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ORISSA HIGH COURT, CUTTACK

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2019 (III) ILR-CUT- 593 (S.C)

INDIRA BANERJEE, J & M.R. SHAH, J.

CRIMINAL APPEAL NO.1580 OF 2019
(ARISING OUT OF SLP (CR) NO. 8827/2016)

ARUN KUMAR .....Appellant(s)

.Vs.

ANITA MISHRA & ORS. .....Respondent(s)

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 – Complaint under – Accused convicted, sentenced and fined – Appeal – During pendency of appeal the matter settled in Lok Adalat – The cheque issued by the accused pursuant to the settlement in the Lok Adalat dishonoured – Complainant again filed complaint under section 138 – Whether maintainable – Held, Yes.

"With the greatest of respect, the High Court has misconstrued the judgment of this Court in Lalit Kumar Sharma and Anr. vs. State of Uttar Pradesh and Anr. reported in 2008 (5) SCC 638. In Lalit Kumar Sharma (supra), the Supreme Court found that ingredients of Section 138 of the Act were : i) a legally enforceable debt; ii) that the cheque was drawn for discharge in whole or in part of any debt or other liability, which presupposes a legally enforceable debt; and iii) the cheque so issued had been returned due to insufficiency of funds. Lalit Kumar's case is distinguishable on facts, in that the cheque had not been issued in discharge of any debt or liability of the Company of which the accused were said to be the Directors. The cheque was found to have been issued for the purpose of arriving at a settlement. In the instant case, the respondent clearly had a liability. As observed above, there was an earlier adjudication which led to the conviction of the respondent accused. Thus there was adjudication of liability of the respondent accused. While the appeal was pending, the matter was settled in the Lok Adalat in acknowledgment of liability of the accused respondent to the appellant complainant. The cheque issued pursuant to the order of the Lok Adalat, was also dishonoured. This clearly gave rise to afresh cause of action under Section 138 of the Negotiable Instruments Act."

Case Laws Relied on and Referred to :-

1. 2008 (5) SCC 638 : Lalit Kumar Sharma & Anr. -V- State of Uttar Pradesh & Anr.

2. (2012)2 SCC 51 : K.N. Govindan Kutty Menon -V- C.D. Shaji.

For Petitioner(s) : Mr. N.K.Mody, Sr.Adv.
Mr. Siddhant Gupta, Mr. Prabudahu Singh Gour,
Mr. M. P. Shorawala

For Respondent(s): Mr. Uday Gupta, Mrs. Shivani Lal,
Mr. M.K.Tripathi, Mrs. Sarla Chandra,
Mr. Hiren Dasan.

ORDER Date of Order : 18.10.2019

INDIRA BANERJEE, J.

Leave granted.

This appeal is against an order dated 09.09.2015 passed by the Indore Bench of the High Court of Madhya Pradesh allowing the application filed by the accused respondent being Misc. Criminal Case No.9128/2012 against an order passed by the Learned Judicial Magistrate, First Class Narsinghgarh, dated 29.07.2011, refusing to dismiss the Complaint Case No. 547/2009 filed by the appellant complainant against the accused respondent under Section 138 of the Negotiable Instruments Act and the order passed by the Additional District Judge dated 24.08.2012, dismissing the Revisional application of the accused respondent against the said order dated 29.7.2011 of the Learned Judicial Magistrate, being Criminal Revision No.195/2011.

The brief facts are that a complaint under Section 138 of the Negotiable Instruments Act was filed by the appellant complainant against the accused respondent on 02.07.2007.

The Judicial Magistrate, First Class, Narsinghgarh sentenced the accused respondent to six months' imprisonment and further imposed a fine of Rs.3,30,000/- on the accused respondent. Being aggrieved, the accused respondent filed a Criminal Appeal No.231/2007. During the pendency of the criminal appeal, the matter was settled in a compromise before the Lok Adalat on 25.07.2008.

In terms of the compromise, the accused respondent was required to make a payment of Rs.3,51,750/- which was paid on the same day through a post dated cheque drawn in favour of the appellant complainant.

The said cheque drawn by the accused respondent in favour of the appellant complainant as per the compromise arrived at between the appellant complainant and the accused respondent before the Lok Adalat, also got dishonoured, whereupon the appellant complainant filed criminal complaint No.547/2009 u/s 138 of the Negotiable Instruments Act, referred to above, against the accused respondent.

The accused respondent filed an application before the Judicial Magistrate, First Class Narsinghgarh for dismissal of the complaint. The said application was dismissed. A Revisional application against the order of dismissal of the said application, passed by the Judicial Magistrate was also dismissed by the Sessions Court.

The accused respondent, however, approached the High Court under Section 482 of the Criminal Procedure Code for quashing the proceedings. The application under Section 482, as observed above, has been allowed by the High Court by the order impugned.

The High Court observed that it was an undisputed fact that in respect of earlier cheque issued by the respondent accused, a criminal case had been preferred u/s 138 of the Negotiable Instruments Act and the respondent accused had also been convicted. A fine was also imposed on the respondent accused.

The High Court proceeded to quash the complaint observing that the question of entertaining the second complaint did not arise, when the cheque was not issued in discharge of any debt or liability of the company. It was issued on account of a settlement.

With the greatest of respect, the High Court has misconstrued the judgment of this Court in ***Lalit Kumar Sharma and Anr. vs. State of Uttar Pradesh and Anr.*** reported in 2008 (5) SCC 638.

In **Lalit Kumar Sharma (supra)**, the Supreme Court found that ingredients of Section 138 of the Act were : i) a legally enforceable debt; ii) that the cheque was drawn for discharge in whole or in part of any debt or other liability, which presupposes a legally enforceable debt; and iii) the cheque so issued had been returned due to insufficiency of funds.

Lalit Kumar's case is distinguishable on facts, in that the cheque had not been issued in discharge of any debt or liability of the Company of which

the accused were said to be the Directors. The cheque was found to have been issued for the purpose of arriving at a settlement.

In the instant case, the respondent clearly had a liability. As observed above, there was an earlier adjudication which led to the conviction of the respondent accused. Thus there was adjudication of liability of the respondent accused. While the appeal was pending, the matter was settled in the Lok Adalat in acknowledgment of liability of the accused respondent to the appellant complainant.

The cheque issued pursuant to the order of the Lok Adalat, was also dishonoured. This clearly gave rise to afresh cause of action under Section 138 of the Negotiable Instruments Act.

In ***K.N. Govindan Kutty Menon vs. C.D. Shaji*** *reported in (2012)2 SCC 51 cited by the appellant complainant, this Court held :*

> **"11. In the case on hand, the question posed for consideration before the High Court was that "when a criminal case referred to by the Magistrate to a Lok Adalat is settled by the parties and an award is passed recording the settlement, can it be considered as a decree of a civil court and thus executable by that court?" After highlighting the relevant provisions, namely, Section 21 of the Act, it was contended before the High Court that every award passed by the Lok Adalat has to be deemed to be a decree of a civil court and as such, executable by that court.**
>
> **23. In the case on hand, the courts below erred in holding that only if the matter was one which was referred by a civil court it could be a decree and if the matter was referred by a criminal court it will only be an order of the criminal court and not a decree under Section 21 of the Act. The Act does not make out any such distinction between the reference made by a civil court and a criminal court. There is no restriction on the power of Lok Adalat to pass an award based on the compromise arrived at between the parties".**

Every award of the Lok Adalat is, as held in K.N. Govindan Kutty Menon vs. C.D. Shaji (supra), deemed to be decree of a civil court and executable as a legally enforceable debt. The dishonour of the cheque gave rise to a cause of action under Section 138 of the Negotiable Instruments Act. The impugned judgment and order is misconceived.

The appeal is accordingly allowed and the judgment and order impugned is set aside.

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2019 (III) ILR-CUT- 597 (S.C)

UDAY UMESH LALIT, J & R. SUBHASH REDDY, J.

CIVIL APPEAL NO. 8197 OF 2019
(ARISING OUT OF SLP(C) NO. 12979 OF 2019)

SHAUKAT HUSSAIN MOHAMMED PATEL ……..Appellant

-Vs-

KHATUNBEN MOHMMEDBHAI POLARA ..……Respondent

CODE OF CIVIL PROCEDURE, 1908 – Order 7 Rule 11 – Application by the defendant was considered and rejected – In revision, the High Court allowed the petition – Appeal – The question arose as to what should be the consideration while considering a petition under Order 7 Rule 11? – Indicated.

"It is well settled that for the purposes of the provisions of Order VII Rule 11 of the Code, the entirety of the averments in the plaint have to be taken into account. Going by the version of the appellant as detailed in the plaint, there was an element of deception and fraud which was practised upon him as a result of which the concerned document got entered into. It is also a matter of record that the consideration in respect of the transfer of the property in question was stated to have been paid in cash. Again going by the averments made in the plaint, the information in respect of the transaction came to the knowledge only in the year 2013-2014. According to the assertions in the plaint, the plaintiff-appellant was always in possession of the property. In the entirety of the circumstances, as pleaded in the plaint, the issues raised in the matter were certainly required to be considered on merits. In our view, the High Court was not right and justified in accepting the prayer and holding that the plaint was required to be rejected. We, therefore, allow this appeal, set-aside the judgment and order passed by the High Court and restore the one that was passed by the Trial Court."

For Petitioner(s) : Mr. Somesh Chandra Jha, Mr. R.M. Jadhav, Mr. Rahul Narang, Mr. Anand Darshan

For Respondent(s) : Mr. Aniruddha P. Mayee, Mr. A. Rajarajan, Mr. Sanjeev Kr. Choudhary

ORDER Date of Order : 22.10.2019

UDAY UMESH LALIT, J.

Leave granted.

This appeal arises out of the final judgment and order dated 06.05.2019 passed by the High Court of Gujarat at Ahmedabad in Civil Revision Application No.354 of 2017.

The instant proceedings arise out of an application preferred by the respondent under the provisions of Order VII Rule 11 of the Code of Civil Procedure, 1908 which was initially rejected by the Trial Court but came to be allowed by the High Court in its revisional jurisdiction.

Special Civil Suit No.204/2016 was filed by the appellant in the Court of Principal Civil Judge, Surat submitting *inter alia* that by deception, a sale-deed came to be obtained on 21.03.2008 under which the appellant purportedly sold away his interest in Block 221 at Survey No.91 situated at Village Bhanodara, District Surat, Gujarat. Though the sale-deed was effected, the appellant continued to be in possession of the property. The relevant assertions as regards cause of action and limitation as pleaded in the Suit were as under:

> "10. The cause of suit: That, the defendant of this case has executed a sale deed No.5728 of the agriculture land occupied by the plaintiff on dated 21/03/2008, without the knowledge of the plaintiff and in collusion with other person and thereby created false and forged, non executable sale deed, which affect the plaintiff's right, title and interest. Since than, the cause of action arose for this suit. Further, if the defendant is not prevented to further continue the above transaction, in that case, on the basis of the aforesaid alleged sale deed, further sale-deeds will be continued. Therefore also, it is required to prevent the present defendant.
>
> 11. Limitation: The present suit is within limitation, because of out of the knowledge of the plaintiff, by rendering wrong understanding, by way of creating false and forged sale deed No.5728 on dated 21/03/2008 is created in the name of the defendant. Thus, on the basis of this alleged sale-deed, the defendant has made application to post Entry No.1750 in the Revenue Record on dated 15/06/2013, which came to be rejected on dated 30/07/2013. Thus, against this Entry, the present defendant has preferred an appeal being No.362/2013 before Deputy Collector, the notice of that appeal was served to me, and therefore, the plaintiff came to know that, the alleged sale-deed is executed in the land owned by the plaintiff. Therefore, the present suit is filed within limitation as per legal provisions."

With the aforesaid averments, the appellant prayed as under :

> "2. As the defendant of this case has, out of the knowledge of the plaintiff, created in his name false, non-executable and forged sale deed No.5728 on dated 21/03/2008, which affect the interest of the plaintiff over the land, which is requested to be cancelled. It is requested to declare that it is null and void and the intimation of cancellation of sale-deed may be forwarded to the Sub-registrar office."

Pursuant to the application moved by the respondentoriginal defendant under Order VII Rule 11 of the Code, the Trial Court considered the issue and by its order dated 07.03.2017 rejected the prayer. In revision arising therefrom, the High Court by its judgment and order, which is presently under appeal, interfered in the matter and held that in terms of the provisions of Order VII Rule 11 of the Code, the plaint was required to be rejected. The High Court observed as under:

> "16. From overall reading and from consideration of the relevant proposition, it appears that this being a litigation generated after more than a period of 8 years, is clearly hit by law of limitation and as such, in view of the proposition of law laid down by the Apex Court, the revision petition deserves to be allowed. Accordingly, the order impugned dated 7.3.2017 passed below Exh.16 in Special Civil Suit No.204 of 2016 is quashed and set aside hereby and accordingly, the application under Order 7 Rule 11(d) of the Code of Civil Procedure stands allowed and the plaint i.e. Special Civil Suit No.204 of 2016 is hereby rejected. Rule is made absolute with no order as to costs."

It is well settled that for the purposes of the provisions of Order VII Rule 11 of the Code, the entirety of the averments in the plaint have to be taken into account. Going by the version of the appellant as detailed in the plaint, there was an element of deception and fraud which was practised upon him as a result of which the concerned document got entered into. It is also a matter of record that the consideration in respect of the transfer of the property in question was stated to have been paid in cash.

Again going by the averments made in the plaint, the information in respect of the transaction came to the knowledge only in the year 2013-2014. According to the assertions in the plaint, the plaintiff-appellant was always in possession of the property. In the entirety of the circumstances, as pleaded in the plaint, the issues raised in the matter were certainly required to be considered on merits.

In our view, the High Court was not right and justified in accepting the prayer and holding that the plaint was required to be rejected. We, therefore, allow this appeal, set-aside the judgment and order passed by the High Court and restore the one that was passed by the Trial Court.

Since the Suit now stands restored, we direct the parties to appear before the concerned Court on 25.11.2019.

We also direct the Trial Court to dispose of the suit as expeditiously as possible and preferably within six months.

The appeal is allowed in aforesaid terms. No costs.

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2019 (III) ILR-CUT- 600 (S.C)

NAVIN SINHA, J & B.R. GAVAI, J.

CRIMINAL APPEAL NO. 1613 OF 2019
(ARISING OUT OF SLP (CRL) NO. 6997 OF 2015)

P. RAJKUMAR & ANR. ……Appellant(s)

-Vs-

YOGA @ YOGALAKSHMI ….....Respondent(s)

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 20 read with Section 125 of the Code of Criminal Procedure, 1973 – Claim for maintenance under section 20 of the Act was specifically negatived by the judicial magistrate – Whether the Magistrate can order for maintenance in a pending proceeding under section 125 of Code of Criminal Procedure over which he has no jurisdiction – Held, No.

"We are of the considered opinion that the present appeal can be disposed of on a very short point. Admittedly, the respondent was denied any monetary compensation under section 20 of the Act by the learned Magistrate. Once the learned Magistrate declined to grant maintenance for reasons specified, it was not open for him to assume jurisdiction in a

proceeding under section 125 of the Cr.P.C. which was not pending before him and was a completely independent proceeding to direct grant of maintenance under the same. The two being independent proceedings, the learned Magistrate wrongly assumed jurisdiction under Section 125 Cr.P.C in a proceeding under the Act. In effect, what the magistrate directly declined to the respondent, he granted indirectly by observing that till the proceedings under section 125 of Cr.P.C. is not decided, the appellants shall pay maintenance at a rate of Rs.2,000/- per month to the respondent. The order is without jurisdiction and therefore wholly unjustified and unsustainable."

For Petitioner(s) : Mr. B. Karunakaran, Mr. S. Gowthaman.

For Respondent(s): Mr. Mayil Samy. K, Mr. G. Ananda Selvam,
Ms. Kavita Bharadwaj, Mr. P. Soma Sundaram.

ORDER Date of Order : 23.10.2019

NAVIN SINHA, J.

Leave granted.

The appellants assail order dated 06.03.2015 passed by the High Court dismissing the criminal revision, declining to interfere with the order dated 20.01.2015 affirming order dated 28.09.2012 for grant of Rs.10,000/- as maintenance to the respondent in proceedings under section 20 of the Protection of Women from Domestic Violence Act, 2005 (for short, the 'Act').

Learned counsel for the appellants makes a short submission that the claim for maintenance under section 20 of the Act was specifically negatived by the judicial magistrate. The learned Magistrate therefore could not have simultaneously ordered for maintenance in a pending proceeding under section 125 of Code of Criminal Procedure (for short, the 'Cr.P.C.') over which he had no jurisdiction. It was lastly submitted that the respondent has since remarried.

Learned counsel for the respondent invited our attention to the interim order dated 12.10.2018 for payment of all arrears of maintenance. He however did not dispute the fact that the respondent has since remarried on 10.02.2019.

We are of the considered opinion that the present appeal can be disposed of on a very short point. Admittedly, the respondent was denied any

monetary compensation under section 20 of the Act by the learned Magistrate.

Once the learned Magistrate declined to grant maintenance for reasons specified, it was not open for him to assume jurisdiction in a proceeding under section 125 of the Cr.P.C. which was not pending before him and was a completely independent proceeding to direct grant of maintenance under the same. The two being independent proceedings, the learned Magistrate wrongly assumed jurisdiction under Section 125 Cr.P.C in a proceeding under the Act. In effect, what the magistrate directly declined to the respondent, he granted indirectly by observing that till the proceedings under section 125 of Cr.P.C. is not decided, the appellants shall pay maintenance at a rate of Rs.2,000/- per month to the respondent. The order is without jurisdiction and therefore wholly unjustified and unsustainable. The respondent never challenged the order of the learned Magistrate declining monetary relief under section 20 of the Act.

The parties are however agreed that the amount of maintenance which has already been paid under the impugned orders shall not be recovered and also that any amount lying in deposit in the family court may be withdrawn by the respondent.

The impugned orders, with the aforesaid exception, are set aside. The appeal is allowed.

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2019 (III) ILR-CUT- 602

K.S. JHAVERI, C.J.

ARBP NO. 6 OF 2012

M/S. RIDHI SIDHI ……Petitioner

-Vs-

M/S. LEVIS STRAUSS (INDIA) PVT. LTD. & ANR. ……Opp. Parties

ARBITRATION AND CONCILIATION ACT, 1996 – Section 11 (6) – Appointment of Arbitrator – Arbitration clause in the agreement specifies that the place of arbitration would be at Bangalore –

Opp. parties raise question on jurisdiction of Orissa High Court on the ground that in view of clause, the place of arbitration being at Bangalore, the exclusive jurisdiction is in Karnataka High Court and not of Orissa High Court – Materials show the most part of business transaction effected at Cuttack – Whether the Orissa High Court has the jurisdiction to appoint the Arbitrator – Held, Yes – Circumstances – Indicated.

"13.2. If we take it, the stamp paper was purchased from West Bengal, the registered office of the opp. party-company is situated in Bangalore, Karnataka and all throughout the agency which has been performed contract i.e. the present applicant was at Cuttack. Therefore, majority cause of action in respect of the contract, which was terminated in the present case, arose exclusively in the place of Cuttack. Therefore, under the Civil Procedure Code, this Court has jurisdiction.

13.3. Merely because the place of arbitration has been referred to as Bangalore, it cannot oust the jurisdiction of this Court. If the applicant would have gone for civil suit, in my considered opinion, the Court at Cuttack has jurisdiction inasmuch as cause of action has arisen here, merely for the purpose of arbitration, the jurisdiction cannot be ousted. The civil dispute is governed by Section 9 of the Code of Civil Procedure. The cause of action is within Cuttack.

14. In that view of the matter, keeping in mind Section 9 of CPC, I have to apply the law as applicable to the individual. Merely because the present petitioner has chosen to invoke jurisdiction U/s.11 of the Arbitration & Conciliation Act, it should not be relegated to another High Court after seven years of pendency of this petition in absence of Clause-18 in the case of Swastik Gas (supra) is not reflected in the agreement. In my considered opinion, merely because the arbitration clause provided arbitration proceeding at Bangalore, it should not be relegated to the Bangalore Court for referring the matter under Section 11 of the Arbitration & Conciliation Act, 1996.

15. This Court has given option to the counsel for the opposite party for arbitrator from Bangalore and since he did not agree, I have appointed the arbitrator. The contention of the learned counsel for the opposite party that the Orissa High Court has no jurisdiction, is misconceived since the whole cause of action is within the State of Odisha. If the case is referred to at the Bangalore Court and the arbitration is taken place there, both the parties have to incur heavy cost. The endeavour and claim which has been made by the opp. parties are premature at this stage.

16. In that view of the matter, this Court appoints learned Government Advocate of Karnataka High Court as Arbitrator in the matter to resolve the dispute between the parties. It will be open for both the sides to raise the contentions before the Arbitrator. The venue of the arbitration shall be at Bangalore, Karnataka and the proceedings shall be conducted by the learned Arbitrator as per Rules prevailing in Karnataka. I have decided to appoint Arbitrator and no point is decided on merit".

Case Laws Relied on and Referred to :-

1. (2009) 9 SCC 403 : Balaji Coke Industry Pvt. Ltd. -V- Maa Bhagabati Coke Gujarat Pvt. Ltd.
2. (2013) 9 SCC 32 : Swastik Gases Pvt. Ltd. -V- Indian Oil Corporation Ltd.
3. (2017) 7 SCC 678 : Indus Mobile Distribution Pvt. Ltd. -V- Datawind Innovations Pvt. Ltd. & Ors.

For Petitioner : M/s. P.K. Pattnaik, S.N. Senapati, A.K. Dwibedi, M.R. Sarangi, S.K. Pattnaik, M.K. Mishra, G.M. Rath & S.S. Padhi.

For Opp.Parties: M/s. Aditya N. Das, N. Sarkar & E.A. Das. M/s. Rajjeet Roy, S.K. Singh, A. Pradhan, S. Sourav, H. Deora, G. Paharia & N. Nawab.

JUDGMENT Heard and Decided on : 11.01.2019

K.S. JHAVERI, C.J.

By way of this arbitration proceeding under Section 11 of the Arbitration and Conciliation Act, 1996; a poor petitioner, in terms of justice, has approached this Court on 03.02.2012 and notice was issued by this Court on 12.09.2014.

2. Time and again the matter was adjourned. The opposite parties appeared before this Court and filed counter affidavit only on 02.02.2018 after lapse of four years. Thereafter the matter was taken up by this Court on 21.12.2018 and the same is heard today.

3. Shri S.S. Padhy, learned counsel for the petitioner has pointed out that the dispute can be resolved between the parties in view of the arbitration clause, which reads as under :

> "28.11.2 Any controversy or claim arising out of, or relating to, this Agreement or the breach of this Agreement shall be referred to arbitration under the Arbitration and Conciliation Act of 1996, by a sole arbitrator mutually acceptable to Franchisee and LS failing which by three (3) arbitrators i.e. one each appointed by Franchisee and LS and the third appointed by the two (2) arbitrators so appointed by Franchisee and LS. The arbitrator shall be a person of professional repute who is not directly or indirectly connected with any of the Parties to this Agreement. The place of arbitration shall be Bangalore, India. The language to be used in the arbitration proceedings shall be English. The award of the arbitration proceedings will be final and binding on the Parties to the Agreement."

4. Pursuant to the above arbitration clause, the opposite party No.1 was given an undated notice under Annexure-4 regarding settlement of the dispute through Arbitration, under Clause 28.11.2. of the Franchise Agreement dated 11.02.2011. Thereafter by notice on 09.09.2011, the said undated notice was replied and dispute was raised by the opposite party in paragraph-3, 4 and 5, which reads as under:

> "3. Please be notified that R.S. being in constant default of the Franchise Agreement and failing to act prudently and diligently as required in a business of such nature had caused considerable concern to our client. In the circumstances and with the intention of mitigating further damage, our client considered it appropriate that the relationship of the parties under the Franchise Agreement be terminated in due course. Our client's internal email communication dated May 31, 2011 merely indicates such intention. It goes without saying that the Franchise Agreement was not specifically terminated by our client vide email communication dated May 31, 2011. This e-mail was forwarded to R.S. by an employee of our client with the intention of communicating our client's concerns and thought processes with regard to the matter. R.S. vide email communication dated June 01, 2011, immediately suggested that in the interest of both parties the Franchise Agreement ought to be terminated and specifically instructed one Mr. Satya to abstain from placing orders with our client for further stocks. The tenor of the said e-mail, subsequent correspondence between the parties and the subsequent conduct of the parties clearly go to show that the parties had indeed mutually consented for the termination of the Franchise Agreement. Therefore, the Franchise Agreement has been terminated by mutual consent of the parties. R.S. is therefore estopped from contending otherwise.
>
> 4. In the above circumstances there cannot be a dispute as to whether our client terminated the Agreement illegally or not. Therefore, a reference to

> arbitration citing such a nonexistent dispute is not maintainable in law. Please note that this reply is issued without prejudice to our client's right to seek and claim all its dues either by way of recoveries or damages against R.S. with regard to all defaults and breaches committed by R.S.
>
> 5. Without prejudice to the above, please note that our client does not accept your nomination of Mr. Anup Narayan Mohanty, Advocate, as the Sole Arbitrator. Despite the above, in the event you insist on the formation of a three member arbitral tribunal as contemplated in Clause 28.11.2 of the Franchise Agreement and thereby appoint your nominee arbitrator, our client will be constrained to appoint an arbitrator and defend the consequent arbitration, holding R.S. solely responsible for the costs and consequences thereof. You may notify us in this regard."

5. Pursuant to the notice as stated above, the opposite parties appeared and filed their reply raising question of jurisdiction of this Court on the ground that in view of clause, the place of arbitration was Bangalore and, therefore, in view of various judgments of the Hon'ble Supreme Court, the exclusive jurisdiction is in Karnataka High Court and not of Orissa High Court.

6. From the record, it seems that the agreement executed on the Stamp Paper was purchased from West Bengal and performed at Cuttack all throughout.

7. Mr. S. Sourav, learned counsel for the opp. parties relies upon the following decisions :

> 1. Balaji Coke Industry Private Limited vs. Maa Bhagabati Coke Gujarat Private Limited reported in (2009) 9 SCC 403 [Paragraphs-24, 25 and 30]
>
> 2. Swastik Gases Private Limited vs. Indian Oil Corporation Limited, reported in (2013) 9 SCC 32 [Paragraph-53]

8. For ready reference it will not be out of place to reproduce here Clause-18 which is a part of paragraph-8 of the judgment in *Swastik Gases (supra)*. Paras-7, 8, 32 and 53 of the said judgment are reproduced hereunder:

> "7. We have heard Mr. Uday Gupta, learned counsel for the appellant and Mr. Sidharth Luthra, learned Additional Solicitor General for the Company. The learned Additional Solicitor General and the learned counsel for the appellant have cited many decisions of this Court in support of their

respective arguments. Before we refer to these decisions, it is apposite that we refer to the two clauses of the agreement which deal with arbitration and jurisdiction. Clause 17 of the agreement is an arbitration clause which reads as under:

17. Arbitration

If any dispute or difference(s) of any kind whatsoever shall arise between the parties hereto in connection with or arising out of this agreement, the parties hereto shall in good faith negotiate with a view to arriving at an amicable resolution and settlement. In the event no settlement is reached within a period of 30 days from the date of arising of the dispute(s)/difference(s), such dispute(s)/difference(s) shall be referred to 2 (two) arbitrators, appointed one each by the parties and the arbitrators, so appointed shall be entitled to appoint a third arbitrator who shall act as a presiding arbitrator and the proceedings thereof shall be in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification or re- enactment thereof in force. The existence of any dispute(s)/difference(s) or initiation/ continuation of arbitration proceedings shall not permit the parties to postpone or delay the performance of or to abstain from performing their obligations pursuant to this Agreement.

8. The jurisdiction Clause 18 in the agreement is as follows :

18. Jurisdiction

<u>The agreement shall be subject to jurisdiction of the Courts at Kolkata.</u>

32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like “alone”, “only”, “exclusive” or “exclusive jurisdiction” have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties – by having Clause 18 in the agreement – is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is

not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.

53. Proceedings were initiated by the respondent in Shriram City Union Finance in Bhubaneswar (Odisha). An objection was taken by the appellant that the Court in Bhubaneswar had no jurisdiction to entertain the proceedings. However, the objection was not accepted by the trial Judge, Bhubaneswar. In appeal, the District Judge accepted the contention of the appellant that only the courts in Kolkata had jurisdiction in the matter. In a civil revision petition filed before the Orissa High Court by the respondent, the order passed by the trial Court was affirmed with the result that it was held that notwithstanding the exclusion clause, the Civil Judge, Bhubaneswar (Odisha) had jurisdiction to entertain the proceedings."

9. Learned counsel for the opposite party has also relied upon a decision of the Hon'ble Supreme Court in the case of *Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited and others, (2017) 7 SCC 678*, wherein in paragraphs-19 and 20, the Hon'ble Court has held as under :

"19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction – that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

20. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd,, (2013) 9 SCC 32. This was followed in a recent judgment in B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd., (2015) 12 SCC 225. Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical

seat of arbitration is at Mumbai. This being the case, the impugned judgment is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. The appeals are disposed of accordingly."

10. I have heard Shri S.S.Padhy, learned counsel for the petitioner and Shri S. Sourav, learned counsel for the opp. parties.

11. Before proceeding with the matter, this Court is of the view of that there is no dispute that there has been dispute between the parties. Section 11 of the Arbitration and Conciliation Act, 1996 provides for "Appointment of Arbitrators", which reads as under :

"11. Appointment of arbitrators.

1. A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

2. Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

3. Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators, shall appoint the third arbitrator who shall act as the presiding arbitrator.

4. If the appointment procedure in sub-section (3) applies and-

a. a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party ; or

b. the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

5. Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

6. Where, under an appointment procedure agreed upon by the parties,-

a. a party fails to act as required under that procedure; or

b. the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure ; or

c. a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

6-A The Supreme Court or, as the case may be, the High Court while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

6-B The designation of any person or institution by the Supreme Court or, as the case m ay be, the High Court, for the purpose of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

7. A decision on a matter entrusted by sub-section (4) or sub- section (5) or sub section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision. 8. The Supreme Court or, as teh case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure I writing from the prospective arbitrators in terms of sub-section (1) of Section 12, and have due regard to –

a. any qualifications required of the arbitrator by the agreement of the parties; and

b. the contents of disclosure and other considerations as the appointment of an independent and impartial arbitrator.

9. In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Supreme Court or the person or institution designated by that Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

10. The Supreme Court or, as the case may be, the High Court may make such scheme as said Court may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to it.

12. (a) Where the matters referred to in sub-sections (4), (6), (7), (8) and sub-section (10) arise in an international commercial arbitration, the reference to "Supreme Court, or as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "Supreme Court"; and

> (b) where the matter referred to in sub-sections (4), (5), (6), (7), (8), and sub-section (10) arise in any other arbitration, the reference to "Supreme Court or, as the case may be, the High Court" within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to that High Court.
>
> 13. An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.
>
> 14. For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.
>
> Explanation.— For the removal do doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution."

12. The very object of Section 11 of the Act, 1996 is only to examine whether arbitrable dispute is there or not. Admittedly, the opposite parties are not disputing the arbitration clause and the dispute between the parties.

12.1. In this matter, I have not adjudicated upon the dispute. Mere reference of dispute to arbitrate, it will not be appropriate to defer it to other Court after six years, where only arbitrator is to be appointed. I have accepted his contention. Dispute is referred to arbitrator at Karnataka and even the arbitrator is appointed from Karnataka to reduce the cost of arbitration.

12.2. In that view of the matter, no prejudice is caused to the opposite parties.

13. Taking into consideration the very object to resolve the dispute amicably between the parties and the Act, 1996 envisages that the dispute should be resolved through arbitration and since this petition was filed in 2012, it will not be appropriate for this Court to refer to the matter for want of jurisdiction after seven years because of the matter could not be taken up by the Court.

13.1. Further taking into consideration various judgments which are sought to be relied upon by the opposite parties, the Clause 18 referred to in the case of *Swastik Gas (supra)* is not reflected in the present agreement.

13.2. If we take it, the stamp paper was purchased from West Bengal, the registered office of the opp. party-company is situated in Bangalore, Karnataka and all throughout the agency which has been performed contract i.e. the present applicant was at Cuttack. Therefore, majority cause of action in respect of the contract, which was terminated in the present case, arose exclusively in the place of Cuttack. Therefore, under the Civil Procedure Code, this Court has jurisdiction.

13.3. Merely because the place of arbitration has been referred to as Bangalore, it cannot oust the jurisdiction of this Court. If the applicant would have gone for civil suit, in my considered opinion, the Court at Cuttack has jurisdiction inasmuch as cause of action has arisen here, merely for the purpose of arbitration, the jurisdiction cannot be ousted. The civil dispute is governed by Section 9 of the Code of Civil Procedure. The cause of action is within Cuttack.

14. In that view of the matter, keeping in mind Section 9 of CPC, I have to apply the law as applicable to the individual. Merely because the present petitioner has chosen to invoke jurisdiction U/s.11 of the Arbitration & Conciliation Act, it should not be relegated to another High Court after seven years of pendency of this petition in absence of Clause-18 in the case of *Swastik Gas (supra)* is not reflected in the agreement. In my considered opinion, merely because the arbitration clause provided arbitration proceeding at Bangalore, it should not be relegated to the Bangalore Court for referring the matter under Section 11 of the Arbitration & Conciliation Act, 1996.

15. This Court has given option to the counsel for the opposite party for arbitrator from Bangalore and since he did not agree, I have appointed the arbitrator. The contention of the learned counsel for the opposite party that the Orissa High Court has no jurisdiction, is misconceived since the whole cause of action is within the State of Odisha. If the case is referred to at the Bangalore Court and the arbitration is taken place there, both the parties have to incur heavy cost. The endeavour and claim which has been made by the opp. parties are premature at this stage.

16. In that view of the matter, this Court appoints learned Government Advocate of Karnataka High Court as Arbitrator in the matter to resolve the dispute between the parties. It will be open for both the sides to raise the contentions before the Arbitrator. The venue of the arbitration shall be at Bangalore, Karnataka and the proceedings shall be conducted by the learned Arbitrator as per Rules prevailing in Karnataka. I have decided to appoint Arbitrator and no point is decided on merit.

17. The fees of the learned Arbitrator shall be as per the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015. It shall be open to the parties to raise all such pleas as are available to them in law before the learned Arbitrator, who shall consider the same on merits and in accordance with law.

18. The ARBP stands disposed of accordingly.

18.1. Urgent certified copy of this order be granted on proper application.

18.2. This order be communicated to the learned Government Advocate of Karnataka High Court, forthwith.

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2019 (III) ILR-CUT- 613

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

W.P.(C) NO. 21564 OF 2019

RAMESH PRASAD SAO …… Petitioner

-Vs-

STATE OF ODISHA & ORS. ……Opp.Parties

MINES AND MINERALS (DEVELOPMENT AND REGULATION) ACT, 1957 & MMDR AMENDMENT ACT, 2015 – Section 8(6) – Period of grant of a mining lease for minerals other than coal, lignite and atomic minerals – Writ petition seeking restoration of the lost period (from 27.06.2013 to 16.05.2014, i.e., 10 months and 20 days and from 23.05.2015 to 10.04.2018, i.e., 34 months and 19 days); thus total period of 45 months and 09 days, for which the

Lessee could not operate its mines due to interruptions/disruptions caused which was beyond the control of the Lessee, more particularly when such disruptions were caused mainly by the act or omission on the part of the authorities of the State Government – Plea that the Govt. action was not authorized under law – The question arose as to whether such an extension can be granted? – Held, No.

"In view of MMDR Amendment Act, 2015, and more particularly there is no extension on record after 2013 and the petitioner having accepted the supplementary lease deed of 2015 up to 31st March, 2020, in our considered opinion, it would not be appropriate to extend the lease period or grant the petitioner 45 months and 9 days contrary to Section 8A(6) of the MMDR Act. The lease period which was accepted by both the sides up to 31st March, 2020 is in consonance with the MMDR Amendment Act, 2015. In that view of the matter, the petitioner cannot be allowed to operate the mines beyond 31st March, 2020, which will contravene the provision under Section 8A(6) of the MMDR Act. In that view of the matter, the contention of the petitioner that the affidavit which was filed before the Hon'ble Supreme Court and referred to hereinabove with reference to the present context, cannot yield any benefit to the petitioner in view of the explanation of learned Advocate General to the effect that the Hon'ble Supreme Court, in a proceeding pending before it, directed the State Government to give list of each mine holders, whether they have complied with the statutory requirement or not. Having accepted the supplementary lease, without any demur in 2015, the petitioner cannot possibly raise any objection for the period prior to execution of the said lease. However, it will not be appropriate to allot the mining lease in favour of a Government owned Corporation as per provisions of Section-17A of MMDR Act. But, here it is at such preliminary stage of decision making process by the State Government, Section-17A will not come into play." (Para 13.1)

Case Laws Relied on and Referred to :-

1. (2003) 1 SCC 726 : Beg Raj Singh -V- State of U.P. & Anr.
2. AIR 1989 Del 227 : Dharam Veer -V- Union of India & Ors.

For Petitioner : Mr. Nidhesh Gupta, Sr. Adv,
M/s. Umech Ch. Patnaik, S. Patnaik & M.R. Sahoo

For Opp. Party : Mr. Ashok Ku. Parija, Adv. General

ORDER Heard and Disposed of on : 19.11.2019

BY THE COURT

Heard Mr.Nidhesh Gupta, learned Senior Advocate for the petitioner and Mr.Ashok Ku. Parija, learned Advocate General for State-opposite party Nos. 1 and 2.

2. The petitioner, who is the Lessee in respect of Guali Iron Ore Mines situated over an area of 365.026 hectares in village Guali, Panduliposi, Topadihi, Loidapada and Rugudihi and Sidhamatha reserve forest under Barbil Tahasil in Champua Sub-Division of Keonjhar district, has filed the present writ petition seeking restoration of the lost period (from 27.06.2013 to 16.05.2014, i.e., 10 months and 20 days and from 23.05.2015 to 10.04.2018, i.e., 34 months and 19 days); thus total period of 45 months and 09 days, for which the Lessee could not operate its mines due to interruptions/disruptions caused which was beyond the control of the Lessee, more particularly when such disruptions were caused mainly by the act or omission on the part of the authorities of the State Government. He further submitted that various legal proceedings are pending before this Court and the Hon'ble Supreme Court in respect of the mines in question.

2.1 The substratum of challenge of the petitioner in this writ petition is the decision dated 22.10.2019 of the State Government communicated to the petitioner under Annexure-30, to allocate the mining lease in question in favour of Odisha Mineral Exploration Corporation Ltd. (OMECL). For ready reference, relevant portion of Annexure-30 is quoted below :-

> *"Sub: Discussion on Guali Iron Mining Lease.*
>
> *Govt. of Odisha has decided to allocate the above mining lease in favour of Odisha Mineral Exploration Corporation Ltd. (OMECL) which is lapsing on 31.03.2010.*
>
> *In view of the above, it has been decided to hold a meeting under the Chairmanship of Sri Sanjeev Chopra, IAS, Home Secretary-cum-Chairman, OMECl on 25th Oct'2019 at 6.00 PM in the Conference Room of Home Department, Loka Seva Sadan, Bhubaneswar.*
>
> *Therefore, you are requested to make it convenient to attend the meeting on the afore mentioned date, time & venue."*

3. Learned counsel for the petitioner mainly contended that the tenor of the agreement, which was entered into between him and the Government, more particularly in view of the last extension agreement which stipulates, "*AND, WHEREAS this supplementary lease deed is a part and parcel of the said deed and the terms & conditions are in furtherance to the terms and*

conditions in addition to the terms and conditions agreed to in the said lease deed", he is entitled to the relief sought for.

