**SUPREME COURT OF INDIA**

**ANIL R.DAVE, J., & DIPAK MISRA, J.**

CIVIL APPEAL NOS. 6448-6452 OF 2011 (WITH BATCH)

**YOGENDRA KU. JAISWAL ETC.** …….Appellants

*.Vrs.*

**STATE OF BIHAR & ORS.** ……..Respondents

**(A) CONSTITUTION OF INDIA, 1950 – ART.247**
**r/w section 3 Odisha Special Courts Act, 2006**

**Whether establishment of special Courts to try offences U/s. 13(1)(e) of the Prevention of Corruption Act, 1908, is violative of Article 247 of the Constitution of India, on the ground that for offences provided under central laws only parliament has power to create additional courts ? Under Entry 11-A of list III of the Seventh Schedule, Courts can be created by State legislature as well as by the Parliament under concurrent list – Held, establishment of Special Courts under the Odisha Act is not violative of Article 247 of the Constitution of India.**

(Paras 45,48,162)

**(B) CONSTITUTION OF INDIA, 1950 – ART.199, 212**

**Odisha Special Courts Act, 2006, introduced in the Assembly as "Money Bill", though it has no characteristics of a money bill – Whether it is hit by Article 199 of the Constitution of India ? Under Article 199(3), the decision of the Speaker of the Legislative Assembly that the bill in question was a Money Bill is final – Neither the said decision nor the procedure of the State Legislature be questioned by virtue of Article 212 of the Constitution – Held, the Odisha Act, 2006 is not hit by Article 199 of the Constitution of India.**

(Paras 37,38,162)

**(C) CONSTITUTION OF INDIA, 1950 – ART.254**

**Whether the provisions of Odisha Special Courts Act, 2006 are repugnant to P.C.Act, 1988, the Code of Criminal Procedure, 1973 and the Criminal Law Amendment Ordinance, 1944 ? Held, No**.

(Para 66)

**(D) CONSTITUTION OF INDIA, 1950 – ART.254**

**Whether Odisha Special Courts Act, 2006 is repugnant to Money Laundering Act, 2002 ? Held, there is no repugnancy between the two Acts**. (Paras 77,78)

**(E) ODISHA SPECIAL COURTS ACT, 2006 – Ss. 5, 6**

**Constitutional Validity of sections 5 & 6 raised on the ground that it confers unfettered power on the State Government to make declaration – State Government before making a declaration is only required to see whether the person is involved in an offence U/s. 13(1)(e) of the Odisha Act, 1988 and once that is seen, the concerned authority has no other option but to make a declaration and once the declaration is made, the prosecution has to be instituted in a Special Court which is the mandate of Section 6 (1) of the Act, so there is no element of discretion and only primafacie satisfaction is required – Held, the provisions pertaining to declaration and effect of declaration as contained in sections 5 & 6 of the Odisha Act are constitutionally valid as they do not suffer any unreasonableness or vagueness.**

(Paras 98,162)

**(F) ODISHA SPECIAL COURTS ACT, 2006 – Ss. 5,13**

**Persons holding "high public or Political Office" – Not defined under the Act – Classification of said persons challenged on the ground that Government is given liberty to pick and choose – The words convey a category of public servants which is well understood – Held, the provision is not arbitrary – Odisha Act and Bihar Act, are not violative of Article 14 of the Constitution of India.**

(Paras 110,112,128)

**(G) ODISHA SPECIAL COURTS ACT, 2006 – Ss. 14,15**

**Confiscation of property – Accused bound to disclose all his defence before the authorized officer at pre-trial stage – Provision challenged on the ground that accused will be prejudiced and it would be against the mandate of Article 20(3) of the Constitution of India – There is statutory protection U/s. 14(3) of the Act that the materials produced before the authorized officer shall not be used during trial, even such materials not to be looked into by the trial court and neither the prosecution nor the defence can refer to the same – Held, the right conferred on an accused under Article 20(3) of the Constitution of India is not violated.** (Paras 150,151,152)

**(H) ODISHA SPECIAL COURTS ACT, 2006 – S. 15(3)**

**The expression "free from all encumbrances" used U/s. 15(3) of the Act – Meaning of – It is submitted by the appellants that once the property stands confiscated to the State Government free from all encumbrances, the right, title and interest of the person concerned is extinguished – The above submission is on a broad Canvass – But in Odisha Act the confiscation is interim in nature and it does not assure**

**the character of finality – Even the accused is entitled to get return of the property or money if he succeeds in appeal before the High Court against the order passed by the authorized officer – Same is the position in the Bihar Act – Held, the words "free from all encumbrances" are to be given a restricted meaning and it is not equivalent to vesting.** (Paras 145,147)

**(I) ODISHA SPECIAL COURTS ACT, 2006 – S. 17(3)**

**Appellants alleged that section 17(3) of the Act is unconstitutional on the ground that "Stay order if any passed in an appeal shall not remain in force beyond the prescribed period of disposal of appeal" – It is the legislative intention that an appeal has to be tried expeditiously – No statutory provision can postulate that an order of stay shall not remain in force beyond the period meant for disposal of the appeal – Moreover, High Court being a Superior Court having the power of judicial review shall see that the real purpose of the legislation is not defeated – For that purpose request made to the Chief Justice to demarcate a Bench for one day to hear these appeals – Held, the Order of stay if passed in an appeal would not debar or prohibit the High Court to pass a fresh stay order or extend the order of stay beyond that period subject to its satisfaction.**

(Paras 154)

**(J) ODISHA SPECIAL COURTS ACT, 2006 – S. 18**

**Challenge made to the proviso to section 18(1) of the Act, on the ground that the delinquent officer is compelled to be disposed from his dwelling house – Under the Act, Confiscation does not take place immediately after lodging of the F.I.R. – A detailed procedure has been stipulated which contains adequate safe guards and there after the order is given effect to – Moreover the person concerned can satisfy the authorized officer or in appeal that the dwelling house where he is residing is acquired from his known sources of income but he can not be allowed to indulge in corruption and conceive of protection to his dwelling house after a finding in the confiscation proceeding that it is constructed or purchased by way of corrupt means – Held, the objection raised by the appellants stands rejected and the provision is held to be not violative of Article 21 of the Constitution of India.**

(Para 155)

**(K) ODISHA SPECIAL COURTS ACT, 2006 – S. 19**

**Refund of confiscated money or property – Key words in the provision i.e, "in case it is not possible for any reason to return the property" is challenged as confiscatory and violative of Article 300-A of the Constitution of India – Legislative intention is to curb corruption at**

**high places and to conclude trial in a speedier manner and to see that the beneficiaries of ill gotten property or money do not enjoy the same during trial – It is also clear that government should not appropriate the money or property to itself in any manner – Held, the provision is not confiscatory and not violative of Article 300-A of the Constitution of India – However, any order passed under this provision is always subject to judicial review by the superior Courts.**

(Paras 158)

**(L) BIHAR SPECIAL COURTS RULES, 2010 – RULE 12**

**When Bihar Special Courts Act, 2010 provides to follow warrant procedure Prescribed by the Code for trial of cases before a Magistrate, Rule 12 of the Rules, 2010 could not have prescribed for summary procedure – The rules can supplement the provisions of the Act but they can not supplant the same – Held, Rule 12 of the Bihar Special Courts Rules 2010 which lays down that the learned Special Judge shall follow summary procedure is ultra vires the Bihar Act.**

(Para 161)

**(M) CONSTITUTION OF INDIA, 1950 – ART.14**

**Odisha Special Courts Act, 2006 and Bihar Special Courts Act, 2010 – Both Acts are almost similar – Appellants raised a question that when corruption is an all India Phenomenon and accused persons in other states are prosecuted under the P.C.Act, 1988, why similarly situated persons in Odisha and Bihar will be tried under their respective Special Acts in a more rigorous manner and whether it brings inequality causing discomfort to Article 14 of the Constitution of India ? Since assent of the President under Article 254(2) of the Constitution has been obtained and the assent is valid in law, the State law will operate – Held, Article 14 of the Constitution is not violated – Therefore, the question of bringing in the concept of equality qua persons who function in other states is an unacceptable proponement and it is impossible to accept the same.** (Paras 124, 125)

**(N) ODISHA SPECIAL COURTS ACT, 2006 – Ss. 15, 16**

**Provisions of sections 15 & 16 challenged on the ground that the accused persons against whom cases are pending under the P.C.Act, 1988 are compelled to be tried under the present Odisha Act and provisions of the Act can not be allowed to operate retrospectively when it imposes different kind of punishment like pre-trial confiscation of property – Whether it violates the basic tenent of Article 20(1) of the Constitution of India ? Held, since confiscation is not a punishment, Article 20(1) is not violated.** (Paras 138, 140, 142)

**Case Laws Reffered to:-**

1. 1993 (76) CLT 720 : Kishore Chandra Patel v. State of Orissa.

2. (1980) Supp. SCC 249 : Delhi Administration v. V.C. Shukla
3. (1994) 4 SCC 391 : S. Satyapal Reddy v. Govt. of A.P. & Ors.
4. (1999) 1 SCC 396 : M.P.Shikshak Congress & Ors. v. R.P.F. Commissioner, Jabalpur & Ors.
5. (2008) 5 SCC 1 : P. Venugopal v. Union of India.
6. AIR (1979) SC 898 : M.Karunanidhi v. Union of India.
7. AIR (1983) SC 1019 : Hoechst Pharmaceuticals v. State of Bihar.
8. AIR (1969) SC 903 : State of Punjab v. Satyapal.
9. AIR (1961) SC 954 : Burrakur Coal Co. Ltd v.Union of India.
10. (2014) 9 SCC 1 : Manoj Narula v. Union of India.
11. (2013) 4 SCC 642 : Niranjan Hemchandra Sashittal v. State of Maharashtra.
12. (2014) 8 SCC 682 : Subramanian Swamy v. CBI.
13. AIR 1965 SC 745 : Special Reference No. 1 of 1964.
14. (2007) 3 SCC 184 : Raja Ram Pal v. Hon'ble Speaker, Lok Sabha & Ors..
15. (2014) 11 SCC 415 : Mohd. Saeed Siddiqui v. State of Uttar Pradesh & Anr.
16. (2014) 10 SCC 1 : Madras Bar Association v. Union of India & Anr.
17. AIR 1968 SC 888 : O. N. Mohindroo v.The Bar Council Of Delhi & Ors.
18. (2005) 2 SCC 591 : Jamshed N. Guzdar v. State of Maharashtra.
19 (1979) 1 SCC 380 : The Special Courts Bill, 1978.
20. AIR 1983 SC 1019 = 1983 (4) SCC 45=: Hoechst Pharmaceuticals Ltd. & Anr. v. State of Bihar & Ors.
21. (1959) Supp. 2 SCR 8 : Deep Chand v. The State of Uttar Pradesh & Ors.
22. (1956) SCR 393 : Ch. Tika Ramji & Ors. v. The State of Uttar Pradesh & Ors.
23. (2004) 6 SCC 36 : Engineering Kamgar Union v. Electro Steels Castings Ltd. & Anr.
24. (2004) 1 SCC 320 : M.P. AIT Permit OwnersAssociation & Anr. v. State of M.P.
25. (2005) 3 SCC 212 : Govt. of A.P. & Anr. v. J.B. Educational Society & Anr.
26. (2007) 9 SCC 109 : Dharappa v.Bijapur Coop. Milk Producers Societies Union Ltd.
27. 1995 (1) SCC 257 : Sitaram & Bros. v. State of Rajasthan.

28. (2001) 4 SCC 68 : EID Parry (I) Ltd. v. G. Omkar Murthy & Ors.
29. (2002) 3 SCC 202 : Saurashtra Oil Mills Assn. v. State of Gujarat.
30. (2008) 2 SCC 614 : Imagic Creative (P) Ltd. v. CCT.
31. (2003) 1 SCC 591 : Hindustan Times v. State of U.P.
32. (2002) 8 SCC 182 : Kaiser-I-Hind (P) Ltd. v. National Textile Corpn. (Maharashtra North) Ltd.
33. 1995 Supp. (2) SCC 187 : P.N.Krishna Lal v. Govt. of Kerala
34. (1985) 3 SCC 661 : Gram Panchayat, Jamalpur v.Malwinder Singh
35. (2011) 8SCC 708 : Rajiv Sarin & Anr. v. State of Uttarakhand & Ors.
36. 2015(11) SCALE 1:Supreme Court Advocates-on-Record Association & Anr. v. Union of India
37. (1983) 1 SCC 147 : Sanjeev Coke Manufacturing Company v. M/s Bharat Coking Coal Limited & Anr.
38. AIR 1987 SC 1023 : Reserve Bank of India v. Peerless General Finance & Investment Co. Ltd.
39. 1990 AIR 981: Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama
40. AIR 1964 SC 1230 : R.L. Arora v. State of Uttar Pradesh & Ors.
41. (2000) 5 SCC 346 : TATA Engineering & Locomotive Co. Ltd. v. State of Bihar & Anr.
42. (1977) 4 SCC 193 : Union of India v. Sankalchand Himatlal Sheth.
43. (1977) 1 SCC 155 : Maharaj Singh v. State of U.P.
44. (2015) 5 SCC 1 : Shreya Singhal v. Union of India
45. AIR 1999 SC 101 = 1991 Supp (1) SCC 600 : DTC v. Mazdoor Congress
46. (2014) 1 SCC 1 : Suresh Kumar Koushal v. Naz Foundation
47. (2003) 10 SCC 533 : Calcutta Gujarati Education Society v. Calcutta Municipal Corporation
48. 1993 Supp (4) SCC 536 : Hotel Balaji & Ors. v. State of A.P. & Ors.
49. AIR 1970 SC 1173 : J.K. Steel Ltd. v. Union of India.
50. (1999) 6 SCC 559 : P. Nallamal v. Inspector of Police
51. AIR 1958 SC 538 : Ram Krishna Dalmia v. Shri Justice S.R.Tendolkar & Ors.
52. (2008) 5 SCC 287 :Satyawati Sharma (Dead) by LRs v. Union of India and Another.
53. AIR 1960 SC 1 : Rehman Shagoo v. State of Jammu and Kashmir
54. AIR 1960 SC 548 C.I. Emden v. State of Uttar Pradesh
55. (1954) SCR 30 : Kedar Nath Bajoria v. The State of West Bengal
56. (1952) SCR 284 : State of West Bengal v. Anwar Ali Sarkar
57. (1952) SCR 435 : Kathi Raning Rawat v. The State of Saurashtra
58. (1999) 5 SCC 138 : J. Jaya Lalitha v. Union of India.
59. AIR 1961 SC 1602: Jyoti Pershad v. Administrator for the Union Territory of Delhi.

