding to continue against the petitioner, this Court should quash the proceeding invoking the inherent powers.

3. Mr. Prem Kumar Pattnaik, learned Addl. Government Advocate for the State, on the other hand, contended that the delay cannot be a sole factor to quash the criminal proceeding in all the cases and the allegations against the petitioner are very serious in nature and he is facing prosecution under section 7 of the Essential Commodities Act, 1955 for violating Clauses 9(1) and 14 of the Orissa Rice and Paddy Procurement (Levy and Restriction of Sale and Movement) Order, 1982 (hereafter '1982 Order') and sufficient materials are available on record against the petitioner. He further submitted that it cannot be said that the petitioner has not contributed to the delay in the proceeding and it also appears that the petitioner has waited for so many years to take advantage of the delay in disposal of the case and therefore, it is not a fit case to invoke the inherent powers to quash the criminal proceeding.

4. Adverting to the contentions raised by the learned counsel for the respective parties and on perusal of the materials available on record, it appears that on receipt of a complaint/ prosecution report under section 7 of the Essential Commodities Act, 1955 for violation of Clauses 9(1) and 14 of the 1982 Order, 2(c) CC Case No. 09 of 1993 was instituted on 29.03.1993 before the learned Special Judge, Ganjam, Berhampur as it was then a Special Court under the Essential Commodities Act. On the date of registration of the case, cognizance of the offence was taken. After particulars of the offence were explained to the petitioner, the record was posted for trial. The petitioner filed petitions under sections 227 and 245(2) of Cr.P.C. and those petitions were rejected on 06.10.1994. Being aggrieved, the petitioner

moved this Court in Criminal Revision No. 640 of 1994. Since this Court did not entertain the revision and dismissed the revision, the petitioner moved the Hon'ble Apex Court in Special Leave to Appeal (Cri) No.600 of 1995 and the Hon'ble Supreme Court while disposing of the Special Leave Petition granted liberty to the petitioner to raise the plea of limitation at the appropriate time before the learned trial Court. Pursuant to such order, the petitioner filed a petition to discharge him in the criminal proceeding and the learned Special Judge by order dated 16.12.1995 rejected the said petition and posted the case for hearing and also by order dated 20.01.1996 transferred the case to the file of learned First Additional Sessions Judge-cum- Special Judge, Berhampur for trial and disposal in accordance with law. Challenging such order, the petitioner moved this Court in Criminal Revision No.33 of 1996 and this Court stayed the further proceeding of the case. However, while the matter was pending with the learned First Addl. Sessions Judge-cum- Special Judge, Berhampur, this Court by order dated 15.05.1998 dismissed the revision petition and sent back the lower Court records. However, the learned First Addl. Sessions Judge-cum- Special Judge, Berhampur with whom the case was pending, transferred the case to the Court of learned S.D.J.M., Berhampur for trial by order dated 27.09.2016 as the said Court had no power to try the case as a Special Court under the Essential Commodities (Special Provisions) Act, 1981. On perusal of the lower Court records, it appears that after remand of the case to the learned trial Court, the record was misplaced and the learned First Addl. Sessions Judge, Berhampur vide order dated 09.09.2016 directed to trace out the record and to open a part file. Thereafter, vide order dated 16.09.2016, it is mentioned that the records of 2(c) CC Case No. 9 of 1993 is traced out and then by order dated 27.09.2016 the learned First Addl. Sessions Judge, Berhampur transferred the case to the Court of learned S.D.J.M., Berhampur as it had no power to act as a Special Court to try the offence under the Essential Commodities Act. Thus, it is clear that after the matter was remanded to the learned trial Court by this Court vide order dated 15.05.1998 till 09.09.2016, no order has been passed in the said case. It further appears that even after receipt of the case records on 27.09.2016 by the learned S.D.J.M., Berhampur, there is no progress of the case and the petitioner has not contributed to the delay.

5. Learned counsel for the petitioner relied upon the decision of this Court in the case of **Maheswar Mohanty -Vrs.- State of Orissa reported in 2006 (II) Orissa Law Reviews 67**, wherein this Court has held that the two

criminal cases were registered relating to the occurrences which occurred twenty two years back and no fruitful purpose would be served in keeping the criminal cases pending and accordingly, quashed the proceeding of the two cases.

Learned Addl. Govt. Advocate for the State on the other hand placed reliance in the case of **Ranjan Dwivedi -Vrs.- C.B.I. through the Director General reported in (2012) 53 Orissa Criminal Reports (SC) 428**, wherein it is held as follows:-

> "20. Second limb of the argument of the learned Senior Counsel Shri Andhyarujina is that the failure of completion of trial has not only caused great prejudice to the petitioners but also their family members. Presumptive prejudice is not an alone dispositive of speedy trial claim and must be balanced against other factors. The accused has the burden to make some showing of prejudice, although a showing of actual prejudice is not required. When the accused makes a prima-facie showing of prejudice, the burden shifts on the prosecution to show that the accused suffered no serious prejudice. The question of how great lapse it is, consistent with the guarantee of a speedy trial, will depend on the facts and circumstances of each case. There is no basis for holding that the right to speedy trial can be quantified into specified number of days, months or years. The mere passage of time is not sufficient to establish denial of a right to a speedy trial, but a lengthy delay, which is presumptively prejudicial, triggers the examination of other factors to determine whether the rights have been violated.
>
> 21. The length of the delay is not sufficient in itself to warrant a finding that the accused was deprived of the right to a speedy trial. Rather, it is only one of the factors to be considered, and must be weighed against other factors. Moreover, among factors to be considered in determining whether the right to speedy trial of the accused is violated, the length of delay is least conclusive. While there is authority that even very lengthy delays do not give rise to a per se conclusion of violation of constitutional rights, there is also authority that long enough delay could constitute per se violation of right to speedy trial. In our considered view, the delay tolerated varies with the complexity of the case, the manner of proof as well as gravity of the alleged crime. This, again, depends on case to case basis. There cannot be universal rule in this regard. It is a balancing process while determining as to whether the accused's right to speedy trial has been violated or not. The length of delay in and itself, is not a weighty factor.
>
> 22. In the present case, the delay is occasional by exceptional circumstances. It may not be due to failure of the prosecution or by the systemic failure but we can only say that there is a good cause for the failure to complete the trial and in our view, such delay is not violative of the right of the accused for speedy trial.
>
> 23. Prescribing a time limit for the Trial Court to terminate the proceedings or, at the end thereof, to acquit or discharge the accused in all cases will amount to legislation, which cannot be done by judicial directives within the arena of judicial

law making power available to constitutional courts; however, liberally the courts may interpret Articles 21, 32, 141 and 142. (**Ramchandra Rao P. -Vrs.- State of Karnataka, (2002) 4 SCC 578**). The Seven Judges Bench overruled four earlier decision of this Court on this point: **Raj Deo (II) -Vrs.- State of Bihar, (1999) 7 SCC 604, Raj Deo Sharma -Vrs.- State of Bihar, (1998) 7 SCC 507; Common Cause, A Registered Society -Vrs.- Union of India, (1996) 4 SCC 33**. The time limit in these four cases was contrary to the observations of the Five Judges Bench in *A.R. Antulay* (Supra). The Seven Judges Bench in **Ramchandra Rao P. -Vrs.- State of Karnataka**, (Supra) has been followed in **State through CBI -Vrs.- Dr. Narayan Waman Nerukar, (2002) 7 SCC 6 and State of Rajasthan -Vrs.- Ikbal Hussen, (2004) 12 SCC 499**. It was further observed that it is neither advisable, feasible nor judicially permissible to prescribe an outer limit for the conclusion of all criminal proceedings. It is for the criminal Court to exercise powers under sections 258, 309 and 311 of the Cr.P.C. to effectuate the right to a speedy trial. In an appropriate case, directions from the High Court under Section 482 Cr.P.C. and Article 226/227 can be invoked to seek appropriate relief.

24. In view of the settled position of law and particularly in the facts of the present case, we are not in agreement with the submissions made by learned Senior Counsel, Shri. T.R. Andhyarujina. Before we conclude, we intend to say, particularly, looking into long adjournments sought by the accused persons, who are seven in number, that accused cannot take advantage or the benefit of the right of speedy trial by causing the delay and then use that delay in order to assert their rights."