3.1 Emphasis is laid on Form-K (Part-IX) of Mineral Concession Rules, 1960, Clause-4 of which is placed reliance. For better appreciation of facts, Clause-4 of Form-K is quoted hereunder:-

> *"4. Failure on the part of the lessee/lessees to fulfill any of the terms and conditions of this lease shall not give the Central or State Government any claim against the lessee/lessees or be deemed a breach of this lease, insofar as such failure is considered by the said Government to arise from force majeure, and if through force majeure the fulfillment by the lessee/lessees of any of the terms and conditions of this lease be delayed, the period of such delay shall be added to the period fixed by this lease. In this clause the expression "Force Majeure" means act of God, war, insurrection, riot, civil commotion, strike, earthquake, tide, storm, tidal wave, flood, lightening, explosion, fire, earthquake and any other happening which the lessee/lessees could not reasonably prevent or control."*
>
> (*emphasis supplied by the petitioner*)

4. It is contended that the petitioner was not allowed to carry on the mining from 27.06.2013 to 16.05.2014, i.e., 10 months and 20 days and from 23.05.2015 to 10.04.2018, i.e., 34 months and 19 days; thus, the total period is 45 months and 09 days. In this regard, he had made representation, which has not yet been paid heed of, and in the meantime, the Government have decided to lease out the mines in question to the OMECL, which is a State owned Corporation. As such, the action of the Government is contrary to provisions of Section-17A (2) of Mines & Minerals (Development & Regulation) Act, 1957 (for short, 'MMDR Act'), which is reproduced below for ready reference:-

> "17A. ***Reservation of areas for purposes of conservation.-***
>
> *(1) xx xx xx*
>
> *(2) The State Government may, with the approval of the Central Government, reserve any area not already held under any prospecting licence or mining lease, for undertaking prospecting or mining operations through a Government company or corporation owned or controlled by it and where it proposes to do so, it shall, by notification in the Official Gazette, specify the boundaries of such area and the mineral or minerals in respect of which such areas will be reserved."*

4.1 Since there is no approval as yet from the Central Government, issuance of Annexure-30 runs contrary to the above provision of the MMDR Act.

5. The further contention of Mr.Gupta, learned Senior Advocate is that pursuant to Annexure-15, vide communication dated 27.04.2015 of Special Secretary, Government of Odisha in the Department of Steel and Mines to the petitioner regarding extension of lease period from 27.06.2013 to 31st March, 2020, petitioner deposited an amount of Rs.82,06,93,695/- through pay order towards stamp duty vide letter dated 19.05.2015 and Rs.32,82,78,874/- towards registration addressed to the Sub-Registrar, Barbil, for execution of supplementary lease deed for the entire period with effect from 27.06.1993 till 31.03.2020.

6. Regarding period of lease as per the original agreement and supplementary agreement, as referred to hereinabove, it is contended that the amount of stamp duty and registration fee should be correspondingly reduced for the period of 45 months and 09 days, during which there was no mining, which was beyond the control of the petitioner.

7. In support of his contentions, reliance is placed on the judgment of the Hon'ble Supreme Court in the case of ***Beg Raj Singh Vs. State of U.P. and other***, reported in (2003) 1 SCC 726, wherein the Hon'ble Supreme Court in paragraph-7 held as under:-

> "*7. Having heard the learned counsel for the petitioner, as also the learned counsel for the State and the private respondent, we are satisfied that the petition deserves to be allowed. The ordinary rule of litigation is that the rights of the parties stand crystallized on the date of commencement of litigation and the right to relief should be decided by reference to the date on which the petitioner entered the portals of the court. A petitioner, though entitled to relief in law, may yet be denied relief in equity because of subsequent or intervening events i.e. the events between the commencement of litigation and the date of decision. The relief to which the petitioner is held entitled may have been rendered redundant by lapse of time or may have been rendered incapable of being granted by change in law. There may be other circumstances which render it inequitable to grant the petitioner any relief over the respondents because of the balance tilting against the petitioner on weighing inequities pitted against equities on the date of judgment. Third-party interests may have been created or allowing relief to the claimant may result in unjust enrichment on account of events*

happening in-between. Else the relief may not be denied solely on account of time lost in prosecuting proceedings in judicial or quasi-judicial forum and for no fault of the petitioner. A plaintiff or petitioner having been found entitled to a right to relief, the court would as an ordinary rule try to place the successful party in the same position in which he would have been if the wrong complained against would not have been done to him. The present one is such a case. The delay in final decision cannot, in any manner, be attributed to the appellant. No auction has taken place. No third-party interest has been created. The sand mine has remained unoperated for the period for which the period of operation falls short of three years. The operation had to be stopped because of the order of the State Government intervening which order has been found unsustainable in accordance with stipulations contained in the mining lease consistently with GO issued by the State of Uttar Pradesh. Merely because a little higher revenue can be earned by the State Government that cannot be a ground for not enforcing the obligation of the State Government which it has incurred in accordance with its own policy decision.

In another judgment, the Delhi High Court in the case of ***Dharam Veer Vs. Union of India and others***, reported in AIR 1989 Del 227, it has been held as under:-

"*43. The expression force majeure has been held to mean, act of god, war, insurrection, riot, civil commotion, strike, earthquake(sic), tide, storm, tidal wave, flood, lightening; explosion; fire and "any other happening which the lessee could not reasonably prevent or control". Though this is not a case of force majeure in terms, on analogous principles, it appears to us that the unlawful interruption of enjoyment caused to the lessee by the illegal act of respondent No. 2 is something that the lessee could not reasonably prevent or control and the period of this interruption should be excluded from the term of the three year lease. It appears to us necessary as a matter of law and justice to give this consequential relief as a result of our striking down the order of premature termination. Not to do so would result in multiplication of litigation, and depriving the petitioner who has been prejudiced of substantial relief."*

Therefore, learned counsel argued with vehemence that the lease period should be extended for 45 months and 9 days, i.e. the period for which there was no mining operation which was beyond the control of the petitioner.

8. Further, learned counsel for the petitioner submitted that his submissions gets support from the reply affidavit filed by the State Government before the Hon'ble Supreme Court in IA No.70 of 2015 [arising

out of W.P.(C) No.114 of 2014], paragraphs-2 and 3 of which is relevant for our consideration and reproduced hereunder:-

> *"2. That the present applicant was granted mining lease for iron ore over an area of 365.026 hects in village Guali, Topashi, Rugudihi etc of Keonjhar district for 20 years from 27.06.1053 to 26.06.1973 which was executed on 21.05.1963. The applicant applied for first renewal of mining lease which was granted and executed on 23.06.1980 for 20 years from 27.06.1973 to 26.06.1993. The 2nd RML application was filed on 10.02.1992 but it was not granted (for the period 27.06.1993 to 26.06.2013). The applicant filed 3rd RML application over an area of 365.026 hects on 25.04.2012 before one year prior to expiry of the 2nd RML period U/R 24A of MC Rules, 1960.*
>
> *3. It is respectfully submitted that the Application/Lessee has obtained all statutory Clearances/Approvals like forest clearance from MoEF and consents to operate from OSPCB, Bhubaneswar.*
>
> *4. That in the meantime State Government have extended the validity period of the mining lease from 27.06.06.1993 to 31.03.2020 U/S 8A(6) of the MMDR Amendment Act, 2015."*

9. Taking into consideration the above, it has been argued by Mr.Gupta that non-operation of the mines in question was accepted by the Government. It is further contended that pursuant to coming into force of the MMDR Amendment Act, 2015, the extension of lease period was through supplementary lease deed, wherein the State Government accepted the payment of the stamp duty and registration fee for the entire period of extension. He further contended that the Rules, more particularly Clause-4 of Form-K (Part-IX) of Mineral Concession Rules, 1960, should be read harmoniously with the provisions under Section 8A of the MMDR Amendment Act of 2015.

10. In an alternate argument, Mr.Gupta contends that as per Clause-4 of Form-K (Part-IX) of Mineral Concession Rules, 1960, the petitioner is to get six months breathing period after expiration of the lease period. For better appreciation of facts, Clause-4 of Form-K is quoted below:-

> *"**Lessee/lessees to remove his/their properties on the expiry of lease**:-*
>
> *5. The lessee/lessees having first paid discharged rents, rates and royalties payable by virtue of these presents may at the expiration or sooner determination of the said term or within six calendar months thereafter*

> *(unless the lease shall be determined under clauses 1 and 2 of this Part andin that case at any time not less than three calendar months nor more than six calendar months after such determination) take down and remove for his/their own benefit all or any 1 [ore mineral excavated during the currency of lease] engines, machinery, plant, buildings structures, tramways, railways and other works, erections and conveniences which may have been erected, set up or placed by the lessee/lessees in or upon the said lands and which the lessee/lessees is/are not bound to deliver to the State Government under clause 20 of Part VII of this Schedule and which the State Government shall not desire to purchase."*

In view of such provision, the decision for lease of mines in favour of the OMECL with effect from 1st April, 2020 as per Annexure-30, is without authority of law. The petitioner has the statutory right to continue for a period of six calendar months after expiration of the lease period, i.e., 30th March, 2020 for removal of his materials, machineries etc., which the Government is not prepared to purchase and during that period lease in favour of OMECL could not have been granted, more particularly in absence of any prior approval of Central Government as required under Section 17A (2) of MMDR Act.

11. Mr.Ashok Kumar Parija, learned Advocate General appearing for the State of Odisha has taken us to Clause-6 of Section-8A of the MMDR Amendment Act, 2015, which is quoted hereunder for ready reference.

> *"**8. Periods of grant of a mining lease for minerals other than coal, lignite and atomic minerals:***
>
> *xx xx xx*
>
> *(6) Notwithstanding anything contained in sub-sections (2), (3) and sub-section (4), the period of lease granted before the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, where mineral is used for other than captive purpose, shall be extended and be deemed to have been extended upto a period ending on 31st March, 2020 with effect from the date of expiry of the period of renewal last made or till the completion of renewal period, if any, or a period of fifty years from the date of grant of such lease, whichever is later, subject to the condition that all the terms and conditions of the lease have been complied with."*

12. In that view of the matter, it is contended that extension beyond 31st March, 2020 cannot be granted unless there is renewal prior to the Amendment Act of 2015 come into effect, i.e. on 12th January, 2015. There

is no extension prior to 12th January, 2015. Form-K, if it is contrary to the substantive provisions in the Act, cannot be allowed to operate and it should always be read in harmony with the substantive provision.

13. We have heard the learned counsel for the parties and perused the record.

13.1 In view of MMDR Amendment Act, 2015, and more particularly there is no extension on record after 2013 and the petitioner having accepted the supplementary lease deed of 2015 up to 31st March, 2020, in our considered opinion, it would not be appropriate to extend the lease period or grant the petitioner 45 months and 9 days contrary to Section 8A(6) of the MMDR Act. The lease period which was accepted by both the sides up to 31st March, 2020 is in consonance with the MMDR Amendment Act, 2015. In that view of the matter, the petitioner cannot be allowed to operate the mines beyond 31st March, 2020, which will contravene the provision under Section 8A(6) of the MMDR Act. In that view of the matter, the contention of the petitioner that the affidavit which was filed before the Hon'ble Supreme Court and referred to hereinabove with reference to the present context, cannot yield any benefit to the petitioner in view of the explanation of learned Advocate General to the effect that the Hon'ble Supreme Court, in a proceeding pending before it, directed the State Government to give list of each mine holders, whether they have complied with the statutory requirement or not. Having accepted the supplementary lease, without any demur in 2015, the petitioner cannot possibly raise any objection for the period prior to execution of the said lease. However, it will not be appropriate to allot the mining lease in favour of a Government owned Corporation as per provisions of Section-17A of MMDR Act. But, here it is at such preliminary stage of decision making process by the State Government, Section-17A will not come into play.

14. In view of the discussions made above, the case laws those are pressed into service by learned counsel for the petitioner are not applicable to the facts and circumstances of the present case, since in those cases, order of cancellation of lease was found to be illegal. But, in the instant case, it was not cancellation of lease but non-extension of the lease. In view of Clause-4 of Form-K (Part-IX), referred to and reproduced hereinabove, the petitioner will not be disturbed for a period of six months beyond the lease period, i.e., 31st March, 2020 so as to enable him to remove the stacked materials and

machineries etc. It is made clear that the petitioner cannot operate the mining beyond 31st March, 2020.

15. With the aforesaid observations and direction, the writ petition is disposed of.

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2019 (III) ILR-CUT- 622

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

OJC NOs. 16022 OF 1997 & 4507 OF 1999

SMT. LABANYAREKHA ……..Petitioner

-Vs-

STATE ……..Opp. Party

ORISSA GOVERNMENT LAND SETTLEMENT ACT, 1962 – Section 7-A (3) – Provisions under – Lease of Govt. land – Cancellation by revisional authority – Plea that since the lease was granted in 1981, the provision as was stood on the date of lease, should have been followed – Board of Revenue being the revisional authority then, should have exercised the revisional power and not the Additional District Magistrate – Whether such a plea can be accepted ? – Held, No – Reasons indicated.

"Admittedly every statute has prima facie prospective in operation. The suo motu revision was initiated in the year 1994. On the said date, District Magistrate/Collector was the Revisional Authority as per Section 7-A(3) of the Act, who has been empowered with power to call for and examine the records of any proceedings in which any authority sub-ordinate to it has passed an order. The amended Act of 1981 also reveals that the same is prospective in nature. Nowhere in the repealed and savings section it has been indicated that the date of lease governs the field or any authority has been cited by the parties to that effect. Rather it indicates that the same is prospective and valid. The statute conferred jurisdiction on the authority and he has to exercise such authority as per the amended provision. Thus there is no error apparent on the face of it nor there is any illegality or impropriety in the impugned orders to be interfered with.:"

Case Laws Relied on and Referred to :-

1. (2014) 2 SCC 401 : J. Jayalalitha & Ors. -V- State of Karnataka & Ors.
2. 2013 (I) OLR 344 : Capital Bar Association,BBSR-V- State of Odisha & Ors.
3. (2015) 1 SCC 1 : Commissioner of Income Tax, (Central)-I, New Delhi -V- Vatika Township Private Ltd.
4. (1976) 1 SCC 906 : Govind Das & Ors. -V- The Income Tax Officer & Anr.
5. (2008) 1 SCC 391 : Sangram Spinners -V- Regional P.F. Commissioner
6. 1990 (I) OLR 22 : Sudam Charan Kanungo -V- State of Orissa.
7. AIR 1964 SC 477 : Syed Yakoob -V- K.S. Radhakrishnan & Ors.

For Petitioner : M/s. A.K.Parija, S.P.Sarangi, P.P.Mohanty, B.C.Mohanty.
For Opp. Party : --

ORDER Date of Order : 15.11.2019

S. PANDA, J.

Heard learned counsel for the petitioners and learned Additional Government Advocate.

2. Since the issue involved in both the writ applications is one and same, both the matters were heard together and disposed of by this common order.

3. In OJC No. 16022 of 1997, the petitioner challenges the order dated 17.09.1997 passed by the Additional District Magistrate, Khurda in OGLS Revision Case No. 96 of 1994 and in OJC No. 4507 of 1999, the petitioner challenges the orders dated 17.09.1997 and 06.11.1998 passed by the Additional District Magistrate, Khurda in OGLS Revision Case No. 93 of 1994. By the impugned orders, the lease granted in favour of the petitioners by the Tahasildar, Khurda have been cancelled in exercise of Section 7-A (3) of the Orissa Government Land Settlement Act, 1962.

4. So far as OJC No. 16022 of 1997 is concerned, the impugned order reveals that pursuant to the application filed by the petitioner for settlement of land measuring an area of Ac.0.200 decimal out of Plot No. 393 under Khata No. 481 of Mouza-Paikatigiraia in the district of Khurda, W.L. Lease Case No. 1740 of 1980-81 was initiated by the Tahasildar Khurda and accordingly the lease was granted in favour of the petitioner. Thereafter certain irregularities had been pointed out in settlement of the Government land by the Sub-Collector, Khurda and accordingly he suggested for cancellation of the lease to Collector, Khurda vide letter dated 06.01.1994.

Basing on such suggestion given by the Sub-Collector, Khurda, O.G.L.S. Revision Case 96 of 1994 was instituted by the Additional District Magistrate, Khurda. The Additional District Magistrate, Khurda vide order dated 17.09.1997 observed that the order of the Tahasildar is bad in law and in contravention of the prescribed Act and Rules. Therefore, the lease granted by the Tahasildar was cancelled. The same is challenged in the present writ application.

5. So far as OJC No. 4507 of 1999 is concerned, the impugned orders reveal that on an application filed by the petitioner for settlement of land measuring an area of Ac.0.200 decimal out of Plot No. 393 under Khata No. 481 of Mouza-Paikatigiraia in the district of Khurda, W.L. Lease Case No. 1756 of 1980-81 was initiated by the Tahasildar Khurda and accordingly the lease was granted in favour of the petitioner. Thereafter certain irregularities had been pointed out in settlement of the Government land by the Sub-Collector, Khurda and accordingly he suggested for cancellation of the lease to Collector, Khurda vide letter dated 06.01.1994. Basing on such suggestion given by the Sub-Collector, Khurda, O.G.L.S. Revision Case 93 of 1994 was instituted by the Additional District Magistrate, Khurda. The Additional District Magistrate, Khurda vide order dated 17.09.1997 observed that the order of the Tahasildar is bad in law and in contravention of the prescribed Act and Rules. Therefore, the lease granted by the Tahasildar was cancelled. The petitioner challenged the said order before this Court in OJC No. 14977 of 1997. The said writ application was disposed of on 16.07.1998 by remitting the matter back to the revisional authority, i.e. Addl. District Magistrate, Khurda for taking a fresh decision in the matter. After remittance of the matter, the Addl. District Magistrate Khurda passed an order on 06.11.1998 by upholding the earlier order dated 17.09.1997. The petitioner challenged the said order in the present writ petition.

6. Learned counsel for the petitioners contended that since the lease were granted in January, 1981, the provision as was stood on the date of lease, should have been followed while the authority exercising its revisional power. On the date of lease, as per Section 7-A (3) of the Orissa Government Land Settlement Act, 1962, the Board of Revenue was the Revisional Authority. Since the impugned orders were passed by the Additional District Magistrate, the impugned orders are liable to be quashed. Learned counsel for the petitioners submitted that where the statute requires to do certain things in a certain way that thing must be done in that way and not contrary to it. In

support of such contention, the petitioners cited the decision in the case of ***J. Jayalalitha and others vs. State of Karnataka and others, reported in (2014) 2 SCC 401***, ***Capital Bar Association, Bhubaneswar vs. State of Odisha and others, reported in 2013 (I) OLR 344***. He further submitted that the current law should govern the current activities and law passed today cannot apply to the events of the past. To such submission he cited the decision in the case of ***Commissioner of Income Tax, (Central)-I, New Delhi vs. Vatika Township Private Ltd., reported in (2015) 1 SCC 1, Govind Das and others vs. The Income Tax Officer and another, reported in (1976) 1 SCC 906*** and so far as every statute is prima facie prospective in nature, learned counsel cited the decision in the case of ***Sangram Spinners vs. Regional Provident Fund Commissioner I, reported in (2008) 1 SCC 391*** and in the case of ***Sudam Charan Kanungo vs. State of Orissa reported in 1990 (I) OLR 22***.

7. Learned Additional Government Advocate submits that on the date of initiation of the Revisional Proceeding, Orissa Government Land Settlement (Amendment) Act, 1981 was in force, which has empowered the Collector to be the Revisional Authority as per Section 7-A (3) of the Act in case the lease was granted by the authority subordinate to him. Since the impugned orders were passed as per the existing provision on the date of initiation of the Revision, therefore, the impugned orders need not be interfered with.

8. The decisions cited above are not in dispute. Admittedly every statute has prima facie prospective in operation. The suo motu revision was initiated in the year 1994. On the said date, District Magistrate/Collector was the Revisional Authority as per Section 7-A(3) of the Act, who has been empowered with power to call for and examine the records of any proceedings in which any authority sub-ordinate to it has passed an order. The amended Act of 1981 also reveals that the same is prospective in nature. No where in the repealed and savings section it has been indicated that the date of lease governs the field or any authority has been cited by the parties to that effect. Rather it indicates that the same is prospective and valid. The statute conferred jurisdiction on the authority and he has to exercise such authority as per the amended provision. Thus there is no error apparent on the face of it nor there is any illegality or impropriety in the impugned orders to be interfered with. Further the impugned order in OJC No. 16022 of 1997 reveals that the husband of the petitioner managed to grab valuable government lands in the name of his wife, son and brother. The income of the husband of the petitioner, who is a school teacher of TRW department, has

not been taken into account while computing her income along with all the family members of her family living in joint mess. The impugned orders in OJC No. 4507 of 1999 reveals that the sub Collector conducted the inquiry and submitted the report where in he found that by misrepresentation of facts, the petitioners have obtained the lease. He does not belong to the village Paikatigiria and he is not a landless person. The petitioner in OJC No.16022 of 1997 is the wife of the brother of petitioner in OJC No. 4507 of 1999. In view of the above, all the decisions cited above do not support the case of the petitioner.

9. In view of the discussions made hereinabove paragraphs, since the Additional District Magistrate has passed the reasoned orders and therein no illegality or error apparent on the face of the same, by applying the ratio of the decision of the apex court in the case of ***Syed Yakoob vs. K.S. Radhakrishnan and others*** reported ***in AIR 1964 SC 477***, we are not inclined to interfere with the same in exercise of the jurisdiction conferred under Article 227 of the constitution of India.

Both the writ applications are accordingly dismissed.

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2019 (III) ILR-CUT- 626

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

CRA NO. 173 OF 2000

SANJIT MANDAL .....Appellant

-Vs-

STATE OF ORISSA .....Respondent

INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction – Conviction based on circumstantial evidence – Prior enmity between the accused and the deceased – Accused found absent after the occurrence – Subsequently surrendered by producing material objects – Whether the chain of circumstances complete so as to maintain conviction – Held, No.

"The fact that the accused surrendered before the witness-P.W.15 and produced M.O.I to M.O.V and on chemical examination the said material objects were found to be stained with human blood of Group-'B' by themselves do not form a complete chain of circumstances unerringly pointing to the guilt of the accused-appellant. In other words, the circumstances that have been brought out in this case do not form a complete chain, without any gap, definitely pointing to the only possibility of the accused-appellant having committed the murder of the deceased. As the chain is not complete, as per the judgement rendered by the Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda****, we are of the opinion that the conviction recorded and sentence imposed by the learned Addl. Sessions Judge cannot be sustained."* (Paras 5 & 7)

Case Law Relied on and Referred to :-

1. AIR 1984 SC 1622 : Sharad Birdhichand Sarda -V- State of Maharashtra.

For Appellant : M/s. Jugalkishore Panda, Mr.S.K.Joshi
For Respondent : Mr. K.K.Mishra (Add. Govt. Adv.)

JUDGMENT Date of Hearing & Judgment : 31.07.2019

S.K. MISHRA, J.

In this appeal, the appellant-Sanjit Mandal being the convict in Sessions Case No.67 of 1999 (SC No.306/97 of Sessions Judge, Koraput-Jeypore) of the court of learned Addl. Sessions Judge, Malkangiri assails the judgment dated 20.06.2000, whereby he has been convicted for the offence U/s. 457 and 302 of the IPC (hereinafter referred to as "I.P.C." for brevity) and has been sentenced to undergo imprisonment for life.

2. Case of the prosecution in short is that one Ananda Sarkar of village M.V.82 lodged a report on 17.07.1997 at about 2 A.M. before the O.I.C., Motu Police Station to the effect that on 16.07.1997 night on a Wednesday, his brother Govinda Sarkar, aged about 23 years, was sleeping in his Book Shop in the Bazar. At about 11.30 P.M., one Parimal Sarkar called him and told him that Govinda is dead and hearing this news, he came running and found a gathering there. He entered into the shop and found the dead body was lying with full of blood and there were injuries on the neck, back, head and hand. He came to know from Jadunath that at about 10 P.M., his brother Govinda and accused Sanjit Mandal were talking on the backside of the

Shop. The prosecution further alleged that the accused was not pulling well with his brother due to the reason that 4 years back, the sister of the accused namely Krishna was in love with deceased-Govinda. He agreed for the marriage but the father of Krishna did not agree. Thereafter, Krishna died taking poison. From that day, the accused was not pulling well with Govinda. So, he suspected that the accused might have murdered his brother. He and others went to the house of the accused and found that the accused was absent from his house. He was also absent from the village. So, the informant suspected that the accused after murdering his brother left the village. On the written report of the informant Motu P.S. Case No.13/97 was registered and the matter was investigated. After investigation, finding a prima facie case against the accused, the Investigating Officer submitted charge-sheet under Sections 457 and 302 of IPC. Hence, the accused faced trial for the aforesaid offences.

The plea of the accused is one of complete denial.

3. In order to prove its case, the prosecution has examined 15 (fifteen) witnesses. P.W.3-Ananda Kumar Sarkar is the informant in this case. P.W.11 is the scribe of F.I.R.

3.(a) P.W.1 is the Doctor, Ramakanta Panda, who has conducted post-mortem examination on the dead body of the deceased. P.W.14 is the Investigating Officer of this case and P.W.15 is the Police Officer before whom the appellant allegedly surrendered and produced the weapon of offence i.e. one sickle and his wearing apparels. Rest of the witnesses were either post-occurrence witnesses or formal witnesses.

No witness has been examined on behalf of defence.

3.(b) Admittedly, this case is based upon the circumstantial evidence as there is no direct evidence in the shape of narration of any eye-witness.

4. Learned Addl. Sessions Judge has come to the conclusion that the death of the deceased was homicidal in nature. This aspect is not challenged by the appellant. In fact, the evidence of P.W.1 and the post-mortem report well proves that the deceased died of several injuries on his person which could have been inflicted by a sharp cutting weapon. The Doctor has also opined that the death of the deceased was homicidal in nature. That aspect need not be disturbed in this appeal.

4.(a) As far as the complicity of the appellant in the crime is concerned, learned Addl. Sessions Judge has relied upon following circumstances to record conviction of the appellant. These are as follows :-

i. There was prior enmity between the accused and the deceased.

ii. The accused had motive to murder the deceased.

iii. The accused after the occurrence, was found absent from his house and from the village.

iv. He was also found absent from the place where he was sleeping prior to the occurrence.

v. He surrendered before P.W.15 (O.I.C., M.V.79 P.S.) by producing material objects (M.Os. I to V).

vi. The Chemical Examination report i.e. Ext. 11 clearly reveals the earth was found having human blood, the 'KATI' was found stained with human blood, the banian, full-pant and nail-clippings of the accused was also found with the human blood.

4.(b) Basing upon the aforesaid circumstances coupled with the fact that the death of the deceased was homicidal in nature, learned Addl. Sessions Judge convicted the appellant as aforestated.

5. Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda vrs. State of Maharashtra** reported in *AIR 1984 SC 1622* has laid down five golden principles of appreciation of evidence in a case solely based upon the circumstantial evidence. These are as follows:-

1. The circumstances from which the conclusion of guild is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;
2. the facts so established should be consistent only with the hypothesis of the guild of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
3. the circumstances should be of a conclusive nature and tendency;
4. they should exclude every possible hypothesis except the one to be proved; and
5. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

5.(a) Judging this case from the above quoted judgment of the Hon'ble Supreme Court, this Court finds that the case of the prosecution cannot be held to be established by the circumstances that has been established in this case. No doubt, there was previous enmity between the accused and the deceased, because of the suicide of the death of the sister of the accused. So he has a motive to commit murder of the deceased. However, the other circumstances like the accused after murder who was found absent from the village cannot be taken as a circumstance which is consistent only with a hypothesis of guilt of the accused and no other hypothesis is consistent with such circumstances.

5.(b) As far as the circumstance of his being found absent from the spot, where he was sleeping also is not a circumstance which is consistent only with the guilt of the accused.

6. In order to appreciate the circumstances better, it is appropriate to take note of the evidence of the witnesses, P.W.3-Ananda Kumar Sarkar stated that two years and three months prior to his depositions, accused murdered his brother. Four to five years back, the deceased was in love with Krishna i.e. the sister of the accused. The witness further stated that they did not agree for the marriage and when the marriage of Krishna was settled elsewhere, Krishna committed suicide. So, there was enmity between the family of the accused and family of the deceased. The accused was sleeping on the sand hip along with Arun Mandal, Kartik Sarkar beyond his shop. At about 11.30 P.M., he heard hullah and went there by running and found a gathering. He also found that his brother lying dead. They doubted the accused to have committed the murder the deceased. Hence, he asked Jadunath Biswas that the deceased was sleeping on the sand heap along with Arun Mandal, Kartik Sarkar. He searched for the accused but could not trace him. Jadunath Biswas scribed the F.I.R. according to the instructions of P.W.3 and read over and explained it to him. Thereafter he signed the F.I.R. Ext.6 is the F.I.R. and Ext.6/1 is his signature in Ext.6. On cross-examination, he has stated that he has not seen the murder of his brother. There are some other shops near the spot. Parimal and Jadunath Biswas have their shops. Jadunath has also not seen the accused murdering the deceased.

6.(a) Jadunath Biswas has been examined as P.W.11. He has not supported the case of the prosecution. He has stated that he does not know anything about the case. Though cross-examined by the prosecution, he has not been confronted with the F.I.R., which he allegedly wrote, by the prosecution and there is no explanation why the same was not done.

6.(b) P.W.4- Parimal has stated that he heard hullah at about 11 P.M. found the dead body of the deceased in a house. Police seized earth and the earth stained with blood from the sport in his presence. Ext. 8 is the seizure list and Ext.8/1 is his signature in Ext.8.

6.(c) P.W.5-Sapan Mandal has also stated that he cannot say who killed the deceased. Only after hearing hullah, he went to the spot and found the dead body lying.

6.(d) P.W.6-Debadash Bala has also not seen the occurrence. He has stated that prior to the occurrence there was enmity between the family of the accused and family of the deceased.

6.(e) P.W.7- Chitaranjan Choudhury is a seizure witness and has turned hostile and not supported the case of the prosecution.

6.(f) P.W.8 has stated that he has no knowledge about the case and police never seized anything from the possession of the accused in his presence.

6.(g) P.W.9-Saiba Sarkar is the father of the deceased and he stated that he saw the accused running but he has not seen who killed his son. In the cross-examination, it is brought out that he has not stated that the accused was found running, in his statement recorded U/s. 161 Cr.P.C.

6.(h) P.W.10-Parimal Mandal also stated that he has not seen the occurrence and hearing hullah he went to the spot and found that the dead body of the deceased was lying.

6.(i) P.W.12-Pradip Mandal has stated that he has no knowledge about the occurrence or the case.

6.(j) P.W.13-Rabindra Kumar Sethi is a Police Officer who submitted charge-sheet after taking over charge of the investigation from the S.I.S.P., Chituri.

6.(k) As stated earlier, P.W.14 is the Investigating Officer and P.W.15-Sada Hantal, S.I. of Police before whom the accused surrendered and produced the material objects.

7. The fact that the accused surrendered before the witness-P.W.15 and produced M.O. I to M.O. V and on chemical examination the said material objects were found to be stained with human blood of Group-'B' by themselves do not form a complete chain of circumstances unerringly

pointing to the guilt of the accused-appellant. In other words, the circumstances that has been brought out in this case do not form a complete chain, without any gap, definitely pointing to the only possibility of the accused-appellant having committed the murder of the deceased. As the chain is not complete, as per the judgement rendered by the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda** (supra), we are of the opinion that the conviction recorded and sentence imposed by the learned Addl. Sessions Judge cannot be sustained.

8. Thus, on the conspectus of the materials as discussed above, we are of the opinion that the appeal has to be allowed and the conviction should be set aside. Accordingly, the appeal is allowed.

9. Conviction of the appellant for the offence U/s.457 and 302 of I.P.C. are hereby set aside. We also set aside the sentence of imprisonment for life.

Accordingly, the criminal appeal is disposed of. It is submitted that the accused is on bail. The bail bond be cancelled. LCRs be returned immediately to the lower court.

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2019 (III) ILR-CUT- 632

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

JAIL CRIMINAL APPEAL NO. 29 OF 2005

RAMNATH KISKU .....Appellant

-Vs-

STATE OF ODISHA .....Respondent

INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction – Appreciation of evidence – To invoke Exception-IV of Section 300, the four requirements must be satisfied – Four requirements (i) There was a sudden fight; (ii) There was no premeditation; (iii) The act was done in a heat of passion; and (iv) The assailant had not taken any undue advantage or acted in a cruel manner – Whether requirements are satisfied in this case? – Held, Yes – Conviction altered.

"*Learned Sessions Judge has held that the defence has not proved its case by preponderance of probability that there was sudden quarrel. In fact it is the case of the prosecution that there was dispute between the family members of one family relating to partition of ancestral property. It was a ongoing incident where the father-in-law of the deceased assaulted Lalmohan by means of a lathi. The same lathi was used by the present appellant to assault the deceased when she tried to intervene between the acquitted accused Bisun Kisku and P.W.1 Lalmohan Kisku. So it was a sudden fight. Moreover, there was no premeditation on the part of the appellant Ramnath Kisku and the act was done in a heat of passion. It is not the case of the prosecution that the appellant has taken any undue advantage or acted in a cruel manner, hence we are not in agreement with the findings recorded by the learned Sessions Judge and come to the conclusion that the ingredients required to attract Exception - IV of Section 33 I.P.C. have been satisfied in this case. So we are of the opinion that the conviction of the appellant U/s.302 I.P.C. is erroneous."* (Paras 13 to14)

Case Law Relied on and Referred to :-

1. AIR 1989 SC 1094 : Surinder Kumar -V- Union Territory

For Appellant : M/s. D. Pradhan, G. Behera, N. Das and S. K. Mohanty.

For Respondent : Mr. K. K. Mishra, Addl. Govt. Adv.

JUDGMENT Date of Hearing and Judgment : 01.08.2019

S. K. MISHRA, J.

Appellant Ramnath Kisku calls in question his conviction U/s.302 of the Indian Penal Code, 1860 (herein after referred as "I.P.C." for brevity) by the learned Sessions Judge, Keonjhar in S.T. Case No.175 of 2002 as per judgment dtd. 24.4.2004 and sentence of imprisonment for life.

2. Originally the case was initiated against three accused persons, i.e. father of the appellant whose name is Bisun Kisku and his sister-in-law Basanti Kisku and charge sheet was submitted for offence U/s.302, 307 read with section 34 of the I.P.C.

3. The case of the prosecution in nutshell is as follows:-

Deceased Sagar @ Sakar Kisku is the wife of injured – informant Lalmohan Kisku (P.W.1). Accused Bisun Kisku and appellant Ramnath Kisku are father and brother respectively of said Lalmohan Kisku. Accused

Basanti Kisku is the sister-in-law of said Lalmohan Kisku, being the widow of his cousin Laxman Kisku. The occurrence took place at about 7 P.M. on 16.4.2002 in the dwelling house of the parties where Lalmohan Kisku along with his family lives in separate mess from accused Bisun and appellant Ramnath. The F.I.R. (Ext.6) was lodged by Lalmohan Kisku (P.W.1) at Sub-divisional Hospital, Anandapur at 9.30 A.M. on 17.4.2002. It is alleged in the F.I.R. that including the informant, Bisun Kisku has four sons. Three sons including the informant (P.W.1) resides outside the village. Appellant Ramnath who is elder to informant Lalmohan (P.W.1) alone lives in the village and enjoys the landed property. At about 4 P.M. on 16.4.2002 informant Lalmohan (P.W.1) asked his father and brother appellant Ramnath for partition of the ancestral landed property. They did not agree for partition and picked up quarrel with him.

At first, accused Bisun Kisku assaulted informant Lalmohan Kisku (P.W.1) with a bamboo lathi on his head and left shoulder. Thereafter, appellant Ramnath Kisku rushed towards the informant, snatched away the bamboo lathi from the hand of his father and assaulted the informant with that lathi on his right shoulder and left knee. At that time, wife of informant Lalmohan (deceased Sakar Kisku) rushed to the spot with a view to separate them. Appellant Ramnath and his concubine caught hold of Sakar Kisku and appellant Ramnath assaulted deceased Sakar Kisku with the bamboo lathi on her head. Deceased fell down on the ground. In order to escape further assault, deceased ran away from the spot. At that time, accused Bisun gave her a push. Deceased fell down on the ground. Accused Bisun Kisku instructed the other accused persons to assault Sakar Kisku. The accused Bisun, appellant Ramnath and concubine of Ramnath combinedly assaulted deceased Sakar. Then the informant (P.W.1) took his wife Sakar and children to the house of his neighbor Gobinda Baskey. Gobinda Baskey was not present in the house. At about 8/9 P.M. Gobinda Baskey returned to his house. Lalmohan narrated the incident before him. Gobinda Baskey arranged a trekker and some co-villagers of Lalmohan brought Lalmohan and his wife to S.D. Hospital, Anandapur where his wife Sakar Kisku was declared brought dead.

The medical officer attached to S.D. Hospital, Anandapur sent a medicolegal report to Ghasipura P.S. As the case was related to jurisdiction of Anandapur police station, the I.I.C., Ghasipura P.S. sent information telephonically to O.I.C., Anandapur police Station. O.I.C., Anandpur P.S. visited S.D. Hospital, Anandapur where informant Lalmohan Kisku was

undergoing treatment. There, in the hospital, informant Lalmohan lodged oral report which was reduced in to writing by the I.O. On the basis of the F.I.R., the I.O. took up investigation and on completion of investigation, he filed charge-sheet against all the accused persons including the appellant implicating them in offence punishable U/s.302 and 307 I.P.C. read with Section 34 I.P.C.

4. Defence took the plea of complete denial and false implication. Accused Basanti Kisku has taken the plea that at the time of occurrence she was not present in the house but such plea has not been proved.

5. In proof of its case, prosecution has examined 6 witnesses out of whom P.Ws.1, 2 and 4 are the alleged eye witnesses to the occurrence. P.W.3 is a witness to seizure of bamboo lathi and blood stained earth and sample earth. P.W.5 is the medical officer who conducted post mortem examination on the dead body of deceased Sakar Kisku and also examined the injured-informant Lalmohan Kisku (P.W.1). P.W.6 is the investigating officer.

6. Basing on the testimony of P.W.1 – Lalmohan Kisku, P.W.2-Phaguram Tudu and P.W.4 – Bisan Kisku, the eye witnesses to the occurrence and the testimony of doctor (P.W.5) Dr. Parsuram Sahu, learned Sessions Judge has come to the conclusion that the offence U/s.302 I.P.C. is proved only against appellant Ramnath Kisku. He has acquitted the accused Basanti Kisku from both the offences U/ss.302 and 307 I.P.C. read with Section 34 I.P.C. but as far as accused Bisun Kisku is concerned, he has been held guilty individually for offence U/s.323 I.P.C. At present only the convict Ramnath Kisku is before us assailing his conviction.

The learned Sessions Judge also come to the conclusion that nothing has been proved on preponderance of probability to show that there was a sudden quarrel so as to extend the benefit of exception IV of Section 300 I.P.C.

7. Learned counsel for the appellant, at the outset, does not dispute the fact that the death of deceased was homicidal in nature, nor he disputes the fact that the prosecution has established its case against the appellant Ramnath Kisku that he led the deceased to death by assaulting her by means of a bamboo lathi. What is argued very seriously by the learned counsel for the appellant is that the offence U/s.302 I.P.C. is not made out as the occurrence took place due to a petty quarrel inside the family relating to partition of family property. He also argues that only one injury, i.e. fracture of skull, both parietal bones and fracture of left temporal bone is grievous in

nature and has led to the death of the deceased. It is also argued that as because there was no motive and the occurrence took place all of a sudden in a spur of moment and the appellant has acted without premeditation and commit the offence in the heat of passion, without taking undue advantage of anything, any situation or without acting in cruel manner, he should not be convicted U/s.302 I.P.C.

8. Learned Addl. Government Advocate Mr. Mishra, on the other hand, supports the findings recorded by learned Sessions Judge and urges the court to dismiss the appeal upholding the conviction of the sole appellant U/s.302 I.P.C.

9. It is apparent that only 6 witnesses have been examined in this case. P.W.1, 2 and 4 have been examined as eye witnesses of the occurrence. P.W.1, the husband of the deceased has stated that accused Bisun Kisku is his father and appellant Ramanath Kisku is his elder brother and accused Basanti Kisku is his sister-in-law. Deceased Sagar @ Sakar Kisku is his wife. The occurrence took place in the evening on a Tuesday, one year prior to his deposition in the court. He has further stated that his father and brother appellant Ramanath live in one mess. He along with his wife, deceased Sagar live in separate mess in the same house. At about 4 P.M. of the occurrence day he asked his father accused Bisun Kisku to make partition of the landed property and also said that he will give him one quintal paddy every year for his maintenance. His father agreed with his proposal but his sister-in-law, accused Basanti intervened and his father changed his mind. At about 7/8 P.M. when he was relaxing, his father, all on a sudden assaulted him by means of a 'Thenga' and he sustained bleeding injuries on his head and left shoulder. When he raised shout, his wife, deceased came to his rescue and tried to separate his father from him. At that time appellant Ramnath Kisku, who was present in the house, appeared at the scene, snatched away the 'Thenga' from the hands of his father and assaulted his wife by the said 'Thenga'. On being assaulted when his wife was running away from the spot, his father gave her a push and she fell down. At that time his brother, appellant Ramnath caught hold of his wife while she was lying on the ground and accused Basanti assaulted her with the same 'Thenga'.