60. AIR 1954 SC 493 : The State of Madhya Pradesh v. G.C. Mandawar
61. AIR 1987 SC 2117 : Prabhakaran Nair v. State of Tamil Nadu & Ors.
62. AIR 1953 SC 325 : Maqbool Hussain v. State of Bombay
63. AIR 1963 SC 255 =1963 (2) SCR 111 : State of West Bengal v. S.K. Ghosh.
64. (1985) 4 SCC 573 : Divisional Forest Officer and another v. G.V. Sudhakar Rao & Ors.
65. (1996) 2 SCC 471 : Director of Enforcement v. M.C.T.M. Corporation Pvt. Ltd & Ors.
66. (2014) 4SCC392 : Biswanath Bhattacharya v. Union of India & Ors.
67. (2013) 5 SCC 111 : State of Andhra Pradesh & Ors. v. CH.Gandhi
68. (1989) 3 SCC 448 : Pyare Lal Sharma v. Managing Director & Ors.
69. AIR 1960 SC 266 : K. Satwant Singh v. State of Punjab
70. (1969) 1 SCC 445 : Maya Rani Punj v. CIT
71. (1975) 4 SCC 101 : Tiwari Kanhaiyalal v. CIT
72. (2006) 10 SCC 709 : Kerala State Financial Enterprises Ltd. v. Official Liquidator, High Court of Kerala
73. AIR 2001 SC 3431: State of Himachal Pradesh v. Tarsem Singh & Ors.
74. (2010) 8 SCC 467 : Sulochana Chandrakant Galande v.PuneMunicipal Transport & Ors.
78. (2012) 8 SCC 263 : Dayal Singh v.State of Uttaranchal
79. (2012) 4 SCC 516 : Rattiram v. State of M.P.
80. AIR 1954 SC 300 : M.P. Sharma v. Satish Chandra

For Appellants : Mr. A. Saran, Mr. Vinoo Bhagat, Mr. P.S. Narasimha, Mr. R.K. Dash, Mr. Rakhruddin, Mr. S.B. Upadhyaya, Mr. Neeraj Shekhar, Mr. Gaurav Agrawal, Mr. Anirudh Sanganeria, & Mr. M.P. Jha,

For Respondents: Mr. Ranjit Kumar, Mr. S.K. Padhi, Sr. Counsel, Mr. Gopal Singh, Mr. Shibashish Misra and Mr. Nishant Ramakantrao Katneshwarkar,

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Date of judgment: 10.12.2015

**JUDGMENT**

***DIPAK MISRA, J.***

Corruption, a 'noun' when assumes all the characteristics of a 'verb', becomes self-infective and also develops resistance to antibiotics. In such a situation the disguised protagonist never puts a Hamletian question - "to be or not to be" – but marches ahead with perverted proclivity – sans concern, sans care for collective

interest, and irrefragably without conscience. In a way, corruption becomes a national economic terror. This social calamity warrants a different control and hence, the legislature comes up with special legislation with stringent provisions. The law having been enacted, there is a challenge to the constitutionality of the provisions. That is the subject matter of these appeals, for the judgments rendered by the High Courts of Orissa and Patna are under assail herein.

2. Leave granted in Special Leave Petition (Criminal) No. 4558 of 2012, Special Leave Petition (Criminal) No. 3084 of 2013 and Special Leave Petition (Criminal) No. 3085 of 2013.

3. In this batch of appeals, by special leave, we are called upon to deal with the legal substantiality of the judgments rendered by the High Court of Judicature of Orissa at Cuttack and the High Court of Judicature at Patna upholding the constitutional validity of the Orissa Special Courts Act, 2006 (for brevity, "the Orissa Act") which has been assented to by the President of India on 19.9.2007 and published in Extraordinary Orissa Gazette on 15.10.2007; and the Bihar Special Courts Act, 2009 (for short, "the Bihar Act"), respectively. We are also required to consider the validity of an aspect of Bihar Special Court Rules, 2010 (for short, "the 2010 Rules"). May it be stated though the High Court has noted the same and made certain observations yet has not proceeded to deal with the validity of the Rule in question.

4. As the factual matrix in all the cases has a common backdrop, we shall refer to the facts in brief. In all the cases, the appellants are/were public servants and facing criminal cases for various offences including the offences under the Prevention of Corruption Act, 1988 (for short, 'the 1988 Act'), particularly Section 13(1)(e) of the 1988 Act on the allegation that they were having property disproportionate to their known sources of income. The grievance of appellants in these appeals relate to the impact and effect of the legislations brought during the pendency of the proceedings. That apart, the constitutional validity of the number of provisions of the two enactments has been assailed on many a ground which are not restricted to the pending trials alone.

5. At the outset, we may state that the provisions in both the Acts are almost similar and, therefore, we shall dwell upon the constitutionality of the Orissa Act first and in course of our delineation, we shall refer to the Bihar Act wherever it is necessary. Hence, we proceed to deal with the Orissa Act. The State legislature keeping in view the accumulation of extensive properties disproportionate to the known sources of income by persons who had held or are holding high political and public offices, thought it appropriate to provide special courts for speedy trial for certain class of offences and for confiscation of properties involved; and accordingly, enacted the Orissa Act which was passed by the Orissa Legislative Assembly that got the assent of the President of India. The State Government in

exercise of its power conferred under Section 27 of the Orissa Act framed a set of Rules, namely, the Orissa Special Courts Rules, 2007 (for short "2007 Rules").

6. Before we dwell upon the submissions that were raised before the High Court and how the High Court has dealt with them, we think it appropriate to understand the scheme of the Orissa Act. Section 2(a) of the Orissa Act defines "authorised officer" which means any serving officer belonging to Orissa Superior Judicial Service (Senior Branch) and who is or has been an Additional Sessions Judge, nominated by the State Government with the concurrence of the High Court for the purpose of Section 13. Section 2(c) defines "declaration" in relation to an offence and it means a declaration made under Section 5 in respect of such offences. The term "offence" has been defined under Section 2(d) which means an offence of criminal misconduct within the meaning of clause (e) of sub-section (1) of section 13 of the 1988 Act. As per dictionary clause, Section 2(e) specifies "Special Court" which means a Special Court would be one as provided under Section 3 of the Orissa Act. Section 2(f) provides that words and expressions used herein and not defined but defined in the Code shall have the same meanings respectively assigned to them in the Code.

7. Section 3 of the Orissa Act deals with establishment of Special Courts. Section 4 enables the Special Court to take cognizance and try such cases as are instituted before it or transferred to it under Section 10. Section 7 deals with the jurisdiction of Special Courts as to trial of offences. It lays down that Special Court shall have jurisdiction to try any person alleged to have committed the offence in respect of which a declaration has been made under Section 5, either as the principal, or as a conspirator or abettor and for all the other offences, and the accused persons can jointly betried therewith at one trial in accordance with the Code of Criminal Procedure, 1973 ("the Code" for short). Section 8 deals with the procedure and powers of the Special Courts. Sub-section (2) of Section 8 lays the postulate that save as expressly provided in the Act, the provisions of the Code and of the 1988 Act shall, in so far as they are not inconsistent with the provisions of the Orissa Act, apply to the proceedings before a Special Court and for the purpose of the said provisions, the person conducting a prosecution before a special court shall be deemed to be a Public Prosecutor. Section 9 provides for an appeal to the High Court of Orissa from any judgment and sentence. Section 10 confers the power on the High Court of Orissa to transfer cases from one Special Court to another. Section 11(1) expressing the legislative command lays down that the special courts shall not adjourn any trial for any purpose unless such adjournment is, in its opinion, necessary in the interest of justice and for reasons to be recorded in writing and sub-Section (2) of said Section provides that the Special Court shall endeavour to dispose of the trial of the case within a period of one year from the date of its institution or transfer, as the case may be. Section 12 enables the Special Judge presiding over a Special Court on the evidence recorded by his predecessor or predecessors or partly recorded by his predecessor or predecessors and partly

recorded by himself. Section 13 provides for filing of application for confiscation before the Authorised Officer. It empowers the State Government to authorise the Public Prosecutor to make an application and also stipulates what the application shall accompany.

8. Section 14 provides for issuance of show cause notice by the Authorised Officer to the person concerned to explain his source of income and other assets and why such money or property or both should not be declared to have been acquired by means of the offence and be confiscated to the State Government. Sub-section (2) provides that where a notice under sub-section (1) to any person specifies any money or property or both has been held on behalf of such person by any other person, a copy of the notice shall also be served upon such other person. Sub-section (3) lays down that the evidence, information or particulars brought on record before the authorised officer shall not be used against the accused in the trial before the special court. Section 15 deals with the confiscation of property in certain cases. It provides a detailed procedure and obliges the authorised officer to follow the principles of natural justice. It prescribes a time limit for disposal of the proceeding and gives immense stress on identification of property or money or both which have been acquired by means of the offence and further it makes the confiscation subject to the order passed in appeal under Section 17 of the Orissa Act. It may be noted here that the proviso to Section 15(3) stipulates that the market price of the property confiscated, if deposited with the Authorised Officer, the property shall not be confiscated. Section 16 lays down that after the issue of notice under Section 14, any money or property or both referred to in the said notice are transferred by any mode whatsoever, such transfer shall for the purposes of the proceedings under the Orissa Act, be void and if such money or property or both are subsequently confiscated to the State Government under Section 15, then the transfer of such money or property or both shall be deemed to be null and void. Section 17(1) enables the aggrieved person by the order passed by an authorised officer to prefer an appeal within thirty days from the date on which the order appealed against was passed. Sub-section (2) provides that upon appeal being preferred under the said provision, the High Court may, after giving such parties, as it thinks proper, an opportunity of being heard, pass such order as it thinks fit; sub-section (3) requires the High Court to dispose of the appeal within three months from the date it is preferred and stay order, if any, passed in appeal shall not remain in force beyond the period prescribed for disposal of appeal. Sub-section (1) of Section 18 of the Orissa Act empowers the State Government to take possession. It stipulates that where any money or property has been confiscated to the State Government under the Act, the concerned authorized officer shall order the person affected as well as any other person who may be in possession of the money or property or both, to surrender or deliver possession thereof to the concerned authorised officer or to any person duly authorised by in this behalf, within thirty days of the service of the order. The proviso to the said sub-section stipulates that the authorised officer, on an application being made in that

behalf and being satisfied that the person affected is residing in the property in question, may instead of dispossessing him immediately from the same, permit such person to occupy it for a limited period to be specified on payment of market rent to the State Government and thereafter, such person shall deliver the vacant possession of the property. Sub-section (2) provides that if any person refuses or fails to comply with an order made unde r sub-section (1), the authorized officer may take possession of the property and may, for that purpose, use such force as may be necessary. Sub-section (3) confers powers on the authorised officer to requisition service of any police officer to assist and mandates the concerned police officer to comply with such requisition.

9. Chapter IV of the Orissa Act deals with the miscellaneous provisions. Section 20 stipulates that no notice issued or served, no declaration made and no order passed under the Act shall be deemed to be invalid by reason of any error in the description of the property or person mentioned therein, if such property or person is identifiable from the description so mentioned. Section 21 provides that the provisions of the Orissa Act shall be in addition, and not in derogation of, any other law for the time being in force. It also lays down that nothing contained in the Act shall exempt any public servant from a proceeding, apart from this Act, be instituted against him. Section 22 says save as provided in Sections 9 and 17 and notwithstanding anything contained in any of the law, no suit or any other legal proceeding shall be maintainable in any Court in respect of money or property or both ordered to be confiscated under Section 15. Section 23 grants protection to the person in respect of any action done in good faith or intended to be done in pursuance of the Orissa Act. Section 24 empowers the State Government to make rules as it may deem necessary for carrying out the purposes of the Orissa Act. Section 26, an overriding provision, provides that notwithstanding anything in the 1988 Act and the Criminal Law Amendment Ordinance, 1944 or any other law for the time being in force, the provisions of the said Act shall prevail in case of any inconsistency.