He further placed reliance in case of **Sajjan Kumar -Vrs.- Central Bureau of Investigation reported in (2010) 47 Orissa Criminal Reports (SC) 650**, wherein it is held as follows:-

"24. Though delay is also a relevant factor and every accused is entitled to speedy justice in view of Article 21 of the Constitution, ultimately it depends upon various factors/reasons and materials placed by the prosecution. Though Mr. Lalit heavily relied on paragraph 20 of the decision of this Court in *Vakil Prasad Singh's case* (supra), the learned Additional Solicitor General, by drawing our attention to the subsequent paragraphs i.e., 21, 23, 24, 27 and 29 pointed out that the principles enunciated in *A.R. Antulay's case* (supra) are only illustrative and merely because of long delay the case of the prosecution cannot be closed.

25. Mr. Dave, learned senior counsel appearing for the intervenor has pointed out that in criminal justice "a crime never dies" for which he relied on the decision of this Court in **Japani Sahoo v. Chandra Sekhar Mohanty, (2007) 7 SCC 394**. In para-14, C.K. Thakker, J. speaking for the Bench has observed:

"It is settled law that a criminal offence is considered as a wrong against the State and the society even though it has been committed against an individual. Normally, in serious offences, prosecution is launched by the State and a Court of law has no power to throw away prosecution solely on the ground of delay."

In the case on hand, though delay may be a relevant ground, in the light of the materials which are available before the Court through CBI, without testing the same at the trial, the proceedings cannot be quashed merely on the ground of delay.

As stated earlier, those materials have to be tested in the context of prejudice to the accused only at the trial."

He further placed reliance in case of **P. Ramachandra Rao -Vrs.- State of Karnataka reported in AIR 2002 Supreme Court 1856**, wherein it is held as follows:-

"30. For all the foregoing reasons, we are of the opinion that in **Common Cause case (I) AIR 1996 SC 1619** as modified in **Common Cause (II) AIR 1997 SC 1539** and **Raj Deo Sharma (I) and (II) AIR 1999 SC 3524**, the Court could not have prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceeding cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. In conclusion we hold:-

(1) The dictum in A.R. Antulay's case is correct and still holds the field.

(2) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in A.R. Antulay's case, adequately take care of right to speedy trial. We uphold and re-affirm the said propositions.

(3) The guidelines laid down in A.R. Antulay's case are not exhaustive but only illustrative. They are not intended to operate as hard and fast rules or to be applied like a strait-jacket formula. Their applicability would depend on the fact-situation of each case. It is difficult to foresee all situations and no generalization can be made.

(4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in Common Cause (I), Raj Deo Sharma (I) and Raj Deo Sharma (II) could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in common Cause Case (I), Raj Deo Sharma case (I) and (II) . At the most the periods of time prescribed in those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in A.R. Antulay's case and decided whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any Court as a bar to further continuance of the trial or proceedings and a mandatorily obliging the Court of terminate the same and acquit or discharge the accused.

(5) The Criminal Courts should exercise their available powers, such as those under Sections 309, 311 and 258 of Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be better protector of such right than any guidelines. In appropriate cases jurisdiction of High Court under Section 482 of Cr.P.C. and Articles 226 and 227 of Constitution can be invoked seeking appropriate relief or suitable directions.

(6) This is an appropriate occasion to remind the Union of India and the State Governments of their constitutional obligation to strengthen the judiciary-quantitatively and qualitatively-by providing requisite funds, manpower and infrastructure. We hope and trust that the Governments shall act."

He further placed reliance in case of **Mangilal Vyas -Vrs.- State of Rajasthan reported in 1990(1) SCALE 63**, wherein it is held as follows:-

"3. The learned Counsel for the appellant submitted that the appellant had been prosecuted in 11 criminal cases for offences under section 408 or 409 IPC, that the proceedings are pending for over 25 years, the prolongation of the trial without any fault on the part of the appellant amounts to persecution of the appellant and, therefore, the proceedings should have been quashed by the High Court. It is maintained that in spite of passage of several years, no evidence worth the name has been recorded by the prosecutor. We have been taken though the various steps taken in each case and the nature of the evidence purported to have been collected.

4. We do not consider it necessary to narrate the detailed facts leading to the present appeals except to state that the trial in the pending cases have been unduly protracted due to various causes. It is no doubt regrettable feature, but having regard to the nature of the allegations made and the availability of evidence in support of the prosecution, it is not expedient to terminate the proceedings at this stage, on account of lapse of time alone, by invoking the inherent power of the Court. We think that the circumstances of the case only call for appropriate directions for the expeditious disposal of the pending proceedings and the law has to be allowed to take its own course to prevent miscarriage of justice."

He further placed reliance in case of **Vakil Prasad Singh -Vrs.- State of Bihar reported in AIR 2009 Supreme Court Cases 1822**, wherein it is held as follows:-

"9. Before adverting to the core issue, viz. whether under the given circumstances the appellant was entitled to approach the High Court for getting the entire criminal proceedings against him quashed, it would be appropriate to notice the circumstances and the parameters enunciated and reiterated by this Court in a series of decisions under which the High Court can exercise its inherent powers under section 482 Cr.P.C. to prevent abuse of process of any Court or otherwise to secure the ends of justice. The power possessed by the High Court under the said provision is undoubtedly very wide but it has to be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the courts exist. The inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. It is trite to state that the said powers have to be exercised sparingly and with circumspection only where the Court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the Court or that the ends of justice require that the proceedings ought to be quashed.

x x x x x

13. The exposition of Article 21 in Hussainara Khatoon's case (supra) was exhaustively considered afresh by the Constitution Bench in **Abdul Rehman Antulay and Ors. v. R.S. Nayak and Anr. 1992 AIR SCW 1872**. Referring to a number of decisions of this Court and the American precedents on the Sixth Amendment of their Constitution, making the right to a speedy and public trial a constitutional guarantee, the Court formulated as many as eleven propositions with a note of caution that these were not exhaustive and were meant only to serve as guidelines. For the sake of brevity, we do not propose to reproduce all the said propositions and it would suffice to note the gist thereof. These are: (i) fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily; (ii) right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial; (iii) in every case where the speedy trial is alleged to have been infringed, the first question to be put and answered is - who is responsible for the delay?; (iv) while determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the work-load of the Court concerned, prevailing local conditions and so on-what is called, the systemic delays; (v) each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case; (vi) ultimately, the Court has to balance and weigh several relevant factors- 'balancing test' or 'balancing process' -and determine in each case whether the right to speedy trial has been denied; (vii) Ordinarily speaking, where the Court comes to a conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open and having regard to the nature of offence and other circumstances when the Court feels that quashing of proceedings cannot be in the interest of justice, it is open to the Court to make appropriate orders, including fixing the period for completion of trial; (viii) it is neither advisable nor feasible to prescribe any outer time-limit for conclusion of all criminal proceedings. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the Court to weigh all the circumstances of a given case before pronouncing upon the complaint; (ix) an objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in the High Court must, however, be disposed of on a priority basis.

x x x x x

15. It is, therefore, well settled that the right to speedy trial in all criminal persecutions is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in Court but also includes within its

> sweep the preceding police investigations as well. The right to speedy trial extends equally to all criminal prosecutions and is not confined to any particular category of cases. In every case, where the right to speedy trial is alleged to have been infringed, the Court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case. Where the Court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the Court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the Court to make an appropriate order as it may deem just and equitable including fixation of time frame for conclusion of trial."

He further placed reliance on a Full Bench decision of Punjab and Haryana High Court in the case of **Dalip Singh alias Deepa -Vrs.- State of Punjab reported in 2010 (1) RCR (Criminal) 566**, wherein it is held as follows:-

> "26. Therefore, in every case where the right to speedy trial is alleged to have been infringed, the first question to be necessarily put is: who is responsible for the delay? Besides, each and every delay does not necessarily prejudice the case. Some delays may indeed work to the advantage of the accused. Inordinate long delay may be taken as presumptive proof of prejudice. In this context, incarceration of the accused will also be a relevant fact. Prosecution should not be reduced to persecution. But when does prosecution become persecution, depends upon the facts of a given case. Ultimately, the Court has to balance and weigh the several relevant factors- through a `balancing test' or `balancing process' to determine in each case whether the right to speedy trial has been denied. It is neither advisable nor practical to fix any time-frame for trials. Any such rule is bound to be a qualified one. Such a rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution."