However, in cross-examination at paragraph 5 this witness has stated that on being assaulted by his father on his head, he lost his consciousness and regained consciousness after about one hour. He has not seen the assault on his wife.

So, the evidence of this witness, so far as assault on the deceased Sagar @ Sakar Kisku by the appellant cannot be accepted.

10. The second witness for the prosecution who has been examined as eye witness is P.W.2 – Phaguram Tudu. He has stated that he is the neighbor of the accused persons. On the date of occurrence at about 7/8 P.M. he was returning from the easing ground and heard commotion in the house of accused Bisun Kisku. Coming near the house, he saw accused Bisun Kisku was assaulting his son Lalmohan by a bamboo lathi. He has further stated that thereafter appellant Ramnath appeared in the scene and snatching the lathi from the hands of his father, assaulted Lalmohan. Wife of Lalmohan came to rescue of Lalmohan. Appellant Ramnath assaulted her by the same lathi. Both Lalmohan and his wife, deceased Sakar were lying at the spot on receiving the assault. Out of fear he left the spot.

In the cross-examination this witness has stated that he has seen the assault on deceased Sagar Kisku. Appellant Ramnath assaulted her with the said lathi on her face and chest. He has not seen if accused Bisun Kisku assaulted deceased Sagar Kisku.

11. The 3rd witness of the prosecution examined as eye witness is P.W.4 who happens to be the son of P.W.1 Lalmohan Kisku. He has stated that accused Bisun Kisku got up from sleep and all on a sudden started assaulting his father Lalmohan on his shoulder by a 'Thenga'. He has further stated that appellant Ramnath thereafter snatched away the 'Thenga' from the hands of accused Bisun Kisku and by that 'Thenga' assaulted his father on his head, back and shoulder. On being so assaulted, his father called his mother. At the time of occurrence his mother had gone to the house of their neighbor Bira. His mother came hearing the shout of his father and when his mother intervened, appellant Ramnath assaulted her mother with the same 'Thenga'. His mother was also assaulted on her head, chest and other parts of her body. Both his father and mother fell down on the ground and appellant Ramnath gave kick blows to his mother. After the occurrence his father took his mother to the house of Govinda Baskey and he accompanied them.

12. Reference to the evidence of P.W.5, the doctor who has conducted post mortem examination over the dead body of the deceased, reveals that the deceased has sustained the following external and internal injuries :-

EXTERNAL INJURIES:-

(i) One lacerated wound 2" X 1" X ½" over right leg in middle interiorly.

(ii) Lacerated wound 2" X 1" X bone depth over left temporal region 1" above left external ear placed sagitally.

(iii) Lacerated wound 3" X 1" X bone depth placed sagitally in the inter parietal line in mid-line; and

(iv) Contusion 3" X 2" X 4" over right shoulder.

INTERNAL INJURIES ON DISSECTION:-

(i) There was fracture of skull, both parietal bones and fracture of left temporal bone which corresponds to external injury nos.(ii) and (iii).

(ii) There was laceration of membrane adjacent to external injury nos.(ii) and (iii).

(iii) There was laceration of brain (both parietal lobe and left temporal lobe).

Further the doctor has opined that the external injury nos.(ii) and (iii) with their corresponding internal injuries are sufficient in ordinary course of nature to cause death.

Both the aforesaid fatal injuries with their corresponding internal injuries show the severity with which the assault has been imparted on the deceased Sakar Kisku who has intervened to separate her father-in-law from her husband.

13. On the conspectus of the evidence of eye witnesses and also the evidence of doctor (P.W.5), we are of the opinion that the offence U/s.302 I.P.C. is not made out.

Learned Trial Judge has relied upon the decision reported in **AIR 1989 SC 1094**, **Surinder Kumar Vrs. Union Territory** wherein Hon'ble Supreme Court has laid down that in order to invoke Exception – IV of Section 300 I.P.C. four requirements must be satisfied, namely;

(i) There was a sudden fight;
(ii) There was no premeditation;
(iii) The act was done in a heat of passion; and
(iv) The assailant had not taken any undue advantage or acted in a cruel manner.

14. Learned Sessions Judge has held that the defence has not proved its case by preponderance of probability that there was sudden quarrel. In fact it is the case of the prosecution that there was dispute between the family members of one family relating to partition of ancestral property. It was a ongoing incident where the father-in-law of the deceased assaulted Lalmohan by means of a lathi. The same lathi was used by the present appellant to assault the deceased when she tried to intervene between the acquitted accused Bisun Kisku and P.W.1 Lalmohan Kisku. So it was a sudden fight. Moreover, there was no premeditation on the part of the appellant Ramnath Kisku and the act was done in a heat of passion. It is not the case of the prosecution that the appellant has taken any undue advantage or acted in a cruel manner, hence we are not in agreement with the findings recorded by the learned Sessions Judge and come to the conclusion that the ingredients required to attract Exception - IV of Section 300 I.P.C. have been satisfied in this case.

So we are of the opinion that the conviction of the appellant U/s.302 I.P.C. is erroneous.

15. In the result, we allow the appeal in part. Set aside the conviction of the appellant U/s.302 I.P.C. and sentence of life imprisonment. Instead we convict him for the offence U/s.304 Part-I I.P.C. and sentence him to undergo rigorous imprisonment for 10 (ten) years. We are not inclined to impose any fine on the appellant.

The period undergone as under trial prisoner as well as a convict after conviction be set off against the substantive sentence by resorting to Section 428 of Cr.P.C. The JCRLA is allowed in part. Send back the L.C.R. forthwith.

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2019 (III) ILR-CUT- 639

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

MATA NO. 79 OF 2012

TARUNA KUMAR GADABAD .....Appellant

-Vs-

SUBHALAXMI LENKA .....Respondent

HINDU MARRIAGE ACT, 1955 – Section 13(1)(i-a) and (i-b) read with section 23(1)(a) – Provisions under – Husband seeking divorce on the ground of desertion and cruelty – With regard to desertion, it is found that statutory period, i.e. "not less than 2 years" had not elapsed – Allegation of cruelty was omnibus in nature – Divorce petition dismissed – Appeal – Plea that learned Lower Court had committed error in not appreciating the evidence on its proper perspective and there are sufficient materials available on record to establish that wife had treated the husband in cruel manner – Mental cruelty – Meaning thereof – Whether trivial irritation and normal wear and tear of the married life is adequate to grant divorce? – Held, No.

"Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty. But if such conduct is confined only for two months and that too, when wife was under the family way, it could not be accepted as a deviant behavior intolerable for the husband. Whatever is alleged by the husband, is nothing but trivial irritation and normal wear and tear of the married life and is not adequate for grant of divorce on the ground of mental cruelty. Learned Judge, Family Court has correctly appreciated the evidence on record and no fault can be found if the same is weighed on the scale of physical and mental condition of the parties as well as their social status. The impact of prayer for DNA test has outweighed the trivial irritation and quarrelsome conduct of the wife alleged by the husband. Such an unprovoked grave conduct questioning marital fidelity could not have been condoned by granting divorce to the maker."

Case Laws Relied on and Referred to :-

1. (2019) SCC online SC 1320 : R. Srinivash Kumar -V- R. Shametha,
2. (2007) 4 SCC 511 : Samar Ghosh -V- Jaya Ghosh.

For Appellant : M/s. Sankarsan Rath, Sangita Mohanty, D.Vardwaj. M/s. Ramakanta Mohanty, Sr. Advocate, A. Mohanty, S. Rath, D. Mohanty & S. Mohanty.

For Respondent : M/s.Sukumar Ghosh, Mr. Yeeshan Mohanty, Sr. Adv. & Asit R. Panigrahi

JUDGMENT Date of Hearing : 24.09.2019 : Date of Judgment : 18.10.2019

DR. A. K. MISHRA, J.

The unsuccessful husband has preferred this appeal U/s.19 of the Family Courts Act, 1984 challenging the judgment dtd.17.7.2012 passed in

C.P. No.140 of 2010 by the learned Judge, Family Court, Khurda in dismissing the petition U/s13(1)(i-a) and (i-b) of the Hindu marriage Act, 1955 seeking divorce against the wife – respondent.

2. The facts not in controversy are that the husband, a service holder under BSNL, married respondent-wife as per Hindu rites and custom on 12.5.2008. Both of them were blessed with a son born on 16.2.2009. The wife stayed for a fortnight in the house of her father-in-law and then was taken by the husband to his service place at Srikakulam. Since 4.7.2008 the petitioner has been staying at his father's house at Bhubaneswar. The divorce petition by husband was filed on 20.4.2010 on the ground of desertion and cruelty.

3. Now descending to the controversial facts, the case of husband-petitioner is that wife did not like to reside with the plaintiff in his paternal house for which she was brought to the service place at Srikakulam where he was working as Jr. Accounts Officer of BSNL. The respondent was very adamant. She did not behave properly to his parents. She did not do the household work, did not prepare food in time, did not take care of husband. Instead, over silly matter, she misbehaved not only the husband but also his parents addressing them as stupid, miser, ugly fellow, etc. She insisted for separate residence at Bhubaneswar. The husband did not agree. She left the petitioner at her own sweet will on 4.7.2008. The husband-petitioner took several attempts to get her back but all was in vain. A child was born on 16.2.2009 while she was in her father's house. Such information was not given either to the husband or to his family members. The parents of the husband went to the house of her father where she was staying for SORNAKHETRA day but they were all misbehaved. The local gentries were engaged to find an amicable settlement of the dissention. It yielded no fruit. On 10.01.2010 the plaintiff – husband lastly requested the respondent to join with him. She refused. As a last resort this proceeding for divorce was filed.

4. The respondent-wife denied the allegation of cruelty and desertion. Her case is that she was taken to the service place on 28.5.2008. She led her marital life there peacefully. On 30.6.2008, during medical checkup, both spouses came to know that she was pregnant. The husband insisted her to terminate pregnancy and also to bring Rs.3 lakhs and 10 tolas of gold ornaments towards dowry. She was threatened. On 4.7.2008 the husband brought her from Srikakulam to Bhubaneswar by train and left her in her parents' house. During her stay in her father's house, a child was born on 16.2.2009 in the hospital. Intimation was given to the husband and his

parents. They did not turn up. The husband did not take any step to restore the conjugal life with her. She alleged that her husband and his parents had treated her with cruelty. She prayed to dismiss the divorce petition.

5. Learned Judge, Family court framed seven issues including issue No.IV and V on the point of cruelty and desertion. Six witnesses were examined on behalf of husband-petitioner including himself as P.W.1. His father is P.W.2. The mediator is P.W.4. Other witnesses are either friend and neighbours of the husband-petitioner. Seven documents are exhibited on behalf of husband which include certified copy of complaint case in 1.C.C No.374 of 2011 in the Court of S.D.J.M., Bhubaneswar filed by the husband against the wife and her father and brother. It was filed on 2.2.2011 for the incident dated 26.12.2010. Ext.2 is the certified copy of complaint case in 1.C.C. No.27 of 2011 filed on 31.3.2011 by the husband-petitioner against the father-in-law Nityananda for the incident dtd.09.03.2011 in the court of S.D.J.M., Phulabani.

On behalf of wife-respondent 3 witnesses were examined including herself as R.W.1, while R.W.2 is her father and R.W.3 is her maternal uncle. Three documents are exhibited including pregnancy test report dtd.30.6.2008 by the doctor at Srikakulam.

6. Lower court record reveals that wife-respondent had filed interim maintenance petition vide CMA No.180 of 2010 on 25.8.2010. In that proceeding the husband – petitioner had filed a petition U/s.151 Cr.P.C. on 09.02.2011 praying for DNA test of the parties along with the child. The ground for such prayer as mentioned at paragraph 2 of the petition is extracted below:-

> *"2. That, the O.P. / Husband asserts that the O.P. / Husband has / had no successful sexual relationship with the petitioner, due to her non-cooperation, during the period in which the petitioner lived with the O.P. / Husband, i.e. from 12.5.2008 to 4.7.2008. Whereas the petitioner gave birth to a male child and that gives rise to a reasonable doubt that the petitioner had become pregnant through other source and the O.P. is not the father of the child. Therefore, the O.P. is willing to undergo D.N.A. test of t he parties concerned."*

The wife had filed objection and finally the court rejected such petition vide order dtd.16.5.2011. The husband-appellant, as P.W.1, has admitted such fact in his cross-examination.

7. Learned Judge, Family court has recorded finding as to the admitted fact that a son was born to both parties on 16.2.2009. With regard to desertion, it is found that statutory period, i.e. "not less than 2 years" had not elapsed as the wife had left the house of husband on 4.7.2008 and the divorce petition was filed on 20.4.2010.

On the point of cruelty, learned Judge, Family Court has held that if the wife had not behaved properly, the husband would not have taken her to Srikakulam and the allegation of cruelty was omnibus in nature. It is also held that while petitioner-husband had pleaded that a male child was born from their wedlock, he had filed a petition for DNA test to humiliate and torture the wife-respondent and both the complaint cases (Ext.1 and Ext.2) were filed after the divorce proceeding without resorting to any report before police. According to the learned Judge, Family Court, those complaint cases were filed to create evidence for this divorce proceeding. The refusal of husband to accept the wife as stated in the evidence is indicative of his cruel conduct and his allegation of cruelty against the wife was spurious. Disbelieving the plea of cruelty and failure of desertion for want of 2 years separation, learned Judge, Family Court dismissed the petition for divorce.

8. Learned Sr. Counsel Mr. Ramakanta Mohanty for the appellant fairly submitted at the outset that plea of desertion, not accepted by learned Judge, Family Court is not contestable. His submission is that considering the complaint cases (Ext.1 and Ext.2) and Station Diary Entry (Ext.6) and refusal of wife to stay with the husband despite best efforts, learned Lower Court had committed error in not appreciating the evidence on its proper perspective and there are sufficient materials available on record to establish that wife-respondent had treated the husband in cruel manner by not preparing food. He relied upon a decision reported in (**2007) 4 SCC 511, Samar Ghosh and Jaya Ghosh** to contend that husband had proved mental cruelty and both parties having remained separate for more than a decade, their marital tie should be snapped as it is a case of irretrievable breakdown of marriage.

9. Learned counsel for respondent Mr. Sukumar Ghosh repelled the above contention stating that husband cannot take advantage of his own wrong after subjecting the wife to mental cruelty by suspecting the parentage of the child. When the statutory grounds of cruelty and desertion are not proved, irretrievable breakdown of marriage cannot be the basis to allow the divorce. Learned counsel specifically submitted that dissolution of marriage on the ground of irretrievable breakdown of marriage can only be done by

invoking the power under Article 142 of the Constitution of India by Hon'ble Apex Court which is not available to the High Court.

10. We carefully perused the lower court record and evidence along with the materials available therein and patiently heard both the parties.

Admitted facts are already catalogued supra. The plea of desertion, in view of candid concession made by learned counsel for the appellant, is not required to be examined in this appeal. The time essential to maintain such ground fall short admittedly.

The residue but sole ground of cruelty would decide the fate of this appeal. For that, the broader aspect of the evidence peculiar to the case needs to be appreciated.

Marriage between the parties was held on 12.5.2008. The husband (P.W.1) has testified that after marriage both of them stayed in their house at Begunia and led happy conjugal life for a period of 12 days. When he wanted to go back Srikakulam, his service place, the wife accompanied him. She stayed in the quarter with him for 40 days. But she did not treat him properly, underestimated him, did not give food in time. On one occasion, she did not prepare food for his friend. He has further deposed that the wife deserted him on 4.7.2008 and while she was in her father's house, a child was born to her. He has admitted that the complaint cases (Ext.1 and Ext.2) were filed after filing of this divorce petition.

In cross-examination he had admitted that he had not seen his son till the date of his deposition and he had filed a petition for DNA test to ascertain the parentage of the child. He has also stated that he would not accept his wife even if she is willing to stay with him.

Per contra, the wife (R.W.1) has stated that at Srikakulam she stayed for 36 days and she was not treated properly and husband was insisting to terminate her pregnancy and on 4.7.2008 the husband brought her in Prasanti Express train and without going to her father's house, left her at railway station.

11. Given the gamut of evidence, it is established that after marriage both spouses stayed at Begunia for 15 days and thereafter at Srikakulam for 36 days. Medical checkup was done on 30.6.2008, i.e., 5 days before the wife left Srikakulam. The initial hiccup in marital life was blown out of proportion

when complaint cases were filed after the divorce petition and prayer for DNA test was made by husband suspecting the character of the wife and parentage of the child. The act of mental cruelty has been alleged by both of them against each other. Such period was confined only for two months after marriage. The husband after birth of the child on 16.2.2009 had not taken any step to see the child till the date of his deposition in the court. Such a conduct along with the prayer to make DNA test amounts to humiliate the wife and child in public eye in the society. A wronged party cannot take advantage of his own wrong as provided U/s.23(1)(a) of the Hindu Marriage Act, 1955 which reads thus:-

> "***23. Decree in proceedings.*** *– (1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that –*
>
> *(a) any of the grounds for granting relief exists and the petitioner [except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and*"

The evidence of the petitioner – husband is not clinching that for a sustainable period, the wife used frequent rude language and neglected in such a degree that the marital life between them was absolutely intolerable.

Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty. But if such conduct is confined only for two months and that too, when wife was under the family way, it could not be accepted as a deviant behavior intolerable for the husband. Whatever is alleged by the husband, is nothing but trivial irritation and normal wear and tear of the married life and is not adequate for grant of divorce on the ground of mental cruelty.

Learned Judge, Family Court has correctly appreciated the evidence on record and no fault can be found if the same is weighed on the scale of physical and mental condition of the parties as well as their social status. The impact of prayer for DNA test has outweighed the trivial irritation and quarrelsome conduct of the wife alleged by the husband. Such an unprovoked grave conduct questioning marital fidelity could not have been condoned by granting divorce to the maker. The husband-petitioner was reckless and restless in filing complaint cases against the wife and her family members even after filing of the divorce petition.

We affirm the finding of learned Judge, Family Court. The decision of Hon'ble Apex Court in **Samar Ghosh** case (supra) does not help the appellant in any manner in the facts and circumstance of the case as a differentia to the case at hand.

12. Irretrievable breakdown is no more a ground to dissolve a marriage by a decree of divorce U/s.13 of the Hindu Marriage Act, 1955. On that score, the judgment impugned cannot be reversed. The power under Article 142 of the Constitution of India is not available to this court. Hon'ble Apex Court in the case of **R. Srinivash Kumar Vrs. R. Shametha,** reported in **(2019) SCC online Supreme Court 1320** has clarified the position of law in this regard in the following manner:-

> *"7. This Court, in a series of judgments, has exercised its inherent powers under Article 142 of the Constitution of India for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which t he divorce could be granted. In the present case, admittedly, the appellant-husband and the respondent-wife have been living separately for more than 22 years and it will not be possible for the parties to live together. Therefore, we are of the opinion that while protecting the interest of the respondent-wife to compensate her by way of lump sum permanent alimony, this is a fit case to exercise the powers under Article 142 of the Constitution of India and to dissolve the marriage between the parties."*

13. In the wake of above analysis and settled position of law, we do not find any ground to interfere with in the impugned judgment.

Accordingly the MATA stands dismissed. However, there is no order as to cost.

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2019 (III) ILR-CUT- 646

DR. A.K. RATH, J.

CMP NO. 1377 OF 2016

BAPI @ RUPAK KUMAR PANDA .....Petitioner

-Vs-

MRUGARAJ PANDA & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 6 Rule 17 – Amendment – Basic principles – Reiterated.

"In Revajeetu Builders (supra), the apex Court succinctly stated the principles to take into account while dealing with the applications for amendment. The apex Court held thus :

> *"67. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.*
>
> *(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?*
>
> *(2) Whether the application for amendment is bona fide or mala fide?*
>
> *(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;*
>
> *(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;*
>
> *(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? And*
>
> *(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application."*

Case Laws Relied on and Referred to :-

1. 2009 (II) OLR (SC) 815 : Revajeetu Builders & Developers -V- Narayanaswamy and Sons & Ors.
2. 60 (1985) CLT 453 : Kanhu Gauda -V- D. Kodandi Dora & Ors.

For Petitioner : Mr. Nilakantha Jujharsingh.

For Opp. Parties : Ms. Priyadarshini Das.

JUDGMENT Date of Hearing : 30.01.2019 : Date of Judgment: 06.02.2019

DR. A.K. RATH, J.

This petition challenges the order dated 8.7.2016 passed by the learned Civil Judge (Senior Division), Bhadrak in O.S. No.461 of 1999-I. By the said order, the trial court rejected the application of the plaintiff under Order 6 Rule 17 CPC to amend the plaint and implead two persons, namely, Surendra Prasad Mohanty and Hemalata Mohanty as defendants.

2. Plaintiff-petitioner instituted the suit for declaration that he is the adopted son of Bhagaban Panda and Sabitri Dibya, declaration of right, title

and interest, confirmation of possession, for a declaration that the registered gift deeds dated 18.9.1976, 6.1.1978, 5.11.1980 and 21.7.1979 are illegal and permanent injunction.

3. Defendant no.1-opposite party no.1 entered appearance and filed a written statement denying the assertions made in the plaint. While the matter stood thus, the plaintiff filed an application under Order 6 Rule 17 CPC to amend the plaint. In the proposed amendment, the plaintiff sought to incorporate certain facts and implead two persons; Surendra Prasad Mohanty and Hemalata Mohanty as defendants. The petition was rejected. He filed CMP No.500 of 2016 before this Court. This Court did not incline to entertain the application, but observed that it is open to the plaintiff to amend the plaint. The petition was disposed of on 27.4.2016. Thereafter, the plaintiff filed another application under Order 6 Rule 17 CPC to amend the plaint and implead Surendra Prasad Mohanty and Hemalata Mohanty as defendants. Defendant no.1 opposed the petition on the ground that the intervenors are neither necessary nor proper parties to the suit. The trial court rejected the petition holding, inter alia, that the third party petitioners, namely, Surendra Prasad Mohanty and Hemalata Mohanty had earlier filed a petition under Order 1 Rule 10 C.P.C. for impleadment. The petition was rejected on 19.1.2016. Subsequently the plaintiff filed an application under Order 6 Rule 17 CPC to implead them as defendants. By common order dated 20.2.2016, the petition was rejected. Thereafter, they filed CMP No.500 of 2016. This Court granted liberty to the plaintiff to file an application for amendment and directed the trial court to consider the amendment application filed by the plaintiff on merit. Previously similar kind of petitions filed by the third party intervenors and plaintiff were rejected. There is no changed circumstance in the case to take a different view.

4. Heard Mr. Nilakantha Jujharsingh, learned counsel for the petitioner and Ms. Priyadarshini Das on behalf of Ms. Mira Ghosh, learned counsel for the opposite party no.1.

5. Mr. Jujharsingh, learned counsel for the petitioner submitted that the rejection of earlier petition under Order 6 Rule 17 CPC will not operate as res judicata. The intervenors are necessary parties to the suit. The plaintiff intended to incorporate certain facts, which will not change the nature and character of the suit. He placed reliance on the decision of the apex Court in the case of Revajeetu Builders & Developers v. Narayanaswamy & sons and others, 2009 (II) OLR (SC) 815.

6. Per contra, Ms. Das, learned counsel for the opposite party no.1 submitted that once the application under Order 6 Rule 17 CPC to implead Surendra Prasad Mohanty and Hemalata Mohanty as defendants is rejected, it would not be open to the plaintiff to seek the reliefs on the self-same ground by taking recourse to another application. There is no changed circumstance. To buttress submission, she placed reliance on the decision of this Court in the case of Kanhu Gauda v. D. Kodandi Dora and others, 60 (1985) CLT 453.

7. In Kanhu Gauda (supra), this Court held that where an application is made under Order 1, Rule 10, sub-rule (2) of the Code for impletion of a party either on the ground that he is a necessary party or proper party and the application is rejected and reaches its finality, it would not be open to a party at a later stage of that proceeding to seek the relief on the self-same ground by taking recourse to Order 6, Rule 17. He may do on the basis of subsequent events, changed situation, fresh facts, etc. The rule is founded not on the principles of res judicata but on the principles of propriety. Such decisions are not the final decisions in the suit but are interlocutory in nature.

8. Reverting to the facts of the case at hand and keeping in view the enunciation of law laid down in the case Kanhu Gauda, this Court finds that earlier the plaintiff had filed an application under Order 6 Rule 17 CPC to implead Surendra Prasad Mohanty and Hemalata Mohanty as defendants. The intervenors had also filed an application under Order 1 Rule 10 CPC for impleadment as parties. Both the petitions were rejected by the trial court. The matter had attained finality. Again another application under Order 6 Rule 17 CPC had been filed on the self-same ground. There is no changed situation or change of events. As has been observed by this Court in Kanhu Gauda, the Rule is founded not on the principles of res judicata but on the principles of propriety.

9. In Revajeetu Builders (supra), the apex Court succinctly stated the principles to take into account while dealing with the applications for amendment. The apex Court held thus :

> "67. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.
>
> (1) Whether the amendment sought is imperative for proper and effective adjudication of the case?
>
> (2) Whether the application for amendment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? And

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application."

10. There is no quarrel over the proposition of law. The instant case is distinguishable on facts. The ratio in Kanhu Gauda proprio vigore applies to the facts of the case.

11. The impugned order of the trial court cannot be said to be perfunctory or flawed warranting interference of this Court under Article 227 of the Constitution. Accordingly, the petition is dismissed. There shall be no order as to costs.

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2019 (III) ILR-CUT- 650

DR. A.K. RATH, J.

CMP NO. 363 OF 2019

TRINATH PANDA & ANR. .....Petitioners

-Vs-

DILLIP KUMAR PANDA .....Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Order 8 Rule 6-A – Provisions under – Suit for permanent and mandatory injunction – Counter claim by defendant – When can be filed? – Held, the words "any right" appearing in Rule 6(A) (1) of Order 8 C.P.C. mean right over the suit land – The defendant cannot file a counter claim in respect of the property, which is not the subject-matter of suit.

Case Law Relied on and Referred to :-

1. 2017 (I) ILR- CUT-805 : Purna Chandra Biswal -V- Kiran Kumari Brahma.

For Petitioners : Mr. S.K. Samantaray-2

JUDGMENT Date of Hearing and Judgment : 09.04.2019

DR. A.K. RATH, J.

This petition challenges the order dated 08.03.2019, passed by the learned Civil Judge (Junior Division), Khurda, in C.S. No.154 of 2018, where by and whereunder, learned trial judge has rejected the counter claim of the defendant.

2. Since the petition is disposed of on a short point, facts need not be recounted in details. Suffice it to say that plaintiff-opposite party instituted the suit for permanent and mandatory injunction. Defendant entered contest and filed written statement –cum-counter claim. Learned trial court held that the subject-matter of the suit and the counter claim is totally different. Held so, it rejected the counter claim.

3. Heard Mr. S. K. Samantaray-2, learned counsel for the petitioners.

4. Mr. Samantaray, learned counsel for the petitioners submits that there is a common boundary wall between the plaintiffs' land and defendant's land. In view of the same, the defendant has filed a counter claim. Though the suit scheduled property in the counter claim is different, but cause of action is same. In the event the counter claim is rejected, the plaintiff will be remediless.

5. Rule 6-A of Order 8 CPC provides :

> "6-A.Counter-claim by defendant –
>
> (1) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired whether such counter-claim is in the nature of a claim for damages or not:
>
> Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

6. This Court in *Purna Chandra Biswal Vrs. Kiran Kumari Brahma*, 2017 (I) ILR- CUT – 805 held that the words "any right" appearing in Rule 6(A) (1) of Order 8 C.P.C. mean right over the suit land. Thus the defendant cannot file a counter claim in respect of the property, which is not the subject-matter of suit.

7. Reverting to the facts of the case and keeping in view the law laid down by this Court in the decision cited supra, this Court finds that the subject-matter of the suit as well as counter claim was totally different. Plaintiff has described the suit scheduled property as follows :

Schedule of property:
Mouza-Podadiha, Khata No.4527/30.
Plot No.439, Area Ac.0.050 decs.
Bounded by: East- Bhagaban Badi.
West- Defendant.
North-Govt. Road
South-Govt. Road

The defendants have filed counter claim in respect of the property described hereunder:

Schedule-A :
Mouza-Podadiha,
Khata No.35.
Plot No.440, Ac0.125 decs out of it
North-South-38' x 1½' West East.
Bounded by: East- House of Late Bhajaman Panda.
West- House of Alekha Mishra.
North-Village Danda.
South-Govt. Road

8. In view of the authoritative pronouncement of this Court in the case of *Purna Chandra Biswal* (supra), the inescapable conclusion is that defendant cannot file counter claim in respect of the properties, which is not the subject-matter of the suit.

9. The order passed by the learned trial Judge cannot be said to be perfunctory or flawed, warranting interference of this Court under Article 227 of the Constitution. The petition is dismissed.

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2019 (III) ILR-CUT- 652

DR. A.K. RATH, J.

S.A. NO. 4 OF 2001

MANI GAHIR .....Appellant

-Vs-

THE COLLECTOR, KALAHANDI & ORS. .....Respondents

ORISSA GRAMA PANCHAYAT ACT, 1964 – Sections 138 and 139 read with Rule 216 of the Orissa Grama Panchayat Rules, 1968 – Provisions under – Suits against Grama Panchayats or their officers – Notice – Held, before any suit is instituted, notice to Grama Panchayat under Section 138 is a sine qua non – The same is mandatory requirement – For non-compliance of the notice, the suit is not maintainable – Reliance placed under Section 139 of the Orissa Grama Panchayat Act is thoroughly misplaced as Sections 138 and 139 of the Act are operating in different field. (Para10)

Case Law Relied on and Referred to :-

1. (1996) 9 SCC 495 : J.N.Ganatra -V- Morvi Municipality, Morvi.
2. 1998(II) OLR-410 : Adwait Ch.Jena -V- Khandahata Grama Panchayat & Ors.

For Appellant : Mr.P.Behera.
For Respondent Nos. 1 to 3 : Mr.D.K.Pani, A.S.C.
For Respondent No.4 : None

JUDGMENT Date of Hearing & Judgment : 18.04.2019

DR. A.K. RATH, J.

Plaintiff is the appellant against a confirming judgment in a suit for declaration that the proposed action of the defendants dated 6.6.1996 is illegal and permanent injunction not to remove or suspend him from the post of Secretary of Artal Grama Panchayat.

2. Case of the plaintiff was that he was appointed as Secretary of Artal Grama Panchayat on 1.8.1980. He discharged duties to the fullest satisfaction of the authorities. While matter stood thus, on 6.6.1996 the District Panchayat Officer, defendant no.2 along with the Sarpanch of Artal Grama Panchayat, defendant no.4, came to his village, took his signature in a blank paper stating that he had violated the duties of the Grama Panchayat and, as such cannot continue in the post of Secretary. He got reliable information on 6.6.1996 that the defendants will remove him from the post of Secretary. He had not acted against the interest of the Grama Panchayat nor caused any financial loss. He had not been afforded any opportunity before action was taken against him. He could not issue notice to defendant no.4, G.P. under Section 138 of the Orissa Grama Panchayat Act, 1964, since the matter was urgent. With this factual scenario, he instituted the suit seeking the reliefs mentioned supra.

3. The defendants filed written statement pleading inter alia that the plaintiff had misappropriated the Grama Panchayat's J.R.Y fund amounting to Rs.1,23,496/- which was clear from the Audit Report of 1991-92 to 9.7.1995. Hume pipes were purchased by the G.P. for Rs.11,294/-. But there was no stock entry. The said pipes were not available. Work amounting to Rs. 1,26,082/- shown to have been executed by one Khatu Naik V.C.L. of Kanduljhar by manipulating the records. But such work had not been executed. One voucher bearing no.64 dated 21.1.1995 for Rs.10,000/- had been prepared by the plaintiff showing payment of advance to one Chandimal Suna of village Ajarai. The said voucher had not been signed by the said Chandimal Suna. He had paid Rs.1,000/- towards salary of one Chati Juad, Choukidar and prepared a voucher of Rs.3,000/-. The plaintiff had acted in a manner which was prejudicial to the interest of the Grama Panchayat. He deliberately omitted to carry out the duties and functions of the Secretary of Grama Panchayat. He had also abused the power. The defendant no.4 initiated a proceeding against him. A show cause notice was also issued to him. Though he received the notice, but he did not furnish any reply. By order dated 4.6.1996 he was removed from the post of Secretary of Artal Grama Panchayat.

4. Stemming on the pleadings of the parties, learned trial court struck five issues. Parties led evidence, oral and documentary. Learned trial court dismissed the suit holding that the plaintiff had misappropriated the Panchayat fund. No notice under Section 138 of the Orissa Grama Panchayat Act was issued to the Grama Panchayat prior to institution of the suit. Secretary of Grama Panchayat is a civil post. The Administrative Tribunal has jurisdiction to entertain the matter. Unsuccessful plaintiff filed Title Appeal No.11 of 1999 before the learned District Judge, Kalahandi-Nuapada-Bhawanipatna. Learned District Judge held that the plaintiff is not a public servant. Notice under Section 138 of the Orissa Grama Panchayat Act is mandatory. The same was not issued. It concurred with the findings of the learned trial court and dismissed the appeal.

5. The appeal was admitted on the substantial questions of law enumerated in grounds no.E (i) & (ii) of the appeal memo. The same are:

> "(i) Whether in the facts and circumstances of the case, notice U/s.138 of the O.G.P.Act was required to be served prior to filing of the suit specially when the service of notice U/s.80 C.P.C. was dispensed with ?

(ii) Whether in absence of a formal departmental proceeding and the inquiry report, the audit report can from the basis of dismissal of the appellant from service ?"

6. Heard Mr.P.Behera on behalf of Mr.D.K.Mishra, learned Advocate for the appellant and Mr.D.K.Pani, learned Additional Standing Counsel for respondents 1 to 3. None appears for respondent no.4.

7. Mr. Behera, learned Advocate for the appellant submits that the suit was of urgent nature. The plaintiff filed an application under Sub-section 2 of Section 80 CPC before the learned trial court to dispense with notice. The same was allowed. No notice under Section 138 of the Orissa Grama Panchayat Act was required to be issued to the Grama Panchayat before institution of the suit. He further submits that no proceeding was initiated against the plaintiff before taking the proposed action. He further submits that under Rule 216 of the Orissa Grama Panchayat Rules, 1968 the Grama Panchayat may remove the Secretary of the Grama Sasan from services if he willfully omits or refuses to carry out the duties and functions entrusted to him under the provisions of the Orissa Grama Panchayat Act. Elaborating the submissions, he submits that notice under Section 138 of the Orissa Grama Panchayat Act is required to be issued when an action is taken under the Orissa Grama Panchayat Act. But then the action is taken under the Rule 216 of the Orissa Grama Panchayat Rules. Thus no notice was required to be issued under Section 139 of the Orissa Grama Panchayat Act. No opportunity of hearing was provided to the plaintiff. To buttress the submission, he places reliance on a decision of the apex Court in the case of J.N.Ganatra v. Morvi Municipality, Morvi, (1996) 9 SCC 495.

8. Per contra, Mr. Pani, learned Additional Standing Counsel for respondents no.1 to 3 submits that notice under Section 138 of the Orissa Grama Panchayat Act is required to be issued to the Grama Panchayat before institution of the suit. The suit is not maintainable. The plaintiff while functioning as Secretary of the Grama Panchayat committed malfeasance and misfeasance for which the order of suspension was passed and latter on, he was removed from the services after issuing show cause.

9. Before proceeding further, it is apt to refer the provisions of Sections 138 and 139 of the Orissa Grama Panchayat Act, 1964 and Rule 216 of the Orissa Grama Panchayat Rules, 1968.

"138. Suits against Grama Panchayats or their officers –(1) No suit or other legal proceedings shall be instituted against a Grama Sasan or a Grama Panchayat or against member, Sarpanch, Naib Sarpanch, officer or other employee of the Grama Panchayat or against any person acting under its or his direction for anything done or purporting to have been done under this Act, until the expiration of one month next after notice in writing has been, in the case of Grama Sasan or Grama Panchayat, delivered in or left at the office of the Panchayat and in the case of a member, officer or servant or any person acting under his direction or the direction of the Grama Panchayat, delivered to him or left at his office or place of residence, explicitly stating the cause of action, the nature of the reliefs sought, the amount of compensation, if any, claimed and the name and place of residence of the intending plaintiff; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) If the Grama Panchayat, members, Sarpanch, Naib-Sarpanch, officer or other employee or the person as aforesaid has tendered amends, sufficient in the opinion of the Court to the plaintiff, the plaintiff shall not recover any sum in excess of the amount so tendered and shall also pay all costs incurred by the defendant after such tender.

(3) No suit or other legal proceeding referred to in Sub-section (1) shall be instituted after the expiry of a period of six months from the date of the accrual of the alleged cause of action.

139. Protection to Grama Panchayats- No suit or prosecution shall be entertained in any Court against a Grama Sasan or Grama Panchayat or the Sarpanch, Naib-Sarpanch or any other member or officer or other employee thereof or any person acting under its or his direction in respect of anything in good faith done or intended to be done under this Act or any rule or bye-laws made thereunder.

xxx xxx xxx

216. (a) The Grama Panchayat may remove the Secretary of the Grama Sasan from services if he willfully omits or refuses to carry out the duties and functions entrusted to him under the provisions of the Orissa Grama Panchayats Act, 1964 and the rules or orders made thereunder abuses the powers, rights and privileges vested in him or acts in a manner prejudicial to the interest of the Grama Sasan or by his action causes loss to the Grama Sasan or has been convicted of any offence;

Provided that no order of removal shall be passed by the Grama Panchayat without giving him a reasonable opportunity of showing cause. The grounds on which he is proposed to be removed shall be reduced to the form of definite charge or charges which shall be communicated to him in writing. He shall be required to submit his explanation in writing within a reasonable time.

The Grama Panchayat shall take a decision in the matter after having considered the explanation of the Secretary, if any, and having heard him, if he has so desired and thereafter may remove him.

(b) The Grama Panchayat may suspend from office of the Secretary of the Grama Sasan pending disposal of the proceedings against him under this rule or if he has

> been detained in prison during trial, under the provisions of any law for the time being in force.
>
> During the period of suspension the Secretary of the Grama Sasan shall be paid subsistence allowance the amount of which shall not exceed half of his monthly salary."

10. On a conspectus of Section 138 of the Orissa Grama Panchayat Act, it is evident that before any suit is instituted, notice to Grama Panchayat under Section 138 is a sine qua non. The same is mandatory requirement. For non-compliance of the notice, the suit is not maintainable. Reliance placed under Section 139 of the Orissa Grama Panchayat Act is thoroughly misplaced. Sections 138 and 139 of the Act are operating in different field. There was no cause of action, when the suit was instituted. The plaintiff has prayed inter alia that the proposed action of the defendants dated 6.6.1996 may be declared as illegal. Thus, when the suit was instituted there was no cause of action. A suit cannot be filed in anticipation of any cause of action. Further a statutory authority cannot be injuncted by way of permanent injunction to discharge its statutory function. The prayer is thoroughly misconceived. Opportunity of hearing was provided to the plaintiff. The plaintiff was removed from services. But there is no prayer to set aside the same.

11. Though the learned trial court held that the plaintiff is a public servant and the administrative tribunal has jurisdiction to entertain the proceeding, but in view of the authoritative pronouncement of the Full Bench decision of this Court in the case of Sri Adwait Chandra Jena v. Khandahata Grama Panchayat and others, 1998(II) OLR-410 that the Secretary does not hold a civil post under the State Government, and not a Government servant, the finding is perverse. Further, the learned appellate court placed reliance on the said judgment. The substantial questions of law are answered accordingly.

12. The decision in the case of J.N.Ganatra is distinguishable on facts.

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

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2019 (III) ILR-CUT- 658

BISWAJIT MOHANTY, J.