10. Having enumerated the scheme of the Orissa Act, wethink it appropriate to refer to certain definitions under the 2007 Rules framed under the Orissa Act. Rule 2(e) and (f) define "person holding high public office" and "person holding high political office", respectively. The said definitions read as under:-

> "2(e) "person holding high public office" includes a public servant falling within the meaning of clause (c) of Section 2 of the Prevention of Corruption Act, 1988 or under Section 21 of the Indian Penal Code, 1860 and belonging to Group-A service of the Central or State Government or officers of equivalent rank in any organization specified in the explanation below clause (b) of Section 2 of the said Act who was serving under or in connection with the affairs of the State Government;

> (f) "Person holding high political office" includes- (i) members of the Council of Ministers and the Chief Minster;
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> (ii) any person falling under the definition of public servant under clause (c) of Section 2 of the Prevention of Corruption Act, 1988 or under Section 21 of the Indian Penal Code, 1860 who has been appointed to discharge the executive functions of the State in any organization specified in the explanation below clause (b) of Section 2 of the said Act and receiving pay or honorarium or allowances for the services so rendered."

11. We have only referred to the abovesaid definitions since the learned counsel for the State has made an effort to get support from the same and the learned counsel for the appellants have submitted that rules are not to be taken recourse to for sustaining the constitutional validity of the Act.

12. Be it stated after judgment was delivered by the High Court on 16.9.2010, the State Government, Department of Home brought out a notification on 27.11.2010 amending certain rules. The relevant rule which has been amended is as follows:-

> "2. In the Orissa Special Courts Rules, 2007 (hereinafter referred to as the said Rules), in Rule 2, in sub-rule(1), in clause (e), after the words and the figures "Indian Penal Code, 1860" and before the words "belonging to Group 'A' Service", the words "including Officers of All India Services working under Government of Orissa" shall be inserted."

13. The constitutional validity of the Act as well as the Rules (prior to the amendment of the Rule) was assailed before the High Court in many a writ petition. The High Court noted the rivalised contentions and basically posed six questions. The sixth question related to a writ petitioner who was an IAS officer and it was asserted that he belonged to a category other than the officer of Group A service and hence, the declaration bringing him under the Act was illegal. Thus, the said issue stands on a different footing and we shall in due course deal with the said challenge but the five questions posed by the High Court are enumerated herein:-

> "(1) Whether the similar provisions in the present impugned Act is required to be re-examined in these writ petitions with reference to either the definition clause or declaration under section 5(1) and other provisions of Chapter III of the impugned Act in view of the decision rendered by this Court in Kishore Chandra Patel's case (supra) wherein the provisions of section 5 and other similar provisions of the impugned Act and Chapter III (Confiscation) have already been held to be constitutional, legal and valid as the same do not offend Articles 14 and 21 of the Constitution.
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> (2) Whether the impugned Act is repugnant or inconsistent with the provisions of the Prevention of Corruption Act and other Central Acts to the impugned Special Courts Act, 2006?

(3) Whether the provisions of the Orissa Special Courts Act, 2006 are repugnant to the provisions of the Prevention of Money Laundering Act as amended by Amendment Act, 2009?

(4) Whether the impugned notification issued under section 5(1) of the Act is liable to be quashed?

(5) Whether introducing the bill as Money Bill is legal and valid?"

14. After posing the said questions, the High Court dealt with question nos. 1 and 4 together and referred to the decision in ***Kishore Chandra Patel v. State of Orissa***[1], and observed that in the aforesaid judgment, the constitutional validity of Part III regarding confiscation of monies and properties of the accused persons, who were facing the criminal trial in the Special Court constituted under the Orissa Special Courts Act, 1990 by the State Government for speedy disposal, was held to be legal and valid and did not violate any of the fundamental rights and were not inconsistent with the statutory rights conferred either under the Code or the Criminal Law Amendment Act or Civil Procedure Code. The High Court also took note of the fact that the earlier Division Bench had issued certain directions and an ordinance was brought in to cure the flaws and the Court had ultimately found that the amended Act was constitutional. Keeping the same in view, the Division Bench by the impugned order opined that section 5 of the Act is constitutional. The High Court also took note of an affidavit filed on 23.7.2010 and on that basis ruled that the apprehension that certain cases would be selectively picked and chosen from amongst the offenders charged under Section 13(1)(e) of the 1988 Act for the purposes of invoking the provision of Chapter III was untenable in law. After making reference to the authority in ***Delhi Administration v. V.C. Shukla***[2], the Court opined that the attack based on discrimination was unfounded and accordingly answered the question nos. 1 and 4 against the writ petitioners. While dealing with the question no. 3 which pertained to the repugnancy of the Orissa Act to the provisions of the Prevention of Money Laundering Act, 2002 as amended by Amendment Act 2009, it has been opined that there was no repugnancy between the two statutes, for the procedure under both the statutes relating to confiscation of monies and properties of the accused are different and further the Prevention of Money Laundering Act, 2002 does not efface the prosecution against the persons facing prosecutions under the 1988 Act. That apart, the Division Bench also opined that Part A and Part B of the Schedule to the Prevention of Money Laundering Act, 2002 provide that in case of specified offence under the Indian Penal Code (IPC), Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and the Explosive Substances Act, 1908, the 1988 Act, an accused can be prosecuted under the said statutes, apart from being prosecuted under the Prevention of Money Laundering Act, 2002. The Court placed reliance on ***S. Satyapal Reddy v. Govt. of A.P. & Ors***[3]**,** ***M.P. Shikshak Congress & Ors. v. R.P.F. Commissioner, Jabalpur & Ors***[4]**.,** ***P. Venugopal v. Union of India***[5]**,** ***M. Karunanidhi v. Union of India***[6] and

[1]1993 (76) CLT 720 [2](1980) Supp. SCC 249 [3](1994) 4 SCC 391 [4](1999) 1 SCC 396 [5](2008) 5 SCC 1 [6]AIR (1979) SC 898

***Hoechst harmaceuticals v. State of Bihar***[7] and came to hold that there was no repugnancy. As far as question no. 5 is concerned, the High Court referred to the scheme of Articles 198 and 199, referred to the authorities in ***State of Punjab v. Satyapal***[8] and ***Burrakur Coal Co. Ltd v. Union of India***[9] and negatived the assail. As is manifest, the Court has fundamentally placed heavy reliance on earlier legislation which was given the stamp of approval by the High Court in ***Kishore Chandra Patel*** (supra).

15. Having stated how the Division Bench of the High Court of Orissa has dealt with the constitutional validity of the Orissa Act, we think it apt and definitely for the sake of convenience, to refer to the Bihar Act, challenges before the High Court and the judgment rendered by the High Court of Judicature at Patna. The Bihar Act was notified in the Gazette on 8.2.2010. Section 2 of the dictionary clause defines the Act, that is, the 1988 Act, Authorised Officer, Declaration and Offences. Section 3 deals with establishment of Special Courts. Section 4 provides for taking cognizance of cases by Special Courts. Section 7 provides the jurisdiction of the Special Courts for trial of offence. Section 8 stipulates the procedure and powers of the Special Courts. Section 9 provides for an appeal against the judgment and sentence to the High Court. Section 10 deals with transfer of cases. Sections 11 and 12 deal with the role of the presiding Judge. Chapter III of the Bihar Act deals with confiscation of property. Sections 13 to 16 are similar to the Orissa Act. Section 18 empowers the authorized officer to take possession. The proviso appended there is similar to the Orissa Act. Section 19 deals with refund of confiscated money or property. Chapter IV of the Bihar Act enumerates the miscellaneous provisions and Section 26, like the Orissa Act states as regards the overriding effect. The competent authority has framed a set of rules, namely, Bihar Special Courts Rules 2010, for short, "2010 Rules". Rule 2(f) of the 2010 Rules defines "public servant" to mean a public servant as defined within the meaning of clause (c) of Section 2 of the 1988 Act or under Section 21 of the Indian Penal Code, 1860 and including Group – A service of the Central or State Government or officers of equivalent rank in any organization specified in the explanation below clause (b) of Section 2 of the said Act who was serving under or in connection with the affairs of the State Government. Rule 6 deals with cognizance and trial by the Special Court. Rule 9 states that the State Government, in consultation with the High Court shall nominate an officer belonging to the cadre of the Bihar Superior Judicial Service, Senior Branch, who is or has been a Sessions Judge or Additional Sessions Judge to act as the authorized officer for the purposes of the Act and requires him to follow the summary procedure. Rule 13 deals with the application of CrPC and it stipulates that the provisions of the Code shall apply to the proceedings before the authorised officer insofar as they are not inconsistent with the provisions of the Act. Rule 14 provides for particulars of an application made before the Authorised Officer and Form of Notice. The said Rule provides the particulars to be mentioned while filing

[7]AIR (1983) SC 1019 [8]AIR (1969) SC 903 [9]AIR (1961) SC 954

an application under Section 13 of the Act which requires a range of information to be furnished.

16. Presently, we shall refer to the judgment rendered by the Division Bench of the High Court of Patna. It has referred to the preamble and highlighted certain aspects of the preamble and scanned the anatomy of the Bihar Act. It was contended before the High Court that the declaration made under Section 5 which brings the case of the accused under the purview of the Bihar Act to be tried by the Special Judge, exposes him to the risk of confiscation of property which the accused does not face under the 1988 Act; that when there are sufficient provisions in the CrPC pertaining to disposal of property at conclusion of the trial under Section 452, there was no justification or warrant to introduce a provision for confiscation; that no guidelines have been provided by the legislature for working of Section 5(1) and 5(2) of the 2009 Act and it is completely unguided giving total discretion to the State Government to pick and choose any particular case; that Section 5(1) suffers from unreasonable classification because certain offences covered under the 1988 Act would be tried by the Special Judge under the 1988 Act and offence defined under the Bihar Act would be tried according to the procedure which is more rigorous; that the necessity of speedy trial by itself is too vague to withstand the test of reasonable classification; that there is no *intelligible differentia* which can sustain the classification and hence, it is hostile, discriminatory and contrary to the basic tenet of Article 14 of the Constitution; that there has been excessive and unguided delegation of power to the executive and, therefore, the manner of classification to be undertaken is contrary to the constitutional scheme.

17. Resisting the aforesaid submissions, it was urged on behalf of the State that the 2009 Act was brought into existence regard being had to the rampant corruption and disproportionate assets amassed by the public servants through illegal means; that it is the obligation of the State to prosecute such persons and confiscate their ill-gotten assets; that Section 5(1) does not suffer from vice of discrimination and it withstands the test of discernible differentia and there has been no abdication of legislative function or conferment of unguided delegation of power; that making a provision for speedy trial is a facet of Article 21 of the Constitution and in the obtaining scenario to eradicate the maladies and the menace, the legislature had enacted the legislation to deal with it frontally; that the power vested under Section 5 has enough guidance and it cannot be said that it falls foul of Article 14 of the Constitution; that from the very definition of the term "offence" it is clear that it is in a different category or compartment altogether; that the non-assail of the declaration before any court would not include the High Court or the Supreme Court of India which exercises power of judicial review; that the challenge to Section 6(2) of the Act takes in its sweep the pending cases whereby making the provision effective; that it neither offends Article 20(1) nor Article 20(3) of the Constitution, for the plea that accused persons would be exposed to harsher punishment relating to confiscation which is a greater penalty that was prescribed for the offence under the

1988 Act, is unsustainable inasmuch as the Act does not alter the punishment for the offence as provided under the 1988 Act and, in any case, the confiscation proceeding is an independent proceeding to be conducted by the authorized officer and it cannot be treated as a part of the criminal proceeding; that the procedure prescribed for adjudication of the issues relating to confiscation of properties does not suffer from any arbitrariness inasmuch as the confiscation including taking over possession of the confiscated property is independent and the plea that the findings recorded by the authorized officer in every likelihood to cause prejudice and bias during the trial, is absolutely unsustainable inasmuch as the statute itself provides the exclusion of consideration of the said material and the findings during the trial.

18. Adverting to the rivalised submissions, the High Court opined that the nature of property sought to be confiscated under the Act is different and, therefore, the assail has no substance; that the provision in Section 13 of the Act and related provisions in Chapter–III cannot be faulted on account of ordinary principles of criminal jurisprudence that penalty or punishment must follow determination of guilt of the accused for confiscation, a *pro tem* one, is of a different nature; that the Act guarantees fairness to the accused by making the order of confiscation subject to an appeal before the High Court as well as subject to the final determination of guilt of the accused in the trial; that the general criticism that the procedure for confiscation invites the wrath of Article 14 of the Constitution does not deserve acceptance; and that the proceeding for confiscation is to be adjudicated by the Authorized Officer who has to be a Sessions Judge or Additional Sessions Judge and hence, there is fair and adequate protection provided for considering the case of the delinquent before passing an order of confiscation. Adverting to the likelihood of bias, the High Court opined that a trained judicial mind of a person holding post of Sessions Judge/Additional Sessions Judge is not expected to suffer from prejudice and the legislature has cautiously entrusted the confiscation proceeding to an "Authorized Officer" whereas the trial has been entrusted to the "Special Court", and that is why the words i.e. "Authorized Officer" and "Special Court" have been separately defined and the distinction is evident and it is quite clear that confiscation proceeding and criminal trial against accused of an offence are not conducted by the same judicial officer; and, therefore, the likelihood of bias is not allowed to have any room.