He further placed reliance in case of **Niranjan Hemchandra Sashittal -Vrs.- State of Maharashtra reported in (2013) 4 Supreme Court Cases 642**, wherein it is held as follows:-

> "24. It is to be kept in mind that on one hand, the right of the accused is to have a speedy trial and on the other, the quashment of the indictment or the acquittal or refusal for sending the matter for re-trial has to be weighed, regard being had to the impact of the crime on the society and the confidence of the people in the judicial system. There cannot be a mechanical approach. From the principles laid down in many an authority of this Court, it is clear as crystal that no time-limit can be stipulated for disposal of the criminal trial. The delay caused has to be weighed on the factual score, regard being had to the nature of the offence and the concept of social justice and the cry of the collective."

6. Therefore, in view of the citations placed by the learned counsel for both the sides, it is very clear that the delay which has occasioned by action or inaction of the State is one of the main features which are to be taken note

of by the Court. A deliberate attempt to delay the trial in order to hamper the accused is weighed heavily against the prosecution inasmuch as such delay violates the constitutional rights to speedy trial of the accused. The Court while deciding the case has to see whether there is unreasonable and unexplained delay which has resulted in causing serious prejudice to the accused. There is no dispute that there cannot be any straight jacket formula in a particular case to quash the criminal proceeding if the trial is not concluded within a particular time limit. The nature and gravity of the accusation, the qualitative and quantitative materials collected during course of investigation, the conduct of the accused in causing the delay are also to be considered by the Court.

Coming to the case in hand, on perusal of the materials available on record it appears that after dismissal of Criminal Revision No.33 of 1996 by this Court on 15.05.1998, the case records were sent back to the learned trial Court for disposal in accordance with law, but till 09.09.2016, i.e. for a period of more than eighteen years, the matter has not been taken up by the trial Court and no step has been taken to dispose of the case and for that the petitioner is no way responsible. Even after the case record was received by the learned S.D.J.M., Berhampur on 27.09.2016, there is no progress in the case and for that also the petitioner is not responsible. Merely because the petitioner challenged the proceeding in different Courts for some time, the entire period of delay cannot be weighed against him. The learned State Counsel has failed to offer any explanation for the unreasonable delay in the proceeding.

7. In view of the foregoing discussions and the exceptional circumstances in this case in favour of the petitioner, I am of the considered view that the petitioner has been deprived of his constitutional right of speedy trial guaranteed under Article 21 of the Constitution of India. The fact that he is in no way responsible for the inordinate delay caused in the proceeding and has suffered serious prejudice and therefore, in order to prevent miscarriage of justice and in the interest of justice, invoking my inherent powers under section 482 of Cr.P.C., I am of the view that the proceeding against the petitioner in connection with 2 (c) CC Case No.09 of 1993 pending on the file of S.D.J.M., Berhampur should be quashed.

Accordingly, the CRLMC application is allowed. The criminal proceeding in 2 (c) CC Case No.09 of 1993 pending on the file of S.D.J.M., Berhampur against the petitioner stands quashed.

2019 (III) ILR - CUT- 573

P. PATNAIK, J.

W.P.(C) NO.12305 OF 2010

ACHYUTANANDA ROUT .....Petitioner

.Vs.

CHIEF MANAGER, UNION BANK OF INDIA & ORS. .....Opp. Parties

(A) SERVICE LAW – Departmental Proceeding – Imposition of Punishment – Judicial Review – When can be permitted? – Indicated.

(B) SERVICE LAW – Departmental Proceeding – Imposition of penalty by disciplinary authority – Duty of appellate authority while confirming/dissenting the punishment – Discussed.

Case Laws Relied on and Referred to :-

1. AIR 1987 SC 2386 : Ranjit Thakur .Vs. Union of India & Ors

For petitioner : Mr.Manoj Kumar Mishra, Tanmay Mishra, S.Senapati & Sohan Mishra

For Opp.Parties : Mr. S.Das, S.Jena & S.Ray

JUDGMENT Date of Hearing :12.07.2019 : Date of Judgment: 16.08.2019

P.PATNAIK, J.

Assailing the legality and propriety of the order passed by the Disciplinary authority & Appellate authority, the instant writ application has been filed for quashing of the finding of the Inquiry Officer vide Annexure-3 and the order of the Disciplinary Authority and Appellate Authority under Annexures-5 and 7.

2. The brief facts which are germane to the writ application are required to be stated infra. The petitioner initially joined in the Union Bank of India in the year 1984 in the post of Casher-cum-Clerk and after his joining, he has discharged his duty to the utmost satisfaction of his authority without any blemish. While continuing as such at Ambagaon branch as Clerk-cum-Cashier a memorandum of charges for certain omission and commission and irregularities were served on the petitioner calling upon him to submit his explanation. The gravamen of the charge is quoted herein below:

i) Doing acts prejudicial to the interest of the Bank involving or likely to involve the bank in monetary loss.
ii) Willful damage or attempt to cause damage to the property of the bank.
iii) Engaging trade/business outside the scope of his duties.
iv) Breach of rule of business of the Bank or instruction for running of any department.

In response to the alleged charges, the petitioner submitted his reply denying the charges in toto. However, not being satisfied with the explanation, a Departmental Proceeding was initiated against the petitioner and Inquiry Officer was appointed and after inquiry, inquiry report was submitted along with suggestion for punishment. The petitioner was asked to submit his reply on proposed punishment and the Disciplinary Authority imposed the order of punishment on the petitioner vide Annexure-5 to the writ petition. Being aggrieved by the order of the Disciplinary authority the petitioner preferred appeal before the opposite party No.5 and the appellate authority rejected the appeal thereby confirming the order of punishment awarded by the Disciplinary Authority. Being aggrieved by the perfunctory findings of the Inquiry Officer and the impugned order of punishment passed by the Disciplinary Authority as well as Appellate authority the petitioner has filed the instant writ application under Articles 226 and 227 of the Constitution of India for redressal of his grievance.

3. Controverting the averments made in the writ application a counter affidavit has been filed by the opposite party-Bank wherein it has been submitted that on the basis of charge sheet a Departmental Proceeding was initiated and the petitioner participated in the said enquiry by submitting his written defence along with documents. He has also cross-examined the management witnesses. The Inquiry officer after going through the documents and the reply of both the parties has finally given its finding by holding that charge No.1 is proved, charge no.2 is partly proved and charge no.3 has not been proved. The said finding of the Inquiry Officer was communicated to the Disciplinary Authority to take appropriate action in this regard as per the provisions of the Bank and the Disciplinary Authority upon consideration of the said finding and by affording reasonable opportunity of hearing to the petitioner and after going through the evidence submitted by both the parties was prima facie satisfied that the petitioner has committed gross misconduct and accordingly passed the order as per Annexure-5 to the writ application i.e., order of compulsory retirement from the service of the Bank with superannuation benefit without disqualification from the future employment and stoppage of one increment for a period of six months. Both the punishment will run concurrently. Thus, there is no infirmity in the order of the Disciplinary Authority nor the findings of the Inquiry Officer. Therefore, the said findings and orders do not warrant any interference.

Further, it has been submitted that in the matter of domestic enquiry more particularly, on proportionality of punishment, the Hon'ble Apex Court

in catena of cases in relation to banking institution has specifically held that any employee found guilty of the charges in a departmental enquiry which constitutes grave misconduct, in such cases dismissal is the proper punishment. In a disciplinary matter the proper test is wednesbury principle.

4. A rejoinder to the counter affidavit has been filed by the petitioner wherein it has been stated that the petitioner was not given due opportunity to defend his case. The finding of the Inquiry Officer and the order passed by the Disciplinary Authority and the Appellate Authority are perverse being based on no evidence on record and contrary to the materials on record. Even otherwise the impugned punishment is shockingly disproportionate to the charges framed. Further it has been submitted that the Inquiry Officer conducted enquiry in a casual manner. Upon such enquiry report, the order of pusnishment of compulsory retirement has been imposed by the opposite party no.4 and the appeal preferred before the opposite party no.5 was rejected which was the result of non-application of mind.