CRLMP NO. 646 OF 2017

BICHITRA NANDA DAS ……**...**Petitioner

-Vs-

STATE OF ORISSA & ORS. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Prayer for a direction to handover investigation of a murder case to CID (CB) – Allegation of improper and delayed investigation – Materials show that the police took two and half years to sent the exhibits for chemical examination – Fit case for handing over the investigation to other agency.

"An analysis of materials as indicated earlier reveals that after registration of Badampahar P.S. U.D. Case No. 17/2016, the Investigating Officer Shri Nayak, A.S.I. examined the petitioner and other relatives of the deceased and other witnesses, He also held inquest over the dead body of the deceased and sent the same for Post Mortem Examination. He also visited the spot and utilized the service of police dog and scientific team. He also made various seizures including a sealed bottle containing water of the pond from the spot collected by the S.O., D.F.S.L., Baripada in presence of witnesses, obviously for the purpose of carrying out Diatom Test. He also seized wearing apparels of the deceased and various biological samples in presence of witnesses. Later, after registration of F.I.R. under Anexure-2 he handed over the complete record along with seized exhibits to the I.O. of the case, Shri N.K. Das, S.I. Later on, investigation has been carried on by two Sub-Divisional Police Officers. However, there exists no explanation whatsoever as to why there has been a delay of more than two and half years in sending the exhibits as indicated under Annexures-A & B attached to the affidavit dated 16.9.2019 to the Regional Forensic Science Laboratory, Balasore. This reveals shocking state of affairs in carrying out the investigation. In the present case, the Post Mortem Examination was carried out on 31.12.2016, which clearly indicated about preserving of the Sternum for Diatom Test and blood samples, nail clippings for Chemical Examination. While Annexure-A attached to affidavit dated 16.9.2019 shows that the Sternum bone and sample of pond water were sent for examination to the Regional Forensic Science Laboratory vide Memo No.672 dated 27.7.2019; the Annexure-B attached to the said affidavit shows that the wearing apparels, sample blood of the deceased, nail clippings and other exhibits were sent to the said Laboratory vide Memo No.549 dated 1.7.2019. This clearly shows lackadaisical attitude of the investigating authorities. In a case like present one involving ghastly killing of the son of the petitioner, such conduct clearly reflects on the credibility of the investigation and

shakes public confidence in the process of investigation. No doubt a direction to conduct investigation by another agency is a serious thing and power to give such a direction is not to be exercised in a routined manner, however, it is equally well settled that to provide credibility and to instill confidence in investigation such an order can be passed if a fact situation so demands. Since the investigation in the present case has proceeded in a casual and cavalier manner and not in a fair manner, therefore, in order to restore credibility of the investigation and to instill confidence of public in the investigation, this is a fit case, where the matter should be transferred to C.I.D. (C.B.) for proper investigation of the same. For the said purpose, this Court directs the Superintendent of Police, Mayurbhanj (opposite party no. 4) to hand over all the relevant records to the Additional Director General Police, Crime Branch (opposite party no.3), who in turn is directed to hand over the same to the Superintendent of Police, C.I.D. (C.B.). The Superintendent of Police, C.I.D.(C.B.) is directed to take up the investigation of Badampahar P.S. Case No.1 dated 1.1.2017 corresponding to G.R. Case No.6/2017 pending before the learned S.D.J.M., Rairangpur in right earnest and conclude the same in accordance with law as expeditiously as possible". (Para 8)

Case Law Relied on and Referred to :-

1. 2011 (49) O.C.R. 737 : Smt. Namita Panda -V- State of Orissa & Ors.

For Petitioner : Mr. Dharanidhar Nayak, Sr. Adv.
M/s. Basanta Kumar Das, S.K. Das & U.R. Jena

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

JUDGMENT Date of Judgment : 14.11.2019

BISWAJIT MOHANTY, J.

The present writ application has been filed by the petitioner praying for a direction to the opposite parties to investigate the case properly or to hand over the investigation to the C.I.D. (C.B.) or to any other independent agency as the general police is not investigating the matter properly even though six months time has been elapsed from the date of registration of F.I.R.

2. The case of the petitioner is that his youngest son - Sanjeeb Kumar Das @ Jhuntu, went on missing from his house on 26.12.2016. Inspite of best efforts, when he could not be traced out by his family members, on 27.12.2016 vide Annexure-1, a missing report was submitted before I.I.C., Badampahar Police Station (opposite party no.5) and the same was registered as M.M.R. No.3/2016/Station Diary No.590 dated 27.12.2016. Despite this, no sincere effort was made by the police to trace out his son. On 31.12.2016,

the dead body of the son was recovered from a pond and accordingly, the petitioner submitted a written report before opposite party no.5 stating therein that the persons, who have kidnapped, had killed his missing son and have thrown the dead body in the said pond. In the said written report, the petitioner indicated about suspected involvement of the friends of the deceased in committing the crime. Accordingly, the police registered the same as Badampahar P.S. Case No.1/2017 for commission of offences under Sections 363/302/201, I.P.C. vide Annexure-2 but against unknown accused persons. Since the local police was not able to detect the culprits and did not carry out the investigation properly, the petitioner submitted a representation on 4.2.2017 vide Annexure-3 before opposite party no.1 with a prayer to entrust the investigation to C.I.D. (C.B.)/C.B.I. for carrying out proper investigation. When nothing was done, on 27.6.2017, the petitioner filed the present writ application making the above noted prayer. In this application, the petitioner has stated that though the culprits are moving in the broad day light and are threatening the petitioner, however, the police is sleeping over the matter.

3. On behalf of the opposite parties, three affidavits dated 2.7.2019, 29.7.2019 & 16.9.2019 have been filed. According to the said affidavits, initially Badampahar P.S. U.D. Case No.17 of 2016 was initiated and enquired into by Shri U.C. Nayak, A.S.I. He had examined the petitioner and other relatives of the deceased and other witnesses. During enquiry of U.D. Case, he recovered the dead body of the deceased from the pond by utilizing the service of Fire Brigade team of Badampahar Unit. He held inquest over the dead body on 31.12.2016 and sent the dead body for Post Mortem Examination to S.D.H., Rairangpur on the same date. He also visited the spot, utilized the service of police dog and scientific team. From the spot, he seized one Mc-Dwell Celebration Rum bottle, two numbers of use and throw white plastic glasses, one pair of plastic chappal belonging to the deceased as well as sample earth in presence of the witnesses. Further he seized a sealed bottle containing water of the pond collected from the spot by the S.O., D.F.S.L., Baripada in presence of witnesses. He also seized wearing apparels of the deceased and his biological samples in presence of witnesses.

4. On 1.1.2017 after U.D. Case was turned into a cognizable case vide Badampahar P.S. Case No.1 dated 1.1.2017 under Sections 363/302/201, I.P.C., Shri Nayak handed over the complete case records along with seized materials to Shri N.K. Das, S.I. O.I.C., Badampahar Police Station. During

investigation, Shri Das examined the petitioner, relatives of the deceased, Shri U.C. Nayak, A.S.I., girl friend of the deceased, some of the villagers and other P.Ws. and recorded their statements under Sections 161, Cr.P.C. He also visited the spot, prepared sport map in prescribed crime detail form and examined and interrogated the friends of the deceased of village Badampahar as well as of nearby locality. He also put the cell numbers of the deceased, his relatives and some suspected friends under electronic surveillance, engaged spy in the locality to work out clues. He obtained the opinion of the autopsy Surgeon, who opined that death of the deceased was due to injury to the brain.

Subsequently, on 20.4.2017 Shri Mohan Pani Karua, O.P.S., the then Sub-Divisional Police Officer, Rairangpur took charge of the investigation from Shri N.K. Das. During investigation, he tested and re-examined all the witnesses already examined by the previous Investigation Officer, Shri N.K. Das, A.S.I. He also examined and interrogated some of the friends of the deceased and suspects of the case and recorded their statements under Sections 161, Cr.P.C. He engaged sources in the locality and contacted with them from time to time.

On 18.12.2017, consequent upon transfer of Shri Karua, S.D.P.O., Shri Amulya Kumar Dhar, O.P.S., the new Sub-Divisional Police Officer, Rairangpur took charge of the investigation of the case. During investigation, he also reexamined and also interrogated some of the friends of the deceased and suspects of the case and examined some independent witnesses. He also engaged sources in the locality and contacted with them from time to time. He also forwarded the seized exhibits for Chemical Examination and Diatom Test. Vide Annexure-A enclosed to the affidavit dated 16.9.2019 the Regional Forensic Science Laboratory, Bampada, Balasore has made it clear that Diatom could not be detected in Sternum bone of deceased. Accordingly, in the said affidavit it has been made clear that death of the deceased was homicidal in nature and not due to drowning. Further in the affidavit dated 2.7.2019 a stand has been taken that despite all out efforts no clue has been obtained towards detection of the case and sustained efforts are on to unearth tangible clue. It has also been asserted that constant liaison is maintained with the family members of the deceased as well as the engaged sources to work out clue in this case.

5. Heard Mr. Dharanidhar Nayak, learned Senior Advocate appearing for the petitioner and Mr. B.P. Tripathy, learned Additional Government Advocate.

6. Mr. Nayak, learned Senior Advocate submitted that since the matter is not being properly investigated till date, the investigation should be handed over either to the C.I.D. (C.B.) or C.B.I. In this context, he submitted that though the Post Mortem Examination was carried out on 31.12.2016 and though the said report indicated about preserving the Sternum for Diatom Test and preserving blood samples and nail clippings for Chemical Examination, however, all these were forwarded to the Regional Forensic Science Laboratory, Balasore only during July, 2019, which shows gross negligence on the part of the Investigating Officer. Similarly, various other exhibits, which were seized by Sri U.C. Nayak, A.S.I. were also sent during July, 2019 as indicated in Annexure-B of the affidavit dated 16.9.2019 for their examination by the Regional Forensic Science Laboratory, Balasore. In such background, he submitted that this reflects gross negligence on the part of the authorities and according to him such conduct by the Investigating Authorities clearly affects credibility of local police and has shakes the confidence of the petitioner and public at large in the process of investigation involving a ghastly murder. Accordingly, he submitted that the investigation should be transferred at least to C.I.D. (C.B.). In this context, he relied on a decision of this Court in the case of **Smt. Namita Panda** v. **State of Orissa & others** reported in **2011 (49) O.C.R. 737**.

7. Mr. Tripathy, learned Additional Government Advocate on the other hand defended the investigation and submitted that all possible steps have been taken in the matter and efforts are still on to unearth tangible clue. Therefore, he prayed that there is no requirement for handing over the investigation to C.I.D. (C.B.).

8. An analysis of materials as indicated earlier reveals that after registration of Badampahar P.S. U.D. Case No. 17/2016, the Investigating Officer Shri Nayak, A.S.I. examined the petitioner and other relatives of the deceased and other witnesses, He also held inquest over the dead body of the deceased and sent the same for Post Mortem Examination. He also visited the spot and utilized the service of police dog and scientific team. He also made various seizures including a sealed bottle containing water of the pond from the spot collected by the S.O., D.F.S.L., Baripada in presence of witnesses, obviously for the purpose of carrying out Diatom Test. He also seized wearing apparels of the deceased and various biological samples in presence of witnesses. Later, after registration of F.I.R. under Anexure-2 he handed over the complete record along with seized exhibits to the I.O. of the case,

Shri N.K. Das, S.I. Later on, investigation has been carried on by two Sub-Divisional Police Officers. However, there exists no explanation whatsoever as to why there has been a delay of more than two and half years in sending the exhibits as indicated under Annexures-A & B attached to the affidavit dated 16.9.2019 to the Regional Forensic Science Laboratory, Balasore. This reveals shocking state of affairs in carrying out the investigation. In the present case, the Post Mortem Examination was carried out on 31.12.2016, which clearly indicated about preserving of the Sternum for Diatom Test and blood samples, nail clippings for Chemical Examination. While Annexure-A attached to affidavit dated 16.9.2019 shows that the Sternum bone and sample of pond water were sent for examination to the Regional Forensic Science Laboratory vide Memo No.672 dated 27.7.2019; the Annexure-B attached to the said affidavit shows that the wearing apparels, sample blood of the deceased, nail clippings and other exhibits were sent to the said Laboratory vide Memo No.549 dated 1.7.2019. This clearly shows lackadaisical attitude of the investigating authorities. In a case like present one involving ghastly killing of the son of the petitioner, such conduct clearly reflects on the credibility of the investigation and shakes public confidence in the process of investigation. No doubt a direction to conduct investigation by another agency is a serious thing and power to give such a direction is not to be exercised in a routined manner, however, it is equally well settled that to provide credibility and to instill confidence in investigation such an order can be passed if a fact situation so demands. Since the investigation in the present case has proceeded in a casual and cavalier manner and not in a fair manner, therefore, in order to restore credibility of the investigation and to instill confidence of public in the investigation, this is a fit case, where the matter should be transferred to C.I.D (C.B) for proper investigation of the same. For the said purpose, this Court directs the Superintendent of Police, Mayurbhanj (opposite party no. 4) to hand over all the relevant records to the Additional Director General Police, Crime Branch (opposite party no.3), who in turn is directed to hand over the same to the Superintendent of Police, C.I.D. (C.B.). The Superintendent of Police, C.I.D.(C.B.) is directed to take up the investigation of Badampahar P.S. Case No.1 dated 1.1.2017 corresponding to G.R. Case No.6/2017 pending before the learned S.D.J.M., Rairangpur in right earnest and conclude the same in accordance with law as expeditiously as possible.

The CRLMP is accordingly disposed of.

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2019 (III) ILR-CUT- 664

DR. B.R. SARANGI, J.

W.P.(C) NO. 14047 OF 2012

SMT. KESHARI SAHOO .....Petitioner

-Vs-

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

(A) WORDS AND PHRASES – 'Preference' – Meaning of – 'Preference' means the act of preferring one thing above another; estimation of one thing more than another; choice of one thing rather than another.

(B) SERVICE LAW – Selection of Anganwadi Helper – Two candidates on similar footing – Who should be given the preference – Held, 'preference' can only be given when the candidates are on similar footing – If the petitioner as well as opposite party no.5 both are coming under the same preferential category and opposite party no.5 had secured highest mark than that of the petitioner and she has been selected and issued with engagement order pursuant to resolution dated 02.06.2012 in Annexure-2, no illegality or irregularity has been committed by the authority by issuing such engagement order in favour of opposite party no.5, so as to warrant interference by this Court.

Case Laws Relied on and Referred to :-

1. AIR 2008 SC 1470 : K. Manjushree -V- State of A.P.
2. 2008 (II) OLR 314 : Mrutunjaya Nayak -V- State of Orissa,
3. (2001) 10 SCC 51 : Maharastra State Road Transport Corpn. -V- Rajendra Bhimrao Mandve,
4. AIR 2007 SC 2480 : Karnatak Power Corporation Ltd. -V- A.T. Chandrashekar,
5. Vol.107 (2009) CLT 673 : Radhasyam Panigrahi -V- Registrar (Admn), Orissa High Court,
6. AIR 2003 SC 3961 : The Secy, Andhra Pradesh Public Service Commission -V- Y.V.V.R. Srinivasulu,
7. AIR 2002 SC 1503 : Bibhudatta Mohanty -V- Union of India,
8. 2016 (I) ILR-CUT 417: Sevati Patra -V- State of Odisha,
9. AIR 1984 SC 200 : Sher Singh -V- Union of India,
10. AIR 1993 SC 477 : Indra Sawhney -V- Union of India,
11. (2002) 5 SCC 341 : Secretary A.P. Public Service Commission -V- Y.V.V.R. Srinivaulu,
12. (2006) 6 SCC 474 : State of U.P. -V- Om Prakash,
13. AIR 1986 SC 1043 : Om Prakash Shukla -V- Akhilesh Kumar Shukla,

14. AIR 1995 SC 1088 : Madan Lal -V- State of Jammu and Kashmir,
15. (2011) 1 SCC 150 : Vijendra Kumar Verma -V- Public Service Commission, Uttarakhand & Ors.
16. (2007) 11 SCC 522 : Marripati Nagaraja -V- Government of A.P.
17. 2017 (II) OLR 274 : Pradeep Kumar Jena -V- State of Odisha,
18. 2018 (Supp-II) OLR 946 : Pravati Nayak -V- State of Odisha.

For Petitioner : M/s. Dr. Sujata Dash, I. Sahoo & A. Bhuyan.
For Opp.Parties : M/s. B. Senapati, Addl. Government Advocate.
M/s. S.K. Rath and M. Behera.

JUDGMENT Date of Hearing : 26.03.2019 : Date of Judgment : 02.04.2019

DR. B.R. SARANGI, J.

Keshari Sahoo, widow of late Manas Ranjan Sahoo has filed this application seeking to quash the engagement order dated 02.06.2012 issued by the Child Development Project Officer (CDPO), Pallahara under Annexure-1 as Anganwadi Helper in Chasagurujanga-B Anganwadi Centre in favour of opposite party no.5-Kumari Reena Sahu, daughter of Dileswar Sahu, and further seeks for a direction to the opposite parties to engage her in the said post as per the guidelines issued by the Government in Annexure-4 dated 24.11.1997.

2. The factual matrix of the case, in hand, is that an advertisement was issued on 01.07.2011 for engagement of Anganwadi Helper in respect of six Anganwadi Centres, including Chasagurujanga-B Anganwadi Centre, within the revenue village of Chasagurujanga. In the said advertisement, the date of holding Mahila Sabha was fixed to 12.07.2011, but due to some disturbances and quarrel among the members of the Mahila Sabha, decision could not be taken for selection of Anganwadi Helper in respect of Chasagurujanga-B Anganwadi Centre. Again an advertisement vide no.745 dated 01.12.2011 was issued by the CDPO, Pallahara for selection of Anganwadi Helper in respect of the very same Anganwadi Centre, namely, Chasagurujanga-B. In the said advertisement, the date of holding Mahila Sabha was fixed to 16.12.2011. Basing upon the said advertisement, five applicants, including the petitioner, offered their candidature for consideration for selection as Anganwadi Helper. As no decision could be taken, it was agreed that the selection of the candidates would be done at the headquarters through process of oral interview by a selection committee duly constituted by the authorities under the guidelines. Consequently, on 02.06.2012 the oral interview was conducted amongst the candidates in the headquarters, i.e., office of the CDPO, Pallahara. Pursuant to such interview, opposite party no.

5 secured highest mark and selected as Anganwadi Helper. Consequentially, engagement order was issued in her favour on 02.06.2012, pursuant to which she joined in the post and continuing as such. Hence, this application.

3. Dr. Sujata Dash, learned counsel for the petitioner contended that as per the guidelines issued by the Government of Odisha in Women and Child Development Department in Annexure-4 dated 24.11.1997, the petitioner, being a widow, should have been given preferential treatment as per clause-1(v) for selection of Anganwadi Helper. It is further contended that as per the said guidelines, the committee, which has been constituted under clause-2, should have selected the Anganwadi Helper in consultation with the women groups of the village and in case, for any reasons, it was not possible to make the selection in particular village, the selection should have been made in the project headquarters by the said committee. It is also contended that the husband of the petitioner was killed by Maoist on 18.07.2009 and her father is an old man and BPL card holder and her father-in-law family is not supporting in any manner for survival of the petitioner and her 10 years old daughter. Therefore, the Mahila Sabha in all its meetings pressed hard and recommended her case for selection and engagement as Anganwadi Helper, but opposite party no. 4 and the committee did not accept such recommendation and forced to conduct the oral selection. As per the eligibility criteria, since the petitioner is a widow, she is to be given preferential treatment, but without adhering to the provisions of the guidelines in Annexure-4 dated 24.11.1997, the selection and engagement of opposite party no.5 has been made, which cannot sustain in the eye of law. It is further contended that against such selection and engagement of opposite partyno.5 though the petitioner preferred appeal before the Sub-Collector, Pallahara on 06.06.2012 in Misc. Appeal No.2 of 2012, she was not given opportunity to participate in the hearing of the appeal. Therefore, the entire action taken by the authority is arbitrary and unreasonable and, as such, the selection and engagement of opposite party no.5 as Anganwadi Helper in respect of Chasagurujanga-B Anganwadi Centre is liable to be set aside.

To substantiate her contention, she relied upon the judgments of the apex Court as well as this Court in the cases of ***K. Manjushree v. State of A.P.,*** AIR 2008 SC 1470; ***Mrutunjaya Nayak v. State of Orissa,*** 2008 (II) OLR 314; ***Maharastra State Road Trasnport Corporation v. Rajendra Bhimrao Mandve***, (2001) 10 SCC 51; ***Karnatak Power Corporation Ltd. v. A.T. Chandrashekar***, AIR 2007 SC 2480; and ***Radhasyam Panigrahi v. Registrar (Admn.), Orissa High Court***, Vol.107 (2009) CLT 673.

4. Mr. B. Senapati, learned Addl. Government Advocate contended that pursuant to advertisement issued on 01.07.2011 the Mahila Sabha was fixed to 12.07.2011 but due to some disturbances and quarrel, decision could not be taken for selection and engagement of Anganwadi Helper in respect of Chasagurujanga-B Anganwadi Centre. Consequentially, another advertisement was issued on 01.12.2011 fixing the Mahila Sabha to 16.12.2011, but the same could not be done on the scheduled date. Therefore, as per the guidelines issued on 24.11.1997 in Annexure-4, the committee decided to hold the meeting at headquarters, i.e., in office of the CDPO on 02.06.2012 for holding an oral interview of the candidates applied for engagement of Anganwadi Helper to find out the best of the best person from amongst them. It is further contended that the selection was done by following due procedure as envisaged under the guidelines dated 24.11.1997 and consequentially engagement order was issued in favour of opposite party no.5 on 02.06.2012, pursuant to which she joined and now discharging her duty. Against the order of selection and engagement of opposite party no.5 dated 02.06.2012, though the petitioner preferred appeal before the Sub-Collector, which was registered as Misc. Appeal No. 2 of 2012, the same has been dismissed on the ground that no appeal is maintainable in the matter of selection of Anganwadi Helper. It is also contended that the petitioner, having participated in the process of selection and having not come out successful, cannot turn round and file writ petition stating that the selection done by the committee cannot be justified. Therefore, he seeks for dismissal of the writ petition.

5. Mr. S.K. Rath, learned counsel for opposite party no.5 reiterated the factual aspects and stated that pursuant to the advertisement issued, Mahila Sabha could not be conducted to select the Angawadi Helper on two occasions, i.e., on 12.07.2011 and 16.12.2011. Therefore, the selection committee as per the guidelines issued on 24.11.1997 in Annexure-4 conducted interview at the project headquarters. As such there were five applicants in the fray, the petitioner is a widow, whereas opposite party no.5 is a destitute lady. As per the medical certificate issued by the competent authority, opposite party no.5 was having some physical inability, for which natural marriage is not possible on her part. Therefore, she also comes under preferential category as per the guidelines dated 24.11.1997. It is also contended that if two eligible persons in a selection secured equal marks, then the preferential candidate would be considered. As the petitioner has not secured equal mark in the interview with that of opposite party no. 5, she

cannot claim any preferential treatment over and above opposite party no.5 and seek for engagement as Angawadi Helper. It is further contended that opposite party no.5 having been selected and engaged as Angawadi Helper, the challenge made by the petitioner, having participated in the selection process, cannot have any justification. Therefore, the writ petition should be dismissed.

To substantiate his contention with regard to preferential treatment, he has relied upon the judgments of the apex Court as well as of this Court in the cases of ***The Secretary, Andhra Pradesh Public Service Commission v. Y.V.V.R. Srinivasulu***, AIR 2003 SC 3961; ***Bibhudatta Mohanty v. Union of India***, AIR 2002 SC 1503; and ***Sevati Patra v. State of Odisha***, 2016 (I) ILR CUT 417.

6. This Court heard Dr. Sujata Dash, learned counsel for the petitioner; Mr. B. Senapati, learned Addl. Government Advocate for opposite parties no.1 to 4; and Mr. S.K. Rath, learned counsel for opposite party no.5 and perused the record. Pleadings having been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. In the case at hand, the petitioner, being a widow, claims for preferential treatment for engagement as Anganwadi Helper as per clause-1(v) of the guidelines in Annexure-4 dated 24.11.1997. As per the guidelines, so far as Chasagurujanga-B Angawadi Centre is concerned, since no decision was taken in the Mahila Sabha for selection of Anganwadi Helper pursuant to the meetings dated 12.07.2011 and 16.12.2011 as per the advertisement dated 01.07.2011 and 01.12.2011 respectively, it was decided to hold the selection in the headquarters office. Accordingly, the selection committee conducted the selection of Anganwadi Helper at the headquarters office on 02.06.2012. Since there were five candidates applied for the post, the selection committee evolved their own procedure to find out the best of the best in relation to the subject for which the anganwadi Helper is to discharge her duty by conducting an oral interview and this fact was also communicated to all the participants by placing the guidelines of the government dated 24.11.1997. Having agreed with such procedure, the candidates present signed the attendance sheet and participated in the process of selection. Consequentially opposite party no.5, having secured highest mark than that of other participants, the selection committee selected her, pursuant to resolution dated 02.06.2012 in Annexure-2. Contention raised

by learned counsel for the petitioner is that the petitioner, being a widow, should have been given preference for engagement, but opposite party no.5 being a distressed/deserted women having physical inability to go for marriage, as per the medical certificate issued by the competent authority in Annexure-A/5 dated 20.07.2011, the same preferential treatment should have been also extended to her as per the guidelines dated 24.11.1997.

8. Now, it is to be considered what is the meaning of 'preference' as per the guidelines issued in Annexure-4 dated 24.11.1997:

> *"As per **Advanced Law Lexicon, P. Ramanatha Aiyar's**, 'preference' means the act of preferring one thing above another; estimation of one thing more than another; choice of one thing rather than another.*
>
> *"Preference" is the expression of a motive or desire on the part of the directors of a Corporation to favour some creditors over others; to put them, as the word implies, a head in the race for assets.*
>
> *The preference of a creditor is not the payment of one in the ordinary course of business, or under threats or suits but selecting one as a relation or friend, or settling with him before due, or on the eve or bankruptcy, when not pushed by him.*
>
> *The common definition of "preference" as found in law dictionaries, is the paying or securing to one or more of his creditors, by an insolvent debtor, the whole or part of their claims, to the exclusion of the rest."*

9. In ***Sher Singh v. Union of India***, AIR 1984 SC 200, the apex Court held that Prior right; the superiority of one person or thing over another. Preference would mean that other things generally appearing to be qualitatively and quantitatively equal though not with mathematical accuracy; statutory provisions will tilt the balance in favour of the undertakings.

10. In ***Indra Sawhney v. Union of India***, AIR 1993 SC 477, the apex Court held that the expression 'preference' means an equitable apportionment of the vacancies reserved (for backward classes) among them.

11. In ***Secretary A.P. Public Service Commission v. Y.V.V.R. Srinivaulu***, (2002) 5 SCC 341, the apex Court held that the word 'preference' is capable of different shades of meaning taking colour from the context, purpose and object of its use under the scheme of things envisaged. A rule of 'preference' meant to give weightage to the additional qualification cannot be enforced as a rule of reservation or rule of complete precedence. The 'preference' envisaged has to be given only when the claims of all candidates who are eligible, are taken for consideration and when any one or

more of them found equally positioned, by using the additional qualification as a tilting factor, in their favour vis-à-vis others in the matter of actual selection.

12. In ***State of U.P. v. Om Prakash***, (2006) 6 SCC 474, the apex Court held that the use of word 'preference' in Rule-8 I would mean that when the claims of all candidates who are eligible and who possess the requisite educational qualification prescribed in the advertisement are taken for consideration and when one or more of them are found equally positioned, then only the additional qualification may be taken as a tilting factor in favour of candidates vis-a-vis others in the merit prepared by the commission. It does not mean on bloc preference irrespective of inter se merit and suitability.

13. The aforesaid meaning of the word 'preference' has also been taken note of by a learned Single Judge of this Court in a similar Anganwadi Helper case rendered in ***Sevati Patra*** (supra). Therefore, the inevitable conclusion is that 'preference' can only be given when the candidates are on similar footing. Now if the petitioner as well as opposite party no.5 both are coming under the same preferential category and opposite party no. 5 had secured highest mark than that of the petitioner and she has been selected and issued with engagement order pursuant to resolution dated 02.06.2012 in Annexure-2, no illegality or irregularity has been committed by the authority by issuing such engagement order in favour of opposite party no.5, so as to warrant interference by this Court.

14. The second limb of the argument advanced before this Court is that introduction of requirement of minimum marks for interview after entire selection process was completed is impermissible. Learned counsel for the petitioner is misconstrued to this proposition of law to the extent that no minimum mark was introduced after the selection process was completed, rather before the selection was undertaken, pursuant to the advertisement, all the participants were apprised with regard to the guidelines issued by the government on 24.11.1997 and also to find out the best of the best amongst the five candidates, oral interview was conducted in the subject relating to the Anganwadi Helper. Therefore, the judgments cited before this Court in ***K. Manjushree*** (supra) and ***Mrutunjaya Nayak*** (supra) have no application to the present context. Further, the contention raised that introduction of viva-voce and reallocation of marks for interview in the

middle or after the commencement of selection process is impermissible, for which reference has been made on ***Maharastra State Road Transport Corporation*** (supra), that question also does not arise. Therefore, the judgements, which have been referred to by learned counsel for the petitioner, have been rendered on the facts and circumstances of those cases, which have no application in the present peculiar facts and circumstances. On the other hand, the petitioner with eyes wide open participated in the process of selection, without any objection at any point of time, and having not come out successful has challenged the same in the present application contending that the selection procedure adopted by the committee is bad, is not permissible in view of the law laid down by the apex Court in ***Om Prakash Shukla v. Akhilesh Kumar Shukla***, AIR 1986 SC 1043, wherein the apex Court held as follows:

> *"when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."*

15. Taking into account the aforesaid judgment, the apex Court in ***Madan Lal v. State of Jammu and Kashmir***, AIR 1995 SC 1088 held as follows:

> *".....If a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted. In the case of* ***Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors.****, AIR 1986 SC 1043, it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."*

16. In ***Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others***, (2011) 1 SCC 150, the apex Court in paragraph-27 ruled as follows:

> *"In Union of India v. S. Vinodh Kumar, (2007) 8 SCC 100 in para 18, it was held that:*
>
> *"18..... It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same."*

17. In ***Marripati Nagaraja v. Government of A.P.***, (2007) 11 SCC 522, the apex Court observed as follows :-

> *"The other contention of Mr. Rao that the candidates had given only seven days time for making preparation to appear in the second screening test, cannot, in our considered view, give rise to a ground for setting aside the entire selection process. The Tribunal did not make any discrimination. One screening test had already been held. The number of candidates appeared in the first screening test was 510. The Commission obtained the permission of the Tribunal for holding the second screening test. It issued a notification on 12.12.2000 stating that such a test would be conducted on 7.1.2001. All the candidates were given the same time for preparation. Only because the appellants herein were employees at the relevant time, the same by itself could not confer on them any special privilege to ask for an extended time. They had no legal right in relation thereto. Appellants had appeared at the examination without any demur. They did not question the validity of the said question of fixing of the said date before the appropriate authority. They are, therefore, estopped and precluded from questioning the selection process."*

Similar view has also been taken by this Court in ***Sevati Patra*** (supra); ***Pradeep Kumar Jena v. State of Odisha***, 2017 (II) OLR 274; and ***Pravati Nayak v. State of Odisha***, 2018 (Supp-II) OLR 946.

18. Further, to find out the correctness or otherwise of the selection conducted by the selection committee, pursuant to the advertisement issued, this Court on 14.11.2017 in Misc. Case No.6579 of 2016 passed the following orders:

> *"Considering the averments made in Misc. Case No.6579 of 2016, learned counsel for the opposite party-State is directed to obtain the original records pertaining to selection process by the next date of hearing.*
>
> *Let the case appear on 1.12.2017.*
>
> *On that date the record pertaining to the selection process shall be produced before this Court.*
>
> *Misc. Case No.6579 of 2016 is disposed of."*

In compliance of the aforesaid order, Mr. B. Senapati, learned Addl. Government Advocate produced the original record pertaining to the selection process held by the selection committee and on perusal of such record this Court does not find any illegality or irregularity committed by the authority so as to warrant interference.

19. In view of the factual and legal position, as discussed above, this Court does not find any illegality or irregularity committed by the authority

in selecting opposite no.5 as Anganwadi Helper in respect of Chasagurujanga-B Anganwadi Centre under CDPO, Pallahara.

20. Accordingly, the writ petition merits no consideration and the same is hereby dismissed. However, there is no order to costs.

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2019 (III) ILR-CUT- 673

DR. B.R. SARANGI, J.

W.P.(C) NO. 8832 OF 2010

SUBASH CHANDRA SAHU ..... Petitioner

-Vs-

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

SERVICE LAW – Departmental enquiry – Petitioner, while serving as Head Constable/GD at Central Industrial Security Force (CISF) involved in a criminal case – Departmental proceeding – Punishment of dismissal from service by the disciplinary authority relying on the evidence collected during preliminary enquiry – The inquiry officer relied upon the statement recorded by the authority during preliminary inquiry and adopted the same in evidence and, as such, called upon the petitioner to cross-examine the witnesses, whether permissible under law? – Held, No.

In view of the law laid down by the apex Court mentioned supra, it is evident that the evidence recorded in the preliminary inquiry cannot be used in regular inquiry, as the delinquent was not associated with it and opportunity of cross-examination of the persons examined in such inquiry was not given. Therefore, using such evidence would be violative of principles of natural justice. The preliminary inquiry may be useful only to take a prima facie view as to whether there can be some substance in the allegations levelled against the employee, which may warrant a regular inquiry. But that ipso facto cannot give a right to the inquiry officer to proceed without affording opportunity of hearing to the delinquent employee, particularly when the preliminary inquiry has nothing to do with the inquiry conducted after issuance of the charge sheet. The purpose of preliminary inquiry is to find out whether the disciplinary proceeding should be initiated against the delinquent or not. After full-fledged enquiry was held, the preliminary enquiry lost its importance. More particularly, the preliminary inquiry report is neither part of the record nor has it been exhibited. Therefore, the inquiry officer

cannot utilize the statement made in the preliminary inquiry against the petitioner by accepting the same as evidence, as the same would amount to gross violation of principles of natural justice. (Para 19)

Case Laws Relied on and Referred to :-

1. AIR 1965 SC 1767 : Bhagawan -V- Ramchand,
2. AIR 1975 SC 1331 : Sukdev Singh -V- Bhagatram,
3. (1978) 1 SCC 24 : Maneka Gandhi -V- Union of India,
4. (1976) 2 All ER 865 (HL) : Fairmount Investment Ltd. -V- Secretary of State of Environemnt,
5. AIR 1981 SC 81 : Swadeshi Cotton Mills -V- Union of India,
6. AIR 1995 SC 1130 : State of U.P. -V- Vijay Kumar Tripathy,
7. (2008) 16 SCC 276 : Nagarjuna Construction Company Limited -V- Government of Andhra Pradesh,
8. (1993) 3 SCC 259 : D.K. Yadav -V- J.M.A. Industries Ltd.
9. (1997) 1 SCC 299 : Narayan Dattatraya Ramteerthakhr -V- State of Maharastra,
10. (2013) 4 SCC 301 : Nirmala J. Jhala -V- State of Gujarat.

For Petitioner : M/s L. Samantaray, R.L.Pradhan, B. Pradhan, S.Swain and G.Das.

For Opp.Parties: Mr. B. Dash, Central Government Counsel

JUDGMENT Date of Hearing : 25.02.2019 : Date of Judgment : 07.03.2019

DR. B.R. SARANGI, J.

The petitioner, while serving as Head Constable/GD at Central Industrial Security Force (CISF) Unit, Nalco, Angul, having faced with a departmental proceeding, was imposed with major penalty of dismissal from service by the disciplinary authority vide Annexure-16 dated 15.09.2009, which was confirmed by the appellate authority, vide order dated 16.12.2009 in Annexure-18, as well as revisional authority vide order dated 31.03.2010 in Annexure-20, which are subject matter of challenge before this Court.

2. The factual matrix of the case, in hand, is that the petitioner, while serving as Head Constable/GD at CISF Unit, Nalco, Angul, on 26.12.2008 was detailed for duty in 'B' shift, i.e., from 13:00 hours to 2100 hours at Expansion Gate of Nalco, Angul, along with Sub-Inspector K.K. Pallai and Lady Constable Kameli Khatun. At about 16:30 hours of the same day, a tipper bearing registration number OR-06-E-2919 laden with 27 nos. of rejected aluminium ANODE Stem arrived at the said gate to go outside the

plant premises, but due to protest of the duty personnel, the said tipper was seized and handed over to Nalco Nagar, Police Station. First Information Report was lodged at 9.30 PM alleging theft against driver of the said tipper. On the basis of his statement recorded under Section 161, Cr.P.C. by the concerned police, the petitioner was arrested in connection with Nalco P.S. Case No. 144 dated 26.12.2008 for alleged commission of offence under Sections 379/34, IPC.

2.1 The above fact was intimated by Officer in-Charge, Nalco Police Station, vide letter no. 1252/PS dated 28.12.2008, to the Senior Commandant, CISF Unit, Nalco, Angul, who, in exercise of power conferred by sub-rule (2)(a) of Rule 33 of CISF Rules, 2001 placed the petitioner under suspension with effect from 27.12.2008 vide office order dated 29.12.2008. While continuing with the criminal proceeding, the disciplinary authority drawn up a proceeding against the petitioner and issued memorandum of charge on 17.02.2009 framing one article of charge, i.e., an act of gross dereliction in duty on the part of the petitioner with mala fide intention. In response thereto, the petitioner submitted written statement on 28.02.2009 to the disciplinary authority denying the allegations. Having not satisfied with such explanation, the disciplinary authority appointed an inquiry officer to cause enquiry and submit report.

2.2 In course of enquiry, the petitioner submitted an application on 26.03.2009 to the inquiry officer regarding engagement of defence assistance. As the petitioner failed to get the service of a defence assistance from the local Unit, after best efforts, he could get a defence assistance from a Unit other than his own Unit, but the same was rejected. Therefore, the petitioner submitted an application to the apex authority of CISF for the selfsame purpose, but the disciplinary authority, vide letter dated 01.04.2009, intimated to the petitioner that the defence assistance from other Unit is not permissible and the application submitted by the petitioner to D.G., CISF was withheld.

2.3 As regards payment of subsistence allowance, the disciplinary authority issued office order dated 11.04.2009 intimating that it has been decided by review committee to continue the suspension for a further period of 90 days and the subsistence allowance will be raised by another 50% of the initial grant. Being aggrieved by the reduction of subsistence allowance, the petitioner submitted an appeal to the Deputy Inspector General, CISF

Headquarter, Eastern Zone, Patna on 13.07.2009. Pending disposal of the appeal, the petitioner submitted defence statement on 07.08.2009, but, subsequently on 02.09.2009, the appellate authority rejected the appeal of the petitioner dated 13.07.2009.

2.4 On consideration of the defence statement, the inquiry officer submitted its enquiry report to the disciplinary authority, who in turn called for representation from the petitioner by supplying copy of the report, vide letter dated 26.08.2009. In response to the same, the petitioner submitted his representation on 09.09.2009 to the disciplinary authority, who passed final order on 15.09.2009 by imposing major penalty of dismissal from service, and further directed that the period of suspension from 27.12.2008 to 15.02.2009 would be treated as not on duty for all purposes.

2.5 Against imposition of major penalty by the disciplinary authority, the petitioner preferred appeal on 18.09.2009 before the Deputy Inspector General, CISF Group Headquarter, Patna, who, vide order dated 16.12.2009, rejected the same. Being aggrieved by such confirming appellate order, the petitioner preferred revision on 11.01.2010 before the revisional authority, i.e., Inspector General, CISF Group Headquarter, Patna, who, vide order dated 31.03.2010, rejected the revision upholding the orders passed by the disciplinary authority imposing major penalty of dismissal from service and treating the period of suspension as such, as well as the order passed by the appellate authority confirming the same, hence this writ application.