19. The High Court of Patna while dealing with the vice of Section 17(3) proceeded to interpret sub-section (3) of Section 17 and opined that legislature has not given a definite and fixed period of six months as the time for disposal of appeal regard being had to the Phraseology used in the provision, for it has been stipulated that an appeal preferred under sub-section (1) shall be disposed of preferably within a period of six months from the date it is preferred, and stay order, if any, passed in an appeal shall not remain in force beyond the prescribed period of disposal of appeal. The High Court has observed that the use of word "preferably" is a definite pointer that the legislature has only indicated its preference that the appeal should be

disposed of within a period of six months but it also permits disposal of the appeal beyond the period of six months and, therefore, it will not be proper to construe that the prescribed period for disposal of an appeal is only six months. As a logical corollary, it ruled that six months is not the prescribed period of disposal of appeal, but it is only desirable that the appeal should be disposed of within six months, and, accordingly, the stay order passed by the High Court will not lose its force automatically on expiry of any particular period. Placing such an interpretation, the High Court of Patna expressed the view that the said interpretation is to be preferred in order to save the provision from the vice of unreasonableness by causing undue hardship to the delinquent-appellant.

20. Dwelling on the issue of refund as contained under Section 19 is concerned, the High Court found merit in the contention advanced on behalf of the writ petitioners and observed that there can be no justification to cause any hardship or loss to the delinquent or the accused once the confiscation proceeding fails because it is the constitutional obligation of the State that it shall not act in an unreasonable manner. Being of this view, it clarified that Section 19 requires clarification by way of interpretation that ordinarily when the confiscation is modified or annulled by the High Court in an appeal or where the person affected is acquitted by the Special Court, the money or property or both shall be returned to the person affected, and for not returning the property, the State shall have to seek permission of the High Court or the Special Court as the case may be to return only the price of the property and such permission shall be granted only when the State is able to show good reasons as to why it is not possible to return the property. So far as the rate of interest of 5% *per annum* is concerned, it is clearly insufficient and hence, in case the confiscated property is not returned by showing good reasons that it is not possible to do so, the interest payable must be at the usual bank rate prevailing during the relevant period for a loan to purchase or acquire similar property and then alone the constitutionality of the said provision can be saved.

21. Dealing with the grievance relating to forceful eviction from dwelling house ordinarily occupied by the delinquent/accused prior to final determination of guilt in course of trial for the offence, as contemplated under Section 18 of the Act, the Division Bench observed that the said provision makes no distinction between the properties found fit for confiscation, for all the properties subjected to confiscation proceeding whether they are dwelling house or other kinds of property have been treated alike. Addressing to the submission that an exception should have been made in respect of a dwelling house or unit where the delinquent/accused ordinarily resides himself with or without his family, because the dwelling house meets one of the basic needs of a person and it would be arbitrary to deprive a delinquent of such basic requirement when the trial is still pending and taking note of the argument on behalf of the State that the entire confiscated property has to be treated similarly and not making of an exception for a dwelling house or unit from the provisions of Section 18 does not violate any constitutional provision, the High Court opined that

no distinction made between the two sets of properties is justified. That apart, the Court held that once the relevant purpose is to confiscate all the ill-gotten money or property, even if such property includes a dwelling house or unit also under the scheme of the Act, and if there would be any exclusion, it would, to a large extent, frustrate the object of the Act instead of subserving the purposes of the Act. It further opined that if after undergoing the reasonable procedure of confiscation proceeding, including appeal, a dwelling house or unit of the delinquent is found to be ill-gotten property which cannot be accounted for on the basis of lawful income of the delinquent, there can be hardly any justification to allow the delinquent to continue in enjoyment of such illgotten property only because the trial is still pending. The legislature having taken precautions to expedite the trial and if it is made to linger inspite of such provisions, the accused would always be at liberty to take remedial action and get the trial expedited. Being of this view, the Writ Court found that the said provision does not violate any of the facets of Articles 14 and 21 of the Constitution of India.

22. It was also urged before the High Court that the confiscation proceedings as provided under the Act is impermissible because it leaves no option to the affected person but to disclose his defence prior to holding of the trial and such compulsion upon him to disclose true state of affairs in the confiscation proceeding frustrates the right guaranteed by the Article 20(3) of the Constitution. The High Court did not find any substance in the said submission and opined that grant of opportunity in confiscation proceeding to the delinquent official cannot be construed as compelling him to be a witness against himself. It also opined that considering the nature of the two proceedings, both could be maintained together or one after another, for the order of confiscation has been made subject to a final judgment in the trial by the Special Court.

23. Dealing with an Interlocutory Application bearing No. 10468 of 2010 filed in CWJC No. 10735/2010 after dealing with the constitutional validity of the Act, the High Court expressed its unwillingness to decide the vires of the 2010 Rules which was sought to be challenged as the said I.A. was not pressed. However, the High Court observed as follows:-

> "Although we have given the liberty aforesaid but sometimes it is useful to observe certain facts in order to avoid unnecessary litigation. In respect of Bihar Special Court's Rules, 2010 a grievance was raised that Rule 12(f) envisages a procedure which is contrary to procedure prescribed for trial of warrant cases before a Magistrate which has been prescribed by Section 18(1) of the Act. It goes without saying that in case of conflict between Act of Legislature and Rules framed under the Act, the provisions of the Act will prevail. The State of Bihar is expected to take note of the aforesaid submission in its own interest and amend the relevant Rule if there is any need felt for the same."

24. Thus, the High Court interpreted certain provisions to sustain the constitutional validity of the Act and as far as the Rule is concerned observed as above, and thereafter dismissed the writ petitions.

25. We have heard Mr. A. Saran, Mr. Vinoo Bhagat, Mr. P.S. Narasimha, Mr. R.K. Dash, Mr. Rakhruddin, Mr. S.B. Upadhyaya, Mr. Neeraj Shekhar, Mr. Gaurav Agrawal, Mr. Anirudh Sanganeria, and Mr. M.P. Jha, learned counsel for the appellants and Mr. Ranjit Kumar, Mr. S.K. Padhi, learned senior counsel, Mr. Gopal Singh, Mr. Shibashish Misra and Mr. Nishant Ramakantrao Katneshwarkar, learned counsel for the respondents.

26. At the outset, we think it appropriate to mention that the learned counsel for the parties had addressed at length with regard to the issues raised before the High Court and also canvassed certain issues of law before us and we had permitted them to argue the matter from all angles. Before we enumerate the issues that have been urged before the High Court and the additional points that have been canvassed before us, it is necessary to understand the background of the legislation. We have already indicated at the beginning the purpose of enacting the legislation by the States of Odisha and Bihar and have scanned the scheme of both the Acts and also adumbrated upon the reasoning ascribed by the High Courts while upholding the constitutional validity of the enactments. Be it noted, the objects and reasons of the Orissa Act as well as that of the Bihar Act are almost similar. Therefore, we only reproduce the bjects and reasons of the Orissa Act. It reads as follows:-

> "An Act to provide for the constitution of special courts for the speedy trial of certain class of offences and for confiscation of the properties involved.
>
> WHEREAS corruption is perceived to be amongst the persons holding high political and public offices in the State of Orissa;
>
> AND, WHEREAS, investigations conducted by the agencies of the Government disclose prima facie evidence, confirming existence of such corruptions;
>
> AND WHEREAS, the Government have reasons to believe that large number of persons, who had held or are holding high political and public offices have accumulated vast property, disproportionate to their known sources of income by resorting to corrupt means;
>
> AND, WHEREAS, it is constitutional, legal and moral obligation of the State to prosecute persons involved in such corrupt practices;
>
> AND, WHEREAS, the existing courts of Special Judges cannot reasonably be expected to bring the trials, arising out of those prosecutions, to a speedy termination and it is imperative for the efficient functioning of a parliamentary democracy and the institutions created by or under the

Constitution of India that the aforesaid offenders should be tried with utmost dispatch;

AND WHEREAS, it is necessary for the said purpose to establish Special Courts to be presided over by the persons who are or have been Sessions Judge and it is also expedient to make some procedural changes whereby avoidable delay in the final determination of the guilt or innocence, of the persons to be tried, is eliminated without interfering with the right to a fair trial."

27. The objects and reasons and various provisions of the Act which we have referred to in course of our narration would show that there is immense emphasis on corruption by the people holding high political and public offices. The stress is on accumulation of wealth disproportionate to the known sources of their income by resorting to corrupt practices. Corruption at high levels has been taken note of by this Court in many a judgment. This Court has also on the basis of reports of certain Commissions/Committees, from time to time, has painfully addressed to the burning issue of corruption. In ***Manoj Narula v. Union of India***[10], the Constitution Bench harping on the concept of systemic corruption, has been constrained to state that systemic corruption and sponsored criminalisation can corrode the fundamental core of elective democracy and, consequently, the constitutional governance. A democratic republic polity hopes and aspires to be governed by a government which is run by the elected representatives who do not have any involvement in serious criminal offences or offences relating to corruption, casteism, societal problems, affecting the sovereignty of the nation and many other offences.

28. In ***Niranjan Hemchandra Sashittal v. State of Maharashtra***[11], the Court was compelled to say that corruption is not to be judged by degree, for corruption mothers disorder, destroys societal will to progress, accelerates undeserved ambitions, kills the conscience, jettisons the glory of the institutions, paralyses the economic health of a country, corrodes the sense of civility and mars the marrows of governance. The Court further observed that immoral acquisition of wealth destroys the energy of the people believing in honesty, and history records with agony how they have suffered; and the only redeeming fact is that collective sensibility respects such suffering as it is in consonance with the constitutional morality. The emphasis was on intolerance of any kind of corruption bereft of its degree.

29. While dealing with the constitutional validity of Section 6-A of the Delhi Special Police Establishment Act,1946, the Constitution Bench in ***Subramanian Swamy v. CBI***[12], clearly stated that corruption is an enemy of the nation and tracking down corrupt public servants and punishing such persons is a necessary mandate of the 1988 Act and it is difficult to justify the classification which has been made in Section 6-A because the goal of law in the 1988 Act is to meet corruption

[10](2014) 9 SCC 1 [11](2013) 4 SCC 642 [12](2014) 8 SCC 682

cases with a very strong hand and all public servants are warned through such a legislative measure that corrupt public servants have to face very serious consequences.

30. We have highlighted the facet of corruption and the object and reasons of the Orissa Act which basically aims to curb corruption at high places and in the course of hearing, it has been urged by the learned counsel for both the States that corruption at higher levels is required to be totally repressed, for it destroys the fiscal health of the society and it hampers progress. The learned counsel for the appellants have submitted that there cannot be any cavil over the issue that corruption should be hindered from all angles, but when the State legislature brings a new law into existence despite an earlier law, that is, the 1988 Act, the special legislation has to withstand close scrutiny and satisfy the test that is warranted under the constitutional parameters. To elaborate, highlighting on the existing scene of corruption the State legislature or any legislature cannot be allowed to introduce a law which is not constitutionally permissible.

31. The learned counsel appearing for the appellants have raised many a submission and their arguments can be summaried as follows :-

(A) The Orissa Act has been introduced in the assembly as a money bill whereas it does not remotely have any characteristics of a money bill and hence, it violates the mandate of Article 199 of the Constitution.

(B) The State legislature does not have the authority to make provisions for establishment of Special Courts for the offences provided under the Central Act regard being had to the language employed in Article 247 of the Constitution and hence, it suffers from the vice of the said constitutional provision.

(C) The assent obtained from the President of India, the same being imperative, is only in respect of few provisions and not for all the provisions of the Orissa Act and, therefore, it suffers from substantial illegality which has made the Act unconstitutional.

(D) The provisions contained in the Orissa Act cover many a range and sphere that come within the ambit and sweep of the Prevention of Money Laundering Act, 2002 and has encroached into legislation in the occupied field. That apart, there is inherent inconsistency between the 1988 Act and the Orissa Act and that allows enough room for repugnancy, as is understood within the conceptual sweep of Article 254 (2) of the Constitution, to set in.

(E) The State legislation makes a distinction between the other offences under Section 13 and 13(1)(e) without any *intelligible differentia* between the two categories of offences and in the absence of any justifiable classification test, the provision is *ultra vires* the Article 14 of the Constitution.

(F) The corruption on which the fulcrum of argument of the State rests for bringing such a legislation is impermissible inasmuch as corruption is an all India phenomenon and in other States, similarly situated persons are tried under the 1988 Act, but in Odisha they are tried under the special provisions for no manifest reason.

(G) The Orissa Act does not define "high political offices" and "high public offices" but an attempt has been made to define the same in the Rules, but the Rules cannot stand as pillars to support the constitutional validity of the legislation. That apart, these terms are extremely vague and leave enough room to the executive to adopt any kind of discrimination which is impermissible.

(H) Section 5 of the Orissa Act deals with declaration and said provision confers wide and untrammelled discretion and unbridled power on the executive to choose a particular person or allow the executive to adopt pick and choose method thereby clearly inviting the frown of Article 14.

(I) The provisions in the Orissa Act provide for confiscation at the pre-trial stage and eventually at pre-conviction stage which is extremely harsh and, in fact, it takes away the properties of a citizen without any compensation thereby it violates Article 300A of the Constitution.

(J) The concept of confiscation in such a case is confiscatory in nature and, therefore, it is extremely arbitrary and unreasonable. That apart, the confiscation of the properties including the dwelling house disrobes a person from living with dignity having basic requirement of life and hence, it offends Article 21 of the Constitution. The proviso which carves out an exception to enable a delinquent officer to retain the dwelling house on payment of the market price is in a way deceptive inasmuch as all the properties and bank accounts are seized it is well-nigh impossible to offer the market price and the legislature has not kept in view that the law does not envisage an impossible act to be done. In essence, the criticism is that the proviso does not save the provisions from being offensive of Article 21 of the Constitution.