5. Learned senior counsel on behalf of the petitioner has assailed the impugned order of punishment passed by the Disciplinary Authority as well as the Appellate authority on the ground that the Inquiry Officer has gone beyond the allegations made in the Article of charge No.1 and given findings in the matter which is not the subject matter of charge sheet. Further, the learned counsel submits that the conclusion given in Charge No.1 is contrary to the charge sheet and even foreign to the Charge sheet. Hence the conclusion of the Inquiry Officer in charge No.1 with partly proved is based on no evidence and perverse. Therefore, punishment imposed based on the said findings will not be sustainable in the eye of law. Learned senior counsel further submits that there has been flagrant violation of Clauses of Chapter-33 relating to disciplinary matter of the service Regulation. The third ground of challenge is that there has been violation of the principle of natural justice since the petitioner has been awarded punishment on the allegation which are not part of the charge sheet. Therefore, the charge sheet is a vague one. Apart from the challenging the infirmity in the charge sheet learned senior counsel submits that the punishment is shockingly disproportionate to the charges leveled against the petitioner. It would be profitable to refer the decision in this regard reported in (2017) 4 SCC Page 507 (Para-15 and 19) (Central Industrial Security Force-v.Akbar Alli).

During the course of hearing learned senior Counsel on behalf of the petitioner by referring to Charge No.1 submitted that the Charge No.1

pertains to the allegation that the petitioner having entered into an agreement for sale of his property i.e., House No.Fl.116 at Basanti Colony, Rourkela mortgaged with the bank with Smt.Arati Giri wife of Sri R.K. Giri in gross violation of Housing Loan Scheme of the Bank. The Inquiring Officer in its finding though stated that there is no sale agreement of the sale of property at Basanti Colony, Rourkela i.e. House No.FL-116 at Basanti Colony, Rourkela, but curiously made inquiry of a property situated at Balasore which is not part of the charge. Since the said property is not the Bank's property, no possession has been given. On perusal of the inquiry report, it is quite apparent that the Inquiry Officer has clearly stated that damage to the property of the Bank is save. Therefore, none of the allegation made in the charge sheet under heading gross misconduct (1) Doing acts prejudicial to the interest of the Bank in monetary loss (2) willful damage or attempt to cause damage to the property of Bank (3) Engaging in trade/business outside the scope of his duties and minor Misconduct (1) Breach of rule of business of the Bank or instructions for running of any department have been proved against the petitioner. Therefore, the conclusion arrived at by the Inquiry Officer is contrary to the evidence and hence not sustainable in the eye of law.

Learned senior counsel also submits that it is settled proposition of law in a case where the disciplinary authority records a finding that is unsupported by any evidence whatsoever or a finding which no reasonable person could have arrived at, the writ court would be justified to examine the matter and grant relief in appropriate cases. In order to fortify his submission referred the decisions reported in (2017) 2 SCC 308 (para-8) (Allahabad bank and others -vrs.- Krishna Narayan Tewari), 2017(1) OLR 251 (Chandramohan Singh-vrs.-Chairman, Orissa State Handloom Development Corporation Limited and others) and (2015) 2 SCC 610 (Para-12) Union of India and others –vrs.P.Gunasekharan.

It is also the submission of the learned senior Counsel with regard to the contention that there is flagrant violation of principles of natural justice as provided in Chapter-33 of the Service Regulation submits that if the initial action is not in consonance with law, subsequent proceedings would not sanctify the same. In this regard he referred the decision reported in (2011) 5 SCC 142, Coal India Ltd. and others –vrs.- Ananta Saha and others and 2016(1) OLR 602 (Niroj Kumar Das –vrs.-United Bank of India) With regard to Charge No.2 learned senior counsel submits that the Inquiry Officer has given his finding that the allegation is not proved and the 3rd charge is also

not proved. Therefore, the findings of the Inquiry Officer that the petitioner is guilty of gross misconduct is perverse and contrary to the findings based on no evidence

6. As against the submission of the learned counsel for the petitioner, learned counsel for the bank vociferously submitted that despite opportunity given to the petitioner he is choosing not to produce any defence witness, which is reflected in the internal page-13 of the Inquiry report. Learned counsel for the Bank further submits that in the internal page 15 of the Inquiry report reveals that the Inquiry Officer has mentioned that the fact of sale agreement made by the petitioner that Smt. Arati Giri wife of Mr.Rajkishore Giri on land and house of property acquired by availing bank's housing loan without obtaining prior permission from the Bank violating the rules and service conduct of a bank employee cannot be denied and also dealing of unauthorized cash transaction for sale of the house mortgaged with Bank and thereafter not giving possession of the property is a decisive act and which is established in course of enquiry by documentary evidence and deposition of Management witness. Learned counsel for the Bank further submits that the price consideration is the paramount consideration which is expected from the employee of a Bank. Learned counsel further submits that in P.C.Kakkar-vrs.-UCO Bank case their Lordships of the apex Court held that discipline at the work place is a sine qua-non of every employee, whoever violates, dismissal is the proper punishment. In every banking institution every employee should act with honesty, diligently because the customers repose faith and confidence who deals with the public money. Learned counsel for the Bank further submits that in the matter relating to disciplinary authority whether punishment imposed is proportionate or disproportionate, the real test to arrive at i.e. the Wednesbury principle. If that test is applied, the Court plays a secondary role as has been articulated by the Hon'ble apex Court vide 2001 LIC 304(SC) Para 39,41, 47 and 71.)

7. After having given my anxious consideration to the rivalised submissions and on perusal of record, it appears that the petitioner has been able to make out a case of interference due to the following facts, reasons and judicial pronouncement.

i) Looking to the charge sheet and the finding of the Inquiry Officer, there appears that the charge of gross misconduct of engagement in business outside the scope of the duties, has not been proved. But with regard to gross

misconduct doing acts prejudicial to the interest of the Bank in monetary loss has been proved to the extent that he has not entered into an agreement for mortgage with the Bank without permission and willful damage or attempt to cause damage to the property of the Bank is partly proved. Therefore, breach of rules of business or instruction of running of any department has not been proved. Basing on the inquiry report the punishment has been imposed by the Disciplinary Authority which has been confirmed by the appellate authority. From the initiation of proceeding till its culmination apart from vague charges with regard to property at Basanti Colony, Rourkela instead of property at Sahadevkhunta in Balasore, the allegation of misconduct has been proved in the findings of the Inquiry Officer.

It is a settled position of law that the scope of judicial review in the matter of imposition of penalty as a result of Disciplinary proceeding is very limited. The Court can interfere with the punishment only if finds the same is shockingly disproportionate to the charges proved. In such a case the Court can remit the matter to the Disciplinary Authority for reconsideration of the punishment. The question of interference with the quantum of punishment has been considered by the Hon'ble Apex Court in a series of judgment and it has been held that the punishment is proportionate to the charges imposition violates Article 14 of the Constitution of India. The Hon'ble apex Court in **AIR 1987 SC 2386 in the case of Ranjit Thakur-vrs.Union of India and others** has been pleased to observed as under:

14. In the case of Ranjit Thakur (supra), the Apex Court observed as under:-

> "But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect, which is otherwise, within the exclusive province of the Court Martial, if the decision of the Court even as to sentence is in defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review."
>
> 15. In the case of B.C.Chaturvedi (supra), after examining earlier decisions, the Supreme Court observed that in exercise of the powers of judicial review, the Court cannot "normally" substitute its own conclusion or penalty. However, if the penalty imposed by an authority "shocks the conscience" of the Court, it would appropriately mould the relief either directing the authority to reconsider the penalty imposed and in exceptional and rare cases, in order to shorten the litigation, itself impose appropriate punishment with cogent reasons in support thereof.