3. Mr. L. Samantray, learned counsel for the petitioner contended that denial of defence assistance to the petitioner amounts to violation of principles of natural justice. The inquiry officer concluded the inquiry without recording oral evidence and without giving opportunity of hearing to the petitioner to cross-examine the witnesses examined in support of the charge. The statement recorded by the authority during the preliminary inquiry was adopted as evidence and immediately the petitioner was directed to cross-examine the witnesses, which is against the known procedure of law, as the statement recorded in preliminary inquiry is not a part of record nor has it been exhibited, particularly when the inquiry officer is not authorized under law to accept the same as evidence. So far as allegation of mala fide intention is concerned, neither it has been discussed, nor any material was produced or examined and, as such, no finding has been arrived at to that extent, thereby, the same cannot sustain in the eye of law. It is further

contended that the allegation of gross negligence and dereliction in duty are based on no evidence and, as such, none of the witnesses examined have stated anything either about the mala fide intention or with regard to allegation of gross negligence and dereliction in duty by the petitioner. Therefore, the report submitted by the inquiry officer cannot have any leg to stand and on that basis the imposition of major penalty of removal from service by disciplinary authority and confirmation made thereof by the appellate authority as well as revisional authority, cannot sustain in the eye of law. Furthermore, such punishment is grossly disproportionate to the charge levelled against the petitioner. Therefore, he seeks for quashing of the entire proceeding initiated against the petitioner.

4. Mr. B. Dash, learned Central Government Counsel supported the orders imposing major penalty by the disciplinary authority, as well the confirmation made thereof by the appellate and revisional authorities, with reference to the materials available on record, and contended that since the petitioner was rendering discipline service, any step taken by him affects the dignity of the organization and more particularly when the petitioner was involved in theft of materials, to keep the image of the organization high, if action has been taken in consonance with the provisions of law, in that case, no illegality or irregularity has been committed by the authority so as to warrant interference of this Court in exercise of extra ordinary jurisdiction. It is further contended that sub-rule (8)(a) of Rule-36 of the Central Industrial Security Force Rules, 2001 provides that the enrolled member of the force so charged may be permitted by the inquiring authority to present his case with the assistance of any other member of the force posted at the place of inquiry. He will give three choices for his defence assistance and the controlling officer will depute anyone of the three indicated by him. Since the petitioner desired to have assistance of a member of the force outside the place of inquiry, the inquiry officer has rightly rejected the claim of defence assistance. Thereby, no illegality or irregularity has been committed by the authority, rather the authority has acted in consonance with the provisions of Rules.

5. This Court heard Mr. L. Samantray, learned counsel for the petitioner and Mr. B. Dash, learned Central Government Counsel for opposite parties, 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. On the basis of the undisputed pleaded facts, it is to be examined whether the petitioner has been provided with opportunity of hearing in compliance of principles of natural justice.

7. In ***Bhagawan v. Ramchand,*** AIR 1965 SC 1767, the apex Court held that the rule of law demand that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice.

8. In ***Sukdev Singh v. Bhagatram,*** AIR 1975 SC 1331, the apex Court held that whenever a man's rights are affected by decisions taken under statutory powers, the Court would presume the existence of a duty to observe the rules of natural justice.

9. The soul of natural justice is 'fair play in action'. In ***Maneka Gandhi v. Union of India,*** (1978) 1 SCC 24, the Hon'ble Justice P.N. Bhagwati, J, as his lordship then was, has countered natural justice with 'fair play in action'.

In ***HK (An Infant) in re,*** (1967) 1 All ER 226 (DC), Lord Parker, CJ, preferred to describe natural justice as 'a duty to act fairly'.

In ***Fairmount Investment Ltd. v. Secretary of State of Environemnt,*** (1976) 2 All ER 865 (HL), Lord Russel of Kilowen described the natural justice as 'a fair crack of the whip'.

In ***R. V. Secretary of State for Home Affairs,*** (1977) 3 All ER 452 (DC & CA), Geoffery Lane, LJ, in defining the natural justice used the phrase 'common fairness'.

10. In ***Swadeshi Cotton Mills v. Union of India,*** AIR 1981 SC 81, the apex Court considered the meaning of 'natural justice' to the following effect:-

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

11. In ***Swadeshi Cotton Mills*** *(supra)*, the apex Court held as follows :

> *"Principles of natural justice are principles ingrained into the conscience of men. Justice being based substantially on natural ideals and human values, the administration of justice here is freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. Principles/rules of natural justice are not embodied principles/rules. Being means to an end and not an end in them, it is not possible to make an exhaustive catalogue of such rules (Principles).*

12. In ***State of U.P. V. Vijay Kumar Tripathy,*** AIR 1995 SC 1130, the apex Court further held that it is important to note that the normal rule that whenever it is necessary to ensure against the failure of justice, the principles of natural justice must be read into a provision. Such a course is not permissible where the rule excludes expressly or by necessary intendment, the application of the principle of natural justice, but in that event the validity of that rule may fall for consideration.

13. 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 parties must 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.

14. Therefore, principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice. The supreme Court has time and again equated the principles of natural justice with fairness in action, therefore, the Court has insisted upon not so much to act judicially but acting fairly, justly, reasonably and impartially.

15. In ***D.K. Yadav V. J.M.A. Industries Ltd.*** (1993) 3 SCC 259 the apex Court insisted that in arriving at a decision, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. Therefore, it is further 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.

16. Applying the above law, so far as principles of natural justice is concerned, as laid down by the apex Court, to the present context it is observed that admittedly the petitioner had applied for taking defence assistance, but the same was denied in view of the provisions contained under sub-rule (8)(a) of Rule-36 of the Central Industrial Security Force Rules, 2001, as the petitioner sought defence assistance from outside the unit. But fact remains, while conducting inquiry, the inquiry officer did not record any oral evidence, rather he depended upon the preliminary inquiry report without permitting the petitioner to cross examine the witnesses in support of the charge. The inquiry officer relied upon the statement recorded by the authority during preliminary inquiry and adopted the same in evidence and, as such, called upon the petitioner to cross-examine the witnesses, which itself is not permissible under law.

17. In the case of ***Narayan Dattatraya Ramteerthakhr v. State of Maharastra***, (1997) 1 SCC 299 the apex Court held as follows:-

> *"……..The preliminary enquiry has nothing to do with the enquiry conducted after the issue of the charge-sheet. The former action would be to find whether disciplinary enquiry should be initiated against the delinquent. After full-fledged enquiry was held, the preliminary enquiry had lost its importance."*

18. In the case of ***Nirmala J. Jhala v. State of Gujarat***, (2013) 4 SCC 301, in which reference has also been made to the case of ***Narayan Dattatraya Ramteerthakhar*** (supra), in paragraphs 23 and 25 the apex Court held as follows:-

> ***"23.*** *In view of the above, it is evident that the evidence recorded in preliminary inquiry cannot be used in regular inquiry as the delinquent is not associated with it, and opportunity to cross-examine the persons examined in such inquiry is not given. Using such evidence would be violative of the principles of natural justice.*

xx ***xx*** ***xx***

25. *The preliminary enquiry may be useful only to take a prima facie view, as to whether there can be some substance in the allegation made against an employee which may warrant a regular enquiry."*

19. In view of the law laid down by the apex Court mentioned supra, it is evident that the evidence recorded in the preliminary inquiry cannot be used in regular inquiry, as the delinquent was not associated with it and opportunity of cross-examination of the persons examined in such inquiry was not given. Therefore, using such evidence would be violative of principles of natural justice. The preliminary inquiry may be useful only to take a prima facie view as to whether there can be some substance in the allegations levelled against the employee, which may warrant a regular inquiry. But that ipso facto cannot give a right to the inquiry officer to proceed without affording opportunity of hearing to the delinquent employee, particularly when the preliminary inquiry has nothing to do with the inquiry conducted after issuance of the charge sheet. The purpose of preliminary inquiry is to find out whether the disciplinary proceeding should be initiated against the delinquent or not. After full-fledged enquiry was held, the preliminary enquiry lost its importance. More particularly, the preliminary inquiry report is neither part of the record nor has it been exhibited. Therefore, the inquiry officer cannot utilize the statement made in the preliminary inquiry against the petitioner by accepting the same as evidence, as the same would amount to gross violation of principles of natural justice.

20. Needless to say that for the selfsame allegation, criminal case was also instituted against the petitioner and by the time the departmental proceeding was initiated against the petitioner, the criminal case was pending before the appropriate forum. Though law is well settled that departmental proceeding is not a bar during pendency of the criminal case, but it has got its bearing while imposing major penalty of dismissal from service in a departmental proceeding. In any case, since the inquiry officer has not acted in compliance of the principles of natural justice, while conducting inquiry, and submitted the inquiry report, this Court is of the considered view that relying upon the report of the inquiry officer, if the disciplinary authority imposed major penalty of dismissal from service, which has been confirmed by the appellate authority and revisional authority, even though this point was raised and the same was not considered in proper perspective by the said

authorities, the order so passed cannot sustain in the eye of law. Accordingly, the inquiry report in Annexure-14 dated 26.08.2009 basing upon which the order of major penalty has been passed by the disciplinary authority in Annexure-16 dated 15.09.2009 and confirmation thereof by the appellate authority in Annexure-18 dated 16.12.2009 as well as revisional authority in Annexure-20 dated 31.03.2010 are hereby quashed and the matter is relegated to the stage of inquiry. The inquiry officer is directed to cause a de novo inquiry on the basis of the materials available on record, by affording opportunity of hearing to the petitioner, in compliance of principles of natural justice, and submit a fresh report as expeditiously as possible.

21. With the above observation and direction, the writ petition stands disposed of. No order to cost.

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2019 (III) ILR-CUT - 682

DR. B.R. SARANGI, J.

W.P.(C) NO. 11993 OF 2007

SRIKANTA DASH .....Petitioner

-Vs-

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

(A) SERVICE LAW – Termination – Petitioner having fulfilled the conditions and criteria, applied for the post and after the interview he having been found suitable, was selected and appointed as Key Punch Operator in 1989 – Service Book opened, scale of pay fixed – Continued for about eighteen years – Terminated in 2007 on the ground that he had not been appointed in a sanctioned post – No fault of the petitioner – Held, order of termination cannot be sustained.

"There is no dispute with regard to factual matrix discussed above, but fact remains while issuing notice of termination on 18.09.2007, the petitioner has not been given opportunity of hearing in compliance of principle of natural justice, and more particularly, the petitioner has been continuing in service w.e.f. 03.01.1989 and he has gained experience of more than 18 years. As such, his termination is not due to his own fault

rather, due to the lapses of the authority concerned, because appointment of the petitioner has been made following the procedure of selection against a non-sanctioned post and consequentially when the Government has not sanctioned the post, the University has compelled to terminate the petitioner from service. Thereby, the order of termination issued by the University is not due to lapse on the part of the petitioner, but because of lapse on the part of the authority, for which the petitioner should not suffer. As a result, the order of termination passed by the authority concerned cannot sustain in the eye of law." (Para 12)

(B) SERVICE LAW – "Equity Jurisprudence" – When can be considered? – Indicated.

"This is a Court of equity jurisdiction and this Court has taken in to consideration the service rendered by the petitioner from 10.01.1989 till he was terminated from service w.e.f. 18.09.2007 and that too it is not due to his fault rather, due to non-availability of sanctioned post he was terminated from service by the opposite parties. While continuing in service he has also gained experience. Therefore, "equity jurisprudence" is that portion of remedial justice which is exclusively administered by a Court of equity as contradistinguished from that portion of remedial justice which is exclusively administered by a Court of Common Law.

Considering the law of equity as discussed above and taking into consideration that this Court has got equity jurisdiction, since one sanctioned post of Key Punch Operator is lying vacant because of superannuation of one Ms. Mandira Singh, it will not cause any prejudice to any of the parties, if the petitioner, who has also gained experience for a quite long period of above 18 years, can be adjusted against the said post."

(Paras15 & 19)

Case Law Relied on and Referred to :-

1. (2007) 2 SCC 230, 241 : Raghunath Rai Bareja -V- Punjab National Bank.

For Petitioner : Mr. Aswini Kumar Mishra,Sr. Advocate
M/s. J. Sengupta, D.K. Panda, G. Sinha,
A. Mishra and S. Mishra.

For Opp. Parties: Mr. A.K. Mishra, Addl. Government Advocate
M/s. S.K. Das, S. Swain, N.N. Mohapatra.
M/s. B.S. Mishra (2), M.R. Mishra,
A. Mishra and A.P. Dhivsamanta.

JUDGMENT Decided on : 02.07.2019

DR. B.R. SARANGI, J.

The petitioner, who was working as Key Punch Operator under the Berhampur University, has filed this application seeking to quash the order of termination/retrenchment dated 18.09.2007 under Annexure-26, and grant all financial benefits retrospectively, as due and admissible to him, in accordance with law.

2. The factual matrix of the case, in hand, is that pursuant to advertisement issued by the opposite party dated 20.06.1988, the petitioner having eligible for the post of Key Punch Operator, applied for the same and after following due procedure, was selected and appointed on 03.01.1989, consequentially, joined on 10.01.1989, along with two other persons, namely, Ms. M. Singh and P.K. Nayak. Since there was a justification of one post more, against which the petitioner is continuing, request was made by the University to Government for sanction of one post of Key Punch Operator, but the same having not been granted, the petitioner faced the termination on 18.09.2007. Hence this application.

3. Mr. A.K. Mishra, learned Senior Counsel for the petitioner contended that pursuant to advertisement issued on 20.06.1988, the petitioner was duly selected and appointed on 03.01.1989 as a Key Punch Operator, in which post he joined on 10.01.1989 and has been discharging his duty since then. He has also been granted regular scale of pay admissible to the post along with two other selected Key Punch Operators, those who are continuing against sanctioned posts.So far as the post held by the petitioner is concerned, the same has not been sanctioned by the Government, despite consistent efforts made by the University. As a result of which, the petitioner has been terminated from service on 18.09.2007. Therefore, the petitioner has invoked jurisdiction of this Court seeking above relief.

4. Mr. A.K. Mishra, learned Addl. Government contended that the petitioner, having been appointed against a non-sanction post, his appointment is arbitrary and illegal. Thereby, no illegality or irregularity has been committed by terminating the service of the petitioner.

5. Mr. S.K. Das and associates enter appearance for opposite party no.2, on being noticed, but none was present at the time of call. Since it is a matter of 2007 and in the meantime 12 years have passed, this Court is not inclined to adjourn the matter and proceed with the hearing on the basis of materials available.

6. Mr. B.S. Mishra (2), learned counsel for the University-opposite party no.3 argued with vehemence stating that since the post has not been sanctioned, the petitioner has no right to continue in the University. Therefore, he has been retrenched from the service of the University.

7. This Court heard Mr. A.K. Mishra, learned Senior Counsel appearing along with Mr. G. Sinha, learned counsel for the petitioner; Mr. A.K. Mishra, learned Addl. Government Advocate appearing for the State opposite party; Mr. B.S. Mishra (2), learned counsel for opposite party no.3- University; 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.

8. The undisputed facts which have been advanced by learned counsel for the parties and on perusal of the records, it appears that the opposite parties have issued an advertisement on 20.06.1988 inviting applications from eligible candidates for the post of Key Punch Operator in the computer system, along with other posts, with different qualifications. The petitioner, having fulfilled the conditions and criteria, applied for the said post and he was called upon to appear the interview which was scheduled to be held on 31.12.1988. The petitioner, being found suitable, was selected and appointed as Key Punch Operator on 03.01.1989, pursuant to which he reported for duty 10.01.1989. He was called upon to produce the original certificates for verification for opening of service book, after completion of one year of service, and on production of the same, service book was opened. As such, 10% of his basic salary per month was deducted towards contributory provident fund scheme and after successful completion of one year of service, he has been granted increment and has also been paid scale of pay as peer Revised Pay Scale Rules, 1989.

9. Thereafter, the petitioner's scale was re-fixed to 3200-85-4900/- with effect from 01.01.1996 in accordance with the Orissa Universities Revised Scale of Pay Rules, 1999. On 25.01.2003, a letter was addressed by the University Authority to the Government stating therein that three persons, namely, Ms. M. Singh, P.K. Nayak, and the petitioner are working as Key Punch Operator in the Computer Centre of the University. Two posts have been sanctioned and the third one has not been done so far. By giving detailed justification a request was made to convey the approval of the additional post of Key Punch Operator in the University. On receipt of the

same, the Government wrote a letter to the University on 21.02.2004 seeking information as to how many Computer Operators and Key Punch Operators, who are working in the University, have been asked to work for self financing courses and if yes, how much remuneration they are getting from each course and whether the proposal has been approved by the Chancellor. Request was made by the University on 03.09.2004 to the Government for sanction/concurrence of the posts of one Computer Operator and one Key Punch Operator.

10. The opposite party no.4, vide letter dated 09.09.2004, requested the opposite party no.2 to convey the approval/sanction of the posts of one Computer Operator and one Key Punch Operator, as University has already availed financial assistance from the UGC. On 09.12.2004, a show cause notice was issued to the petitioner to explain as to why salary and allowance paid to him shall not be recovered and further payment will not be stopped in the event of refusal of Government for according sanction. Pursuant to such notice, the petitioner submitted his reply explaining therein that he was no way responsible for non-sanction of the post. He was appointed in compliance of due procedure of Rules through a duly constituted selection committee and he has already served the University for a long time and also requested the authority not to take any such coercive action which would cause prejudice to him.

11. On 23.12.2004, Government wrote a letter to the Office of the Chancellor, Rajbhavan, Bhubaneswar pointing out non-receipt of approval letter for sanction of post of Computer Operator and Key Punch Operator and requested the views of the Chancellor regarding approval of the aforesaid post. On 18.03.2005, the University wrote a letter to the Government stating that sanction/approval of creation of the post of Key Punch Operator and Computer Operator is still awaiting from the Government since they are created and sanctioned by the UGC to enable the University to take up tabulation work of all examinations, computerization of all the financial matters and for working in the computer centre in two shifts. On 18.09.2007, an office order was issued by the Registrar, Berhampur University stating that the petitioner has been retrenched/terminated from service with immediate effect, as it is not possible to allow him to hold the post without sanction.

12. There is no dispute with regard to factual matrix discussed above, but fact remains while issuing notice of termination on 18.09.2007, the petitioner

has not been given opportunity of hearing in compliance of principle of natural justice, and more particularly, the petitioner has been continuing in service w.e.f. 03.01.1989 and he has gained experience of more than 18 years. As such, his termination is not due to his own fault rather, due to the lapses of the authority concerned, because appointment of the petitioner has been made following the procedure of selection against a non-sanctioned post and consequentially when the Government has not sanctioned the post, the University has compelled to terminate the petitioner from service. Thereby, the order of termination issued by the University is not due to lapse on the part of the petitioner, but because of lapse on the part of the authority, for which the petitioner should not suffer. As a result, the order of termination passed by the authority concerned cannot sustain in the eye of law.

13. In course of hearing, Mr. A.K. Mishra, learned Senior Counsel for the petitioner brings to notice of this Court that one Ms. Mandira Singh, who was working against a sanctioned post, has attained the age of superannuation on 31.10.2018 and she has already been retired from service. She was granted six months extension of service, which has already been over in the meantime. Therefore, one sanctioned post of Key Punch Operator is lying vacant. More so, the petitioner has already gained experience of 18 years. Thereby, it will not cause any difficulty on the part of the University, if the petitioner can be adjusted and allowed to continue in service against the sanctioned post, which is lying vacant.

14. This Court called upon Mr. B.S. Mishra (2), learned counsel appearing for opposite party no.3-University, who on instruction also admitted that Ms. Mandira Singh, who was continuing against the sanctioned post, retired on attaining the age of superannuation and she was also given extension for a period of six months, which has already over in the meantime. As such, said sanctioned post is still lying vacant.

15. This is a Court of equity jurisdiction and this Court has taken in to consideration the service rendered by the petitioner from 10.01.1989 till he was terminated from service w.e.f. 18.09.2007 and that too it is not due to his fault rather, due to non-availability of sanctioned post he was terminated from service by the opposite parties. While continuing in service he has also gained experience. Therefore, “equity jurisprudence” is that portion of remedial justice which is exclusively administered by a Court of equity as

contradistinguished from that portion of remedial justice which is exclusively administered by a Court of Common Law.

16. Sir JOHN TREVOR, M.R. while considering the equity of law, states as follows:

> *"Equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness and edge of the law, and is a universal truth. It does also assist the law, where it is defective and weak in the constitution (which is the life of the law), and defends the law from crafty evasions, delusions and mere subtleties, invented and contrived to evade and elude the common law, whereby such as have undoubted right are made remediless. And thus is the office of equity to protect and support the common law from shifts and contrivances against the justice of the law. Equity, therefore, does not destroy the law, nor create it, but assists it."*

17. CARIG R. DUCAT in Constitutional Interpretation has stated that, that branch of the common law in which the specifics or relief in a given case could not be found in existing procedures and remedies, but instead called for the exercise of justice and fairness by the judge.

18. In ***Raghunath Rai Bareja v. Punjab National Bank,*** (2007) 2 SCC 230, 241, the apex Court held that "Equity" can only supplement the law and it cannot supplant or override it. Equity has no role to play where the statute contained express provisions. It cannot prevail over the law in case of a conflict between the two.

19. Considering the law of equity as discussed above and taking into consideration that this Court has got equity jurisdiction, since one sanctioned post of Key Punch Operator is lying vacant because of superannuation of one Ms. Mandira Singh, it will not cause any prejudice to any of the parties, if the petitioner, who has also gained experience for a quite long period of above 18 years, can be adjusted against the said post.

20. In that view of the matter, the writ petition is disposed of directing the opposite party no.3-University to consider the grievance of the petitioner by adjusting and allowing him against the vacant post of Ms. Mandira Singh, which is also a sanctioned post and is lying vacant, as expeditiously as possible, preferably within a period of two months from the date of communication of this order.

21. With the above observation and direction, the writ petition stands disposed of. There shall be no order as to cost.

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2019 (III) ILR-CUT- 689

DR. B.R. SARANGI, J.

W.P.(C) NO. 18900 OF 2012

BAMADEV JAYASINGH .....Petitioner

-Vs-

I.G, B.S.F, SOUTH BENGAL FRONTIER, KOLKATA & ANR. .....Opp. Parties

BOARDER SECURITY FORCE ACT, 1968 – Section 2 and 11 read with Rule 22 of the The Border Security Force Rules, 1969 – Provisions under – Compliance – Petitioner, a Constable working under BSF granted leave for fifteen days – Overstayed for more than three months due to suffering from infective hepatitis – Undergone treatment in Govt. Hospital for three months – While submitting his joining report after recovery, he was informed that he has been dismissed from service – Various statutory provisions discussed – No compliance of the principles of audi alteram pattern – Held, the order of dismissal liable to be set aside.

"The apex Court while considering the rule of audi alteram pattern have gone to the extent that mere opportunity to make submissions on the objections of the reporting authority on the grant of applicant's request not enough and that to clear opportunity must be given to demonstrate that the reporting authority was not justified in making the objections and the accepting authority should not accept the objections in the facts and circumstances. Therefore, there is violation of rule of audi alteram pattern and effect there could be that a quasi judicial order denying right to be heard is null and void." (Paras 10 to 15)

Case Laws Relied on and Referred to :-

1. (1989) 1 SCC 628 : M/s R.B. Shreeram Durga Prasad & Fatehchand Nursing Das -V- Settlement Commission (IT & WT),
2. AIR 2015 SC 598 : Chhel Singh -V- M.G.B. Gramin Bank Pali,
3. AIR 2016 SC 2510 : Chamoli District Cooperative Bank Ltd. -V- Raghunath Singh Rana.
4. 118 (2014) CLT 250: Golak Chandra Swain -V- Union of India.

For Petitioner : M/s. Dr.A.K. Mohapatra, Sr.Counsel
G.K. Mishra, G.N.Mishra, P.K. Sahoo & S.C. Sahoo.

For Opp.Parties : Mr. B. Nayak, Central Government Counsel

JUDGMENT Date of Hearing : 27.06.2019 : Date of Judgment : 02.07.2019

DR. B.R.SARANGI, J.

The petitioner, who was working as constable in Border Security Force in 47th BN, Boarder Security Force (BSF) of South Bengal Frontier (SBF), has filed this application seeking to quash the order of punishment of dismissal from service w.e.f. 07.05.2010 under Annexure-6, for unauthorized absence, and consequential order passed by the appellate authority confirming the same in Annexure-5 dated 04.09.2012 respectively.

2. The factual matrix of the case, in hand, is that the petitioner by following due process of selection was appointed as constable in 47th BN, Boarder Security Force (BSF) of South Bengal Frontier (SBF) on 05.07.1998 having personal number as 98098135. He was discharging his duty assigned to him as per the deployment order issued by the competent authority. While he was on deployment at Jammu, he was granted leave for 15 days from 11.01.2010 and was to join in service on 01.02.2010. The petitioner, while availing the leave on his village, suffered from infective hepatitis and was hospitalized from 28.01.2010 till 11.05.2010, therefore he could not join duty on 01.02.2010. He was declared fit by the medical officer of Unit-4 Government Hospital, Bhubaneswar on 11.05.2010. Soon after recovery, he submitted his joining report on 15.05.2010 along with the medical certificate, but he was not allotted duty rather he was intimated by his authority that he has been dismissed from service on 07.05.2010 (F/N). Against the said order of dismissal, the petitioner preferred appeal and he was assured of an inquiry, but his appeal was rejected by a cryptic order on 27.08.2010. Against rejection of his appeal, the petitioner preferred W.P.(C) No.12792 of 2010, which was disposed of by this Court, vide order dated 07.05.2012, directing the appellate authority to rehear the matter and pass a reasoned and speaking order within a period of three months from the date of communication of the order after dealing with all the points raised by the petitioner by giving opportunity of hearing to the petitioner. But the Deputy Inspector General rejected the appeal on 04.09.2012 in Annexure-5. Hence this application.

3. Dr. A.K. Mohapatra, learned Sr. Counsel appearing along with Mr. S.C. Sahoo, learned counsel for the petitioner contended that action of the authorities in passing the impugned order of dismissal from service in Annexure-6 dated 7.05.2010 and consequential order of the appellate authority in Annexure-5 dated 04.09.2012, after remand from this Court, is illegal and arbitrary. It is contended that the authority, while passing the order of dismissal from service, has not followed Rule-22 of Border Security Force Rules, 1969 (hereinafter referred "Rules, 1969"), thereby the order of dismissal cannot sustain in the eye of law. It is further contended that the Dy. I.G., who has passed the consequential order in appeal in compliance with the remand order dated 07.05.2012 passed by this Court, is not the appellate authority, and as such, the order passed by him for I.G., BSF is without jurisdiction, contrary to the provisions of law and also violates Rule-28-A of Rules, 1969.

To substantiate his contention, reliance has been placed on the judgments of the apex Court rendered in the case of ***M/s R.B. Shreeram Durga Prasad and Fatehchand Nursing Das v. Settlement Commission (IT & WT)***, (1989) 1 SCC 628; ***Chhel Singh v. M.G.B. Gramin Bank Pali***, AIR 2015 SC 598; ***Chamoli District Cooperative Bank Ltd. v. Raghunath Singh Rana***, AIR 2016 SC 2510; and judgment of this Court rendered in the case of ***Golak Chandra Swain v. Union of India***, 118 (2014) CLT 250.

4. Per contra, Mr. B. Nayak, learned Central Government Counsel justifies the order of dismissal passed by the disciplinary authority on 07.05.2010 and stated that the petitioner having remained in discipline service could not have remained unauthorized leave for more than 94 days beyond the command issued to him. It is further contended that the petitioner had given adequate opportunity by calling upon him to show cause vide letter dated 31.03.2010 against the proposed dismissal from service. The show cause notice was delivered to the petitioner by pasting/affixing at the entrance of the individual house, the same having not received back undelivered, it shows that the same was delivered to the petitioner for needful steps. Even though the show cause notice was delivered, no reply was received from the petitioner. Therefore, the action so taken is wholly and fully justified. Subsequently, when the petitioner submitted joining report on 15.05.2010, the same was not accepted because by that time he had already been dismissed from service on 07.05.2010. The petitioner thereafter preferred appeal, which was rejected by an unreasoned order. Against the said order of rejection, the

petitioner filed W.P.(C) No.12792 of 2010 and this Court, vide order dated 07.05.2012, quashed the order passed by the appellate authority and remanded the matter for hearing afresh. Consequentially, the grievance of the petitioner was examined carefully by the I.G., BSF, South Bengal Frontier (SBF) and the relevant medical documents produced by the petitioner was sent to the Capital/Zonal Hospital and Dispensary, Bhubaneswar, Orissa for verification. Thereafter, the DIG passed the order on 04.09.2012 for IG, BSF South Bengal Frontier (SBF) confirming the order of dismissal passed by the authority. Thereby, no illegality or irregularity has been committed by the authority in passing the order impugned, warranting interference by this Court in this proceeding.

5. This Court heard Dr. A.K. Mohapatra, learned Sr. Counsel appearing along with Mr. S.C. Sahoo, learned counsel for the petitioner; and Mr. B. Nayak, learned Central Government Counsel; and perused the record. Pleadings having been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. The admitted fact being that the petitioner, while continuing as constable at Jammu, was granted leave for 15 days from 11.01.2010 to join in service on 01.02.2010. As he suffered from infective hepatitis, he was hospitalized w.e.f. 28.01.2010 till 11.05.2010. When he was declared fit by the Medical Officer, Unit-4, Government Hospital, Bhubaneswar, he reported for duty on 15.05.2010, but he was informed that he has been dismissed from service vide order dated 07.05.2010. Against the said order, he preferred appeal but the same was dismissed on 27.08.2010. Against the said order of the appellate authority, the petitioner filed W.P.(C) No.12792 of 2010, which was disposed of on 07.05.2012 remanding the matter back to the appellate authority to rehear the same and pass a reasoned and speaking order within a period of three months from the date of communication of the order by giving opportunity of hearing to the petitioner. Consequentially, the order dated 04.09.2012 was passed by the appellate authority.

7. For just and proper adjudication of the case, relevant provisions of the Boarder Security Force Act, 1968 (hereinafter referred to "Act, 1968") are extracted below:-

> *"2.* ***Definitions****.—(1) In this Act, unless the context otherwise requires,—*
> *(a) "active duty", in relation to a person subject to this Act, means any duty as a member of the Force during the period in which such person is attached to, or forms part of, a unit of the Force—*

(i) Which is engaged in operations against an enemy, or

(ii) which is operating at a picket or engaged on patrol or other guard duty along the borders of India, and includes duty by such person during any period declared by the Central Government by notification in the Official Gazette as a period of active duty with reference to any area in which any person or class of persons subject to this Act may be serving;

(b) "battalion" means a unit of the Force constituted as a battalion by the Central Government;

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(f) "Commandant", when used in any provision of this Act with reference to any unit of the Force, means the officer whose duty it is under the rules to discharge with respect to that unit, the functions of a Commandant in regard to matters of the description referred to in that provision;

xxx xxx xxx

(h) "Deputy Inspector-General" means a Deputy Inspector General of the Force appointed under section 5;

(i) "Director-General" means the Director-General of the Force appointed under section 5;

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(k) "enrolled person" means an under-officer or other person enrolled under this Act;

(l) "Force" means the Border Security Force;

xxx xxx xxx

(n) "Inspector-General" means the Inspector-General of the Force appointed under section 5;

(o) "member of the Force" means an officer, a subordinate officer, an under-officer or other enrolled person;

xxx xxx xxx

(r) "officer" means a person appointed or in pay as an officer of the Force, but does not include a subordinate officer or an under-officer;

(s) "prescribed" means prescribed by rules made under this Act;

(t) "rule" means a rule made under this Act;

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11. ***Dismissal, removal of reduction by the Director-General and by other officers****.—(1) The Director-General or any Inspector-General may dismiss or remove from the service or reduce to a lower grade or rank or the ranks any person subject to this Act other than an officer.*

(2) An officer not below the rank of Deputy Inspector-General or any prescribed officer may dismiss or remove from the service any person under his command other than an officer or a subordinate officer of such rank or ranks as may be prescribed."

8. In exercise of powers conferred by sub-sections (1) and (2) of Section 141 of the Border Security Force Act, 1968, the Central Government framed Rules called The Border Security Force Rules, 1969 (hereinafter referred to "Rules, 1969"). Relevant provisions of the said Rules are extracted below:-

> "**22. Dismissal or removal of persons other than officers on account of mis-conduct.**- (1) When it is proposed to terminate the service of a person subject to the Act other than an officer, he shall be given an opportunity by the authority competent to dismiss or remove him, to show cause in the manner specified in sub-rule (2) against such action:
>
> Provided that this sub-rule shall not apply –
>
> (a) where the service is terminated on the ground of conduct which has led to his conviction by a criminal court or a Security Force Court; or
>
> (b) where the competent authority is satisfied that, for reasons to be recorded in writing, it is not expedient or reasonably practicable to give the person concerned an opportunity of showing cause.
>
> (2) When after considering the reports on the mis-conduct of the person concerned, the competent authority is satisfied that the trial of such a person is inexpedient or impracticable, but, is of the opinion that his further retention in the service is undesirable, it shall so inform him together with all reports adverse to him and he shall be called upon to submit, in writing, his explanation and defence:
>
> Provided that the competent authority may withhold from disclosure any such report or portion thereof, if, in his opinion its disclosure is not in the public interest.
>
> (3) The competent authority after considering his explanation and defence if any, may dismiss or remove him from service with or without pension:
>
> Provided that a Deputy Inspector General shall not dismiss or remove from service, a Subordinate Officer of and above the rank of a Subedar.
>
> (4) All cases of dismissal or removal under this rule, shall be reported to the Director General.
>
> xxx xxx xxx
>
> [28A. **Petition**.-2 [Any person subject to the Act, who considers himself aggrieved by any order of termination of his service passed under this Chapter may; in the case of an officer, present a petition to the Central Government, in the case of an Assistant Sub Inspector or a subordinate officer, present a petition to the Director General and in the case of an

enrolled person, present a petition to the Inspector General, who may pass such orders on the petition as deemed fit].

Provided that the limitation period for filing such petition shall be three months from the date of order of termination or from the date of its receipt, whichever is later.

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177. Prescribed Officer under Section 11 (2).- The Commandant may, under sub-section (2) of section 11, dismiss or remove from the service any person under his command other than a officer or a subordinate officer."

9. In view of the aforesaid statutory provisions, unauthorized absence of 94 days by the petitioner beyond the period of sanctioned leave may construe as misconduct. If it is construed as misconduct and the authorities passed the order of dismissal of the petitioner from service, then they have to follow Rule-22 of Rules, 1969. Meaning thereby, when it is proposed to terminate/dismiss the service of a person subject to the Act other than an officer, namely, constable herein the petitioner holding the post, shall be given an opportunity by the authority competent to dismiss or remove him, to show cause in the manner specified in sub-rule (2) of Rule-22, provided that sub-rule 1(a) of Rule-22 will not have any application while his service is terminated on the ground of conduct which has led to his conviction by a criminal court or a security force court or the competent authority is satisfied that for reasons to be recorded in writing, it is not expedient or reasonably practicable to give the person concerned an opportunity of showing cause. In the present case, neither the petitioner was dismissed on the ground of conduct which led to his conviction by a criminal court or security force court nor the competent authority, namely, commandant is satisfied for reasons to be recorded in writing, it is not expedient or reasonably practicable to give the person concerned an opportunity of showing cause while passing the order in Annexure-6 dismissing the service of the petitioner in consonance with sub-clause 1(b) of Rule-22. Thereby, Rule-22(1)(b) has not been complied with in its letter and spirit while passing the order of dismissal by the authority. While passing such order of dismissal, the procedure as envisaged under sub-rule(2) of Rule-22 has to be followed by the competent authority.

10. On perusal of the records available, nothing has been placed to satisfy the Court that Rule-22 has been followed by the opposite parties while passing the order of dismissal in Annexure-6 dated 07.05.2010. On the other

hand, it is stated that show cause notice was issued in conformity with sub-rule (2) of Rule-22 on 31.03.2010 to the petitioner giving opportunity against the proposed dismissal. But the so called proposed notice was neither received by the petitioner nor was service of such notice placed on record treating the same as sufficient. On the other hand, it has been mentioned that two copies of the show cause notice dated 31.03.2010 were sent through Superintendent of Police district Nayagarh, Orissa for delivery; one show cause notice to the individual and the other by pasting/affixing at the entrance of the individual house. But the letters were not received back undelivered, which shows that said registered letters were delivered to the petitioner for needful. On the basis of such presumption, since the petitioner remained absent for 94 days, it was not justified for waiting him for rejoining on duty in order to maintain discipline amongst the force personnel. Accordingly, the order of dismissal dated 07.05.2010 was passed for unauthorized absence, as his continuance is detrimental to the force discipline, which makes his further retention in the force as undesirable. But, the petitioner was neither served with the copy of such letter dated 31.03.2010 nor was the same pasted/affixed at the entrance of his house, as stated, nor anything has been placed on record to justify that such notice dated 31.03.2010 had ever been served on the petitioner himself. Therefore, there is gross non-compliance of the provisions contained in sub-rule (2) of Rule-22 of Rules, 1969. Consequence thereof, the order of dismissal passed by the commandant dated 07.05.2010 cannot sustain in the eye of law.

11. Admittedly, after recovery from infective hepatitis, the petitioner submitted his joining report on 15.05.2010, along with the documents, justifying his unauthorized absence from duty as he was under treatment in Government Hospital, Unit-4 Bhubaneswar from 28.01.2010 till 11.05.2010, but the same was not accepted stating inter alia that the order of dismissal has already been passed on 07.05.2010, though copy of which was not served by the opposite parties till the date of submission of his joining report on 15.05.2010. When on 15.05.2010, such order of dismissal was served on the petitioner, he preferred appeal but the appellate authority by a cryptic order, rejected the request of the petitioner for reinstatement in service stating that the appeal was devoid of merit. As no reasons were assigned while rejecting the appeal by the appellate authority, this Court vide order dated 07.05.2012 in W.P.(C) No.12792 of 2010 quashed the said order and remanded the matter back to the appellate authority to rehear the same and pass a reasoned and speaking order within a period of three months from the date of

communication of the order after dealing with all the points raised by the petitioner by giving opportunity of hearing to him. Consequence thereof, Annexure-5 has been passed by the DIG/PSO for IG, BSF, SB, FTR on 04.09.2012.

12. The order of dismissal in Annexure-6 dated 07.05.2010 has been passed by the Commandant and in view of the provisions contained under Section 11(2) of the Act, 1968 read with Rule-177 of Rules, 1969 he is the competent authority to pass the order of dismissal from service of any person under his command other than an officer or a subordinate officer. Therefore, the commandant being the competent authority, in consonance with the provisions contained under Section 11(2) of the Act, 1968 read with Rule-177 of Rules, 1969, has passed the order of dismissal from service of the petitioner, who was working as a constable, not being an officer or subordinate officer under his control, rather it comes within the meaning of any person under the command of the commandant as specified in Rule-177. As per the provisions contained under Rule-28-A of Rules, 1969, since the petitioner was aggrieved by the order of dismissal passed by the authority, he, being a constable, was to present a petition to the IG, who may pass an order on such petition as deemed fit, provided the person filed the same within prescribed period of three months from the date of order of termination from service.

13. Admittedly, the petitioner, having been dismissed from service on 07.05.2010, filed the petition on 15.05.2010 to the IG by way of appeal against such order of dismissal in consonance with the provisions contained under Rule 28-A. The same having been rejected, without assigning reasons and by a cryptic order, the petitioner preferred W.P.(C) No.12792 of 2010, which was disposed of by this Court, vide order dated 07.05.2010, by quashing the said order and the appellate authority was directed to rehear the matter by passing a reasoned and speaking order after dealing with all points raised by the petitioner within a period of three months by affording opportunity of hearing to the petitioner. In compliance of the said order dated 07.05.2012, the order dated 04.09.2012 in Annexure-5 has been passed by the DIG, who is not the competent authority in compliance of the provisions contained in Rule-28-A of Rules, 1969. Under the Rules, 1969, the IG is the competent authority and, as such, the order dated 04.09.2012 in Annexure-5 clearly indicates that the "DIG/PSO for IG, BSF, SB FTR" has passed the order. Meaning thereby, the IG himself has not passed the order, rather the

DIG has passed the order on 04.09.2012 relating to the appeal preferred by the petitioner. Though contention was raised by learned Central Government Counsel referring to paragraph-5 of the impugned order that the IG has examined the grievance of the petitioner carefully and relevant medical documents so produced by him was sent to the Capital/Zonal Hospital and Dispensary, Bhubaneswar, Orissa for verification, but the order impugned was passed by the DIG, who is not competent to pass such order with reference to Rule-28-A of the Rule-1969. Thereby, the order so passed on 04.09.2012 is without jurisdiction, more particularly, such order has been passed without giving opportunity of being heard to the petitioner. Consequentially, the order is a nullity as the same has been passed without complying with the principles of natural justice.