(K) In the proceedings for confiscation, the accused is bound to disclose all his defence at the pre-trial stage and that ultimately plays foul of Article 20(3) of the Constitution and also Article 21 which encompasses a fair trial and does not tolerate any violation of the same.

(L) The accused persons against whom cases have been registered under the 1988 Act are compelled to be tried under the present Orissa Act as a consequence of which they have to face a pre-trial confiscation which was not there in the 1988 Act and that clearly violates the basic tenet of Article 20(1) of the Constitution, for the provisions of the Act cannot be allowed to operate retrospectively when it imposes a different kind of punishment.

(M) The mandate by the legislature in Section 17 that an order of stay passed by the appellate court, that is, the High Court, shall remain in force for a period of three months and would stand automatically vacated, is an encroachment on the power of court proceedings and there can be no shadow of doubt that such a provision creates a dent in the concept of power of judicial review, which is constitutionally not allowable.

(N) The provision contained in Section 19 of the Orissa Act which pertains to payment of amount with five per cent interest *per annum* when the State Government is not in a position to return the property and the value of the property has to be on the date of confiscation, is absolutely arbitrary and unreasonable which clearly invites the discomfort of Article 14 and also clearly violates Article 300A of the Constitution.

(O) The reason ascribed to classify the persons holding high public office or high political office on the foundation that there is a necessity for speedy trial is absolutely no justification because there has to be speedy trial in every case.

32. Resisting the aforesaid submissions and defending the judgment of the High Court, learned counsel for the State of Odisha has submitted as follows:-

(I) The Bill was introduced in the legislature as a money bill, regard being had to the confiscation of disproportionate assets by way of interim measure and various other aspects and, in any case, the introduction of such a bill as a money bill would not invalidate the legislation and the High Court is justified in placing reliance upon Article 212 of the Constitution. Emphasis is laid on legislative independence on this score. (II) The interpretation placed by the appellant on Article 247 is absolutely incorrect because the said Article does not enjoin that the Parliament alone in all circumstances can provide for additional courts for carrying out the provisions of the Central Act. That apart, in the instant case, the Special Courts are established after obtaining the assent from the President and, therefore, the provision for establishing the Special Courts by the State Government in consultation with the High Court does not become unconstitutional.

(III) The submission that the assent has not been obtained in respect of all the provisions of the Orissa Act and, therefore, the Orissa Act is invalid and cannot withstand scrutiny, is absolutely unsustainable, for the entire enactment with notes were sent for the assent of the President and the same has been given due assent by the President as required under the Constitution.

(IV) The submission that the provisions of the Orissa Act are repugnant to other enactment as the provisions encroach upon the offences under the Acts, namely, the Prevention of Money Laundering Act, 2002, as amended in 2009, is totally untenable as the sphere of operation is altogether different.

(V) The submission that there is no rationale to differently try the offence punishable under Section 13(1) (e) separating it from other offences under Section

13 in the backdrop of Article 14, is absolutely unacceptable inasmuch as there is a gulf of difference between the two categories of offences as the offence under Section 13(1) (e) relates to amassing of wealth disproportionate to the income of the person.

(VI) The stand that the Act does not define "high political office" and "high public office" and hence, confers unfettered discretion on the executive is sans substance, for the said words are well understood and really do not allow any room for exercise of any arbitrary power. Quite apart from that, the State Government has framed the rules which supplement the Act. In this backdrop, the question of any discrimination taking place, as argued, is inconceivable.

(VII) The principle of speedier disposal of corruption cases at high levels, especially instituted under Section 13(1)(e) of the 1988 Act, is definitely a ground to sustain the provisions of the Orissa Act.

(VIII) The plea that provisions, namely, Sections 5 and 6, and the provisions pertaining to confiscation being irrational and discriminatory, are violative of Article 14, is wholly unacceptable inasmuch as the classification in respect of offences, that is, Section 13(1)(a) to (1)(e), stand on a different footing and the *intelligible differentia* is clearly demonstrable. The attack on the provisions on the plank of unbridled conferment of power on the executive to pick and choose pertaining to the declaration is on an erroneous understanding of the provision, for the provision has to be read in an apposite manner to convey the meaning that the State Government has extremely limited discretion only to see whether the offence falls under Section 13(1)(e) or not and the moment a person covered under the Act is booked for the offence under Section 13(1)(e), the State Government has no further discretion than to make a declaration to transfer the case to the Special Court.

(IX) The challenge to the confiscatory proceeding which is *'pro tem'* in nature, is devoid of any merit, for it is constitutionally permissible inasmuch as acquisition of property by the delinquent is associated with ill-gotten money and has no connection with the property which is acquired by the person from acceptable component of his earnings. The submission that retention of a dwelling house on payment of market price is extremely harsh and, in fact, it effectively affects the right to life as is understood within the broader umbrella of Article 21 of the Constitution is based on erroneous premises.

(X) The argument that the accused persons being tried in respect of other offences under the 1988 Act do not face the situation of interim confiscation, whereas the accused persons facing trial under the Orissa Act face the confiscation proceedings which is arbitrary has no legs to stand upon if the classification as regards offences and the forum is valid, for that, as a natural corollary, would structurally protect the interim confiscation.

(XI) The assailment as regards the retrospective applicability is concerned, may, on a first blush, look quite attractive but on a keener scrutiny it has to pale into insignificance. The plea that it plays foul of Article 20(1) of the Constitution is absolutely unsound.

(XII) The provisions relating to confiscation are absolutely guided and, in fact, a judicial officer of the rank of Sessions Judge or Additional Sessions Judge is nominated as the authorised officer and there is an appeal provided from his order which would show that the confiscation is not done at the whim and caprice of the executive but after affording adequate opportunity to the delinquent officer. Therefore, it is not hit by Article 14 of the Constitution.

(XIII) The criticism that the provision for order of stay passed by the appellate court, that is, the High Court, shall remain in force for a period of three months may be treated as a directory provision so as to require the court to dispose of the appeal within three months; and the order of stay, if any, passed in an appeal shall not remain in force beyond the prescribed period of disposal of appeal.

(XIV) The challenge to Section 19 of the Orissa Act which pertains to release of the confiscated property after the release order and further provision that if it is not possible to return, to pay the value with five per cent interest *per annum* has to be appropriately understood, for this can only happen in a very rarest occasion and the words used in the provision are to be appropriately understood because of some reason beyond control like due to natural disaster or some other calamity; and not because of any appropriation of the property by the State Government. In essence, the submission is, the said provision can be read down to sustain its constitutional validity.

33. First, we shall take up the issue pertaining to the introduction of the Bill as a money bill in the State legislature. Mr. Vinoo Bhagat, learned counsel appearing for some of the appellants, has laid emphasis on the said aspect. Article 199 of the Constitution, defines Money Bills. For our present purpose, sub-article (3) of Article 199 being relevant is reproduced below:-

> "(3). If any question arises whether a Bill introduced in the Legislature of a State which has a Legislative Council is a Money Bill or not, the decision of the Speaker of the Legislative Assembly of such State thereon shall be final."

We have extracted the same as we will be referring to the authorities as regards interpretation of the said sub-article.

34. Placing reliance on Article 199, learned counsel would submit that the present Act which was introduced as a money bill has remotely any connection with the concept of money bill. It is urged by him that the State has made a Sisyphean endeavour to establish some connection. The High Court to repel the challenge had placed reliance upon Article 212 which stipulates that the validity of any

proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.

35. Learned counsel for the appellants has drawn inspiration from a passage from ***Special Reference No. 1 of 1964***[13], wherein it has been held that Article 212(1) lays down that the validity of any proceedings in the legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure and Article 212(2) confers immunity on the officers and members of the legislature in whom powers are vested by or under the Constitution for regulating procedure or the conduct of usiness, or for maintaining order, in the legislature from being subject to the jurisdiction of any court in respect of the exercise by him of those powers. The Court opined that Article 212(1) seems to make it possible for a citizen to callin question in the appropriate Court of law the validity of any proceedings inside the Legislative Chamber if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinised in a Court of law, though such scrutiny is prohibited if the complaint against the procedure is not more than that the procedure was irregular. Thus, the said authority has made a distinction between illegality of procedure and irregularity of procedure.

36. Our attention has also been drawn to certain paragraphs from the Constitution Bench decision in ***Raja Ram Pal v. Hon'ble Speaker, Lok Sabha and Others***[14]. In the said case, in paragraphs 360 and 366, it has been held thus:-

> "360. The question of extent of judicial review of parliamentary matters has to be resolved with reference to the provision contained in Article 122(1) that corresponds to Article 212 referred to in *M.S.M. Sharma v. Dr. Shree Krishna Sinha*, AIR 1960 SC 1186 [*Pandit Sharma (II)]*. On a plain reading, Article 122(1) prohibits "the validity of any proceedings in Parliament" from being "called in question" in a court merely on the ground of "irregularity of procedure". In other words, the procedural irregularities cannot be used by the court to undo or vitiate what happens within the four walls of the legislature. But then, "procedural irregularity" stands in stark contrast to "substantive illegality' which cannot be found included in the former. We are of the considered view that this specific provision with regard to check on the role of the judicial organ vis-à-vis proceedings in Parliament uses language which is neither vague nor ambiguous and, therefore, must be treated as the constitutional mandate on the subject, rendering unnecessary search for an answer elsewhere or invocation of principles of harmonious construction.
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> 366. The touchstone upon which parliamentary actions within the four walls of the legislature were examined was both the constitutional as well as

[13]AIR 1965 SC 745 [14](2007) 3 SCC 184

substantive law. The proceedings which may be tainted on account of substantive illegality or unconstitutionality, as opposed to those suffering from mere irregularity thus cannot be held protected from judicial scrutiny by Article 122(1) inasmuch as the broad principle laid down in *Bradlaugh*, (1884) 12 QBD 271 : 53 LJQB 290 : 50 LT 620, acknowledging exclusive cognizance of the legislature in England has no application to the system of governance provided by our Constitution wherein no organ is sovereign and each organ is amenable to constitutional checks and controls, in which scheme of things, this Court is entrusted with the duty to be watchdog of and guarantor of the Constitution."

37. In this regard, we may profitably refer to the authority in ***Mohd. Saeed Siddiqui v. State of Uttar Pradesh and another***[15], wherein a three-Judge Bench while dealing with such a challenge, held that Article 212 precludes the courts from interfering with the presentation of a Bill for assent to the Governor on the ground of non-compliance with the procedure for passing Bills, or from otherwise questioning the Bills passed by the House, for proceedings inside the legislature cannot be called into question on the ground that they have not been carried on in accordance with the Rules of Business. Thereafter, the Court referring to Article 199(3) ruled that the decision of the Speaker of the Legislative Assembly that the Bill in question was a Money Bill is final and the said decision cannot be disputed nor can the procedure of the State Legislature be questioned by virtue of Article 212. The Court took note of the decision in ***Raja Ram Pal*** (supra) wherein it has been held that the proceedings which may be tainted on account of substantive or gross irregularity or unconstitutionality are not protected from judicial scrutiny. Eventually, the Court repelled the challenge.

38. In our considered opinion, the authorities cited by the learned counsel for the appellants do not render much assistance, for the introduction of a bill, as has been held in ***Mohd. Saeed Siddiqui*** (supra), comes within the concept of "irregularity" and it does come with the realm of substantiality. What has been held in the ***Special Reference No. 1 of 1964*** (supra) has to be appositely understood. The factual matrix therein was totally different than the case at hand as we find that the present controversy is wholly covered by the pronouncement in ***Mohd. Saeed Siddiqui*** (supra) and hence, we unhesitatingly hold that there is no merit in the submission so assiduously urged by the learned counsel for the appellants.

39. The next issue pertains to understanding of ambit and sweep of Article 247 of the Constitution. The said Article reads as follows:-

> **"Article 247. Power of Parliament to provide for the establishment of certain additional courts**.—Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List."

[15](2014) 11 SCC 415

40. Relying on the said constitutional provision, learned counsel has proponed that the Article empowers the Parliament to provide for establishment of certain additional courts and that too for the better administration of laws made by Parliament. He has contended that no part of the Constitution confers power on State legislature to create additional courts for administering central laws and, therefore, the Orissa Act is *ultra vires* Article 247 of the Constitution. He has referred to Article 366(10) of the Constitution to buttress the proposition that courts can be established in respect of central laws only by the Parliament and not by the State legislature, for the said Article denudes the State legislature the competence to make laws and create additional courts for administering laws made by the Parliament.

41. The aforesaid submission has to be carefully scrutinised. The Article is not to be understood the way it is put forth. Recently, in ***Madras Bar Association v. Union of India and another***[16]**,** a contention was advanced by the Union of India, respondent therein, that Article 247 empowers Parliament to establish additional courts for better administration in respect of laws passed under List I of the Seventh Schedule of the Constitution. After reproducing Article 247, the Constitution Bench noted the following submissions which throw some light:-

> "Referring to the above provision, it was the assertion of the learned counsel for the respondents, that power was expressly vested with Parliament to establish additional courts for better administration of laws. It was submitted that this was exactly what Parliament had chosen to do while enacting the NTT Act. Referring to the objects and reasons, indicating the basis of the enactment of the NTT Act, it was the categorical assertion at the hands of the learned counsel, that the impugned enactment was promulgated with the clear understanding that NTT would provide better adjudication of legal issues arising out of direct/indirect tax laws."