17. What is the appropriate quantum of punishment to be awarded to a delinquent is a matter that primarily rests at the discretion of the disciplinary authority. An authority sitting in appeal over any such order of punishment is by an means entitled to examine the issue regarding the quantum of punishment inasmuch as it is entitled to examine whether the charges have been satisfactorily proved. But when any such order is challenged before a Service Tribunal or the High Court the exercise of discretion by the competent authority in determining the awarding punishment is generally respected except where the same is found to be so outrageously disproportionate to the charges of misconduct and the Court considers it to be arbitrary and wholly unreasonable. The superior Courts and the Tribunal invoke the doctrine of proportionality which has been gradually accepted as one of the facets of judicial review. Where punishment is excessive or disproportionate to the offence so as to shock the conscience of the Court and is unacceptable even then Courts should be slow and generally reluctant to interfere with the quantum of punishment. The law on the subject is well settled by a series of decisions rendered by this Court.

18. In Ranjit Thakur-v- Union of India , the Apex Court held that the doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is otherwise, within the exclusive province of the Court Martial, if the decision even as to the sentence is in defiance of logic, then the quantum of sentence would not be immune from correction. Irrationality and perversity, observed this Court, are recognized grounds of judicial review.

iii) On perusal of the order of the appellate authority the same has been passed in cryptic manner bereft of any cogent reason. In this connection, it would be profitable to refer to the judgment of the Hon'ble Apex Court rendered in the case of Chairman Life Insurance Corporation of India and others –vrs.-A.Masilamani reported in (2013) 6 SCC 530 and paragraph-19 of the said judgment appears to be relevant, which is quoted here-in-below:

"19. The word "consider" is of great significance. The dictionary meaning of the same is, "to think over", "to regard as", or "deem to be". Hence, there is a clear connotation to the effect that there must be active application of mind. In other words, the term "consider" postulates consideration of all relevant aspects of a matter. Thus, formation of opinion by the statutory authority should reflect intense application of mind with reference to the material available on record. The order of the authority itself should reveal such application of mind. The appellate authority cannot simply adopt the language employed by the disciplinary authority and proceed to affirm its order."

In the aforesaid factual backdrop coupled with the reasons and judicial pronouncement, this Court is of the considered view that the impugned order of punishment vide Annexure-5 and the order of the appellate authority vide Annexure-7 appears to be grossly disproportionate to the charges proved and not commensurate with the charges proved. They are liable to be interfered with. Accordingly the impugned punishment under Annexure-5 and the appellate order under Annexure-7 are hereby quashed and set aside and the matter is remitted to the opposite party-bank to pass order on the quantum of punishment commensurate with proved charges within a period of eight weeks from the date of receipt/communication of the order. With the aforesaid direction the writ petition stands allowed.

2019 (III) ILR - CUT- 580

P. PATNAIK, J.

W.P.(C) NO.1209 OF 2013

SMT. BIJAYALAXMI NAIK .....Petitioner.

.Vs.

STATE OF ORISSA & ORS .....Opp.parties

CONSTITUTION OF INDIA, 1950 – Arts.226 & 227 – Engagement of "Gana Sikshyak" – Eligibility – Guidelines of the Education Guarantee Scheme and Alternative & Innovative Education (EGS & AIE) – Clause 21 – Information & Monitoring – Petitioner challenges the order of the District Collector not engaging her as "Gana Sikshyak" – As per resolution, before a Education Volunteer rehabilitated in the scheme must have faced disengagement due to up-gradation of E.G.S to regular scheme – Petitioner is claiming engagement only on the basis of the report of the BRCC, whereas neither any record was available in the office of the DPC, nor any acquaintance report with regard to payment of remuneration to the petitioner as Education Volunteer, so as to prove her continuance – Held, in the absence of such clinching and unimpeachable documentary evidence, the collector could not have passed the orders of continuance of the petitioner as "Gana Sikshyaka" – Therefore, there is no infirmity in the impugned order to call for any interference – Writ petition dismissed.

For Petitioner : Mr. S.K. Das.
For Opp.parties : MR. S.K. Samal, Standing Counsel.

JUDGMENT Date of Hearing : 09.07.2019 : Date of judgment: 16.08.2019

P.PATNAIK, J.

In the accompanied writ application, the petitioner has inter alia prayed for quashing of the order dated 11.10.2012 passed by the Collector, Jagatsinghpur communicated vide letter dated 21.12.2012 by the D.P.C., SSA, Jagatsinghpur under Annexure-9 and further prayer is to direct opposite party nos.3 and 4 to engage the petitioner as Gana Sikshyak in Jagatsinghpur District in pursuance of Government Resolution dated 16.02.2008.

2. The factual matrix as borne out from the record in a nutshell is that the petitioner was initially appointed as a Non-Formal Facilitator in Arana Non-Formal Education Center on 31.01.1991 by the order of the D.I. of the School, Jagatsinghpur-II, Tirtol and she continued for one decade till closer of the scheme. After abolition of the Non Formal Educator Scheme, new scheme, namely, Educational Guarantee Scheme (EGS) was brought in place and as per the said scheme, the retrenched Non Formal facilitators were to be

considered for Education Volunteer (EV) under EGS Scheme. The petitioner was selected and recommended for appointment as Education Volunteer of Arana EGS Centre by the District Project Coordinator (DPC) in letter dated 06.10.2004, which was forwarded to village education committee for issuance of appointment order. Accordingly, the President of the VEC issued the formal appointment/engagement order in favour of the petitioner, who resumed her duty on the very same day, i.e., 08.10.2004, as revealed from Annexure-5, while the petitioner was continuing as such, the Education Volunteer (EV), the State Government closed down the EGS scheme with effect from 31.03.2008. But the policy decision was taken by the State Government to rehabilitate the retrenched EVs of the erstwhile EGS centers as Gana Sikshyak as per the Resolution dated 16.02.2008. Since the case of the petitioner was not considered for engagement as Gana Sikshyaka despite representation made to the Collector, Jagatsinghpur, the petitioner was compelled to approach this Court in W.P.(C) No.9507 of 2012, which was disposed of on 18.07.2012 with a direction to the Collector, Jagatsinghpur to dispose of the representation of the petitioner within a period of 8 weeks from the date of filing of the representation by the petitioner. In deference to the direction of this Court, the petitioner submitted representation along with all the supporting documents, but the Collector rejected the claim of the petitioner for engagement as Gana Sikshayaka by the impugned order vide Annexure-9. Being aggrieved and dissatisfied with the impugned order, the petitioner has invoked the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India for redressal of her grievances.

3. Controverting the averments made in the writ petition a counter affidavit has been filed by opposite party no.4. In the counter affidavit, it has been submitted that there was no proof with regard to the petitioner's continuance as E.V. in Arana E.G.S. Center, after being engaged by the VEC, there was neither any acquaintance regarding payment of remuneration nor VEC Bank account was available to justify the continuance of the petitioner. Therefore, as per the Government Resolution dated 16.02.2008, which inter alia states that the Government, after careful consideration of the problems of the E.Vs. under E.G.S. Scheme decided to rehabilitate E.Vs. in the EGS Centre, who have been disengaged or faced disengagement under the Education Guarantee Scheme as Gana Sikshayaka under the Sarva Sikshya Abhiyan. Since the petitioner never faced any disengagement on 31.03.2008, as she was not working as E.V. as per the enquiry report and official records. The Collector, Jagatsinghpur has rightly passed the order dated 11.10.2012

rejecting the claim of the petitioner as Gana Sikshayak, after due enquiry and observing the guidelines stipulated in the Government Resolution dated 16.02.2008. Hence, the petitioner is not entitled to be engaged as Gana Sikshyaka.

4. Rejoinder to the counter affidavit has been filed by the petitioner wherein, it has been submitted that in the impugned order, the report of the DPC (SSA), Jagatsinghpur and the report of the concerned BRCC dated 21.09.2012 have been considered, but the said report have been brushed-aside by the learned Collector in passing the impugned order and the copy of the Government Resolution dated 16.02.2008 has been annexed to Annexure-11 to the rejoinder.