14. In ***M/s R.B. Shreeram Durga Prasad and Fatehchand Nursing Das*** mentioned supra, the apex Court held that rule of audi alteram pattern being the basis of procedural fairness of compliance of natural justice, thereby, without being given opportunity of hearing to the petitioner, the order of dismissal passed in Annexure-6 dated 07.05.2010 and consequential order in appeal dated 04.09.2012 in Annexure-5 is nullity. Therefore, they should be set aside for non-compliance of principles of natural justice.

15. The apex Court while considering the rule of audi alteram pattern have gone to the extent that mere opportunity to make submissions on the objections of the reporting authority on the grant of applicant's request not enough and that to clear opportunity must be given to demonstrate that the reporting authority was not justified in making the objections and the accepting authority should not accept the objections in the facts and circumstances. Therefore, there is violation of rule of audi alteram pattern and effect there could be that a quasi judicial order denying right to be heard is null and void.

16. Applying the principles to the present context, this Court is of the considered view that the same is applicable in fullest form and, as such, the order of dismissal in Annexure-6 dated 07.05.2010 and consequential order in appeal in Annexure-5 dated 04.09.2012 are null and void, as the same were passed without complying the principles of natural justice and more particularly without complying the statutory provisions of law.

17. In ***Chhel Singh*** (supra), the fact was that the appellant therein was absent from service approximately 10 and ½ months due to his serious illness beyond his control and in support of that he has submitted medical certificates issued by the doctor after rejoining the post and, as such, unauthorized absence from duty was not willful and deliberate, in that case, the apex Court quashed the order of dismissal and directed the authority to implement the direction and order passed by the learned Single Judge by allowing the petitioner to join in service. The factual matrix of the present case is akin to the fact mentioned in ***Chhel Singh*** (supra), more so in ***Chhel Singh*** case proceeding was initiated against the petitioner and in the said proceeding charges were framed and the disciplinary authority passed the impugned order of dismissal from service, which was made confirmed by the appellate authority. The learned Single Judge set aside the said termination order by quashing such order of dismissal passed by the appellate authority, but the Division Bench without considering the same in proper perspective, refused to reinstate the petitioner in service. Against the said order of the Division Bench, the petitioner preferred SLP before the apex Court and after due adjudication, the order passed by the learned Single Judge has been made confirmed by the apex Court. Therefore, applying the said principles to the present case, while passing the order in Annexure-6 in dismissing the service of the petitioner neither any statutory provision complied with nor was any proceeding initiated against the petitioner for the said purpose nor the order was passed by following due procedure in compliance of natural justice. Therefore, both the order passed by the Commandant as well as the DIG in appeal, cannot sustain in the eye of law.

18. In ***Chamoli District Cooperative Bank Ltd.*** (supra), the disciplinary order having been passed without any inquiry and without due observance of natural justice, has been quashed. In the present case, similarly while passing the order of dismissal, no inquiry has been conducted and, as such, there was no observance of principles of natural justice, more particularly, there was non-compliance of the provisions as contained under Rule-22 of Rules, 1969. Thereby, the order of dismissal so passed by the authority is liable to be quashed. Consequentially, the order in appeal confirming the dismissal also cannot sustain in the eye of law.

19. In ***Golak Chandra Swain*** (supra), this Court only considered the punishment of dismissal from service is grossly disproportionate to the charges of unauthorized absence and shockingly harsh and accordingly the

same was quashed. But in the present case, no charge has been framed nor has any inquiry been conducted, therefore for illness beyond the control of the petitioner, if he remained unauthorized absence and, as such, the order of dismissal having not been passed without complying the provisions contained under Rule-22 of Rules, 1969, the same cannot sustain in the eye of law.

20. Considering the factual and legal matrix, as discussed above, this Court is of the considered view that the order of dismissal dated 07.05.2010 in Annexure-6 and consequential order in appeal dated 04.09.2012 in Annexure-5, having been passed contrary to the statutory provisions governing the field and without complying the principles of natural justice, cannot sustain in the eye of law and the same are hereby quashed. The opposite parties are directed to allow the petitioner to continue in service as before and grant all consequential service and financial benefits, as due and admissible to him, as expeditiously as possible, preferably within a period of three months from the date of communication of this judgment.

21. The writ petition is allowed. However, there shall be no order as to cost.

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2019 (III) ILR-CUT- 700

D. DASH, J.

CRIMINAL APPEAL NO. 119 OF 1993

ARUNDHATI MISHRA …. ….Appellant

-Vs-

PARAMESWAR NANDA & ANR. …. …Respondents

CODE OF CRIMINAL PROCEDURE, 1973 – Section 378(4) – Appeal against acquittal by the complainant – Scope of interference – Indicated.

"It is the settled position of law that in an appeal against the order of acquittal, the scope and power of the appellate forum is not that wide as it is

in case of an appeal against an order of conviction. The scope of the appeal thus remains to interfere with the order of acquittal reversing the finding of trial court against the prosecution, in case the order of acquittal is the outcome of perverse appreciation of evidence giving rise to some compelling reasons to interfere with the finding as it has caused miscarriage of justice. It is also the position that the appellate court would hesitate to reverse the order of acquittal simply because a second view is taken in the matter of appreciation of evidence. The finding rendered by the trial court taking a view in respect of the evidence, is not permissible to set at naught the order of acquittal. Time and again, it has been held by the Hon'ble Apex Court as well as this Court that when the trial court had the occasion to look to the demeanour of witnesses while recording their evidence and in finally appreciating the same, ordinarily the said appreciation of evidence and the finding based upon the same, is not liable to be disturbed unless there exists compelling reasons to do so to prevent grave miscarriage of justice."

(Para 5)

For Appellant : M/s. K.N.Jena, R.Rath, A.K.Mohapatra, P.K.Jena, D.K.Mohapatra.

For Respondents : M/s. D.Panda, A.C.Rath, J.Rath.

JUDGMENT Date of Hearing and Judgment : 24 .07.2019

D. DASH, J.

The appellant by filing this appeal has questioned the order of acquittal dated 06.11.1992 passed by the learned J.M.S.C., Bhadrak in I.C.C. Case No. 81 of 1992/Trial No. 478 of 1992.

By the said order, the respondents (accused persons) have been acquitted in the case initiated by the appellant as the complainant for commission of offence under sections 323/294/354/34 IPC.

2. The prosecution case in short is that on 10.03.1992 at 10.00 AM when the son of the complainant P.W.1 had been to the public tube well to fetch water, the accused persons did not allow him to do so and attempted to assault him. When he rushed to his house and informed his mother; she came there protested. It is further stated that the accused persons abused her in obscene language and accused Parsuram assaulted to her by chappal and accused Parameswar pulled her saree.

The case of the prosecution is that of complete denial and false implication.

3. The trial court upon analysis of evidence of four prosecution witnesses, out of whom, P.W.1 is the complainant and P.W.3 is her son has held those to be insufficient to fasten the guilt upon the accused persons for commission of offences as aforesaid.

4. Heard learned counsel for the appellant (complainant). None appears on behalf of the respondents (accused persons).

It is submitted by the learned counsel for the appellant that the finding of the trial court holding the accused persons not guilty of offences for which they faced trial is the outcome of perverse appreciation of evidence. According to him, there is no justification to disbelieve the evidence of P.W.1 and P.W.3, which have received corroboration from the evidence of P.W.2, the eye witness.

5. Before going to address the submission, it is felt apposite to take note of the settled position of law with regard to the scope and power of this Court for interference with the order of acquittal.

It is the settled position of law that in an appeal against the order of acquittal, the scope and power of the appellate forum is not that wide as it is in case of an appeal against an order of conviction. The scope of the appeal thus remains to interfere with the order of acquittal reversing the finding of trial court against the prosecution, in case the order of acquittal is the outcome of perverse appreciation of evidence giving rise to some compelling reasons to interfere with the finding as it has caused miscarriage of justice. It is also the position that the appellate court would hesitate to reverse the order of acquittal simply because a second view is taken in the matter of appreciation of evidence. The finding rendered by the trial court taking a view in respect of the evidence, is not permissible to set at naught the order of acquittal. Time and again, it has been held by the Hon'ble Apex Court as well as this Court that when the trial court had the occasion to look to the demeanour of witnesses while recording their evidence and in finally appreciating the same, ordinarily the said appreciation of evidence and the finding based upon the same, is not liable to be disturbed unless there exists compelling reasons to do so to prevent grave miscarriage of justice.

6. Keeping in view the submission as above, I have carefully gone through the judgment of the trial court. The court below as it appears has gone for a thread bare analysis of the evidence on record, keeping in mind the

strained relationship between the accused persons on one hand and the family members of the complainant on the other hand. It has then noted some disturbing features and those having been considered in their proper perspective, the court below has found the evidence to be insufficient to record the finding that the prosecution has established its case against the accused persons beyond reasonable doubt. When P.W.1 has stated to have sustained injuries, she has refrained from being medically examined. P.W.3 while stating that her mother had received slap by means of chappal in her cheek has further stated that as a result of that, there is swelling on her mother's cheek. Whereas it has been stated by P.W.2 that P.W.1 was given the slap by a piece of leather. The improvement of the case made by the witnesses has been adversely viewed.

In such state of affairs in the evidence, the trial court having held that the prosecution to have failed in establishing its case against the accused persons for commission of offence under sections 323/294/ 354/34 IPC, this Court finds no such justifiable reason to term the finding to be the outcome of perverse appreciation of evidence so as to interfere with the same within the scope and ambit of this appeal.

7. Accordingly, the appeal stands dismissed.

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2019 (III) ILR-CUT- 703

D. DASH, J.

G.A. NO. 39 OF 1992

STATE OF ORISSA …….Appellant

-Vs-

PURIA PATI …….Respondents

CODE OF CRIMINAL PROCEDURE, 1973 – Section 378 – Appeal against acquittal – Offence alleged was under section 451 and 376 – The trial court analyzing the evidence of the victim discarded the same since there remains no corroboration from any other source, beside the evidence contain basic infirmities such as maintenance of silence, lack of resistance and absence of such other injuries which do ordinarily come in – Scope of

interference in appeal by State – Held, High Court in an appeal under section 378 Cr.P.C. is entitled to reappraise the evidence and put the conclusions drawn by the trial court to test but the same is permissible only if the judgment of the trial court is perverse – The evidence of P.W.1 being read with the evidence of P.W.2 and tested with her version at the earliest point of time as it finds mention in the F.I.R., falls far short of being placed reliance with in order to conclude that the accused had forcibly committed the sexual intercourse upon her without her consent and against her will.

Case Law Relied on and Referred to :-

1. (2014) 57 OCR 1044 : Basappa -V- State of Karnataka,
2. (2009) 10 SCC 639 : Gamini Bala Koteswara Rao & Ors.-V- State of Andhra Pradesh,
3. (2008) 1 SCC 258 : K. Prakashan -V- P.K. Survenderan,
4. (2006) 1 SCC 401 : T. Subramaniam -V- State of Tamil Nadu,
5. (2002) 10 SCC 461 : Bhima Singh -V- State of Haryana.

For Appellant : Addl. Government Advocate
For Respondent :

JUDGMENT Date of Hearing and Judgment: 01.08.2019

D. DASH, J.

The State having filed this appeal has called in question the judgment dated 05.08.1992 passed by the learned Assistant Sessions Judge, Jeypore in Sessions Case No. 69 of 1991 (S.C. No. 269/91). The respondent (accused) having faced the trial for commission of offence under sections 451/ 376, I.P.C. has been acquitted from the charge.

2. Prosecution case in short in that on 01.06.1991 during day time the victim and her husband were sleeping in their house. It was around 3 P.M. the accused came and removing her saree and undergarments committed rape upon her. It is stated that the victim at the relevant time was thinking as if she was having sexual intercourse with her husband. The victim having thereafter come to sense found the accused to be the person and then she protested. But the accused further cohabited with her against her consent. It is the further case of the prosecution that after commission of rape the victim when give a

push to the accused and raised hulla, the elder daughter of the victim came and protested. The accused then left the place. The matter being reported by the victim to her husband, a Panchayat had been convened. It is stated that the accused admitted his guilt before the Panchayat. The victim then reported the matter at the police station which led to the registration of the case and commencement of the investigation. On conclusion of the investigation, charge-sheet having been submitted against the accused for commission of offence under sections 451/376, I.P.C., he faced the trial.

The prosecution in the trial has altogether examined nine witnesses. Out of whom the victim is P.W.1, P.W.2 is her daughter and P.W. 3 is the witness to have seen the accused entering into the house. Other witnesses P.W.4 to 6 are the members of the Panchayat, which had been convened aftermath the incident. The doctors in the case has been examined as P.W.7 and 9. The investigating officer has come to the dock and has been examined as P.W.8. From the side of the prosecution, F.I.R. (Ext.2), seizure lists and other contemporaneous documents seized and collected in course of investigation have been proved.

3. The case of defence is that of complete denial.

4. The trial court upon examination of the evidence on record and upon their scrutiny as well as examining the documents admitted in the evidence from the side of the prosecution has not found the accused guilty for commission of offence under sections 451/376, I.P.C.

The trial court analyzing the evidence of the victim discarded the same since there remains no corroboration from any other source in support of the case of rape upon her by the respondent. It is said that the evidence contains basic infirmities such as maintenance of silence, lack of resistance and absence of such other injuries which do ordinarily come in. With this, the respondent having been acquitted, the appeal has been preferred by the State.

5. Learned counsel for the State submits that the evidence of the victim examined as P.W.1 being free from any basic infirmity, the trial court ought not to have proceeded to test the same with a pinch of salt from the beginning simply from the reason that she is married and aged about 38 years without keeping in view that the witness belonging to scheduled tribe community hails from rural area in the schedule district of the State. According to him, the version of P.W.1 is natural and when nothing has surfaced in her evidence

that she had any axe to grind against the accused, the court below is not right in going to say that she has given the colour of rape to the incident. He, thus, submits that even though the solitary testimony of P.W.1 in the present case is enough to fasten the criminal liability upon the accused yet it has received corroboration from the evidence of other witnesses, such as, her daughter (P.W.2) and P.W.3. He, therefore, urges that here the finding of the trial court against prosecution is the outcome of perverse appreciation of evidence and cannot be sustained.

6. None appears for the respondent (accused).

I have perused the judgment of the trial court.

7. On such rival submission, this Court is now called upon to examine the evidence tendered by the prosecution in order to judge the sustainability of the finding of the trial court as to whether the same is the outcome of the proper appreciation of evidence or not. But before that it is felt to apposite to take note of the settled position of law as regards the scope of this appeal and power of this Court to interfere with the order of acquittal.

8. It has been held in case of ***Basappa Vrs. State of Karnataka***; (2014) 57 OCR 1044 that the High Court in an appeal under section 378 Cr.P.C. is entitled to reappraise the evidence and put the conclusions drawn by the trial court to test but the same is permissible only if the judgment of the trial court is perverse. Relying the case of ***Gamini Bala Koteswara Rao and others – Vrs. State of Andhra Pradesh***; (2009) 10 SCC 639, it has been held that the word "perverse" in terms as understood in law has been defined to mean 'against weight of evidence'. In '***K. Prakashan Vrs. P.K. Survenderan***; (2008) 1 SCC 258, it has also been held that the Appellate Court should not reverse the acquittal merely because another view is possible on evidence. It has been clarified that if two views are reasonably possible on the very same evidence, it cannot be said that prosecution has proved the case beyond reasonable doubt (Ref.:- ***T. Subramaniam Vrs. State of Tamil Nadu***; (2006) 1 SCC 401). Further, the interference by appellate Court against an order of acquittal is held to be justified only if the view taken by the trial court is one which no reasonable person would in the given circumstances, take (Ref.:- ***Bhima Singh Vrs. State of Haryana;*** (2002) 10 SCC 461).

9. In the backdrop of above, let us glance at the evidence of P.W.1, the victim. She is a married woman aged about 38 years. It has been stated by her

that on the relevant date and time her husband was sleeping in the verandah and she had slept inside the house by just closing the door without putting the bolt from inside. She has further stated that the accused entered into the house, removed her cloth and went for sexual intercourse. It has been stated that she then believed the man having the sexual intercourse to be her husband as at that point of time she was under intoxication and, therefore, did not protest. It has been next stated that while the accused was having sexual intercourse, her daughter (P.W.2) arrived and saw the same. Seeing it, she shouted at the accused and challenged him for such indecent act. The victim states that only then she could know that the man who was going for the sexual intercourse was not her husband. So, she further protested, when accused fled away.

The evidence of P.W.2 is on the score that when she came to the house, she saw her father sleeping on the verandah. So she wanted to open the door. She found it to have been bolted from inside for which she forced her entry to the house when she could see the accused having sexual intercourse with P.W.1, who was completely naked at that time and was asleep. The version of the F.I.R. (Ext.8), however, runs in a different direction. The F.I.R. has been lodged by P.W.1. Her version has been reduced into writing. It has been indicated there that she had slept in the house by bolting the door from inside. It has also been mentioned therein that around 3 P.M. the accused was seen to be committing sexual intercourse upon her. So, she physically protested. But still the accused went on committing the sexual intercourse till he fulfilled his sexual lust and desire by discharge of semen.

The evidence of P.W.1 being read with the evidence of P.W.2 and tested with her version at the earliest point of time as it finds mention in the F.I.R., in my considered view falls far short of being placed reliance with in order to conclude that the accused had forcibly committed the sexual intercourse upon her without her consent and against her will.

For the aforesaid the finding of the trial court that the accused is not guilty of offence under section 451/376, I.P.C. is not liable to be interfered with in this appeal.

10. Accordingly, the appeal stands dismissed.

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2019 (III) ILR-CUT- 708

D. DASH, J.

CRLREV NO. 501 OF 2019

KHAKAN BHUYAN .....Petitioner

-Vs-

STATE OF ORISSA .....Opp. Party

INDIAN PENAL CODE, 1860 – Section 363 and 366 – Offence under – Conviction – Appreciation of evidence – Victim girl says she and accused had developed love relationship and the father of the accused had gone with the proposal of marriage – Subsequently she went with the accused and the marriage was solemnized and she denied the fact of kidnapping – Whether conviction is legal? – Held, No.

"The evidence as discussed above, do not satisfy the element of taking or "enticing" merely because the victim is seen with the company of accused is not sufficient for attraction of the charge under section 363 of the IPC unless some evidence come to surface as to taking or enticing by the accused out of the keeping of lawful guardianship. In the instant case, it appears that such evidence is lacking so as to attract the offences for commission of which the accused has been convicted by the courts below. In that view of the matter, this Court is constrained to hold that the finding of conviction recorded against the accused for commission of offence under section 363/366 of the IPC suffer from the vice of perversity."

For Petitioner : M/s. S.K.Dwibedi, R.K.Mohanta, N.Hota and D.J.Sahoo

For Opp.Party : Mr.Purna Ch. Das, Addl. Standing Counsel

JUDGMENT Date of Hearing and Judgment : 01.08.2019

D. DASH, J.

This revision has been directed against the judgment dated 27.02.2018 passed by the learned Additional Sessions Judge-II, Baripada, Mayurbhanj in Criminal Appeal No.74 of 2015.

By the impugned judgment, the appellate court has confirmed the judgment of conviction and order of sentence dated 16.10.2015 passed by the learned Assistant Sessions Judge, (Special Track Court), Baripada in Sessions Trial Case No.03/259 of 2015-14.

The petitioner (accused) having faced the trial for commission of offence under section 363/366 of the Indian Penal code (in short, 'the IPC'), he has been convicted thereunder and has been sentenced to undergo rigorous imprisonment for five years as also to pay fine of Rs.10,000/-in default to undergo rigorous imprisonment for four months for commission of offence under section 363/366 of the IPC.

2. The prosecution case, in brief, is that on 3.5.2014, the informant (P.W.3) lodged a written report before the Rasgobindpur Police Station that on 27.04.2014, she had gone to the house of her elder daughter to attend the obsequies ceremony of the mother-in-law of her elder daughter and on her return, she found one person to be in her house, who expressed his desire to marry her daughter then aged around 17 years. It is stated that on protest, that person threatened her and when P.W.3, had gone to attend the call of nature, her daughter (the victim) had been kidnapped by that person. After search, when the daughter of the informant could not be traced, she was contacted over phone. It was then ascertained that she had married that person in a temple and then threat came from the side of that person that unless the dowry articles be given, her daughter would be killed.

The case of the defence is that of the denial of the charges.

3. The prosecution, in order to establish its case, has examined eight witnesses. Out of whom, P.W.3 is the informant, P.W.4 is the victim whereas P.W.5 is the elder daughter of P.W.3 who are the important witnesses so far as the accusations levelled against the accused are concerned.

4. The trial court having examined the evidence of those witnesses on behalf of the prosecution and taken note of the documents admitted in evidence from the side of the prosecution such as FIR, admit card etc, has found the accused to be guilty for commission of offence under section 363/366 of the IPC. The accused having preferred the appeal, the same has been dismissed.

5. Learned counsel for the petitioner submits that even accepting the evidence of the victim, P.W.4 in its entirety, no case under section 363 or 366 of the IPC is made out. According to him, finding of conviction recorded by the trial court, as has been confirmed by the appellate court, are wholly perverse and it is a fit case to set those at naught in exercise of the revisional jurisdiction of this Court.

Learned counsel for the State, placing the fact that the victim then was a minor and was taken by the accused from the unlawful guardianship as well established in evidence, supports the judgments passed by both the courts below.

6. On the above rival submission, let us straight have a look at the evidence of the victim, P.W.4. She has stated her age to be 17 years. It is her evidence that she and accused had developed love relationship and the father of the accused had gone to their house with the proposal of the marriage between her and the accused but that had not been agreed to by her mother in view of her age. She has further stated that 4 to 5 months after, on a particular day, the accused had gone to their house when her mother was absent and he asked her to marry or else he would commit suicide. It has been further stated that she accompanied the accused to his house situated at Bhograi and then the marriage was solemnized. During cross-examination, she has clearly stated to have not known as to why her mother lodged FIR. She admits to have previously stated to have gone to the house of her friends and as he did not pick up the call, her family members thought that she had fled away. She has also admitted to have earlier stated before the Magistrate that she had not been kidnapped by the accused.

The mother of this P.W.4 has been examined as P.W.3. It is her evidence that the accused and her daughter were having love affair and when she had gone outside, the accused talked with P.W.4 over phone and took her away. Then she has also stated that her daughter went along with the accused to see him off at a bus stand, but subsequently she was found to be absent. It is her evidence that being contacted, her daughter told over phone that she with the accused have already crossed village Amarda by bus. During cross-examination, she has stated that her daughter had not disclosed anything regarding the purpose of her visit to the house of the accused. The elder daughter of P.W.3 has been examined as P.W.5. It is her evidence that her mother told her over phone that accused had taken the victim to his house at Bhograi and married her and then he is demanding money and threatened to assault the victim. This part regarding the demand and threat by the accused is not stated by the victim, P.W.4.

The evidence as discussed above, do not satisfy the element of taking or "enticing" merely because the victim is seen with the company of accused is not sufficient for attraction of the charge under section 363 of the IPC unless some evidence come to surface as to taking or enticing by the accused

out of the keeping of lawful guardianship. In the instant case, it appears that such evidence is lacking so as to attract the offences for commission of which the accused has been convicted by the courts below. In that view of the matter, this Court is constrained to hold that the finding of conviction recorded against the accused for commission of offence under section 363/366 of the IPC suffer from the vice of perversity.

Accordingly, the judgment dated 27.02.2018 passed by the learned Additional Sessions Judge-II, Baripada, Mayurbhanj in Criminal Appeal No.74 of 2015 confirming the judgment of conviction and order of sentence dated 16.10.2015 passed by the learned Assistant Sessions Judge (S.T.C.), Baripada in Sessions Trial Case No.03/259 of 2015-14 are set aside.

Resultantly, the CRLREV is allowed. The accused, if is in custody, be set at liberty forthwith, in case his detention is not so warranted in any other case.

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2019 (III) ILR-CUT- 711

D. DASH, J.

CRA NO. 226 OF 1992

JALANDHAR SINGH .....Appellant

-Vs-

STATE OF ORISSA .....Respondent

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20(b) – Offence under – Conviction for possessing 6 kgs of ganja – Ganja has not been sent for chemical examination – Conviction based on the evidence of P.W.4 who opined that "by smell and departmental experience, the seized substance to be ganja" – No memorandum prepared at the spot in support of the physical examination – Sustainability of the finding – Held, the prosecution has not proved the chemical examination report and that the P.W.4 has no where stated that he had undergone any special training for detection of ganja and providing opinion upon examination of the substance – Judgment of conviction and order of sentence set aside.

For the Appellant : M/s. H.S. Mishra

For the Respondent : Mr. P.C.Das, Additional Standing Counsel.

JUDGMENT Date of Hearing & Judgment : 07.08.2019

D. DASH, J.

The appellant, by filing this appeal, has assailed the judgment of conviction and order of sentence dated 19.06.1992 passed by the learned Sessions Judge, Sambalpur in S.T. Case No.158 of 1990.

The appellant has been convicted for offence under section 20(b) of the Narcotic Drugs and Psychotropic Substances Act (for short, 'N.D.P.S. Act') for possessing 6 kgs of ganja and he has been sentenced to undergo rigorous imprisonment for three years and fine of Rs.3,000/- in default to undergo rigorous imprisonment for six months.

2. Prosecution case, in brief, is that on 12.07.1990 the Sub Inspector of Excise (P.W.4) and Assistant Sub Inspector of Excise (P.W.1) were performing patrol duty at Dhutura. It was around 9.30 A.M. to 10.00 A.M. they found accused going over the railway crossing carrying a bag. At the sight of P.W.1 and 4, when his movement was found to be suspicious, he started running. He was then chased by P.W.4 and detained. Thereafter in presence of witnesses, P.W.4 observing legal formalities, searched the bag carried by the accused. On search the bag was found to contain 6 kgs of ganja. Seizure of the gnaja and other articles were made and seizure list was prepared. A copy of the said seizure list was handed over to the accused in presence of witnesses. The accused then being arrested was forwarded in custody to the court of the learned S.D.J.M., Jharsuguda along with seized ganja. On completion of investigation, prosecution report being submitted in the court; the accused faced the trial.

The case of the accused is that of complete denial and false implication.

3. It has been stated by the accused in his statement under section 313 Cr.P.C. that he had come to Jharsuguda for purchasing some articles and being called by the Excise officials had gone to the office where he was asked about his brother and then his signature were taken in few papers. It is

further stated that the Excise officials having detained him for about two hours, arrested him and forwarded to the court.

4. Heard learned counsel for the appellant (accused) and learned counsel for the State.

I have perused the judgment of the trial court as also the depositions of all the witnesses. Side-by-side I have gone through the documents exhibited during the trial.

5. In the trial, prosecution has examined four witnesses. As already indicated, P.W.1 is the A.S.I. of Excise whereas P.W.4 is the S.I. of Excise then posted at Jharsuguda. P.W.2 and P.W.3 are the witnesses present at the time of arrest. Besides leading to the oral evidence through the lips of the above witnesses, the prosecution has proved the seizure list.

The trial court, on analysis of evidence and upon their evaluation, has held that the prosecution has proved its case that the accused was in possession of 6 kgs of ganja at the relevant time of detention. Having arrived at that finding, the trial court has convicted the accused for offence under section 20(b) of the Act and he has been sentenced as aforesaid.

6. Considering the submissions made, this Court is called upon to judge the sustainability of the finding of the trial court insofar as the factum of seizure of 6 kgs of ganja from the possession of the accused is concerned. Accepting the prosecution evidence for a moment that the accused was found to be carrying a bag, it is first of all to be seen as to whether the evidence is enough to hold that 6 kgs of ganja has been recovered from that bag. The prosecution has not proved the chemical examination report in the particular case. For the purpose, reliance is placed on the evidence of P.W.4. He has nowhere stated as to have himself conducted any such test. It is stated that by smell, colour and experience, he could know that the contents of the bag seized from the possession of the accused were nothing but ganja. The witness has been cross-examined on that score. He has not submitted as to how many years departmental experience, he had by that time. It is also not said that as to in this particular field of holding the tests, he had the experience. He is silent as to whether he had undergone any special training for detection of ganja in giving any such opinion upon examination of the

substance. At this stage for proper appreciation the evidence of P.W.4 needs reproduction- **"**By smell and departmental experience I opined the seized substance to be ganja**"**. This P.W.4 has not prepared any memorandum at the spot in support of the physical examination of the contents of the bag which he claims to have made. It, however, reveals from the L.C.R. that after more than a year since seizure, this P.W.4 on 08.10.1991 had filed a petition before the trial court for sending the seized contents of the bag for chemical examination. The prayer having been declined, the prosecution has not further pursued the matter. Although, it has been stated by the prosecution that prior to that there was no such move, yet no such explanation for the inaction had been offered. The same witness during cross-examination on 14.11.1991 however has again deposed that being very much sure that the substance seized from the possession of accused was ganja, he did not feel it necessary to send the seized contents of the bag for chemical examination. Had it been the firm view, there was no reason for said move before the trial court at the time when the trial was going to commence. The trial court in para-14 of the judgment in addressing the contention raised from the side of the defence that no report of the chemical examiner being proved, the prosecution case has to fail; has gone to rely upon the evidence of P.W.4. His evidence in a general manner that by the smell and experience, he is of the opinion that the contents of the bag were ganja has been accepted by the trial court in giving a final say in the matter. With the above discussion of evidence on record, this Court being unable to concur with the said finding as has been rendered by the trial court and extending the benefit of doubt on that score holds that the prosecution has not been able to establish its case beyond reasonable doubt that on the relevant date and time, the accused was in possession of 6 kgs of ganja.

For the aforesaid discussion and reasons, the judgment of conviction and order of sentence dated 19.02.1992 passed by the learned Sessions Judge, Sambalpur in S.T. Case No.158 of 1990 are hereby set aside.

7. Accordingly, the appeal is allowed. The bail bonds executed by the accused stands discharged. The LCR be sent back immediately.

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2019 (III) ILR-CUT- 715

BISWANATH RATH, J.

W.P.(C) NO. 11882 OF 2017

DR. CHITTARANJAN NAYAK .....Petitioner

-Vs-

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

SERVICE LAW – Claim of service benefits/advance increments – Petitioner initially worked as a post graduate teacher in Kendriya Vidyalaya – Subsequently awarded PH.D in Economics – Petitioner during his continuance of service as teacher, appointed as a Lecturer/Asst. Professor in Ravenshaw University being the holder of PH.D degree – Claim of advance increments at the entry level of the post of Lecturer /Asst. Professor – Such claim denied on the ground that, petitioner being entitled to pay protection/counting past service, is not entitled to advance increments – Whereas similarly situated candidates of other university of the state have received the benefits – Plea of the right to equality raised – Entitlement of the petitioner questioned – Action of the authority challenged – Clause 9.1 of U.G.C Regulation pleaded – Held, the petitioner is entitled to receive the advance increments along with 6% interest.

Case Laws Relied on and Referred to :-

1. (2013) 8 SCC 633 : Jagdish Prasad Sharma & Ors. -V- State of Bihar & Ors.
2. (2015) 6 SCC 363 : Kalyani Mathivanan -V- K.V.Jeyaraj & Ors.

For Petitioner : M/s.S.K. Das, S.K. Mishra & P.K. Behera
For O.P.1 : Mr.S.N.Mishra, Additional Standing Counsel
For O.Ps. 2 & 3 : Mr.K.K.Jena

JUDGMENT Date of Hearing : 17.06.2019 : Date of Judgment : 28.06.2019

BISWANATH RATH, J.

This writ petition involves the following prayer :-

"Under the above circumstances, it is therefore humbly prayed that the Hon'ble Court be graciously pleased to direct the Opp.Parties to sanction

and release five advance increments in favour of the petitioner from the date of his initial joining in the University, i.e. Dtd. 26.2.2010 as per the UGC Regulation under Annexure-4 with all consequential benefits ;

And further the Hon'ble Court be pleased to quash the Government letter Dtd. 30.11.2017 under Annexure-9/1 ;

And further the Hon'ble Court be pleased to direct the opposite party to calculate the difference arrears of the petitioner and pay the same to him with accrued interest minimum at the rate of 8% per annum within a stipulated period as deem fit and proper ;

And/or pas any other appropriate writ/writs, order/orders and direction/directions in the fitness of the case…."

2. Short background involving the case is that the petitioner was a Post Graduate Teacher in Economics in Kendriya Vidyalaya Sangthan. While continuing in K.V.No.1 (Army), Jodhpur, Rajasthan, his job was confirmed with effect from 6.9.2004. While continuing in K.V.No.1 at Itanagar of Arunachal Pradesh, the petitioner did his PH.D. in Economics from Utkal University and he was awarded with PH.D. in January, 2008. Coming across the advertisement no. 3748 dated 2.9.2008 issued by the Ravenshaw University asking for applications for the post of Lecturers subsequently re-designated as Assistant Professor, the petitioner applied for the post of Assistant Professor with due permission from his Employer. O.P.3, Vice-Chancellor, Ravenshaw University in his Office Letter dated 30.11.2009 issued appointment order, vide Annexure-1. It is contended that for the conditions in the U.G.C. Regulation and for initial appointment in the Ravenshaw University, the petitioner was not only entitled to pay protection considering his previous service but he was also entitled to number of increments as prescribed in the U.G.C. Regulation. For not being granted the increment in terms of Clause-9.1 of the U.G.C. Regulation, the petitioner approached the University. For no action from the side of the University involving the above, the petitioner moved the Vice-Chancellor of the University. The University did not take any follow up action on the other hand in the meantime the Utkal University sought for a clarification from the State Government. The State Government, vide letter no.20625 dated 14.9.2015 issued clarification on payment of advance increment to the

Lecturers with Ph.D. Degree in the State Universities thereby disclosing that for the old practice, persons of similar nature would be entitled to three advance increments at the time of entry into service. Such clarification being not worked out the petitioner sought for information through R.T.I. Act by communication dated 14.9.2016. The petitioner was intimated that the matter regarding grant of advance increment was pending consideration and as such, no information could be supplied. However, the petitioner was supplied with Government Resolution dated 30.12.1999. Clause 4.8 (a) of the Government Resolution deals with sanction of advance increment to the Lecturers having Ph.D. Degree at entry level. On the premises of Government Resolution dated 31.12.1999, vide Annexure-9 the petitioner while claiming to be entitled to at least the minimum four advance increments, contended that similarly situated persons in the BPUT and VSSUT at Burla have been entitled to five additional advance increments following the U.G.C. Regulation. Referring to Annexure-9/1 the petitioner contended that grant of advance increment has been illegally withdrawn in case of persons at entry level entitled to pay protection. Referring to the documents at Annexures-10 to 12 the petitioner contended that for grant of benefit under the U.G.C. Regulation to similarly situated employees in other Universities under the State Government, the petitioner alleged that there has been discrimination meted against the petitioner and the petitioner has been given a differential treatment, such action is not only contrary to the U.G.C. Regulation but also contrary to the benefits granted to the similarly situated persons working in other Universities under the same State Government.

3. Sri S.K.Das, learned counsel for the petitioner referring to the pleading involving the writ petition as well as the documents indicated herein above and taking this Court to the U.G.C. Regulation and the other clarifications from time to time appearing at Annexures-4, 7 & 9 contended that the petitioner has been discriminated so far as the entitlement of additional increment is concerned. Referring to two decisions of this Court in W.P.(C) No.4480/2018 (Governing Body of Laxminarayan Mahavidyalaya, Jamusuli & another vrs. State of Odisha & others) decided on 16.4.2018 and W.P.(C) No.16810/2016 (Sri Basudev Guru & others vrs. State of Odisha & others) decided on 18.12.2018, while claiming application of the above decisions to the petitioner's case, Sri Das requested this Court for allowing the prayer involving the writ petition. Sri Das, learned counsel for the petitioner also referring to the denial of the State Government, vide the impugned order, submitted that since the Resolution of the State Government

has the authority of the Chancellor of the State, mere decision of the Deputy Secretary or the Secretary cannot override the decision of the Chancellor more particularly in absence of the authority of the Chancellor at least.

4. Sri S.N.Mishra, learned Additional Government Advocate appearing for O.P.1-State taking this Court to the counter averments at the instance of O.P.1 and the impugned order again filed in the counter affidavit as Annexure-A/1 submitted that for the petitioner being entitled to pay protection/counting of past service is not entitled to advance increment. Referring to the counter statement made in different paragraphs, Sri Mishra, learned Additional Government Advocate attempted to justify the stand of the O.P.-State and accordingly prayed this Court for not interfering with the impugned order. Sri Mishra further submitted that in the event of allowing the writ petition, there may be financial implications on the State Government.

5. Sri K.K.Jena, learned counsel for O.Ps.2 & 3-University while not disputing the claim of the petitioner submitted that they are bound by the direction of the State Government, as the matter involves financial implication.

6. Considering the rival contentions of the parties and looking to the documents involving the case involved herein, this Court finds, there is no dispute that the petitioner while working in the Kendriya Vidyalaya was selected for the post of Lecturer in Economics in Ravenshaw University in the Scale of Pay of Rs.8000-275-13400/- and admissible allowance on the specific terms and conditions that his salary will be determined on the basis of principle of pay protection with reference to U.G.C. Pay Scale prevailing in the country in addition to be entitled to revision of scale and allowance as admissible from time to time. Under the above condition, the petitioner joined the post of Lecturer in Ravenshaw University. Looking to the U.G.C. Regulation, this Court finds from Clause-9.0 of Annexure-4, which deals with incentives for Ph.D./M.Phil and other higher qualification to take effect from 1.9.2008. Relevant Clause 9.1 of the U.G.C.Regulation is quoted herein below :-

> "9.1. Five non-compounded advance increments shall be admissible at the entry level of recruitment as Assistant Professor to persons possessing the degree of Ph.D. awarded in a relevant discipline by the University following the process of admission, registration, course work and external evaluation as prescribed by the UGC."

Further looking to the document at Annexure-9, a correspondence by the Government of Orissa, Department of Higher Education to the Vice-Chancellor, Utkal University clarifying the advance increment to the Lecturers with Ph.D. in the State University issued on 14.9.2015, which discloses as follows :-

> "I am directed to invite a reference to the letter and subject cited above and to say that the Universities may continue with the existing practice of allowing 3 (three) and 1(one) advance increments to the teachers having Ph.D. and M.Phil. qualification respectively at the time of their entry into service until further orders."

Further looking to Clause 4.8 of the Government Resolution in the Department of Higher Education, vide Annexure-9 dated 31st December, 1999 dealing with incentives for Ph.D./M.Phil. speaks as follows :-

> "4.8. Incentives for Ph.D./M.Phil. :
>
> (a) Four and two advance increments will be admissible to those who hold Ph.D. and M.Phil. degrees, respectively, at the time of recruitment as Lecturers. Candidates with D.Litt./D.Sc. should be given benefit on part with Ph.D. and M.Litt. on par with M.Phil.
>
> (b) One increment will be admissible to those teachers with M.Phil, who acquire Ph.D. within two years of recruitment.
>
> (c) A Lecturer with Ph.D. will be eligible for two advance increments when she/he moves into Selection Grade/Reader.
>
> (d) A teacher will be eligible for two advance increments as and when she/he acquires a Ph.D. degree in her/his service career."

7. Looking to the aforesaid clear directives, this Court while recording the submission of the learned counsel appearing for the parties that there is no dispute on the application of U.G.C. Regulation, a statutory Regulation, this Court observes, the petitioner is entitled to be governed under the U.G.C. Regulation. Looking to the provision quoted and available in the U.G.C. Regulation, this Court finds, there is no obstruction in the entitlement of the

petitioner with five additional increments, as prescribed to the petitioner at the entry level of the recruitment as Lecturer subsequently designated as Assistant Professor particularly to a Professor possessing Ph.D. Even assuming that there is some consideration of this entitlement by the State Government through its Resolution at Annexure-9 for the provision at Clause 4.8, the petitioner at the entry level on his joining the University for having Ph.D. is at the minimum entitled to four advance increments particularly keeping in view that State Resolution at Annexure-9 is brought into force under special consideration and being adopted and applied by all the Universities under the State Government. It is at this stage, taking into account the offer of appointment involving the petitioner, this Court finds, for Clause-I in the offer of appointment involving the petitioner, the petitioner has been guaranteed, vide Annexure-1 that his salary will be determined on the basis of principle of pay protection with reference to U.G.C. Pay Scales prevailing in the country. This Court here finds, there is no restriction on the part of an Assistant Professor having Ph.D. Degree being entitled to advance increment involved in the U.G.C. Regulation, vide Annexure-4, thus the State Government issuing directive disentitling the Assistant Professor from the advance increments remains contrary to the provision both at Annexures-4 & 9, the U.G.C. Regulation as well as the Government Resolution respectively.