42. Be it noted, in the said case, the constitutional validity of the National Tax Tribunal Act, 2005 was called in question on many a ground. One of the grounds that was urged by the petitioner therein was that the appellate power of the High Court in respect of substantial question of law could not have been taken away by the Parliament. Defending the legislation, the respondents apart from other grounds, had also laid emphasis on Article 247 and we have reproduced the paragraph from the judgment. It has to be borne in mind that this Court was dealing with the abolition of the appellate jurisdiction enshrined under Article 260A of the Income Tax Act, 1961 by the National Tax Tribunal Act, 2005 which had not taken away the power of judicial review. The submission on behalf of the Union of India was that its power to establish the courts is created under a statute. Keeping that in view, we have to focus on the 1988 Act. In the 1988 Act, under Section 3 special Judges stand appointed by the concerned States to deal with the offences and the State Governments in consultation with the High Court appoint requisite special Judges. Section 3 of the 1988 Act provides that the Central Government or the State

[16](2014) 10 SCC 1

Government may, by notification in the Official Gazette, appoint as many special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try any offence punishable under this Act; and any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a) of sub-section (1) of the said Section.

43. The present Orissa Act which specifically deals with offences under Section 13(1)(e) and provides for Special Courts for the trial of the said offences has got the assent of the President. It is to be understood that under the 1988 Act the State had the authority to appoint special Judges in respect of all the offences. Presently, one part of the offence has been carved out and after obtaining assent Special Courts have been established. In view of the fact situation, it does not violate Article 247. That apart, the language employed in Article 247 does not take away the jurisdiction of the State legislature for constitution of courts. Entry 11-A of List III of the Seventh Schedule, which provides for "administration of Justice; constitution and organisation of all courts, except the Supreme Court and the High Courts", has been transferred from Entry 3 of List I by the 42nd Constitution (Amendment) Act, 1976 in order to make it a concurrent power. It was opined in ***O. N. Mohindroo v. The Bar Council Of Delhi & Ors***[17] that it was within the exclusive power of the State. After the amendment both Parliament and the State legislature are empowered under the Constitution to give the High Court general power including territorial jurisdiction and also take away jurisdiction and powers from the High Court which have been conferred by the statutory law by enacting appropriate legislation which is referable to administration of justice. But, it cannot take away the power specifically conferred on the High Courts under the Constitution. This principle has been stated in the following terms in ***Jamshed N. Guzdar v. State of Maharashtra***[18]:-

> "In the light of the various decisions referred to above, the position is clear that the expression "administration of justice" has wide amplitude covering conferment of general jurisdiction on all courts including High Court except the Supreme Court under Entry 11-A of List III. It may be also noticed that some of the decisions rendered dealing with Entry 3 of List II prior to 3-1-1977 touching "administration of justice" support the view that conferment of general jurisdiction is covered under the topic "administration of justice". After 3-1-1977 a part of Entry 3 namely "administration of justice" is shifted to List III under Entry 11-A. This only shows that the topic "administration of justice" can now be legislated both by the Union as well as the State Legislatures. As long as there is no Union legislation touching the same topic, and there is no inconsistency between the Central legislation and State legislation on this topic, it cannot be said that the State Legislature had no competence to pass the 1987 Act and the 1986 Act."

44. Interpreting Entry 11-A this Court in ***the Special Courts Bill, 1978***[19] has held that Parliament has concurrent power to set up Special Courts for the trial of

[17]AIR 1968 SC 888 [18](2005) 2 SCC 591 [19](1979) 1 SCC 380

offences of special class. In this regard, we may reproduce the relevant passage from the said authority:-

> "44. The challenge to the legislative competence of Parliament to provide for the creation of Special Courts is devoid of substance. Entry 11-A of the Concurrent List relates to "Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Court". By virtue of Article 246 (2), Parliament has clearly the power to make laws with respect to the constitution and organisation, that is to say, the creation and setting up of Special Courts. Clause 2 of the Bill is therefore within the competence of the Parliament to enact."

45. Be it noted that a contention was raised that Parliament could not have created Special Courts but the Court repelled the said submission and accepted the contention that such a power exists with Parliament in view of Articles 138(1) and 246(1) and Entries 77, 78 and 99 of List I of the Seventh Schedule and Entry 11-A of List III and the courts can be created by the State legislature as well as by the Parliament. As has been indicated earlier, Section 3 of the 1988 Act empowers the State Government to constitute special courts and when a category of offence has been segregated and for the said purpose the Orissa Act has been enacted and assent has been taken, the power to constitute special courts cannot be found to be fallacious.

46. Under the scheme of the Constitution, the courts as established by the State are to administer the laws made by the Parliament as well as by the State legislature and have the obligation to carry the administration of justice but the same is subject to Entry 77 and Entry 78 of List I. Entry 77 and Entry 78 of List I read as follows:-

> "Entry 77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court. Entry 78. Constitution and organization (including vacations) of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practise before the High Courts."

47. Entry 46 of List III in this context needs to be reproduced:-

> "Entry 46. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List."

Entry 65 of List II is worth referring to :-

> "Entry 65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List."

48. The aforesaid entries make it clear that as regards jurisdiction and powers of the Supreme Court, the Parliament has exclusive legislative competency and as far as the jurisdiction other than Supreme Court and the High Courts is concerned, the

power can be exercised by the Union and the State legislature. The purpose of Article 247, which commences with a *non-obstante* clause, is to confer power on the Parliament to create additional courts for the better administration of a particular Union law, but it cannot be said that the State cannot make laws for adjudication and administration of justice in respect of a parliamentary legislation more so, when initially power was conferred under Section 3 of the 1988 Act and assent has been accorded for establishment of Special Courts for adjudication of the offence. Let it be made clear that we have so answered regard being had to the offence being carved out and a different category of Special Courts are constituted to try the said offence. It does not take away the power already conferred under Section 3 of the 1988 Act.

49. The next aspect we shall dwell upon pertains to repugnancy and the nature of "assent" obtained by the State Government from the President under Article 254(2) of the Constitution. The submission of the learned counsel for the appellants is that though the State legislature reserved it for presidential assent, yet assent has not been taken in respect of the entire Orissa Act and also in respect of other laws, namely, the Prevention of Money-Laundering Act, 2002, etc. as a consequence of which it will ultimately lead to a situation of anomaly and, therefore, there is repugnancy in respect of existing legislations in similar fields enacted by the Parliament and the Orissa Act.

50. Article 254 deals with inconsistency between laws made by the Parliament and laws made by the Legislature of States. Article 254(2) deals with laws made by the State legislature in respect of the matters enumerated in the Concurrent List. The issue of repugnancy arises when the subjects come within List III of the Seventh Schedule. In ***Hoechst Pharmaceuticals Ltd. & Another v. State of Bihar and Others***[20], the Court referred to the authority in ***Deep Chand v. The State of Uttar Pradesh & Ors.***[21] wherein Subba Rao, J., analysing the ratio of earlier authorities, had taken note of three tests evolved by Nicholas in his "Australian Constitution" as regards inconsistency or repugnancy. The three tests are (i) there may be inconsistency in the actual terms of the competing statutes; (ii) though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive Code; and (iii) even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject-matter. The Court had placed reliance upon ***Ch. Tika Ramji & Ors. v. The State of Uttar Pradesh & Ors.***[22].

51. Thereafter, the Court proceeded to state that:-

> "The question of repugnancy under Article 254(1) between a law made by Parliament and a law made by the State Legislature arises only in case both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List, and there is direct conflict between the

[20] AIR 1983 SC 1019 = 1983 (4) SCC 45 [21](1959) Supp. 2 SCR 8 [22](1956) SCR 393

two laws. It is only when both these requirements are fulfilled that the State law will, to the extent of repugnancy become void. Article 254(1) has no application to cases of repugnancy due to overlapping found between List II on the one hand and List I and List III on the other. If such overlapping exists in any particular case, the State law will be ultra vires because of the non-obstante clause in Article 246(1) read with the opening words "subject to" in Article 246(3). In such a case, the State law will fail not because of repugnance to the Union law but due to want of legislative competence. It is no doubt true that the expression "a law made by Parliament which Parliament is competent to enact" in Article 254(1) is susceptible of a construction that repugnance between a State law and a law made by Parliament may take place outside the concurrent sphere because Parliament is competent to enact law with respect to subjects included in List III as well as 'List I' But if Article 254(1) is read as a whole, it will be seen that it is expressly made subject to clause (2) which makes reference to repugnancy in the field of Concurrent List-in other words, if clause (2) is to be the guide in the determination of scope of clause (1), the repugnancy between Union and State law must be taken to refer only to the Concurrent field. Article 254(1) speaks of a State law being repugnant to (a) a law made by Parliament or (b) an existing law."

52. Thus, it is settled in law that the State law may become repugnant when there is a direct conflict between the two provisions. In this regard, reference to the authority in ***Engineering Kamgar Union v. Electro Steels Castings Ltd. and Another***[23] would be instructive. It has been held therein that recourse to the said principles, however, would be resorted to only when there exists direct conflict between two provisions and not otherwise. Once it is held that the law made by the Parliament and the State Legislature occupy the same field, the subsequent legislation made by the State which had received the assent of the President of India indisputably would prevail over the parliamentary Act when there exists direct conflict between two enactments. It has been further observed that both the laws would ordinarily be allowed to have their play in their own respective fields; however, in the event there exists any conflict, the parliamentary Act or the State Act shall prevail over the other depending upon the fact as to whether the assent of the President has been obtained therefore or not.

53. There can be a situation where two enactments come into the field where obedience to each of them may be possible without disobeying the other. Repugnancy may however, come in if one statute commands anything to be done and the other enactment may say the contrary and that even both the laws cannot co-exist together. In such cases, as has been ruled in ***M.P. AIT Permit Owners Association and Another v. State of M.P.***[24], the law made by Parliament shall

[23](2004) 6 SCC 36 [24](2004) 1 SCC 320

prevail over the State law. Same principle has been reiterated in ***Govt. of A.P. and Another v. J.B. Educational Society and Another***[25].

54. Thus viewed, repugnancy arises when there is a clear and direct inconsistency between the central law and the State law and such inconsistency is irreconcilable. It is because in such a situation there is a direct collision with the Central Act or brings about a situation where obeying one would lead to disobeying the other. In ***Dharappa v. Bijapur Coop. Milk Producers Societies Union Ltd***.[26] it has been spelt out that clause (2) of Article 254, however, provides that where a law made by the legislature of a State with respect to one of the matters enumerated in the Concurrent List, contains any provision repugnant to an existing law with respect to that matter, then, the law so made by the legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State. The question of repugnancy can arise only with reference to a legislation made by Parliament falling under the Concurrent List or an existing law with reference to one of the matters enumerated in the Concurrent List. If a law made by the State Legislature covered by an entry in the State List incidentally touches any of the entries in the Concurrent List, Article 254 is not attracted. But where a law covered by an entry in the State List (or an amendment to a law covered by an entry in the State List) made by the State Legislature contains a provision, which directly and substantially relates to a matter enumerated in the Concurrent List and is repugnant to any provision of an existing law with respect to that matter in the Concurrent List then such repugnant provision of the State law will be void. Such a provision of law made by the State Legislature touching upon a matter covered by the Concurrent List, will not be void if it can coexist and operate without repugnancy with the provisions of the existing law.

55. It needs no special emphasis to state that the issue of epugnancy would also arise where the law made by the Parliament and the law made by the State legislature occupy the same field. It has been so held in ***Sitaram & Bros. v. State of Rajasthan***[27]**.**

56. In this context, reference to ***M.P. Shikshak Congress*** (supra) would be fruitful. While repelling the plea of repugnancy, it has been held that under Article 254(1) of the Constitution, if any provision of a law made by the legislature of a State is repugnant to any provision of a law made by the Parliament, which Parliament is competent to enact, then subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the legislature of such State shall prevail and the law made by the legislature of the State shall, to the extent of the repugnancy, be void. The ordinary rule, therefore, is that when both the State Legislature as well as Parliament are competent to enact a law on a given subject, it is the law made by Parliament which will prevail. The exception which is carved out is under sub-clause (2) of Article 254. Under this sub-clause (2), where a law made by the legislature of a State with respect to one of the matters enumerated

[25](2005) 3 SCC 212 [26](2007) 9 SCC 109 [27]1995 (1) SCC 257

in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament, then the law so made by the legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in the State.

57. Another aspect with regard to repugnancy and the validity of the State legislation may be stated. If there is a parliamentary legislation and the law enacted by the State legislation can co-exist and operate where one Act or the other is not available, then there is no difficulty in making the State law on the fact situation available. It has been so held in ***EID Parry (I) Ltd. v. G. Omkar Murthy and Others*** [28] and ***Saurashtra Oil Mills Assn. v. State of Gujarat***[29]. When a situation crops up before the court pertaining to applicability of a parliamentary legislation and any enactment or law enacted by the State legislature for consideration, the effort of the court should be to see that the provisions of both the Acts are made applicable, as has ruled in ***Imagic Creative (P) Ltd. v. CCT***[30].