5. Additional affidavit has been filed by opposite party no.4-District Project Coordinator, SSA, Jagatsinghpur wherein it has been mentioned that although the petitioner was selected as Education Volunteer in Arana EGS Centre, but she has not performed her duty as an Education Volunteer and she has not produced any such documents to prove that she has continued as Education Volunteer till closure of the EGS Centre. There is no such record available in the office of the District EGS Committee, as regards payment of remuneration and running of the centre and even the present petitioner has not produced any such document to establish that she has continued as an Education Volunteer till closure of the EGS Centre except the report of the BRCC regarding continuance of the petitioner as Education Volunteer for one and half month without any material evidence. The resolution dated 16.02.2008 passed by the Government of Odisha in the Department of School and Mass Education, clearly spells out that the Education Volunteers, those who have faced disengagement due to up-gradation of EGS centers to regular school and for various reasons are only to be rehabilitated as Gana Sikshayak. Since the petitioner has neither continued as an Education Volunteer rather she has abandoned her engagement and she has not faced disengagement due to either up-gradation of EGS centers or due to closure of the EGS centre or for any other reasons, accordingly she is not covered under the above said Resolution dated 16.02.2008 for being rehabilitated as a Ganasikhayak. Therefore, the petitioner cannot be treated as an affected person to be entitled to get the benefit of the resolution dated 16.02.2008.

6. Learned counsel for the petitioner during the course of hearing has strenuously urged that the impugned order under Annexure-9 has not taken into consideration, the reports of the DPC, (SSA), Jagatsinghpur and the

report of the BRCC dated 21.09.2012 which indisputably prove that the petitioner has worked as an Education Volunteer. Therefore, the impugned order is contrary to the records, which is liable to be quashed.

Learned counsel for the petitioner further submits that since the petitioner was duly appointed and has been continuing as EV faced disengagement on closure of Education Guarantee Scheme is entitled to be appointed as Gana Sikshayaka and the case of the petitioner stands on identical facts like Binapani Nayak @ Binapani Parida v. State of Orissa in W.P.(C) No.30982 of 2011 wherein this Court has been pleased to direct engagement of the said petitioner as Gana Sikshayaka.

7. Learned Standing Counsel for School and Mass Education Department, apart from reiterating submission made in the additional affidavit has made vociferous argument to justify the action of the Collector in passing the impugned order.

During the course of hearing, learned counsel for the School and Mass Education Department has drawn the attention of this Court to Clause-21 of the guidelines of the Education Guarantee Scheme and Alternative & Innovative Education (EGS & AIE), which deals with information and monitoring. Clause-21 and the same is quoted hereunder:

> "**21**. **INFORMATION AND MONITORING**
> **21.1**. **Information records.**
>
> The basic information records will be the following:
>
> - Village Education Register to record the status of enrolment of all children in the village/habitation.
> - Attendance Register to record daily school attendance of children and E.V.
> - Personal Learning Record to record child-wise academic progress.
> - E.V. Diary to indicate the E.Vs plan for teaching and lesson planning
> - School Facilities Register
> - VEC Register
> - A school development plan to be prepared by the VEC each year. The plan will aim at mobilizing and converging resources for improving the school and exemplify the sprit of participatory action that is the vital point of EGS.
> - Cash book.
> - Stock Register for contingency.
>
> These records will be maintained at the school by the E.V."

Learned Standing Counsel for School and Mass Education Department further submits that the petitioner approached after four years of the introduction of the Scheme, i.e., in the year 2012. On that score, the claim of the petitioner ought to be rejected in limine.

8. After hearing the learned counsel for the respective parties and on perusal of the records, judgment relied by the learned counsel for the petitioner, i.e. W.P.(C) No.30982 of 2011, Binapani Nayak vs. State of Orissa, this Court is of the considered view that the impugned order under Annexure-9 to the writ application does not suffer from any infirmity or illegality, so as to warrant any interference by this Court.

Admittedly, the resolution dated 16.02.2008, which is meant for rehabilitation of disengaged Education Volunteer as Gana Sikshayaka under SSA, Jagatsinghpur would be applicable to such Education Volunteers, i.e., who have been faced disengagement due to up-gradation of E.G.S. Center to regular school. Apart from the report of the BRCC regarding the continuance of the petitioner for one and half month, no record was available in the office of the DPC., SSA with regard to functioning of the E.G.S. Centre, Arana, nor any acquaintance register with regard to payment of remuneration to the petitioner as Education Volunteers, so as to prove the continuance of the petitioner. Therefore, in the absence of such clinching and unimpeachable documentary evidence, the Collector could not have passed the orders for continuance of the petitioner for engagement as Gana Sikshyaka. Therefore, there is no infirmity in the impugned order to call for any interference.

On perusal of the Scheme, the Clause-21 has referred to (supra), the petitioner did not produce the records, which was supposed to be maintained by the E.V. Had the petitioner been in possession of such records certainly the petitioner would have produced such records. Therefore, in the absence of conclusive or clinching evidence with regard to continuance of the petitioner on the date of closure of the scheme would not entitle the petitioner to be appointed as Gana Sikshayaka.

So far as the decision cited by the learned counsel for the petitioner, the facts and circumstances of the case is not applicable to the present case on the ground that there is no dispute with regard to continuance of the petitioner in the said case as E.V., but here the dispute arises with regard to continuance of petitioner in the said case as E.V. Therefore, the facts, situation in the above cited case is clearly distinguishable and the petitioner cannot derive advantage from the said decision.

9. In view of the aforesaid facts, reasons and the logical sequitur, this Court is not inclined to interfere with the impugned order. Accordingly, the writ petition is dismissed being devoid of merit.

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2019 (III) ILR - CUT- 585

K.R. MOHAPATRA, J.

W.P.(C) NO. 12937 OF 2007

NIKUNJA KISHORE RAJGURU AND ANR. .....Petitioners

.Vs.

NITYANANDA BARIK AND ORS. .....Opp. Parties

ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 34 – Provision under – Writ petition challenging the order passed by the Collector rejecting an application filed under Section 34 of the Act – Sale of chaka – Plea that the petitioners being the contiguous Chaka owner, the land in question should have been sold to them and that such a sale is hit by Section 34 (2) of the Act and is void *ab initio* for the reason that a fragment has been sold to a stranger, not contiguous chaka owner and secondly, no permission from the concerned Consolidation Officer was taken prior to such sale – Law on the issue – Discussed.

"On a conspectus of the Statement of Objects and Reasons together with Section 2 (e), Section 2 (m) and 34(1) & (2) of the Act makes it abundantly clear that the object behind introduction of Section 34 to the Act is not to create a 'fragment of chaka' in contravention of Section 2(m). Section 2(m) though refers to a compact parcel of land, it cannot be equated with 'Chak' as defined under Section 2(e) of the Act. Thus, the word 'fragment' necessarily means a 'fragment of Chak' or 'a division of Chak', which is less than one acre in the district of Cuttack, Puri, Balasore and Ganjam and in Anandapur sub-division of Keonjhar District and less than two acres in rest of the areas of Odisha. Further, Section 34 (2) provides that a fragment of the chaka can be sold to a contiguous land owner. A 'Chak' may be a compact parcel of land less than one acre/two acres. But, it cannot be inferred that wherever a 'Chak' is less than one acre/two acres depending upon the locality, where it situates, the compact parcel of land would be called a 'fragment'. In the case at hand, admittedly the entire chaka i.e. Chaka No.28 to an extent of Ac.0.97 dec. has been sold to opp. Party nos. 1 to 5, not contiguous chaka owner. As discussed earlier, even though land in question i.e. chaka No.28 to an extent of Ac.0.97 dec. is less than one acre, it cannot be treated to be a fragment. Since the entire chak has been sold to opp. Party nos.1 to 5, it can be safely said that no fragment is sold which does not contravene Section 34 (2) of the Act. As notification under section 41 of the Act had already been made in respect of the case village prior to the impugned sale, restriction of Section 4(2) of the Act is not applicable to the case at hand."

(Paras 11 & 12)

Case Laws Relied on and Referred to :-

1. 1997 (II) OLR 399 : Smt. Binapani Sethi and another Vs. Sr. Bijay Kumar Sahoo & Ors
2. 1994 (II) OLR 53 : Padmalabha Swain (since dead) after him, Dhirendra Kumar Swain & Ors

For Petitioners : M/s. Prahalada kar, G.D. Kar, M.R. Satpathy, K. Khuntia, J. Behera and A.K. Mohanty.

For Opp. Parties : M/s. Ch. P.K. Mishra, A. K. Jena, Ch. P.K. and B. Swain
M/s. S.K. Nayak-2, P.K. Paikray
M.K. Pati & J. Paikray
Addl. Govt. Adv.

JUDGMENT Date of Judgment: 05.09.2019

K.R. MOHAPATRA, J.