8. Coming to consider the claim of discrimination meted to the petitioner, this Court going through the document at Annexure-10 involving BPUT finds, the persons in similar stage have been provided five additional increments at the entry level. Similarly, in Annexure-11 involving Ravenshaw University, the persons have been entitled to at least three advance increments. Coming to the document at Annexure-12 again involving the Ravenshaw University, this document also discloses that the Lecturers in similar capacity have been entitled to additional increments.

9. In the above backdrop of the matter, this Court takes into account two decisions of Hon'ble apex Court; one in the ***Jagdish Prasad Sharma & others vrs. State of Bihar & others*** reported in (2013) 8 SCC 633 wherein in paragraphs-70, 72 & 77 wherein the Hon'ble apex Court observed as follows :-

> "70**.** The authority of the Commission to frame regulations with regard to the service conditions of teachers in the Centrally-funded educational institutions is equally well-established. As has been very rightly done in the instant case, the acceptance of the Scheme in its composite form has been left to the discretion of the State Governments. The concern of the State

Governments and their authorities that UGC has no authority to impose any conditions with regard to its educational institutions is clearly unfounded. There is no doubt that the Regulations framed by UGC relate to Schedule VII List I Entry 66 to the Constitution, but it does not empower the Commission to alter any of the terms and conditions of the enactments by the States under Article 309 of the Constitution. Under List III Entry 25, the State is entitled to enact its own laws with regard to the service conditions of the teachers and other staff of the universities and colleges within the State and the same will have effect unless they are repugnant to any Central legislation.

72. As far as the States of Kerala and U.P. are concerned, they have their own problems which are localised and stand on a different footing from the other States, none of whom who appear to have the same problem. Education now being a List III subject, the State Government is at liberty to frame its own laws relating to education in the State and is not, therefore, bound to accept or follow the Regulations framed by UGC. It is only natural that if they wish to adopt the Regulations framed by the Commission under Section 26 of the UGC Act, 1956, the States will have to abide by the conditions as laid down by the Commission.

77. We are inclined to agree with such submission mainly because of the fact that in the amended provisions of Section 67(*a*) it has been categorically stated that the age of superannuation of non-teaching employees would be 62 years and, in no case, should the period of service of such non-teaching employees be extended beyond 62 years. A difference had been made in regard to the teaching faculty whose services could be extended up to 65 years in the manner laid down in the University Statutes. There is no ambiguity that the final decision to enhance the age of superannuation of teachers within a particular State would be that of the State itself. The right of the Commission to frame regulations having the force of law is admitted. However, the State Governments are also entitled to legislate with matters relating to education under List III Entry 25. So long as the State legislation did not encroach upon the jurisdiction of Parliament, the State legislation would obviously have primacy over any other law. If there was any legislation enacted by the Central Government under List III Entry 25, both would have to be treated on a par with each other [Ed**.**: But *see* Articles 254(1) and 246 of the Constitution.] . In the absence of any such legislation by the Central Government under List III Entry 25, the regulations framed by way of delegated legislation have to yield to the plenary jurisdiction of the State Government under List III Entry 25."

Secondly in the case of ***Kalyani Mathivanan vrs. K.V.Jeyaraj & others*** reported in (2015) 6 SCC 363, in paragraphs-62.3 and 62.4 of which it is observed as follows :-

> "62.3. The UGC Regulations, 2010 are mandatory to teachers and other academic staff in all the Central universities and colleges thereunder and the institutions deemed to be universities whose maintenance expenditure is met by UGC.
>
> 62.4. The UGC Regulation, 2010 are directory for the universities, colleges and other higher educational institutions under the purview of the State Legislation as the matter has been left to the State Government to adopt and implement in the Scheme. Thus, the UGC Regulations, 2010 are partly mandatory and is partly directory."

In view of the above decisions, there remain no doubt that the condition in the U.G.C. Regulation has the application but at the same time, the Resolution of the State Government, vide Annexure-9 under special circumstance having the binding force, there is no obstruction in at least adopting the benefits of additional increment available under Annexure-9 to the petitioner at the minimum.

10. In the circumstance, this Court finds, there is no rational behind restricting the grant of additional increments in favour of the petitioner as appearing at Annexure-9/1, which is hereby interfered with and set aside. This Court accordingly directs the State Government in the concerned Department to make necessary communication to the Ravenshaw University allowing grant of four advance increments at least following the entitlement of benefit to the similarly situated persons at Clause-4.8, vide Annexure-9 within a period of one month from the date of communication of this order by the petitioner. On receipt of such communication, the Ravenshaw University is directed to release the entitlement of the petitioner on account of additional increments along with 6% interest at least all through within a period of four weeks thereafter.

11. The writ petition succeeds. In the circumstance, there is no order as to cost.

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2019 (III) ILR-CUT- 723

BISWANTH RATH, J.

W.P.(C) NO. 9390 Of 2009

SMT. TOMALA SAHU @ TAMAL SAHU & ORS. ..... Petitioners

-Vs-

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

THE ORISSA STATE COMMISSION FOR WOMEN ACT, 1993 – Section 10(d) &10(3) – Power & function of the Commission – In the present case, the Commission has issued the direction to recover the dowry articles along with to collect the house rent – Power/competency of the state Women Commission questioned while issuing the above directions – Held, the Commission has only power to receive the complaint and cause the inquiry & thereafter to refer its recommendation to appropriate authority for the necessary action – Hence the directions issued above are without the competency of the Commission, which is bad in law being contrary to the provisions contained in section 10 and the same is set aside accordingly.

For Petitioners : M/s. S.S.Rao, B.K.Mohanty.

For Opp.Parties : M/s. L. Samantaray, S. Swain, R. Pradhan, B. Pradhan.

ORDER Date of Order : 16.09.2019

BISWANTH RATH, J.

Heard Sri B.K.Mohanty, learned counsel for the petitioners, learned State Counsel and learned counsel for the contesting opposite parties.

2. This writ petition involves a challenge to the order at Annexure-3.

3. Referring to the powers of the Orissa State Commission for Women, learned counsel for the petitioners contended that for the restricted power of the Commission under Section 10(1)(d) read with Section 10(3) of the Orissa State Commission for Women Act, 1993, the Commission has no power of directing recovery of dowry article and also authorizing the complainant to collect the house rent from the tenant for her livelihood. It is in the circumstance, learned counsel for the petitioner prayed for interference in the order at Annexure-3 and setting aside the same.

4. On issuing notice, the contesting O.Ps.3 to 6 have appeared. Learned counsel appearing for them have no dispute to the position involving the

Orissa State Commission for Women Act, 1993 but however, taking this Court to the nature of complaint contended that for an Act being framed empowering the Commission to work for the purpose, there should not be any restriction on the Commission in issuing direction in the manner involving Annexure-3.

5. Learned State Counsel also has no objection to the restrictions involving the Orissa State Commission for Women Act, 1993 but however taking this Court to the facts involved herein and the problem faced by the complainant therein contended that the direction involved since in a way to benefit the complainant deprived by her husband and her family members, the same need not be interfered with.

6. Considering the rival contentions of the parties, this Court through the Orissa State Commission for Women Act, 1993 finds Section 10(1)(d) read with Section 10(3) of the Act finds, the Commission has the following powers :-

> "10.(1) The Commission shall perform all or any of the following functions. Commission, namely:"
>
> xxx xxx xxx
>
> (d) receive complaints on"
>
> (i) atrocities on women and offences against women,
>
> (ii) deprivation of women of their rights relating to minimum wages basic health and maternity rights,
>
> (iii) non-compliance of Policy decisions of the Government relating to women,
>
> (iv) rehabilitation of deserted and destitute women and woman forced into prostitution,
>
> (v) atrocities on women in custody and take up with authorities concerned for appropriate remedial measures,
>
> xxx xxx xxx
>
> (3) The Commission shall while investigating any matter referred to in clause (a) or clause (d) of sub-section (1) have all the powers of a Civil Court trying a suit and, in particular, in respect of the following matters, namely:"
>
> (a) summoning and enforcing the attendance of any person from any par of India and examining him on oath;
>
> (b) requiring the discovery and production of any document;
>
> (c) receiving evidence on affidavits;
>
> (d) requisitioning any public record or copy thereof from any court or office;
>
> (e) issuing commissions for the examination of witness and documents; and
>
> (f) any other matter which may be prescribed."

Reading the aforesaid provisions, this Court finds, the Commission has the only power to receive complaint under Section 10(1)(d) of the Act and further to investigate the matter under Sub-Section (3) of Section 10 of the Act and for the limited role of the Commission involving Section 10(1)(a), it has to refer its recommendation on the basis of such investigation for the action being taken by the competent authority. In view of the limited scope under the provision of the Act, 1993, this Court finds, the direction given by the Commission under Annexure-3 is without competency of the Commission.

7. In the circumstance, this Court declaring the direction involving Annexure-3 as bad in law for being contrary to the provision contained in Section 10 of the Act, 1993 sets aside the same.

8. The writ petition succeeds.

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2019 (III) ILR-CUT- 725

S. K. SAHOO, J.

CRLMC NO. 3083 OF 2018

B. SATHISH REDDY @ SATHISH REDDY ……..Petitioner

-Vs-

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Offence under Section – Quashing – Non Compoundable offences – Settlement of matter between the parties – Quashing of the proceeding in view of such settlement – Legality of such quashment questioned – Held, in view of the amicable settlement between the parties, no useful purpose would be served in allowing the proceeding to continue and there is no chance of recording a conviction against the petitioner in the case and entire exercise of the trial against the petitioner is destined to be exercise of futility and it would just be an abuse of process of law – Therefore, it would be proper and justified to exercise the inherent powers under section 482 of Cr.P.C in the ends of justice to quash the proceeding against the petitioner otherwise the continuance of the criminal proceeding would be a sheer wastage of valuable time of the court.

Case Laws Relied on and Referred to :-

1. (2008) 4 SCC 582 : Madan Mohan Abbot -V- State of Punjab,
2. (2011) 10 SCC 705 : Shiji @ Pappu -V- Radhika,
3. A.I.R. 2009 SC 428 : Nikhil Merchant -V- C.B.I.
4. (2013) 11 SCC 497 : Dimpey Gujral -V- Union Territory,
5. (2012) 10 SCC 303 : Gian Singh -V- State of Punjab,
6. (2014) 6 SCC 466 : Narinder Singh -V- State of Punjab,
7. (2012) 12 SCC 401 : Jayrajsingh Digvijaysingh Rana -V- State of Gujarat.
8. (2019) 5 SCC 688 : State of Madhya Pradesh -V- Laxmi Narayan,
9. (2003) 4 SCC 675 : B.S. Joshi -V- State of Haryana.

For Petitioner : M/s. Rajat Kumar Rath, Sr. Adv.
Sanjay Kumar Pradhan.

For State of Odisha: Mr. Prem Kumar Patnaik, Addl. Govt. Adv.

For O.P.Nos. 2 to 5 : M/s. Manmaya Kumar Dash, Bijay Kumar Sastan, Rajat Kumar Das, H.K. Dash.

JUDGMENT Date of Hearing and Judgment: 19.08.2019

S. K. SAHOO, J.

In this application under section 482 of the Code of Criminal Procedure, 1973 the petitioner B. Sathish Reddy @ Sathish Reddy has prayed for quashing the criminal proceeding against him in C.T. Case No.661 of 2013 pending in the Court of learned S.D.J.M., Bhubaneswar including the impugned order dated 18.06.2015, wherein process has been issued against him after taking cognizance of offences under sections 365, 364-A, 342, 368, 307, 120-B read with section 34 of the Indian Penal Code. The said case arises out of Khandagiri P.S. Case No.76 of 2013.

2. The first information report was lodged on 16.02.2013 by the opposite party no.2 Rajesh Agarwal before the Inspector in Charge of Khandagiri Police Station, Bhubaneswar for which a case under section 365 read with section 34 of the Indian Penal Code and sections 25 and 27 of the Arms Act was registered against *unknown persons*. It is stated in the F.I.R. that on 15.02.2013 in the evening hours while the two brothers of the informant namely Subash Agarwal (opposite party no.3) and Sankar Lal Agarwal (opposite party no.4) had been to Khandagiri Guest House for some meeting purpose in a car with driver Bhagirathi Srichandan (opposite party no.5) and they were returning home, at about 10.30 p.m. some persons forcibly took

them towards Khurda side and the informant suspected that his brothers were kidnapped with some foul intention.

All the three victims i.e. the two brothers of the informant and their driver were rescued on the very day of lodging of the first information report and their statements were recorded. Ultimately on completion of investigation, charge sheet was submitted against the petitioner and other co-accused persons, on receipt of which the impugned order was passed.

3. Mr. Rajat Kumar Rath, learned Senior Advocate appearing for the petitioner contended that the matter has been amicably settled between the petitioner and the informant as well as the victims and they are not interested to proceed with the case against the petitioner and they have filed affidavits in that respect before this Court indicating therein that they have no objection if the proceeding against the petitioner stands quashed and in view of such state of affairs, continuance of the proceeding against the petitioner would be an abuse of process and therefore, this Court should invoke its inherent powers under section 482 of Cr.P.C. to quash the criminal proceeding against the petitioner. He placed reliance in the cases of **Madan Mohan Abbot -Vrs.- State of Punjab reported in (2008) 4 Supreme Court Cases 582**, **Shiji @ Pappu -Vrs.- Radhika reported in (2011) 10 Supreme Court Cases 705**, **Nikhil Merchant -Vrs.- C.B.I. reported in A.I.R. 2009 Supreme Court 428**, **Dimpey Gujral -Vrs.- Union Territory reported in (2013) 11 Supreme Court Cases 497**, **Gian Singh -Vrs.- State of Punjab reported in (2012) 10 Supreme Court Cases 303, Narinder Singh -Vrs.- State of Punjab reported in (2014) 6 Supreme Court Cases 466** and **Jayrajsingh Digvijaysingh Rana -Vrs.- State of Gujarat reported in (2012) 12 Supreme Court Cases 401**.

Mr. Prem Kumar Patnaik, learned Addl. Government Advocate on the other hand submitted that since the offences are not compoundable in nature, this Court should not invoke its inherent powers under section 482 of Cr.P.C. to quash the criminal proceeding against the petitioner. He placed reliance in the cases of **State of Madhya Pradesh -Vrs.- Laxmi Narayan reported in (2019) 5 Supreme Court Cases 688**.

Mr. Manmaya Kumar Dash, learned counsel for the informant (opp. party no.2) as well as the victims (opposite parties nos. 3 to 5) supported the contention raised by the learned counsel for the petitioner and submitted that the opposite parties nos. 2 to 5 have no objection if the proceeding against the petitioner is quashed.

4. As per order dated 05.08.2019, this Court asked the learned counsel for the State to obtain instruction through the Inspector in Charge of Khandagiri police station relating to the genuineness of the affidavits filed by the opposite parties nos.2 to 5. Today, the learned counsel for the State produced a letter dated 15.08.2019 of the Inspector in Charge of Khandagiri police station wherein it is mentioned that the opposite party no.2 Rajesh Agrawal who is the informant in the case appeared at the police station and stated that he had sworn the affidavit before the Oath Commissioner of this Court on 30.01.2019 in this case and similarly, the opposite parties nos. 3, 4 and 5 also appeared in the police station on 11.08.2019 and they admitted to have sworn the affidavits before the Oath Commissioner of this Court on 30.01.2019 and they have also given it in writing that they have no objection if the proceeding against the petitioner is quashed and they proved the genuineness of the affidavits and also gave their identity proof. The letter of the Inspector in Charge of Khandagiri police station along with his instructions is taken on record.

5. It is not in dispute that except the offence under section 342 of the Indian Penal Code, no other offences under which cognizance has been taken is compoundable in nature. It is also not in dispute that in view of section 320(9) of Cr.P.C., no offence except as provided by that section shall be compounded.

The question that crops up for consideration is whether this Court invoking its inherent powers under section 482 of Cr.P.C. can quash the proceeding against an accused on the ground of compromise between the parties even though some of the offences under which charge sheet has been submitted are non-compoundable in nature.

Let me first discuss the ratio laid down by the Hon'ble Supreme Court as cited by the learned counsel for the petitioner relating to quashing of the criminal proceeding consisting of non-compoundable offences on the ground of amicable settlement between the parties in exercise of the powers under section 482 of the Code. In the case of **Madan Mohan Abbot** (supra), it is held as follows:-

> "2. This appeal is directed against the judgment dated 14th February 2006 whereby an application for quashing of FIR No.155 dated 17th November 2001 registered at Police Station Kotwali, Amritsar under Sections 379,406,409,418,506/34 of the Indian Penal Code, 1860 on

account of the compromise entered into between the complainant and the accused, has been declined on the ground that Section 406 was not compoundable as the amount involved was more than Rs.250/- and that the case was already fixed on 28th April 2006 for the examination of the prosecution witnesses.

xxx xxx xxx xxx

5. It is on the basis of this compromise that the application was filed in the High Court for quashing of proceedings which has been dismissed by the impugned order. We notice from a reading of the FIR and the other documents on record that the dispute was purely a personal one between two contesting parties and that it arose out of extensive business dealings between them and that there was absolutely no public policy involved in the nature of the allegations made against the accused. We are, therefore, of the opinion that no useful purpose would be served in continuing with the proceedings in the light of the compromise and also in the light of the fact that the complainant has on 11th January 2004 passed away and the possibility of a conviction being recorded has thus to be ruled out.

6. We need to emphasize that it is perhaps advisable that in disputes where the question involved is of a purely personal nature, the Court should ordinarily accept the terms of the compromise even in criminal proceedings as keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury which the Courts, grossly overburdened as they are, cannot afford and that the time so saved can be utilized in deciding more effective and meaningful litigation. This is a common sense approach to the matter based on ground of realities and bereft of the technicalities of the law."

In the case of **Shiji @ Pappu** (supra), it is held as follows:-

"17. It is manifest that simply because an offence is not compoundable under Section 320 Cr.P.C. is by itself no reason for the High Court to refuse exercise of its power under Section 482 Cr.P.C. That power can in our opinion be exercised in cases where there is no chance of recording a conviction against the accused and the entire exercise of a trial is destined to be an exercise in futility. There is a subtle distinction between compounding of offences by the parties before the trial Court or in appeal on the one hand and the exercise of power by the High Court to quash the prosecution under Section 482 Cr.P.C. on the other. While a Court trying an accused or hearing an appeal against conviction, may not be competent to permit compounding of an offence based on a settlement arrived at between the parties in cases where the offences are not compoundable under Section 320, the High Court

may quash the prosecution even in cases where the offences with which the accused stand charged are non-compoundable. The inherent powers of the High Court under Section 482 Cr.P.C. are not for that purpose controlled by Section 320 Cr.P.C.

18. Having said so, we must hasten to add that the plenitude of the power under Section 482 Cr.P.C. by itself, makes it obligatory for the High Court to exercise the same with utmost care and caution. The width and the nature of the power itself demands that its exercise is sparing and only in cases where the High Court is, for reasons to be recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law. It is neither necessary nor proper for us to enumerate the situations in which the exercise of power under Section 482 may be justified. All that we need to say is that the exercise of power must be for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law. The High court may be justified in declining interference if it is called upon to appreciate evidence for it cannot assume the role of an appellate court while dealing with a petition under Section 482 of the Criminal Procedure Code. Subject to the above, the High Court will have to consider the facts and circumstances of each case to determine whether it is a fit case in which the inherent powers may be invoked."

In the case of **Nikhil Merchant** (supra), it is held as follows:-

"22. Despite the ingredients and the factual content of an offence of cheating punishable under Section 420 IPC, the same has been made compoundable under Sub-section (2) of Section 320 Cr.P.C. with the leave of the Court. Of course, forgery has not been included as one of the compoundable offences, but it is in such cases that the principle enunciated in ***B.S. Joshi's*** case (2003 AIR SCW 1824) becomes relevant.

23. In the instant case, the disputes between the Company and the Bank have been set at rest on the basis of the compromise arrived at by them whereunder the dues of the Bank have been cleared and the Bank does not appear to have any further claim against the Company. What, however, remains is the fact that certain documents were alleged to have been created by the appellant herein in order to avail of credit facilities beyond the limit to which the Company was entitled. The dispute involved herein has overtones of a civil dispute with certain criminal facets. The question which is required to be answered in this case is whether the power which independently lies with this Court to quash the criminal proceedings pursuant to the compromise arrived at, should at all be exercised?

24. On an overall view of the facts as indicated hereinabove and keeping in mind the decision of this Court in ***B.S. Joshi's*** case (supra) and the compromise arrived at between the Company and the Bank as also clause 11 of the consent terms filed in the suit filed by the Bank, we are satisfied that this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings, since, in our view, the continuance of the same after the compromise arrived at between the parties would be a futile exercise."

In the case of **Dimpey Gujral** (supra), it is held as follows:-

"8. In the light of the above observations of this Court in ***Gian Singh***, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No.163 dated 26/10/2006 registered under Sections 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising therefrom including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

In the case of **Gian Singh** (supra), it is held as follows:-

"52. The question is with regard to the inherent power of the High Court in quashing the criminal proceedings against an offender who has settled his dispute with the victim of the crime but the crime in which he is allegedly involved is not compoundable under Section 320 of the Code.

xxx xxx xxx xxx

57. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a Court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal Court is circumscribed by the provisions contained in Section 320 and the Court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment.

58. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens the well-being of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between the offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed.

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal Court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be

prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

In the case of ***Narinder Singh*** (supra), it is held as follows:-

"8. We find that there are cases where the power of the High Court under Section 482 of the Code to quash the proceedings in those offences which are non-compoundable has been recognized. The only difference is that under Section 320(1) of the Code, no permission is required from the Court in those cases which are compoundable though the Court has discretionary power to refuse to compound the offence. However, compounding under Section 320(1) of the Code is permissible only in minor offences or in non-serious offences. Likewise, when the parties reach settlement in respect of offences enumerated in Section 320(2) of the Code, compounding is permissible but it requires the approval of the Court. In so

far as serious offences are concerned, quashing of criminal proceedings upon compromise is within the discretionary powers of the High Court. In such cases, the power is exercised under Section 482 of the Code and proceedings are quashed. Contours of these powers were described by this Court in ***B.S. Joshi -Vrs.- State of Haryana : (2003) 4 SCC 675*** which has been followed and further explained/ elaborated in so many cases thereafter, which are taken note of in the discussion that follows hereinafter.

9. At the same time, one has to keep in mind the subtle distinction between the power of compounding of offences given to Court under Section 320 of the Code and quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction conferred upon it under Section 482 of the Code. Once it is found that compounding is permissible only if a particular offence is covered by the provisions of Section 320 of the Code and the Court in such cases is guided solitary and squarely by the compromise between the parties, in so far as power of quashing under Section 482 of the Code is concerned, it is guided by the material on record as to whether the ends of justice would justify such exercise of power, although the ultimate consequence may be acquittal or dismissal of indictment.

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29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or
(ii) to prevent abuse of the process of any Court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 Indian Penal Code would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 Indian Penal Code in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 Indian Penal Code is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 Indian Penal Code. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the

later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 Indian Penal Code is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 Indian Penal Code and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

Coming to the decision cited by the learned counsel for the State in the case of **Laxmi Narayan** (supra), it is held as follows:-

"16. Insofar as the present case is concerned, the High Court has quashed the criminal proceedings for the offences under Sections 307 and 34 Indian Penal Code mechanically and even when the investigation was under progress. Somehow, the accused managed to enter into a compromise with the complainant and sought quashing of the FIR on the basis of a settlement. The allegations are serious in nature. He used the

fire arm also in the commission of the offence. Therefore, the gravity of the offence and the conduct of the accused is not at all considered by the High Court and solely on the basis of a settlement between the accused and the complainant, the High Court has mechanically quashed the FIR, in exercise of power under Section 482 of the Code, which is not sustainable in the eyes of law. The High Court has also failed to note the antecedents of the accused."

6. During course of investigation, it was found out that the co-accused G. Srinibas Reddy and the victim Subash Agarwal (opposite party no.3) were known to each other since long and both were in the construction line and there was financial dispute between them for which case is subjudiced in the Court. It appears that all the three victims i.e. opposite parties nos.3, 4 and 5 were rescued on the very day of lodging of the first information report and their statements were also recorded and none of them has been assaulted or sustained any injury. The statement of the opposite party no.3 Subash Agarwal indicates that it is the co-accused Srinibas Reddy who put a revolver on his head and the petitioner asked him to remain silent. On going through the case records, I find no prima facie case against the petitioner relating to the commission of offence under section 307 of the Indian Penal Code. The allegations in respect of the other offences against the petitioner are omnibus in nature. It cannot be lost sight of the fact that the informant and all the victims have settled their dispute with the petitioner and they have sworn affidavits before this Court that they are not interested to proceed against the petitioner and that they have no objection if the criminal proceeding against the petitioner stands quashed. The Hon'ble Supreme Court in the case of **Jayrajsinh Digvijaysinh Rana** (supra) accepted the compromise between the informant and a particular accused and quashed the proceeding in respect of that accused, inter alia, holding that in view of the settlement arrived at between the informant and the accused, there is no chance of recording a conviction insofar as that accused is concerned and the entire exercise of trial is destined to be an exercise in futility. The ratio laid down in the case of **Laxmi Narayan** (supra) as was placed by the learned counsel for the State is distinguishable as in the present case the investigation has already been completed and the petitioner has not used any fire arm during course of occurrence.

On conspectus of the case records, it is apparent that there was business rivalry between the informant and one of the co-accused and that the occurrence arose out of such business rivalry. In view of the amicable

settlement between the parties, I am of the humble opinion that no useful purpose would be served in allowing the proceeding to continue and there is no chance of recording a conviction against the petitioner in the case and entire exercise of the trial against the petitioner is destined to be an exercise of futility and it would just be an abuse of process of law. Therefore, it would be proper and justified to exercise the inherent powers under section 482 of Cr.P.C. in the ends of justice to quash the proceeding against the petitioner otherwise the continuance of the criminal proceeding would be a sheer wastage of valuable time of the Court.

7. In view of the foregoing discussions, I am inclined to accept the prayer made in this application and direct that the impugned order dated 18.06.2015 and the criminal proceeding in C.T. Case No.661 of 2013 pending in the Court of learned S.D.J.M., Bhubaneswar insofar as the petitioner herein is concerned, stands quashed. Needless to say that the criminal proceeding shall continue against the other accused persons.

Accordingly, the CRLMC application is allowed.

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2019 (III) ILR-CUT- 738

S. K. SAHOO, J.

CRLMC NO. 1923 OF 2018
AND
CRLMC NO. 1925 OF 2018

ODISHA MINING CORPORATION LTD. .....Petitioner

-Vs-

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent Power – Quashing of the Cognizance as well as issuance of the process in the complaint case – Offence under section 15 of the Environment Protection Act, 1986 – Allegation of illegal mining operation without the environmental clearance – Complaint filed against the office bearers of the company without arraigning the

company as an accused – Maintainability of complaint case questioned on the ground of such non arraignment – Application of the doctrine of strict construction as well as the principle of vicarious liability – Held, in view of the provision under 16 of the Act,1986, there is legal bar to the institution & continuance of such proceeding without the company being arraigned as an accused – Hence in the view of above, the proceedings are not legally maintainable and thereby quashed accordingly with a direction to file fresh complaint case in accordance with the law.

Case Law Relied on and Referred to :-

1. (2012) 52 OCR (SC) 254 : Aneeta Hada & Ors. -V- Godfather Travels & Tours Pvt. Ltd.
2. (1991) 3 SCC 756 : Janata Dal -V- H.S. Chowdhary & Ors.
3. (1992) 4 SCC 653 : Simranjit Singh Mann -V- Union of India (UOI) & Ors.
4. (2016) 6 SCC 699 : Amanullah -V- State of Bihar,
5. (2004) 3 SCC 349 : Ashok Kumar Pandey -V- State of W.B.
6. (2017) 9 SCC 340 : Ratanlal -V- Prahlad Jat,
7. (2013) 3 SCC 330 : Rajiv Thapar & Ors. -V- Madan Lal Kapoor,
8. AIR 1992 SC 604 : State of Haryana -V- Bhajan Lal.

For Petitioner : M/s. A.R. Dash, B. Mohapatra, (in both the cases) K.S. Sahoo, A. Mahanta.

For Opp. Party : Mr. Prem Kumar Patnaik, Addl. Govt. Adv.

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

S. K. SAHOO, J.

The pivotal question that arises in these cases is whether the petitioner Odisha Mining Corporation Ltd. (hereafter 'the Company') who has not been arrayed as an accused in the complaint cases can challenge the order of taking cognizance and issuance of process against other accused persons in anticipation that the Company might be arrayed as an accused in the proceedings at a later stage.

The petitioner Company has filed these two criminal miscellaneous cases under section 482 of the Cr.P.C. with a prayer to quash the impugned orders dated 24.02.2014 passed by the learned J.M.F.C., Jajpur Road in taking cognizance of offence under section 15 of the Environment Protection Act, 1986 (hereafter '1986 Act') and issuance of process against the accused

persons in 2 (c) C.C. No.10 of 2014 and 2(c) C.C. No.12 of 2014 vide CRLMC No.1923 of 2018 and CRLMC No.1925 of 2018 respectively.

Since both the CRLMC applications arise out of identical facts and circumstances and raise similar questions of law and the petitioner is the same, with the consent of the parties, those were heard analogously and are being disposed of by this common judgment and order.

2. One Sri Maheswar Panigrahi, Sub-Divisional Magistrate, Jajpur is the complainant in both the complaint cases.

2 (c) C.C. Case No.10 of 2014 was filed against CMD, OMC, OMC House, Bhubaneswar as well as Asst. GM (Mines), DGM (Mines), AGM (Mines), Deputy Manager (Mines) and Asst. Manager (Mines) of Kaliapani Chromite Mines of OMC Ltd. respectively stating therein that the complainant is authorised to file the case by virtue of the power conferred on him by the Central Government and as such he is the authorised person to file the complaint under section 19 of the 1986 Act. It is alleged in the complaint petition that the Company which was having a leasehold area of 971.245 Hects. in Kaliapani Chromite Mines, Kaliapani operated production without obtaining environmental clearance from Ministry of Environment and Forests, Govt. of India during the period from 2000-01 to 2009-10 as per the notice issued by the Collector and District Magistrate, Jajpur to the accused persons who were directly involved in the production of Chromite ore and thereby violating the provisions under the 1986 Act. The report of the Regional Officer, State Pollution Control Board (hereafter 'SPCB'), Odisha, Kalinga Nagar was attached to the complaint petition. It is stated in the complaint petition that the report of the Deputy Director, Mines (I/C), Jajpur Road, Jajpur and the Regional Officer, SPCB, Odisha, Kalinga Nagar were based on the report/information of the accused persons who were supposed to raise production and dispatch report to the concerned Mining Authority, SPCB and Indian Bureau of Mines. According to the complainant, production of any mineral without having environmental clearance amounts to violation of 1986 Act and EIA notifications of the years 1994 and 2006. EIA notification of 1994 mandates to obtain environmental clearance certificate as the project had more than 5 Hects. and EIA notification of 2006 indicates to obtain prior environmental clearance certificate for all major projects. The Forest and Environmental Department, Govt. of Odisha responding to the direction of the Govt. of India, Ministry of Environment and Forest requested the Collector, Jajpur vide letter dated 08.03.2013 to take legal action against

the mining project of the accused persons. It is the further case of the complainant that from the official records, it was evident that accused CMD, OMC in connivance with the other accused persons produced Chromite without having environmental clearance from 01.04.2000 to 31.03.2010 as per EIA notifications as amended from time to time and thus they are liable to be punished under section 15 of the 1986 Act.

2 (c) C.C. Case No.12 of 2014 was filed against CMD, OMC, OMC House, Bhubaneswar as well as Asst. GM (Mines), DGM (Mines), AGM (Mines), Deputy Manager (Mines) and Asst. Manager (Mines) of Sukrangi Chromite Mines of OMC Ltd. on similar allegation that the Company which was having a leasehold area of 382.709 Hects. in Sukrangi Chromite Mines, Sukrangi operated production without obtaining environmental clearance from Ministry of Environment and Forests, Govt. of India during the period from 2000-01 to 2009-10 as per the notice issued by the Collector and District Magistrate, Jajpur to the accused persons who were directly involved in the production of Chromite ore and thereby violating the provisions under the 1986 Act. The report of the Regional Officer, State Pollution Control Board (hereafter 'SPCB'), Odisha, Kalinga Nagar was attached to the complaint petition. It is stated in the complaint petition that the report of the Deputy Director, Mines (I/C), Jajpur Road, Jajpur and the Regional Officer, SPCB, Odisha, Kalinga Nagar were based on the report/information of the accused persons who were supposed to raise production and dispatch report to the concerned Mining Authority, SPCB and Indian Bureau of Mines. According to the complainant, production of any mineral without having environmental clearance amounts to violation of 1986 Act and EIA notifications of the years 1994 and 2006. EIA notification of 1994 mandates to obtain environmental clearance certificate as the project had more than 5 Hects. and EIA notification of 2006 indicates to obtain prior environmental clearance certificate for all major projects. The Forest and Environmental Department, Govt. of Odisha responding to the direction of the Govt. of India, Ministry of Environment and Forest requested the Collector, Jajpur vide letter dated 08.03.2013 to take legal action against the mining project of the accused persons. It is the further case of the complainant that from the official records, it was evident that accused CMD, OMC in connivance with the other accused persons produced Chromite without having environmental clearance from 01.04.2000 to 31.03.2010 as per EIA notifications as amended from time to time and thus they are liable to be punished under section 15 of the 1986 Act.

3. The learned Magistrate after receipt of the complaint petition, registered it and perusing the petition and other connected documents filed with it, on being satisfied regarding existence of sufficient materials against the accused persons for commission of offence under section 15 of the 1986 Act passed the impugned orders in the two complaint cases. The learned Magistrate held that since in the accused column, only official designation of the accused persons were mentioned but it reveals that the occurrence took place in between 01.04.2000 to 31.03.2009, the persons who were holding office in the capacity of CMD, OMC, Asst. GM, DGM, AGM and Deputy Manager of the mines during the said period are to be arrayed as accused persons as the offence attract penal liability. The learned Magistrate while issuing summons to the accused persons for their appearance issued letter to the complainant as well as CMD, OMC for furnishing the names of the accused persons who were holding the respective posts from 01.04.2000 to 31.03.2009.

It appears that the accused persons i.e. Asst. Manager (Mines), OMC and CMD, OMC filed petitions under section 205 of Cr.P.C. with a prayer to dispense with their personal appearance which were allowed as per order dated 21.04.2014. Similar prayer was made by the other accused persons i.e. Asst. GM (Mines), DGM (Mines), AGM (Mines) and Deputy Manager (Mines), Kaliapani Chromite Mines which was allowed as per order dated 17.01.2015.

4. Mr. A.R. Dash, learned counsel appearing for the petitioner in both the cases relying upon the ratio laid down by the Hon'ble Supreme Court in the case of **Aneeta Hada and Ors. -Vrs.- Godfather Travels and Tours Pvt. Ltd. reported in (2012) 52 Orissa Criminal Reports (SC) 254** contended that for maintaining the prosecution against accused persons, arraigning of the Company as an accused is imperative in view of section 16 of the 1986 Act. He further argued that like section 16 of the 1986 Act, there are pari materia provisions in section 141 of the Negotiable Instruments Act, 1881 (hereafter 'N.I. Act') and section 85 of the Information Technology Act, 2000 and the Hon'ble Supreme Court while analysing the provision under section 141 of the N.I. Act in the case of **Aneeta Hada** (supra) took similar view and further held that the other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. It was argued that on a plain

reading of the complaint petitions, it would be evident that the main allegation is against the Company and the accused persons were working in the Company in different capacities and there is every likelihood that the Company would be arrayed as an accused during trial invoking power under section 319 of Cr.P.C. It was further argued that even though the accused persons against whom processes have been issued by the learned Magistrate have not come forward to challenge the impugned order but the petitioner cannot be said to be a complete stranger to the proceeding and therefore, the locus standi of the petitioner cannot be questioned.

Mr. Prem Kumar Patnaik, learned Addl. Govt. Advocate on the other hand contended that since the accused persons against whom processes have been issued have not come forward to challenge the impugned orders rather they have taken steps through their counsel in the Court below, the legal question which is raised by the learned counsel for the petitioner can only be raised by those accused persons by filing appropriate applications and the petitioner Company on the anticipation that it would be arrayed as an accused in future, cannot be permitted to challenge the impugned orders. He relied upon the ratio laid down by the Hon'ble Supreme Court in the case of **Janata Dal -Vrs.- H.S. Chowdhary and Ors. reported in (1991) 3 Supreme Court Cases 756**.

5. Section 15 of the 1986 Act prescribes penalty for contravention of the provisions of the Act and the rules, orders and directions. The section starts with the word 'whoever'. There is no reason why the word 'whoever' in the section should not receive its plain and natural meaning. According to the Shorter Oxford English Dictionary, 'whoever' means' 'any one who'. The meaning given in Webster Comprehensive Dictionary, International is 'any one without exception'. Therefore, the word 'whoever' must mean any person who commits a contravention of that section without exception. That must be the legal connotation of the word 'whoever'.

Section 16 of the 1986 Act deals with offences by Companies and it reads as follows:-

> "16. Offences by companies.-(1) Where any offence under this Act has been committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the

company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.- For the purposes of this section,-

(a) "company" means anybody corporate, and includes a firm or other association of individuals; and
(b) "director", in relation to a firm, means a partner in the firm."

Section 141 of the N.I. Act which deals with offences by companies also contains pari materia provision which is as follows:-

"141. Offences by companies.-(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

xxx xxx xxx xxx

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to

be proceeded against and punished accordingly. Explanation.- For the purposes of this section,-

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

In the case of **Aneeta Hada** (supra), the gravamen of the controversy was whether any person who has been mentioned in sections 141(1) and 141(2) of the N.I. Act can be prosecuted without the company being impleaded as an accused. The Hon'ble Court after analysing the provision and case laws held as follows:-

"43. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself....."

In the case of **Simranjit Singh Mann -Vrs.- Union of India (UOI) and Ors. reported in (1992) 4 Supreme Court Cases 653**, the Hon'ble Supreme Court formulated the following question, "Does a petitioner-third party who is a total stranger to the prosecution culminating in the conviction of the accused have any 'locus standi' to challenge the conviction and the sentence awarded to the convicts in a petition brought under Article 32 of the Constitution? If the answer to this poser is in the negative, this petition must fail on that preliminary ground." Relying on the ratio laid down in the case of **Janata Dal -Vrs.- H.S. Chowdhary and Ors. reported in (1991) 3 Supreme Court Cases 756**, the Hon'ble Court held that the petitioner has no 'locus standi' to invoke the jurisdiction under Article 32 of the Constitution and rejected the petition.