58. Having stated the proposition where and in which circumstances the principle of repugnancy would be attracted and the legislation can be saved or not saved, it is necessary to focus on clause (2) of Article 254. In ***Hindustan Times v. State of U.P.***[31], after referring to the earlier judgments, it has been held that clause 254(2) carves out an exception and, that is, if the Presidential assent to a State law which has been reserved for his consideration is obtained under Article 200, it will prevail notwithstanding the repugnancy to an earlier law of the Union. The relevant passage of the said authority is extracted below:-

> "As noticed hereinbefore, the State of Uttar Pradesh intended to make a legislation covering the same field but even if the same was to be made, it would have been subject to the parliamentary legislation unless assent of the President of India was obtained in that behalf. The State executive was, thus, denuded of any power in respect of a matter with respect whereto Parliament has power to make laws, as its competence was limited only to the matters with respect to which the legislature of the State has the requisite legislative competence. Even assuming that the matter relating to the welfare of the working journalists is a field which falls within Entry 24 of the Concurrent List, unless and until a legislation is made and assent of the President is obtained, the provisions of the 1955 Act and the Working Journalists (Fixation of Rates and Wages) Act, 1958 would have prevailed over the State enactment."

59. The issue in the instant case is that the State Government had not complied with the requisite procedure for obtaining the assent of the President. The criticism advanced by the learned counsel for the appellants is that in the letter written by the State Government to the competent authority for obtaining assent only certain provisions of the Orissa Act were mentioned but there is no reference to other provisions and certain other legislations, which also cover the same field. To bolster

[28](2001) 4 SCC 68 [29](2002) 3 SCC 202 [30](2008) 2 SCC 614 [31](2003) 1 SCC 591

the said submission, reliance has been placed on the Constitution Bench decision in ***Kaiser-I-Hind (P) Ltd. v. National Textile Corpn. (Maharashtra North) Ltd.***[32]. In the said case, the majority dealt with the jurisdiction of the court is to see the record and nature of the assent sought by the State. The Court scanned the anatomy of Article 254(2) and after analyzing the same, opined that it can be stated that for the State law to prevail, the requirements that are to be satisfied are; (a) law made by the legislature of a State should be with respect to one of the matters enumerated in the Concurrent List; (b) it contains any provision repugnant to the provision of an earlier law made by Parliament or an existing law with respect to that matter; (c) the law so made by the legislature of the State has been reserved for the consideration of the President; and (d) it has received "his assent".

60. After so stating, the Court proceeded to lay down as follows:-

> "14. In view of the aforesaid requirements, before obtaining the assent of the President, the State Government has to point out that the law made by the State Legislature is in respect of one of the matters enumerated in the Concurrent List by mentioning entry/entries of the Concurrent List and that it contains provision or provisions repugnant to the law made by Parliament or existing law. Further, the words "reserved for consideration" would definitely indicate that there should be active application of mind by the President to the repugnancy pointed out between the proposed State law and the earlier law made by Parliament and the necessity of having such a law, in the facts and circumstances of the matter, which is repugnant to a law enacted by Parliament prevailing in a State. The word "consideration" would manifest that after careful thinking over and due application of mind regarding the necessity of having State law which is repugnant to the law made by Parliament, the President may grant assent. This aspect is further reaffirmed by use of the word "assent" in clause (2), which implies knowledge of the President to the repugnancy between the State law and the earlier law made by Parliament on the same subject-matter and the reasons for grant of such assent. The word "assent" would mean in the context as an expressed agreement of mind to what is proposed by the State.
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> 20. ...As discussed above before grant of the assent, consideration of the reasons for having such law is necessary and the consideration would mean consideration of the proposal made by the State for the law enacted despite it being repugnant to the earlier law made by Parliament on the same subject. If the proposal made by the State is limited qua the repugnancy of the State law and law or laws specified in the said proposal, then it cannot be said that the assent was granted qua the repugnancy between the State law and other laws for which no assent was sought for. Take for illustration — that a particular provision, namely, Section 3 of the State law is

[32](2002) 8 SCC 182

repugnant to enactment *A* made by Parliament; other provision, namely, Section 4 is repugnant to some provisions of enactment *B* made by Parliament and Sections 5 and 6 are repugnant to some provisions of enactment *C* and the State submits proposal seeking "assent" mentioning repugnancy between the State law and provisions of enactments *A* and *B* without mentioning anything with regard to enactment *C*. In this set of circumstances, if the assent of the President is obtained, the State law with regard to enactments *A* and *B* would prevail but with regard to *C*, there is no proposal and hence there is no "consideration" or "assent". Proposal by the State pointing out repugnancy between the State law and of the law nacted by Parliament is a *sine qua non* for "consideration" and "assent". If there is no proposal, no question of "consideration" or "assent" arises. For finding out whether "assent" given by the President is restricted or unrestricted, the letter written or the proposal made by the State Government for obtaining "assent" is required to be looked into."

61. Proceeding further, the Court placed reliance on ***P.N. Krishna Lal v. Govt. of Kerala***[33] and ***Hoechst Pharmaceuticals Ltd.*** (supra) and ruled that it cannot be said that the High Court committed any error in looking at the file of the correspondence Ext. F collectively for finding out — for what purpose "assent" of the President to the extension of Acts extending the duration of the Bombay Rent Act was sought for and given. After so stating, the Court observed:-

"29. We further make it clear that granting of assent under Article 254(2) is not exercise of legislative power of the President such as contemplated under Article 123 but is part of the legislative procedure. Whether procedure prescribed by the Constitution before enacting the law is followed or not can always be looked into by the Court.

30. Finally, we would observe that the challenge of this nature could be avoided if at the commencement of the Act, it is stated that the Act has received the assent with regard to the repugnancy between the State law and specified Central law or laws."

62. In this regard, we may extract a passage from ***P.N. Krishna Lal*** (supra) wherein the Court, after referring to the decision in ***Gram Panchayat, Jamalpur v. Malwinder Singh***[34] ruled that:-

"...it is clear that this Court did not intend to hold that it is necessary that in every case the assent of the President in specific terms had to be sought and given for special reasons in respect of each enactment or provision or provisions. On the other hand, the observation clearly indicates that if the assent is sought and given in general terms it ould be effective for all purposes. In other words, this Court observed that the assent sought for and given by the President in general terms could be effective for all purposes

[33]1995 Supp. (2) SCC 187 [34](1985) 3 SCC 661

unless specific assent is sought and given in which event it would be operative only to that limited extent."

63. In ***Rajiv Sarin and Another v. State of Uttarakhand and Others***[35], another Constitution Bench adverted to the earlier pronouncements on the concept of "assent of the President" including the authority in ***Kaiser-I-Hind (P) Ltd.*** (supra) and observed that in the said case this Court made it clear that it was not considering whether the assent of the President was rightly or wrongly given; and whether the assent was given without considering the extent and the nature of the repugnancy and should be taken as no assent at all. In ***Rajiv Sarin*** (supra), the Court reproduced paragraph 27 from ***Kaiser-I-Hind (P) Ltd.*** (supra), which is to the following effect:-

> "In this case, we have made it clear that we are not considering the question that the assent of the President was rightly or wrongly given. We are also not considering the question that—whether 'assent' given without considering the extent and the nature of the epugnancy should be taken as no assent at all. Further, in the aforesaid case, before the Madras High Court also the relevant proposal made by the State was produced. The Court had specifically arrived at a conclusion that Ext. P-12 shows that Section 10 of the Act has been referred to as the provision which can be said to be repugnant to the provisions of the Code of Civil Procedure and the Transfer of Property Act, which are existing laws on the concurrent subject. After observing that, the Court has raised the presumption. We do not think that it was necessary to do so. In any case as discussed above, the essential ingredients of Article 254(2) are: (*1*) mentioning of the entry/entries with respect to one of the matters enumerated in the Concurrent List; (*2*) stating repugnancy to the provisions of an earlier law made by Parliament and the State law and reasons for having such law; (*3*) thereafter it is required to be reserved for consideration of the President; and (*4*) receipt of the assent of the President."

64. Thereafter, the Constitution Bench referred to paragraph 65 of the authority in ***Kaiser-I-Hind (P) Ltd.*** (supra) wherein it has been stated that "pointed attention" of the President is required to be drawn to the repugnancy and the reasons for having such a law, despite the nactment by Parliament, has to be understood. After reproducing paragraph 65 in entirety, the larger Bench in ***Rajiv Sarin*** (supra) observed:-

> "64. If it is to be contended that *Kaiser* (supra) lays down the proposition that there can be no general Presidential assent, then such an interpretation would be clearly contrary to the observation of the Bench in para 27 itself where it states that it is not examining the issue whether such an assent can be taken as an assent.
>
> 65. Such an interpretation would also open the judgment to a charge of being, with respect, per incuriam as even though while noting the *Jamalpur*

[35](2011) 8SCC 708

*case* (supra), it overlooks the extracts in *Jamalpur case* (supra) dealing with the aspect of general assent: (SCC p. 669, para 12)

"*12*. … The assent of the President under Article 254(2) of the Constitution is not a matter of idle formality. The President has, at least, to be apprised of the reason why his assent is sought if, there is any special reason for doing so. If the assent is sought and given in general terms so as to be effective for all purposes, different considerations may legitimately arise. But if, as in the instant case, the assent of the President is sought to the law for a specific purpose, the efficacy of the assent would be limited to that purpose and cannot be extended beyond it."

65. Having delved into the principle of obtaining assent, the controversy at hand is required to be dealt with on the touchstone of the said principles. The competent authority of the State had written to the appropriate authority for obtaining assent. We think it apt to reproduce the said letter:-

"N. Sanyal, IAS
Commissioner-cum-Secretary
To Governor, Orissa,

No. 7876/SC(Con)
Dated the 28 October 2006

To,
The Secretary to Government of India,

Ministry of Home Affairs,
New Delhi-1

Sub: Proposal to obtain assent of the President of India under Article 254(2) of the Constitution of India to the Orissa Special Courts Bill, 2006.

Sir,

I am directed to say that in order to tackle the menace of corruption in public life and since the existing courts lack necessary machineries for speedy termination of the trial of the offences under Clause (e) of sub section (1)of Section 13 of the Prevention of Corruption Act, 1988, it is considered necessary to establish Special Courts by enacting a Special legislation. Accordingly, the "Orissa Special Courts Bill, 2006" was passed by the State Legislature on 11.8.2006.

2. The Bill seeks to enable the State Government to establish Special Courts to be presided over by the persons who are or have been Session Judge in the State for trial of offences committed under Clause (e) of sub-

Section (1) of Section 13 of the Prevention of Corruption Act, 1988. To eradicate corruption from high public and political offices properties alleged to have been acquired out of such alleged corruption need to be confiscated. So for confiscation of property of the alleged offender, provision has been made for appointment of authorized officer who is or has been an Additional Session Judge.

3. The sub matter of Legislation is relatable to Entry 11-A read with Entries 1 and 2 of List III (Concurrent List) of the Seventh Schedule to the Constitution. Accordingly, the State Legislature has enacted the said law. But the provisions contained in Clauses 6, 7, 22 and 26 of the Bill are repugnant to the existing provisions of certain laws, namely, the prevention of Corruption Act, 1988, the Code of Criminal Procedure,1973 and the Criminal Law Amendment Ordinance, 1944, therefore, the Bill as passed by the State Legislature is required to be reserved for the consideration and assent of the President of India under Article 254(2) of the Constitution.

4. It is further stated that the aforesaid Bill is similar to the Orissa Special Courts Act, 1990 earlier assented to by the President of India under Article 254(2) of the Constitution,, But it was subsequently repealed by the Orissa Special Courts (Repent and Special Provision) Act, 1995.

5. The Governor of Orissa has been pleased to reserve the Bill for consideration and assent of the President of India under Article 254(2) of the Constitution.

6. Three authenticated copies of the Governor of Orissa alongwith another six copies of such Bill as introduced and passed by the Orissa Legislative Assembly are forwarded herewith, which may kindly be placed before the President of India for favour of his kind consideration and assent.

7. The authenticated copies of the Bill may kindly be returned after the assent of the President is obtained at any earlier date. Six copies of the letter of the State Government are enclosed for your reference.

8. A Certificate in the prescribed proforma is also enclosed.

Encl: As above yours faithfully,

Commissioner-cum-Secretary to
the Governor, Orissa"
[emphasis supplied]

66. On a perusal of the aforesaid letter, it is demonstrable that the State Government had sought assent of the President in respect of certain provisions of the 1988 Act, the Code of Criminal Procedure, 1973 and the Criminal Law Amendment

Ordinance, 1944. On a scrutiny of the judgment of the High Court, it is manifest that on behalf of the State certain communications were placed on record from which the High Court was satisfied that the assent had been properly obtained. In the course of hearing, we have also found that the entire Bill was sent for the assent with the aforesaid forwarding letter and there has been correspondence thereafter. On a perusal of the communication and the finding recorded by the High Court and keeping in view the purpose of communication and taking note of the fact that the entire Bill was sent to the President for obtaining assent, it can safely be concluded that the President was apprised of the reason when the assent was sought. The assent has been given in general terms so as to be effective for all purposes. It cannot be said that the general assent by the President was not obtained. Thus, we are of the considered opinion that the provisions of the Orissa Act are definitely not repugnant to the 1988 Act, the Code of Criminal Procedure, 1973 and the Criminal Law Amendment Ordinance, 1944.