Order dated 27.9.2007(Annexure-3) passed by the Collector, Jagatsinghpur in Consolidation Misc. Case No.2 of 2007 rejecting an application filed by the present petitioners under Section 34 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (for short "The Act") is under challenge in this writ application.

2. Learned counsel for the petitioners submits that the petitioners are the owners of Chaka Nos.27 & 29 which are contiguous to Chaka No.28 to an extent of Ac.0.97 dec., mouza Lathanga in the district of Jagatsinghpur (for short 'the case land'). It is his contention that the owner of Chaka No.28 (opp. Party no.6) namely, Radhanath Rajguru sold the entire Chaka to opp. Party nos. 1 to 5 by virtue of Regd. Sale Deed dated 7.7.2007. Such a sale is hit by Section 34 (2) of the Act and is void *ab initio* for the reason that a fragment has been sold to a stranger, not contiguous chaka owner, namely, the petitioners. Secondly, no permission from the concerned Consolidation Officer was taken prior to such sale.

3. In support of his contention he relied upon a case law of this Court in the case of ***Smt. Binapani Sethi and another v. Sr. Bijay Kumar Sahoo and others,*** *reported in 1997 (II) OLR 399*, wherein it is held as follows:

> "6. Admittedly, the parcels of land sold separately and collectively measure less than one acre, which is the minimum area prescribed for the district of Cuttack. Therefore, there was clear contravention of Section 34. Consequences of transfer contrary to provision of Section 34 are contained in sub-section (1) of Section 35. It clearly lays down that such a transfer is void. Even if it is accepted, as pleaded by learned counsel for the petitioners, that person includes a family and husband and wife would constitute a family, that is really of academic interest, because the total area of land sold by the two sale-deeds was less than one acre. Therefore, the Collector was justified in his conclusion that the transactions were void. The object of stringency underlying Section 34 is clearly in line with the spirit of enacting the Act. It aims to provide for consolidation of holdings and prevention of fragmentation of land for development of agriculture in the State. Basic object is to

give inducement and incentive to the cultivators, by consolidation of scattered holdings and rearrangement of holdings including fragmented holdings among various land owners so that the holdings become compact and future fragmentation of holdings is prevented.

7. Coming to the question of locus standi to contiguous Chaka owners, it has to be noticed that only when a person intens to transfer a fragment and is unable to do so in view of the restriction imposed under Sub-section (2) of Section 34, he has to apply in the prescribed manner to the Tahaildar of the locality, who is required to determine the market value of fragment and sell it through an auction among the land owners of contiguous Chakas at a value not less than the market value so determined. The land owners of the contiguous Chakas come into picture when a person intends to transfer a fragment, and is unable to do so in view of the restrictions imposed and applies to Tahasildar for permission. If there is no intention to transfer a fragment, obviously, the land owners of contiguous Chakas would not come into picture."

4. He also relied upon a case law of this Court in the case of ***Padmalabha Swain (since dead) after him, Dhirendra Kumar Swain and others,*** *reported in 1994 (II) OLR 53,* wherein at paragraph 6, it has been held as follows:

"6. As regards the contention that the lands purchased under the sale deeds are homestead lands we find that the opp. Party no.11 even in his own revision before the Commissioner had stated such fact. Sec.4(2) only prohibits transfer of agricultural lands and specifically excludes lands covered under the explanation to Sec.2(f) which provision includes homestead land. Hence, if the lands involved in the present case are homestead lands, the objection of the petitioners or that of the opp. party no.11 under Section 4(2) would have no force. Admittedly, the commissioner has not addressed himself to the question the case having been disposed of merely on the basis of the decision of the Allahabad High Court. Since the question involves an investigation of facts, we think it proper, while setting aside the order of the Commissioner in Annexure-2, to remit the case to him to determine whether the lands are homestead lands. Since the case is going back we also think, in the facts and circumstances of the case, it to be in furtherance of justice that the Commissioner should also determine as to whether the transfers by Susila were made after publication of the notification under Sec.13(1) of the Act. Once such facts are determined the Commissioner shall thereafter decide the matter in accordance with law as discussed above."

5. However, the Collector, Jagatsinghpur-opp. Party no.7 without taking into consideration the object and intent of the Act and the purport of Section 34 of the Act proceeded on a footing that since the entire chaka has been sold, the sale is not hit by Section 34(2) of the Act, which is illegal and not sustainable in law. Accordingly, he prayed for setting aside Annexure-3.

6. Learned counsel for the opp. Party nos. 1 to 5 on the other hand submits that since entire chaka no.28 has been sold to them, after publication of notification of Section 41 of the Act, no permission as contemplated under

Section 4(2) of the Act is required and the prohibition under Section 34 (2) of the Act is not applicable. As such, the Collector has committed no error in rejecting the application i.e. Consolidation Misc. Case No.2 of 2007. Thus, he prayed for dismissal of the writ application.

7. Section 2 (e) of the Act defines '**Chak**' as under:-

> *"2. (e) "**Chak**" means a compact parcel of land allotted to a landowner on consolidation;"*

8. Further, '**Fragment**' has been defined under Section 2 (m) of the Act which is as follows:-

> *"2. (m) "**fragment**" means a compact parcel of agricultural land held by a land owner by himself or jointly with others comprising an area which is less than-*
>
> *(i) one acre in the district of Cuttack, Puri, Balasore and Ganjam and in the Anandpur subdivision in the district of Keonjhar, and*
>
> *(ii) two acres in the other areas of the State."*

9. Section 34 of the Act deals with prevention of fragmentation of Chaka. It reads as follows.

> *"**34. Prevention of fragmentation** – (1) No agricultural land in a locality shall be transferred or partitioned so as to create a fragment.*
>
> *(2) No fragment shall be transferred except to a land-owner or a contiguous Chaka:*
>
> *Provided that a fragment may be mortgaged or transferred in favour of the State Government, a Co-operative Society, a scheduled bank within the meaning of the Reserve Bank of India Act 1934 (2) of 1934) or such other financial institution as may be notified by the State Government in that behalf of security for the loan advanced by such Government. Society, Bank or institution, as the case may be.*
>
> *(3) When a person, intending to transfer a fragment, is unable to do so owing to restrictions imposed under Sub section (2), he may apply in the prescribed manner to the Tahasildar of the locality for this purpose whereupon the Tahasildar shall, as far as practicable within forty-five days from the receipt of the application determine the market value of the fragment and sell it through an auction among the landowners of contiguous Chakas at a value not less than the market value so determined."*

10. Section 34(1) provides that no agricultural land in a locality shall be transferred or partitioned so as to create fragment. Thus, it necessarily means that no fragmentation of a chaka in contravention of Section 2 (m) of the Act is permissible. Further, Section 34 (2) provides that no fragment shall be transferred except to a land-owner of a contiguous Chaka.

In order to interpret the word 'fragment', the Court can refer to the 'Statement of Objects and Reasons' of the Act for the purpose of ascertaining the circumstances, which led to the legislation in order to find out what was

the mischief, which the legislature aimed at. (AIR 1963 SC 1356 may be referred to). The same reads as follows:-

> *"**Statement of Objects and Reasons**- In the context of strategy for increasing agricultural production in the country and in pursuance thereof to give inducement and incentive to the cultivators, it is considered expedient to initiate legislation for consolidation of scattered holdings and re-arrange the holdings including fragmented holdings among various landowners to make them more compact and to provide against future fragmentation of holdings. This will help in economic farming and application of improved implements and methods of farming which are necessary for development of agriculture and increased agricultural production.*
>
> *The present bill seeks to achieve this object."*

11. On a conspectus of the Statement of Objects and Reasons together with Section 2 (e), Section 2 (m) and 34(1) & (2) of the Act makes it abundantly clear that the object behind introduction of Section 34 to the Act is not to create a 'fragment of chaka' in contravention of Section 2(m). Section 2(m) though refers to a compact parcel of land, it cannot be equated with 'Chak' as defined under Section 2(e) of the Act. Thus, the word 'fragment' necessarily means a 'fragment of Chak' or 'a division of Chak', which is less than one acre in the district of Cuttack, Puri, Balasore and Ganjam and in Anandapur sub-division of Keonjhar District and less than two acres in rest of the areas of Odisha. Further, Section 34 (2) provides that a fragment of the chaka can be sold to a contiguous land owner. A 'Chak' may be a compact parcel of land less than one acre/two acres. But, it cannot be inferred that wherever a 'Chak' is less than one acre/two acres depending upon the locality, where it situates, the compact parcel of land would be called a 'fragment'.