In the case of **Janata Dal** (supra), the background indicates that a public interest litigation was filed for quashing the first information report lodged by the C.B.I. on 22nd January 1990 based on the core allegation that certain named and unnamed persons had entered into a criminal conspiracy in pursuance whereof they had secured illegal gratification of crores of rupees from Bofors, a Swiss Company, through their agents as a motive or reward. The C.B.I had moved an application before the learned Judge, Delhi for the

issuance of a Letter Rogatory/request to the Swiss authorities for assistance in conducting investigation, which request was conceded. An advocate Shri Harinder Singh Chowdhary filed a criminal revision application before the High Court of Delhi for quashing the F.I.R. and the Letter Rogatory on certain grounds. Several questions of law and fact were raised in support of the challenge. The High Court came to the conclusion that the said third party litigant had no 'locus standi' to maintain the action and so also the interveners had no right to seek impleadment/intervention in the said proceeding. However, the learned Judge took suo moto cognizance of the matter and for reasons stated in his order directed issue of show cause notice to the C.B.I and the State as to why the F.I.R. should not be quashed ? Besides the advocate litigant, certain political parties like the Janata Dal, the C.P.I. (Marxist), the India Congress (Socialist) and one Dr. P. Nalla Thampy Thera approached the Hon'ble Supreme Court questioning the High Court's rejection of their request for impleadment/intervention. It was in this context that the Hon'ble Court was required to examine the question whether third parties had any 'locus standi' in criminal proceedings. The Hon'ble Court came to the conclusion that the learned Judge in the High Court was right in holding that the advocate litigant as well as the interveners had no 'locus standi'. The relevant observations found in paragraph 26 of the judgment read as under:

> "26. Even if there are million questions of law to be deeply gone into and examined in a criminal case of this nature registered against specified accused persons, it is for them and them alone to raise all such questions and challenge the proceedings initiated against them at the appropriate time before the proper forum and not for third parties under the garb of public interest litigants."

In the case of **Amanullah -Vrs.- State of Bihar reported in (2016) 6 Supreme Court Cases 699**, it is held as follows:-

> "19. The term *'locus standi'* is a Latin term, the general meaning of which is 'place of standing'. *Concise Oxford English Dictionary*, 10th Edn., at page 834, defines the term 'locus standi' as the right or capacity to bring an action or to appear in a court. The traditional view of 'locus standi' has been that the person who is aggrieved or affected has the standing before the court that is to say he only has a right to move the court for seeking justice. Later, this Court, with justice-oriented approach, relaxed the strict rule with regard to 'locus standi', allowing any person from the society not related to

> the cause of action to approach the court seeking justice for those who could not approach themselves. Now turning our attention towards the criminal trial, which is conducted, largely, by following the procedure laid down in the CrPC. Since, offence is considered to be a wrong committed against the society, the prosecution against the accused person is launched by the State. It is the duty of the State to get the culprit booked for the offence committed by him. The focal point, here, is that if the State fails in this regard and the party having bonafide connection with the cause of action, who is aggrieved by the order of the court cannot be left at the mercy of the State and without any option to approach the appellate court for seeking justice."

In the case of **Ashok Kumar Pandey -Vrs.- State of W.B. reported in (2004) 3 Supreme Court Cases 349**, it was observed that an aggrieved party which is affected by any order, has the right to seek redress by questioning the legality, validity or correctness of the order, unless aggrieved party is a minor or insane person or is suffering from any other disability, etc. to question the decision.

In the case of **Ratanlal -Vrs.- Prahlad Jat reported in (2017) 9 Supreme Court Cases 340**, it is held as follows:-

> "8. In *Black's Law Dictionary*, the meaning assigned to the term 'locus standi' is 'the right to bring an action or to be heard in a given forum'. One of the meanings assigned to the term 'locus standi' in *The Law Lexicon* of Sri P. Ramanatha Aiyar, is 'a right of appearance in a Court of justice'. The traditional view of locus standi has been that the person who is aggrieved or affected has the standing before the court, that is to say, he only has a right to move the court for seeking justice. The orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a sea change with the development of constitutional law in India and the Constitutional courts have been adopting a liberal approach in dealing with the cases or dislodging the claim of a litigant merely on hyper-technical grounds. It is now well-settled that if the person is found to be not merely a stranger to the case, he cannot be non-suited on the ground of his not having locus standi."

6. Keeping in view the ratio laid down in the above cited decisions and looking at the averments taken in both the complaint petitions, it appears that the though allegations are specific against the six accused persons who were holding different posts in the company either in Kaliapani Chromite Mines of OMC Ltd. or in Sukrangi Chromite Mines of OMC Ltd. but it cannot be lost

sight of the fact that whatever illegalities they are alleged to have committed, it is for the sake of the company and not solely for their personal benefits. It is specifically mentioned that the accused no.1 in connivance with the accused nos.2 to 6 produced Chromite ore without having environmental clearance from 01.04.2000 to 31.03.2010 as per EIA notifications as amended from time to time and thus they are liable to be punished under section 15 of the 1986 Act. Section 15 of the Act states that for the failure or contravention of the provisions of the Act and the rules, orders and directions, apart from imposition of substantive imprisonment for maximum period of five years, sentence of fine can also be imposed. In none of the complaint petitions, the company has been arrayed as accused. Keeping in view the ratio laid down in the case of **Aneeta Hada** (supra) and section 16 of the 1986 Act, I am of the humble view that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in section 16 of the 1986 Act which clearly speaks of commission of offences by the companies. The words "as well as the company" used in sub-section (1) of section 16 does not mean that a prosecution against the directors or other officers is tenable even if the company is not arraigned as an accused. The entire statute must be first read as a whole, then section by section, clause by clause, phrase by phrase and word by word. Applying the doctrine of strict construction, I am of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be held vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against the company, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted. Therefore, without arraigning of the company as an accused, the prosecution is not maintainable against the other categories of offenders who were working in the company in different capacities on the touchstone of vicarious liability.

The petitioner company cannot be said to be a total stranger to the prosecution and that it has got no 'locus standi'. Merely because the accused persons against whom processes have been issued have not come forward to challenge the impugned order, this Court does not lack jurisdiction to take suo moto cognizance of the matter.

In the case of **Rajiv Thapar and Ors. -Vrs.- Madan Lal Kapoor reported in (2013) 3 Supreme Court Cases 330**, it is held (para 25) that the discretion vested in the High Court under section 482 of the Code of Criminal Procedure can be exercised *suo moto* to prevent the abuse of process of a Court, and/or to secure the ends of justice.

In the case of **Janata Dal** (supra), the Hon'ble Supreme Court held that section 482 which corresponds to section 561A of the old Code and to section 151 of the Civil Procedure Code proceeds on the same principle and deals with the inherent powers of the High Court. The rule of inherent powers has its source in the maxim "Quadolex a liquid alicia concedit, conceder videtur id sine quo ipso, ess uon protest" which means that when the law gives anything to anyone, it gives also all those things without which the thing itself could not exist. The criminal Courts are clothed with inherent power to make such orders as may be necessary for the ends of justice. Such power though unrestricted and undefined should not be capriciously or arbitrarily exercised, but should be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the Courts exist. The powers possessed by the High Court under section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Courts must be careful to see that its decision in exercise of this power is based on sound principles.

Thus the powers under section 482 of the Code are very wide in amplitude, yet they are not unlimited and have to be exercised sparingly and with caution. A duty is enjoined upon this Court to exercise the inherent powers by setting right the illegality in the order of the Court below as it is well settled that illegality should not be allowed to be perpetuated and failure by this Court to interfere with the same would amount to allowing the illegality to be perpetuated. It is open to this Court to quash the proceedings as against the accused who have not chosen to invoke the inherent jurisdiction if it is found that the proceedings are not legally maintainable. If this Court notices a glaring illegality, it cannot remain silent and thereby perpetuating the illegality and miscarriage of justice.

The parameters indicated in the case of **State of Haryana -Vrs.- Bhajan Lal reported in A.I.R. 1992 S.C. 604** relating to the scope of exercise of inherent powers under section 482 of the Code and the categories of cases where this Court may exercise such powers relating to the cognizable offences have been indicated and in the illustrative categories, it is stated, inter alia, that where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings, the powers can be exercised to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

Therefore, when it is brought to the notice of this Court by the petitioner by filing these criminal miscellaneous applications that without arraigning the company as an accused, the prosecution has been instituted against the accused persons in violation of the provision under 16 of the 1986 Act and the learned Court below has not only entertained the complaint cases but also passed the impugned orders and in view of the ratio laid down in the case of **Aneeta Hada** (supra), there is a legal bar to the institution and continuance of such proceedings without the company being arraigned as an accused, after noticing the glaring illegalities, I am of the humble view that the proceedings are not legally maintainable in the Court below and therefore, I am inclined to exercise the inherent powers *suo moto* to prevent the abuse of process of the Court and to secure the ends of justice and accordingly, direct that both the complaint case proceedings in 2 (c) C.C. No.10 of 2014 and 2(c) C.C. No.12 of 2014 pending in the Court of learned J.M.F.C., Jajpur Road and the impugned orders stand quashed. The complainant is however at liberty to file fresh complaint cases in accordance with law. In the result, the CRLMC applications are allowed.

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2019 (III) ILR-CUT- 750

P. PATNAIK, J.

W.P.(C) NO.10121 OF 2017

PANKAJ KUMAR SRIBASTAB .....Petitioner

-Vs-

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

(A) SERVICE LAW – Petitioner, a Home guard removed from service on the basis of an allegation made against him which has been made only a station dairy entry – No inquiry to such allegation – Appeal dismissed by a cryptic and unreasoned order – Interference by High court called for – Order set aside matter remanded.

(B) WORDS AND PHRASES – The word 'consider' – Its meaning and significance – Held, 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 authority itself should reveal such application of mind.

Case Law Relied on and Referred to :-

1. 6 SCC at page 530 : LIC .Vs. A.Masilamani (2013)

For Petitioner : Mr. Sangram Rath

For Opp.Parties :

ORDER Date of Order : 19.11.2019

P. PATNAIK, J.

Heard learned counsel for the petitioner and Mr.P.Mohapatra,learned Additional Standing Counsel on behalf of the State.

This is a third round of litigation. The petitioner being aggrieved by order 30.03.2017 passed by the Commandant General, Home Guard, Odisha, Cuttack has approached this Court under Articles 226 and 227 of the Constitution of India praying inter alia for quashing of the order dated 17.01.2015 and 30.03.2017 vide Annexures-4 and 6 to the writ application and a further prayer has been made for a direction to opposite party No.3 to reinstate the petitioner in services with all financial and consequential benefits including the full back wages.

The brief facts of the case as has been disclosed in the writ petition is that the petitioner after being duly selected as Home Guard, joined in his duty on 01.02.2010 under opposite party No.4. After undergoing the training course, he was discharging his duty with utmost sincerity. While continuing as such in pursuance of a notice vide letter dated 27.11.2014 on the basis of allegation, the petitioner was asked to submit his show cause reply within a period of 30 days as per Annexure-2. Whereafter the petitioner submitted his

show cause reply denying all the charges levelled against him. The opposite party No.3 after considering of the show cause reply discharged the petitioner from service on the ground that his service is no more required in the organization. Being aggrieved by the order of discharge dated 17.01.2015 the petitioner approached this Court in W.P.(C) No.4760 of 2016 for quashing of the said order and the writ application was disposed of on 21.06.2016 with liberty to the petitioner to file appeal before the Commandant Geneal, Home Guard who disposed of the appeal as per Rule 4(a) of the Orissa Home Guards (Appeal) Rules, 1963 and vided order dated 10.08.2016. Being aggrieved by the aid order, the petitioner filed another writ application vide W.P.(C) No.21785 of 2016 praying inter alia for quashing the order vide Annexures-4 and 5 with a prayer for reinstatement in service and this Court vide order dated 16.06.2017 has been pleased to dispose of the writ application.

> "6. In that view of the mater, the order passed by opposite party no.3, as at Annexure-5, disposing of the appeal filed by the petitioner is dehors the jurisdiction, illegal and therefore is quashed. The matter is remitted back to opposite party No.3 under Rule 4(a) of the Rules, who shall send the matter to the Deputy Commandant General of the Home Guards. On such event, the Deputy Commandant General of the Home Guards shall do well to dispose of the appeal within a period of thirty days from the date of receipt of certified copy of this order along with the copy of the brief and dispose of the same by a reasoned order after affording reasonable opportunity of hearing to the petitioner. It is also directed that while considering the appeal of the present petitioner the Deputy Commandant General of the Home Guards shall take into consideration that the principles of natural justice or statutory principles has been violated or not. If the same has not been violated, appropriate order may be passed in that regard. Opposite party no.3 and the Deputy Commandant General of the Home Guards shall act upon production of certified copy of this order."

In deference to the direction of this Court dated 16.06.2017 passed in W.P.(C) No.21785 of 2016 the opposite party no.2 has disallowed the appeal vide order dated 30.03.2017 vide Annexure-6 which is impugned in this writ application.

Being aggrieved and dissatisfied with the impugned order vide Annexure-6 the present writ application has been filed under Article 226 and 227 of the Constitution of India for redressal of his grievance.

Learned counsel for the petitioner strenuously urged that the impugned order has been passed merely on the ground of suspicion. Therefore, the impugned order being bereft of cogent reasons is liable to be

interfered with. Learned counsel for the petitioner further submits that the alleged Station Diary Entry which has been annexed as Annexure-A to the counter affidavit is based on disclosure of one accused Daitary . Though it has been mentioned in the Station Diary Entry that the petitioner was kept on constant watch regarding his activities and movement, but no such inquiry has been conducted after such Station Diary. Therefore, the order passed by the Commandant General, opposite party no.2 is based on surmises and conjecture.

Learned counsel for the petitioner further submits that Rule-8 of the Orissa Home Guars Rules, 1962 has not been considered by opposite party no.2 while deciding the appeal. Therefore the impugned order being legally unsustainable is nullity in the eye of law.

Controverting the averments made in the writ application a counter affidavit has been filed by opposite party Nos.2,3 and 4 wherein it has been submitted that the petitioner during his tenure at Gourmohisani PS was involved in various illegal activities by keeping liaison with antisocial and associated with persons doing illegal liquor business, cattle business and traders illegally transporting diesel and disclosure of secrecy of police. Also he was instigating local people against the police and collecting illegal gratification from public. Regarding above activities of the petitioner the OIC, Gorumohisani P.S. has made necessary station diary entries. Further it has been submitted in the counter affidavit at paragraph-8 the local public of Gorumohisani P.S. area became annoyed on the activities of petitioner. His continuance in Home Guard service may create resentment among the local public. It is pertinent to mention here that Gorumohisahi P.S. is Naxal affected PS and disclosure of police secrecy by the petitioner may invite untoward incident in future. Hence his explanation was not satisfactory.

Learned Additional Standing Counsel on behalf of the State apart from reiterating the submissions made in the counter affidavit has submitted with vehemence that there is absolutely no infirmity or illegality in the impugned order so as to warrant interference of this Court. Learned Additional Sanding Counsel further submits that since the Home Guard is a voluntary assignment and once the trust of the public is lost, the continuance of Home Guard will not be in the interest of the organization.

After hearing the learned counsel for the respective parties and on perusal of the documents, it appears that the petitioner has been able to make out a case of interference due to following facts, reasons and judicial pronouncements.

On perusal of the order dated 30.03.2017 it would be evident that the allegation which has been levelled against the petitioner by O.I.C. on the basis of a Station Diary Entry is based on suspicion and the order of removal is based on conjecture and surmises which could not have the basis for consideration of the appeal in right prospective.

The Hon'ble Apex Court in the case of ***LIC-vrs. A.Masilamani (2013) 6 SCC at page 530 in paragraph-19*** has held that 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 shold reveal such application of mind. The appellate authority cannot simply adopt the language employed by the disciplinary authority and proceed to affirm its order.

Taking into consideration the aforesaid decision it would appear that the opposite party no.2 has solely and wholly decided the matter basing on the Station Diary Entry dated 16.10.2014 without ascertaining the veracity and genuineness of the allegations and the order has been passed in a cryptic and unreasoned manner which defies the logic and legal tenability. Hence the same is unsustainable in the eye of law.

On cumulative effect of the aforesaid facts and judicial pronouncements the impugned order dated 30.03.2017 is liable to be quashed and set aside. Accordingly the same is quashed/set aside. The matter is remitted back to the Commandant General of Home Guards to decide the matter afresh by conducting an enquiry by a subordinate authority to find out the truth or veracity of the allegations against the petitioner so as to come to a definite conclusion in accordance with the provisions of Odisha Home Guards Rules, 1962. Thereafter the opposite party No.2 may do well to pass appropriate order as deemed proper in accordance with the provisions of Odisha Home Guard Rules 1962. The entire exercise be completed within a period of three months from the date of receipt/communication of the order. The opposite party No.2 shall act on production of certified copy of the order. The writ application stands allowed. Issue urgent certified copy as per Rules.

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2019 (III) ILR-CUT- 755

K.R. MOHAPATRA, J.

M.A. NO. 22 OF 1996

PRAKASH KU. PATNAIK & ORS. .....Appellants

-Vs-

GHASIRAM SAHU & ORS. .....Respondents

MOTOR ACCIDENT CLAIM – Appeal by claimants for enhancement of award amount and to fasten the liability on the Insurance Company – Plea of Insurance Company was that the Vehicle was issued with an insurance policy covering the date of accident, its liability was limited, as no premium was paid to cover unlimited liability of the owner – No document filed to that extent – Effect of – Held, when a plea is taken by the insurer to the effect that the liability of the Insurance Company is limited, it is the duty of the Insurance Company to produce such insurance policy – No such document having been produced, it is very difficult to accept the plea to the effect that the liability of the Insurance Company is limited to Rs.15,000/- per passenger. (Para 8)

Case Laws Relied on and Referred to :-

1. 1991 (1) ACJ 468 (Orissa) : Akhaya Kumar Sahoo -V- Chhabirani Seth & Anr.
2. 1995 (1) TAC 659 (SC) : New Indian Assurance Company Ltd. -V- Smt. Shanti Bai & Ors.
3. 72 (1991) CLT 495 : Udayanath Pani -V-Basanti Dalai & Ors.
4. 1993 (II) OLR 11 : National Insurance Co.Ltd. -V- Prasanna Kumar Mitra & Ors.
5. (2009) 6 SCC 121 : Sarla Verma -V- DTC,
6. (2017) 16 SCC 680 : National Insurance Company Limited -V- Pranay Sethi & Ors.

For Appellants : M/s. H.S. Misra, N.Mishra & S.S.Patra

For Respondents : M/s. S.S.Basu, G.P.Dutta & S.Roy

ORDER Heard & Disposed of on : 09.09.2019

K.R. MOHAPATRA, J.

This appeal has been filed by under Section 173 of the Motor Vehicles Act, 1988 (for short 'the Act') assailing the judgment and award dated 02.09.1995 passed by the 2nd Motor Accident Claims Tribunal

(Northern Division), Sambalpur (for short 'the Tribunal') in M (J) Case No. 23 of 1989(8), whereby the Tribunal awarded a compensation of Rs.57,600/- in favour of the claimants-appellants along with 10% interest per annum from the date of filing of the petition, i.e., 29.03.1989 till its realization holding the respondent No.2-Insurance Company liable to pay Rs.15,000/-, and directed rest of the amount to be recovered from the owner of the vehicle-respondent No.1. This appeal has been filed both for enhancement of compensation and also to make the Insurance Company liable to pay the entire compensation amount along with interest.

2. Heard Mr.H.S.Mishra, learned counsel for the Claimants-Appellants and Mr.G.P.Dutta, learned counsel for respondent No.2-Insurance Company.

3. Short narration of facts as revealed from the impugned judgment and relevant for proper adjudication of the case is that on 30.06.1983, the deceased, namely, Bijay Kumar Pattnaik boarded a Trekker bearing registration No. ORR-3662 at Bolangir to go to Burla. On its way to Burla near village Rampur, due to a sudden jerk, the Trekker capsized to its right. The deceased was thrown out and sustained injuries on his person. Subsequently, he was removed to hospital where the doctor declared him dead. The Trekker was insured with the Oriental Insurance Company-respondent No. 2. Thus, the dependants of the deceased filed petition claiming compensation of Rs. 1.40 lakh. Pursuant to the notice, one Aruni Kumar Sahoo, filed written statement stating that he was the owner of the vehicle, i.e., the Trekker bearing registration No.ORR-3662. The respondent No.1, namely, Ghasiram Sahu was not the owner of the vehicle. He had no knowledge about the alleged accident. He, however, contended in his written statement as follows:-

> *"3) That, the said vehicle was duly insured as stated in the claim petition with comprehensive risks and the Insurance was valid on the alleged date and time of the accident.*
>
> *4) That, this owner has absolutely no liability but the Insurance Company, the opposite party No.2 is fully liable for the compensation, if any."*

4. The respondent No.2- Insurance Company (opposite party No.2 before the Tribunal) filed its written statement contending that no document having been filed with regard to coverage or issuance of insurance policy in the name of the owner of the owner of the Trekker, namely, Ghasiram Sahu,

it is not in a position to make any comment to that effect. As it appears from the impugned award that the learned counsel for the Insurance Company at the time of argument, raised a plea that although the vehicle, i.e., the Trekker was issued with an insurance policy covering the date of accident, its liability was limited, as no premium was paid to cover unlimited liability of the owner. Learned Tribunal, however, considering the materials, passed the impugned award.

5. Mr.Mishra, learned counsel for the claimants-appellants vehemently argued that although the Trekker was issued with a valid insurance policy covering the date of accident, no document to that effect has been filed either by the owner or by the Insurance Company. A specific plea was taken by the owner of the vehicle in its written statement to the effect that a comprehensive insurance policy was issued in respect of the Trekker covering the date of accident, the owner is not liable to pay the compensation and it is to be fully indemnified by the Insurance Company. But, the Insurance Company has neither filed any document to the contrary nor it denied such plea specifically in its written statement. Learned Tribunal, however, taking into consideration an incomplete copy of the insurance policy, which was filed along with the written notes of arguments after the argument in the case was over, passed the impugned award limiting the liability of the Insurance Company to Rs.15,000/- only. He further submitted that the learned Tribunal has committed serious error in assessing the income of the deceased and applying the multiplier 12 to the case at hand although the deceased was only 42 years old at the time of his death as revealed from the PM report Ext.3. He therefore, prayed for enhancement of the compensation and making the Insurance Company liable to indemnify the entire compensation. No compensation for non-pecuniary losses was also granted. In the above regard, he relied upon the decision in the case of ***Akhaya Kumar Sahoo vs Chhabirani Seth and Anr.***, reported in 1991 (1) ACJ 468 (Orissa).

6. Mr.G.P.Dutta, learned counsel for respondent No.2-Insurance Company contended that the Trekker was in fact issued with an insurance policy covering the date of the accident by the respondent No.2. But Rs.108/- was only paid for nine persons at the rate of Rs.9/- from each of the passengers to cover the risk and liability of the passengers upto Rs.15,000/-. No extra premium was paid to cover the unlimited liability. Thus, the Tribunal has rightly held that the liability of the Insurance Company cannot

be more than Rs. 15,000/-. He further submitted that onus is on the claimants to prove that the vehicle (Trekker) was covered under a comprehensive insurance policy on the date of accident to make the Insurance Company liable to pay the entire compensation. Since no such document was filed either by the Claimants or by the owner of the vehicle, the Insurance Company is not liable to pay compensation more than Rs.15,000/-. In support of his case, he relied upon a decision in the case of ***New Indian Assurance Company Ltd. Vs. Smt. Shanti Bai and others***, reported in 1995 (1) TAC 659 (SC), in paragraph-9, relevant paragraph of which reads as follows:-

> *"9. In the present case, the premium which has been paid is at the rate of Rs. 12/- per passenger and is clearly referable to the statutory liability of fifteen thousand rupees per passenger under Section 95 (2)(b)(ii) of the Motor Vehicles Act, 1939. In the present case, there is no special contract between the appellant-company and respondent No. 4 to cover unlimited liability in respect of an accident to a passenger. In the absence of such an express agreement, the policy covers only the statutory liability. The mere fact that the insurance policy is a comprehensive policy will not help the respondents in any manner. As pointed. out by this Court in the case of National Insurance Co. Ltd. v. Jugal Kishore & Ors., (supra) comprehensive policy only entitles the owner to claim reimbursement of the entire amount of loss or damage suffered up to the estimated value of the vehicle. It does not mean that the limit of liability with regard to third party risk becomes unlimited or higher than the statutory liability. For this purpose, a specific agreement is necessary which is absent in the present case. Reference in this connection may also be made to the case of M.K. Kunhimohammed v. P.A. Ahmedkutty & Ors., (1987 (3) SCR 1149). The appellant-company is, therefore, entitled to succeed to the extent that it has been directed to pay to respondents 1 to 3 any amount in excess of Rs. 15,000/-."*

He further relied upon a Division Bench decision of this Court in the case of ***National Insurance Company Ltd. Vs. Prasanna Kumar Mitra and others***, reported in 1993 (II) OLR 11, paragraph-7 of which is quoted below.

> *"7. The liability initially is that of the parson who is responsible for the accident. To get indemnification of any compensation which may become payable, the owner, who is also described as the insured, enters into an agreement with any insurance company like the appellant in the instant case, which for a premium undertakes to indemnity any liability that may be fastened on an insured. The insurance policy is the basic document from which the intention of the insured and the insurer is gathered. It shows the*

extent of liability of the insurer. The old Act and the Motor Vehicles Act, 1988 (herein- after referred to as the 'new Act') mandate insurance, and prescribe the requirements of policies, the limits of liabilities and the duty of the insurer to satisfy judgments against persons insured in respect of third party risks. Sections 94, 95 and 96 of the old Act and Sections 147, 148 and 149 of the new act deal with these aspects. Since the liability is originally that of the insured, ithas to place materials before the adjudicating Tribunal to show what is the quantum of indemnification under- taken by the insurer. The claimants are not expected to possess the policy or a copy thereof and the owners for the reasons best known to them do not choose to produce the policies. The Supreme Court in Jugal Kishore's case (supra) emphasised on the desirability of production of a document which is in possession of a party for an effective adjudication. In that background it was observed that the insurance company concerned should file a copy of the insurance policy along with its defence where it wants to take a defence in respect of a claim petition, that its liability is not in excess of the statutory liability. ***In Udayanath Pani v. Basanti dalai and Ors****. : 72 (1991) CLT 495, one of us (Pasayat, J.) observed that it cannot be laid down as a general principle that in all cases the insurer is required to file a copy of the policy to show that its liability is not unlimited. Such a situation will arise only when there is a positive assertion that the liability of the insurer is unlimited and claim to that effect is made. Only in such cases the question of the insurer taking a defence that its liability is not unlimited arises. The view expressed in Udayanath Pani's case (supra) was approved by us in Fagilal Sinha v. Divisional Manager, Oriental Insurance Company Limited and Ors. (AHO No. 97 of 1991 disposed of on 27-3-1992)."*

He, therefore, prayed for dismissal of the appeal.

7. Before adverting to the rival contentions raised by learned counsel for the parties it must be made clear that the Insurance Company has not filed any Cross Objection to the appeal.

8. On perusal of the impugned award, it reveals that the Insurance Company has not filed any document to show its limited liability at the time of trial of the case. It however, reveals from the impugned award that probably a copy of the insurance policy was filed at the time of the argument, which was taken into consideration by the Tribunal, without admitting it in evidence and giving opportunity to the claimants to adduce rebuttal evidence, if any. From the evidence on record, it appears that no such specific suggestion with regard to its limited liability was given to witnesses of the claimants. On such backdrop, argument advanced by the learned counsel for

the parties is to be scrutinized. In the decision in the case of ***Prasanna Kumar Mitra (supra)***, this Court has categorically held that when the owner of the vehicle takes a plea that the liability of the insurer is unlimited and the Insurance Company is liable to pay the entire compensation and the Insurance Company denies the same and takes a plea that its liability is limited, the insurer has to produce the policy to prove it. On perusal of the written statement filed by the Insurance Company although it appears that a plea was taken to the effect that no such policy was issued in favour of the owner of the vehicle, namely, Ghasiram Sahu, but subsequently in course of argument, learned counsel for the Insurance Company admitted that the policy covering the date of the accident was issued in respect of the Trekker. It is, however, not known as to why such policy was not produced at the time of trial of the claim case. Had it been filed at the time of trial of the case claimants-appellants would have got an opportunity to file rebuttal evidence. In ***Prasanna Kumar Mitra (supra)***, it is very much clear that when a plea is taken by the insurer to the effect that the liability of the Insurance Company is limited, it is the duty of the Insurance Company to produce such insurance policy. No such document having been produced, it is very difficult to accept the plea of Mr.Dutta to the effect that the liability of the Insurance Company is limited to Rs.15,000/- per passenger. Judicial notice of another important aspect can be taken. Although it is the main plea of the Insurance Company that its liability is limited to the extent of Rs.15,000/- per passenger, but no such plea was taken in its written statement originally. But, subsequently there was hand-written incorporation of such a plea at para-17 of the written statement. On verification of record, it is found that no prayer made or permission granted for incorporation of such plea, which creates a doubt with regard to the conduct of the Insurance Company, more particularly when the subsequent hand-written insertion in para-17 of the written statement of the Insurance Company is not in sequence with the earlier typed out portion of such paragraph. Thus, in absence of any materials to the contrary, I am of the considered opinion that respondent No.2-Insurance Company is liable to indemnify the respondent No.1-owner in full.

9. The next question arises as to what would be the just compensation. As is revealed from the case record that monthly income of the deceased at the time of his death was Rs.520/- and he was only 42 years 5 months and 25 days old at the time of his death, as revealed from his service particulars (Ext.6).

In the case of ***Sarla Verma Vs. DTC***, reported in (2009) 6 SCC 121, which has been subsequently approved by a Constitution Bench judgment of the Hon'ble Supreme Court in the case of ***National Insurance Company Limited Vs. Pranay Sethi and others***, reported in (2017) 16 SCC 680, wherein it has been held as follows:-

> "30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in *Trilok Chandra* [(1996) 4 SCC 362], the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six."

Thus, looking at the size of the family of the deceased, who died leaving behind his widow, two minor sons and two minor daughters, 1/4th of his income should be deducted towards personal expenses, which comes to Rs.130/-.

10. Further, in the case of ***Sarla Verma (supra)*** in paragraph-42, the Hon'ble Supreme Court held as follows :-

> "42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas [(1994) 2 SCC 176 : 1994 SCC (Cri) 335], Trilok Chandra [(1996) 4 SCC 362] and Charlie [(2005) 10 SCC 720 : 2005 SCC (Cri) 1657]), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

The same has been approved in the case of Constitution Bench judgment in the case of ***Pranay Sethi (supra)***. The deceased being in the age group of 41-45 years, multiplier 14 is applicable to the case at hand. As such, the dependency would be (Rs.520-Rs.130) = Rs.390 x 12 x 14 = Rs.65,520/-.

11. In addition to the above, the claimants are also entitled for compensation on the heading of non-pecuniary damage. In the case of

Pranay Sethi (supra), wherein the Hon'ble Supreme Court at paragraph-49 held as follows:-

> "49. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for general damages in case of death. It is as follows:
>
> "3. General damages (in case of death):
>
> The following general damages shall be payable in addition to compensation outlined above:

(i)	Funeral expenses	Rs 2000
(ii)	Loss of consortium, if beneficiary is the spouse	Rs 5000
(iii)	Loss of estate	Rs 2500
(iv)	Medical expenses — actual expenses incurred before death supported by bills/vouchers but not exceeding	Rs 15,000"

Thus, the claimants are entitled to funeral expenses to the tune of Rs.2,000/-, loss of consortium of Rs.5,000/-, loss of estate Rs.2,500/- and expenses towards carrying body etc. Rs.5,000/-.

12. In ***Pranay Sethi (supra)***, the Hon'ble Supreme Court has led down the following guidelines for determination of future prospects, which is as follows:-

> "57. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardisation, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception

is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardisation on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable."

13. Taking into consideration the fact that the deceased was working as a male nurse in the District Headquarters Hospital, Bolangir and was drawing a salary of Rs.520/- per month (Ext.6), he is entitled to another 40% of his income towards future prospects. Thus, the claimants are entitled to another Rs.26,208/- towards future prospects. Thus, the claimant would be entitled to compensation in the following manner.

(i)	Compensation for death	Rs. 65,520.00
(ii)	Loss of future prospects	Rs. 26,208.00
(iii)	None pecuniary loss	Rs. 14,500.00

		Total Rs.01,06,228.00

To sum up, it is directed that the respondent No.2-Insurance Company shall deposit the aforesaid compensation amount, i.e., Rs.1,06,228/-(rupees one lakh six thousand two hundred twenty-eight only) along with interest as awarded by learned Tribunal, within a period of eight weeks hence and it shall be released in favour of the claimants on proper identification and on payment of proper fee.

14. With the aforesaid modification in the impugned award the appeal is disposed of. Issue urgent certified copy of the order on proper application.

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2019 (III) ILR-CUT-764

DR. A.K. MISHRA, J.

CRLMC NO. 2464 OF 2018

ANIL KUMAR PRADHAN ……..Petitioner

-Vs-

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Application for quashing of the criminal proceeding – Period of limitations – Delay of four years in filing the application – Plea of delay and latches pleaded – Held, the application dismissed.

Case Laws Relied on and Referred to :-

1. 2007 (2) Crl.Court Cases 712 (Rajasthan) : Dilip Kothari -V- State of Rajasthan & Ors.
2. 2011(1) Crl. Court Cases 33(S.C) : Maharashtra State Electricity Distribution Co.Ltd. & Anr. -V- Datar Switchgear Ltd. & Ors.
3. 2014(1) Crl. Court Cases 845 (Rajasthan) : Sita Ram Suiwal & Anr. -V- State of Rajasthan & Ors.
4. 1992 Suppl. (1) SCC 335 : State of Haryana -V- Bhajanlal
5. 2012 Crl. L. J. 2189 : R. B. Shrivastava -V- Special Police Establishment Lokayukt, Gwalior
6. (2019) 74 OCR (SC) 131 : Sau. Kamal Shivaji Pokarnekar -V- State of Maharashtra & Ors.
7. 1990 Crl.LJ 1110 : Bata @ Ors. -V- Anama Behera
8. CRLMC No.1656 of 2011 : Rajesh Chetwal -V- State (Date of decision 24.08.2011).

For Petitioner : M/s.Biswaranjan Mohapatra, P.K. Behera, B. M. Pattanaik.

For Opp. Parties :M/s. S. N. Panda, P. K. Nayak, D. K. Mohapatra and A. K. Sahoo (for O.P. No.3)
Mrs. Susama Rani Sahu, Addl. Standing Counsel.

JUDGMENT Date of Hearing and Judgment : 25.11.2019

DR. A. K. MISHRA, J.

In this proceeding U/s.482 Cr.P.C. the Lis in C.T. Case No.3786 of 2014, arising out of Saheed Nagar P.S. Case No.455 of 2014, pending in the court of learned S.D.J.M., Bhubaneswar is sought to be quashed.

2. On 2.9.2014 the opposite party no.4, Sukant Sethi deposited a Cheque in the State Bank of India, Mancheswar Industrial Estate Branch in the account of one Smt. Dali Dei (O.P. No.5). The cheque was issued by Sri Arijeet Doss Mullick, drawn at S.B.I., La Martiniere Branch, Kolkata. On 05.09.2014 Sri Mullick lodged complaint that he had never issued any such cheque. On being contacted by the bank officials, Sukanta Sethi disclosed that he received the cheque from one School teacher of Rangamatia School. The F.I.R. dtd.25.09.2014 was registered as Saheednagar police station vide P.S. Case no.455 dtd.30.09.2014. The present petitioner being the teacher of Rangamatia School was taken into custody and investigation ensued.

2-A. In order to overcome 167(2) Cr.P.C, the investigating officer filed charge-sheet no. 463 dtd.30.09.2014 against two accused persons, namely, Anil Kumar Pradhan, the present petitioner and Sukanta Sethi. Basing upon that report, learned S.D.J.M., took cognizance on 24.11.2014 of the offence U/s.420, 467, 468 read with section 34 of the Indian Penal Code. It is not disputed that further investigation U/s.137(8) Cr.P.C. is still under progress.

2-B. After due process of supply of copy U/s.207 Cr.p.C., on 12.12.2014 charge was framed and accused did not plead guilty.

3. On 1.11.2017 petitioner filed CRLMC No.3175 of 2017 before this court invoking jurisdiction U/s.482 Cr.P.C. seeking to quash the order dtd.6.9.2017 of learned J.M.F.C., Bhubaneswar issuing NBW against him. That case was disposed of on 17.1.2018 giving direction to release the petitioner on bail on his surrender.

It appears that on 29.1.2018 the petitioner had availed such fresh bail.

3-A. The present proceeding U/s.482 Cr.P.C. was filed on 10.08.2018 seeking quashing of the whole proceeding on the ground that there is no material prima facie available to implicate the present petitioner with the alleged offence.

4. Learned counsel for the petitioner files decision reported in **2007 (2) Criminal Court Cases 712 (Rajasthan), Dilip Kothari Vrs. State of Rajasthan & Ors.** to contend that when essential ingredients of offence of cheating or criminal conspiracy is not made out, the F.I.R. can be quashed against the petitioner while investigating agency can proceed against others.

He also relies upon decision reported in **2011(1) Criminal Court Cases 33 (S.C.), Maharashtra State Electricity Distribution Co. Ltd. & Anr. Vrs. Datar Switchgear Ltd. & Ors.** wherein it is stated that when the allegation in the F.I.R. or the complaint taken at its face value and accepted in their entirety do not constitute the offence, the proceeding can be quashed invoking powers U/s.482 Cr.P.C.

In the said decision it is also mentioned that powers under the said provision have to be exercised sparingly with caution to secure the ends of justice and to prevent abuse of process of court.

Learned counsel for the petitioner also relies upon a decision reported in **2014(1) Crl. Court Cases 845 (Rajasthan), Sita Ram Suiwal & Anr. Vrs. State of Rajasthan & Ors. (Rajasthan High Court)** wherein the ratio of **Bhajanlal's** case reported in **1992 Suppl. (1) SCC 335** has been considered and as the fact of that case was coming under clause (VII) that is "manifestly attended with mala fide", the proceeding was ordered to be quashed.

In another decision relied upon by learned counsel for the petitioner reported in **2012 Crl. L. J. 2189, R. B. Shrivastava Vrs. Special Police Establishment Lokayukt, Gwalior (Madhya Pradesh High Court) (Gwalior Bench)** it is stated that condition precedent to the commencement of investigation U/s.157 Cr.P.C. is that the F.I.R. must disclose prima facie cognizable offence.

5. Now descending to the facts at hand, on careful perusal of the F.I.R. and charge-sheet I am of the considered opinion that it could not be said that there was no cognizable offence revealed from the F.I.R. as because cheque of somebody was deposited without his knowledge in the Bank and money was encashed which involves criminal intention.

It is not necessary that a meticulous analysis of the case should be done before the trial to find out whether the case would end in conviction or acquittal. In the decision reported in **(2019) 74 OCR (SC) 131, Sau. Kamal Shivaji Pokarnekar vrs. State of Maharashtra & Ors.** Hon'ble Apex Court has held as follows:-

> *"6. Defences that may be available, or facts / aspects which when established during the trial, may lead to acquittal, or not grounds for quashing the complaint at the threshold. At that stage, the only question relevant is whether the averments in the complaint spell out the ingredients of a criminal offence or not."*

6. As far as connecting link of the present accused with such criminal act is concerned, prima facie he was the source from whom the cheque was routed through the Bank.

6-A. Further the petitioner did not pray to quash the proceeding in the earlier proceeding U/s.482 Cr.P.C. even though relief was sought to lancinate the order of NBWA on the averment that initial statements prima facie manifest the falsehood of the claim.

7. Fact remains that the petitioner allowed the court to proceed for a considerable period and only after 4 years he preferred to knock the door of inherent jurisdiction to quash the Lower Court proceeding which he participated questioning a stage earlier in this court.

Thus seen, filing of this application U/s.482 Cr.P.C. suffers from vices of the principle of delay and latches.

In this regard it is apt to refer to a decision reported in **1990 Crl.LJ 1110, Bata @ Others Vrs. Anama Behera** wherein this Court has held as follows:-

> *"Though for filing an application under section 482 there is no limitation, the application should be filed within a reasonable time, so that the progress of the case is not disturbed at a belated stage. A*

revision petition challenging an order can be filed within 90 days from the date of the order, similarly, a period of 90 days which is at par with a revision petition should be treated as reasonable time for filing an application U/s.482 and if it is filed beyond the period of 90 days, the applicant would have to explain the cause of the delay."

The said decision is also relied upon by the Hon'ble Delhi High Court in the case of **Rajesh Chetwal Vrs. State** (CRLMC No.1656 of 2011) (Date of decision 24.08.2011).

8. Regards being had to the above facts, I am not inclined to quash the proceeding in C.T. Case No.3786 of 2014, arising out of Saheed Nagar P.S. Case No.455 of 2014, pending in the court of learned S.D.J.M., Bhubaneswar invoking jurisdiction U/s.482 Cr.P.C.

In the result the CRLMC stands dismissed. Urgent certified copy as per rules.

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