12. In the case at hand, admittedly the entire chaka i.e. Chaka No.28 to an extent of Ac.0.97 dec. has been sold to opp. Party nos. 1 to 5, not contiguous chaka owner. As discussed earlier, even though land in question i.e. chaka No.28 to an extent of Ac.0.97 dec. is less than one acre, it cannot be treated to be a fragment. Since the entire chak has been sold to opp. Party nos.1 to 5, it can be safely said that no fragment is sold which does not contravene Section 34 (2) of the Act. As notification under section 41 of the Act had already been made in respect of the case village prior to the impugned sale, restriction of Section 4(2) of the Act is not applicable to the case at hand.

13 As such, the ratio decided in the case law cited by the learned counsel for the petitioners is not applicable to the case at hand. In that view of the

matter, I am in complete agreement with the view taken by the Collector, Jagatsinghpur-opp. Party no.7.

14. Thus, the writ application being devoid of any merit stands dismissed.

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2019 (III) ILR - CUT-590

DR. A. K. MISHRA, J.

CRLMC NO. 2440 OF 2010

RAMESH KU. AGARWAL & ORS. .....Petitioners

.Vs.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Quashing of the criminal proceeding – Deputy director of mines lodged an F.I.R under sections 379/34 of IPC read with Section 21 of the Mines & Minerals (Development & Regulation) Act, 1957 – Charge sheet submitted & cognizance taken – Order of cognizance challenged on the ground that police have no jurisdiction to undertake the investigation under section 21 of the MMDR Act – Held, the investigation can be taken up for the offence U/s. 379/34 of IPC – But for want of complaint, the offence for contravention of the section 4 of MMDR Act cannot be proceeded with – This being the legal position, this court does not feel justified to quash the proceeding in toto – In that view of the matter, the order taking cognizance U/s 21 of MMDR Act is hereby quashed.

Case Laws Relied on and Referred to :-

1. Surendra Kumar Agarwal Vs. State of Orissa & Ors (2009) 44 OCR 232
2. (2014) 9 SCC 772 : State (NCT of Delhi) Vs. Sanjay

For Petitioners : M/s. Sanjit Mohanty, S.P. Panda,S. Pattnaik,P.K. Muduli.
For Opp. Parties : Mr. D.K. Praharaj (Addl. Standing Counsel)

JUDGMENT Date of Hearing: 03.07.2019 : Date of Judgment: 09.07.2019

DR. A. K. MISHRA, J.

In this proceeding U/s. 482 Cr.P.C., Prayer has been made to quash the criminal proceeding in Koira P.S. Case No.64(10)/2010 corresponding to G.R Case No. 324 of 2010 pending in the court of learned SDJM, Bonai and to release the illegally seized 1819.680 tons of Iron Ore Lumps.

2. Case in brief is that the Mining Officer, Office of the Deputy Director of Mines, Koira Circle, Sundargarh vide Letter No.15975 dated 29.06.2010 lodged an F.I.R. against M/s. Ajay Mineral & Steels (P) Ltd. alleging inter alia that in course of verification 48.510 Metric Ton of Iron Ore Lumps was found which was procured unauthorisedly for crushing and conversation purpose. The said F.I.R. was registered U/s. 379/34 of IPC and U/s. 21 of Mines and Minerals (Development & Regulation) Act, 1957 (in short 'MMDR Act') and investigation was ensued. The present four accused persons were named in the F.I.R. After investigation, charge-sheet was submitted basing upon which learned SDJM, Bonai took cognizance U/s. 379/34 of IPC and U/s.21 of MMDR Act. Being satisfied with sufficient ground, issued process against nine accused persons including the present four petitioners. Quashing of a proceeding ipso facto includes the order of taking cognizance as well as F.I.R. as stated above.

3. Learned counsel for the petitioner submits that the police has no jurisdiction to undertake the investigation for the offence U/s.21 of MMDR Act and as no complaint was filed, initiation of the proceeding and taking of cognizance on police report is illegal and same should be quashed. He has relied upon a decision of this Court in the case of **Surendra Kumar Agarwal vrs. State of Orissa & others** reported in (2009) 44 OCR 232.

4. Learned Addl. Govt. Advocate, Mr. D.K. Praharaj relying upon a decision reported in (2014) 9 SCC 772 in the case of **State (NCT of Delhi) vrs. Sanjay** submits that the case should be continued for the offence U/s. 379 of IPC and the Hon'ble Apex Court judgment is binding under Article 141 of the Constitution of India.

5. Carefully read both the cited judgments. In **Surendra Ku. Agarwal (supra)** decision, it has been held at para-16 and 17 in the following way:-

> xxxx xxxx xxxx xxxx
>
> "**16.** The aforesaid provisions contained in Section 22 of the MMDR Act and Rule 15 of the 2007 Rules, makes it abundantly clear that no Court shall take cognizance of offence punishable under the said Act or the 2007 Rules made thereunder, except upon a complaint in writing made by the competent authority or person authorized in that behalf by the Central Government or the State Government.
>
> **17.** The aforesaid provisions of the Act and the 2007 Rules clearly provide that criminal prosecution can be launched only on the basis of a written complaint filed in that regard by the competent authority or the person authorized in that behalf and not otherwise. Hence a reading of the aforesaid provision makes it clear that no FIR can be registered by the police for any offence committed under Section 21 of the MMDR Act and the said provision does not contemplate investigation in a normal

way by the police on the basis of an FIR but only on the written complaint to be presented to the concerned Court."

In the decision of the Hon'ble Apex Court in the case of **State (NCT of Delhi) (supra)**, it has been held as follows:-

> **"69**. Considering the principles of interpretation and the wordings used in Section 22, in our considered opinion, the provision is not a complete and absolute bar for taking action by the police for illegal and dishonestly committing theft of minerals including sand from the riverbed. The Court shall take judicial notice of the fact that over the years rivers in India have been affected by the alarming rate of unrestricted sand mining which is damaging the ecosystem of the rivers and safety of bridges. It also weakens riverbeds, fish breeding and destroys the natural habitat of many organisms. If these illegal activities are not stopped by the State and the police authorities of the State, it will cause serious repercussions as mentioned hereinabove. It will not only change the river hydrology but also will deplete the groundwater levels.
>
> **70.** There cannot be any dispute with regard to restrictions imposed under the MMDR Act and remedy provided therein. In any case, where there is a mining activity by any person in contravention of the provisions of Section 4 and other Sections of the Act, the officer empowered and authorized under the Act shall exercise all the powers including making a complaint before the Jurisdictional Magistrate. It is also not in dispute that the Magistrate shall in such cases take cognizance on the basis of the complaint filed before it by a duly authorized officer. In case of breach and violation of Section 4 and other provisions of the Act, the police officer cannot insist the Magistrate for taking cognizance under the Act on the basis of the record submitted by the police alleging contravention of the said Act. In other words, the prohibition contained in Section 22 of the Act against prosecution of a person except on a complaint made by the officer is attracted only when such persons is sought to be prosecuted for contravention of Section 4 of the Act and not for any act or omission which constitutes an offence under the Penal Code."

5.(a) Precedential propriety commands to follow the law laid down by the Hon'ble Apex Court qua the High Court. As per the ratio of aforesaid **State (NCT of Delhi) vrs. Sanjay (supra)** decision, the investigation can be taken up for the offence U/s. 379/34 of IPC as the F.I.R. discloses the same. But for want of complaint, the offence for contravention of the Section 4 of MMDR Act cannot be proceeded with. This being the legal position, this Court does not feel justified to quash the proceeding in toto.

6. In that view of the matter, the order dated 12.08.2010 taking cognizance U/s. 21 of MMDR Act is hereby quashed.

6.(a) However, the proceeding will continue for offence U/s. 379/34 of IPC against all the accused persons named in the order dated 12.08.2010. Accordingly, the CRLMC is allowed in part. LCR be returned immediately to the lower court.

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