67. It is submitted that there is repugnancy between Orissa Act and the Prevention of Money-Laundering Act, 2002. It is urged by the learned counsel for the appellants that whatever has been mentioned in the letter or other provisions may not be repugnant but definitely the Act is repugnant to other enactment like the Prevention of Money-Laundering Act, 2002, as amended in 2009. It has been stated by the Constitution Bench in ***M. Karunanidhi*** *(supra)* that in order to decide the question of repugnancy it must be shown (i) that the two enactments contain inconsistent and irreconcilable provision so that they cannot stand together or operate in the same field; (ii) that there can be no repeal by implication unless the inconsistency appears on the face of the two statutes; (iii) that where the two statues occupy a particular field, but there is room or possibility of both the statutes operating in the same filed without coming into collusion with each other, no repugnancy results; (iv) that where there is no inconsistency but the statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statute continue to operate in the same field.

68. In ***J.B. Educational Society*** (supra) the Court, after referring to ***M. Karunanidhi*** (supra), laid down the following principle:-

> "Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I, notwithstanding anything contained in clauses (2) and (3) of Article 246. The non obstante clause under Article 246(1) indicates the predominance or supremacy of the law made by the Union Legislature in the event of an overlap of the law made by Parliament with respect to a matter enumerated in List I and a law made by the State Legislature with respect to a matter enumerated in List II of the Seventh Schedule.

69. On the principles enumerated in the aforesaid pronouncements, the submissions put forth by the learned counsel are to be appreciated. The Prevention

of Money-Laundering Act was enacted in 2002 and an amendment was brought in 2009. We may refer to the objects and reasons of the Prevention of Money-Laundering Act, 2002 which read as follows:-

> "An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto..."

70. Section 2(p) defines "money laundering" and Section 3 which has connection with Section 2(p) defines "offence of money laundering". Sections 3 and 4 read as follows:-

> **"Section 3. Offence of money-laundering**.—
>
> Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.
>
> **Section 4. Punishment for money-laundering**.—
>
> Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine:
>
> Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted."

71. Section 5, which provides for attachment of property involved in the money laundering, stipulates that where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this section, has reason to believe, on the basis of material in his possession, that (a) any person is in possession of any proceeds of crime; and (b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under Chapter III, he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed, provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country; provided further that,

notwithstanding anything contained in first proviso, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing) on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under Chapter III, the non-attachment of the property is likely to frustrate any proceeding under this Act. Sub-section (2) provides that the Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed. Sub-section (3) provides that every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under sub-section (2) of section 8, whichever is earlier and sub-section (4) says that nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment. Sub-section (5) stipulates that the Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating
Authority.

72. Section 8 deals with adjudication and provides that (1) on receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under subsection (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3 or is in possession of proceeds of crime, he may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized 2 or frozen under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government. There are certain provisions appended to the said Section. Sub-section 2 stipulates that the Adjudicating Authority shall, after considering the reply, if any, to the notice issued under subsection (1) and hearing the aggrieved person and the Director or any other officer authorised by him in this behalf, and taking into account all relevant materials placed on record before him, by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in money-laundering. Thereafter, the provisions of the said Act deal with the adjudication by the Adjudicating Authority as regards the property involved in the Prevention of Money-Laundering

Act, confirmation of attachment of property or retention or freezing of the property, taking over of the possession by the competent authority, the order to be passed by the Special Court after conclusion of the trial of the offence, the resultant effect where the Special Court finds the offence of money laundering has not taken place, the circumstances in which the property would vest in the Central Government free from all encumbrances, the management of confiscated properties during the interregnum period, the role of the Administrator, the power of Central Government to dispose of the property, the role attributed to various authorities to conduct search and seizure at various places, the action to be taken in a situation while it is not practical to seize a frozen property, the procedure for seizure and power of arrest, etc.

73. Section 20 of the said Act deals with retention of property. The said provision stipulates about the authority who can seize and freeze money to a maximum period and eventually pass a final order. Section 25 deals with establishment of an Appellate Tribunal and Section 26 provides for appeal to the said Tribunal. Section 42 provides for appeal to the High Court from the order passed by the Tribunal. Section 43 provides for designation of Special Courts. The said provision being relevant is reproduced below:-

> "**Section 43. Special Courts**.—(1) The Central Government, in consultation with the Chief Justice of the High Court, shall, for trial of offence punishable under section 4, by notification, designate one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as may be specified in the notification. Explanation.—In this sub-section, "High Court" means the High Court of the State in which a Sessions Court designated as Special Court was functioning immediately before such designation. (2) While trying an offence under this Act, a Special Court shall also try an offence, other than an offence referred to in sub-section (1), with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

74. Section 44 provides for offences triable by Special Courts. Section 47 provides for appeal to the High Court against the judgment passed by the Special Courts. Chapter IX of the Prevention of Money-Laundering Act, 2002 deals with reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property. Section 55 occurring in this Chapter is a dictionary clause which defines the terms "contracting State", "identifying" and "tracing". Section 56 mentions about the agreement with the foreign countries. Sections 57 to 61 deal with range of topics where concepts of reciprocal arrangement and letter of request are involved. Chapter X which is miscellaneous chapter provides for punishment of vexatious search. Section 70 deals with offences by companies and Section 71 occurring in this Chapter captioned as

"Miscellaneous" is with regard to the overriding effect and it clearly lays down that "The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

75. Be it stated that the Prevention of Money-Laundering Act, 2002 contains Schedules which originally contained three Parts, namely, Part A, Part B and Part C. Part A which contains various paragraphs enumerates offences under the Indian Penal Code, The Narcotic Drugs and Psychotropic Substances Act, 1985, etc. Part B (Containing Para 1 to Para 25) was omitted by Act 2 of 2013, section 30(ii) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013) and earlier Part B was amended by Act 21 of 2009, section 13(ii) (w.e.f. 1-6-2009). Part C deals with an offence which is the offence of cross border implications and is specified in Part A or the offences against property under Chapter XVII of the Indian Penal Code.

76. At this juncture, it is appropriate to note that in 2009, the Prevention of Money-Laundering Act, 2002 was amended whereby the offences under Section 13 of the 1988 Act was incorporated in Part B of the Schedule. It may be mentioned that same has been deleted in 2013 inasmuch as the entire Part B has been deleted. The High Court in the impugned judgment has referred to Entries 93 and 44 of the Union List whereby the Prevention of Money- Laundering Act, 2002 has been brought into force. The High Court has also taken note of the fact that the Orissa Act was enacted in 2007 regard being had to the 1988 Act. The High Court has observed that the Prevention of Money-Laundering (Amendment) Act, 2009 upon which reliance is placed by the petitioners counsel therein cannot prevail upon either the 1988 Act or the Orissa Act.

77. We have analysed the scheme under the Prevention of Money-Laundering Act, 2002. It is clearly demonstrable that the offences under the said Act are different from an offence under the 1988 Act. The offence under the Orissa Act which has been carved out is the offence under Section 13(1)(e) of the 1988 Act and the Orissa Act provides for establishment of Special Courts and also provides for provisions pertaining to confiscation at an interim stage. The entire Prevention of Money-Laundering Act, 2002, if keenly scrutinized, clearly reveals that it deals with different situations altogether; a different offence which has insegregable nexus with money laundering. True it is, in 2009 an amendment was brought incorporating the 1988 Act in Part B of the Schedule, and the said Part B has been totally deleted in 2013. In view of the same, the submission of the learned counsel for the State is that after deletion of Part B the issue has become academic. Be that as it may, Part B of the Prevention of Money-Laundering Act, 2002 enumerated offences under the Indian Penal Code, The Narcotic Drugs and Psychotropic Substances Act, 1985; The Explosive Substances Act, 1908; The Unlawful Activities (Prevention) Act, 1967; The Arms Act, 1959; The Wildlife (Protection) Act, 1972; etc. There was a purpose behind the same. There could be offences under the Prevention of Money-Laundering Act, 2002 arising from the offences under the other Acts. Unless an

offence under the Money Laundering Act, 2002 is committed and taken cognizance of by the authorities, the offences under the other Acts can continue as that is the law in the field. Once there is money laundering, the accused may be tried by the Special Courts as provided under the said Act. Part A enumerates offences under the Central legislation and certain offences under the Indian Penal Code. The first condition precedent is that the offence committed must pertain to money laundering. If a person is tried under Section 13(1)(e) satisfies the ingredients of money laundering, the matter would be different and hence, both the Acts can harmoniously co-exist.

78. In view of the aforesaid analysis and keeping in view the law pertaining to repugnancy we have hereinbefore referred to, we are unable to accept the submission of the learned counsel for the appellants that there is repugnancy between the two Acts and the Orissa Act is invalid as no assent was obtained in respect of the Prevention of Money-Laundering Act, 2002. We may hasten to clarify that we have not addressed the issue on the impact of the deletion of Part B of the Schedule in 2013 as the legislature may have deleted it in its own wisdom.

79. Next, we shall advert to the assail made in respect of certain provisions of the Orissa Act. Attack on two provisions, namely, Section 5 and 6, is basically on Article 14 and Article 20(1) of the Constitution. We shall first address to the challenge made under Article 14 and thereafter deal with the assail under Article 20(1) while we will be addressing the constitutional validity of other provisions, for it has been contended before us by the learned counsel for the appellants that the provisions pertaining to confiscation and other matters are punishments at the pre-trial stage and hence, the person suffers from double jeopardy. That apart, it is urged, confiscation was not there at time of institution of the prosecution and, therefore, the amended law cannot be retrospectively applied. It has been further argued that the submission of the State that there is only a procedural change as no one has a right to the forum is absolutely unsustainable and the appellants have been aggrieved by the substantive part and not by the facet relating to adjective law.

80. The principal ground of attack of the said provisions is that the legislature has not defined persons who have held "high public or political office". According to them, in the absence of any definition, it is extremely arbitrary and confers unbridled powers on the State Government and that apart, it is quite vague as a consequence of which, it invites the frown of Article 14 of the Constitution. Learned counsel for the State, *per contra*, has drawn our attention to the objects and reasons of the Act and has propounded that the concept of high public or political office is well understood and the provision does not deserve to be struck down solely on the ground that there is no definition of the said words in the dictionary clause.

81. Be it stated, the definition in the rules have been pressed into service. We need not look at the rules, for we have to find out whether in the provision in the context of the legislation and the purpose it intends to serve, there is enough guidance not to allow any kind of arbitrariness. To appreciate the said contention,

we are obligated to refer to Section 2(d) of the Orissa Act which defines the term 'offence' which reads as follows:-

> "**Section 2(d).** "Offence" means an offence of criminal misconduct within the meaning of clause (e) of sub-section (1) of section 13 of the Prevention of Corruption Act, 1988."

82. Section 5 and Section 6 of the Orissa Act read as follows:-

> "**Section 5. Declaration of cases to be dealt with under this Act** – (1) If the State Government is of the opinion that there is *prima facie* evidence of the commission of an offence alleged to have been committed by a person, who held high public or political office in the State of Orissa, the State Government shall make a declaration to the effect in every case in which it is of the aforesaid opinion.
>
> (2) Such declaration shall not be called in question in any Court." **Section 6. Effect of declaration** – (1) On such declaration being made, notwithstanding anything in the Code or any other law for the time being in force, any prosecution in respect of the offence shall be instituted only in a Special Court.
>
> (2) Where any declaration made under section 5 relates to an offence in respect of which a prosecution has already been instituted and the proceedings in relation thereto are pending in a Court other than Special Court, such proceedings shall, notwithstanding anything contained in any other law for the time being in force, stand transferred to Special Court for trial of the offence in accordance with this Act."

83. The stand of the learned counsel for the appellants is that Section 5 of the Orissa Act confers uncanalised and unfettered discretion on the State Government to make a declaration as a consequence of which the delinquent officer will have to face the prosecution in the Special Court. No guidance has been provided and in the absence of any guidance, the exercise of power would be arbitrary and the State Government is at liberty to pick and choose any person as it desires. The impugned judgment would show that the State Government had filed an affidavit on 23.7.2010 and the High Court has quoted certain paragraphs from the said affidavit. The relevant part of the affidavit shows that in the event there is *prima facie* evidence of the commission of an offence alleged to have been committed by a person who held high public or political office in the State of Orissa as defined under the Act and the Rules, the State Government shall mandatorily make a declaration to that effect and the State Government does not have any discretion on the subject. It has also been asserted that the role of the State Government is limited to be satisfied that the ingredients of Section 5(1) of the Special Courts Act are existent and if the ingredients of Section 5(1) of the Special Courts Act are in existence, the State Government is bound to make a declaration to that effect. Placing reliance on the

said affidavit, the High Court has repelled the submission urged on behalf of the petitioners therein. We must say without any reservation that the approach of the High Court is erroneous. Constitutionality of a provision has to be tested within the constitutional parameters. An affidavit filed by an officer of the State Government cannot change the interpretation if it is textually and contextually not permissible. In ***Supreme Court Advocates-on-Record Association and Another v. Union of India***[36], while dealing with the term "fit" expressed under Section 5(1) of the National Judicial Appointments Commission Act, 2014, the Court noted the submissions of the learned Attorney General that the said word would only mean mental and physical fitness, and nothing else. Commenting on the said submission, Khehar, J. stated as follows:-

> "...The present wisdom, cannot bind future generations. And, it was exactly for this reason, that the respondents could resile from the statement made by the then Attorney General, before the Bench hearing the Third Judges case, that the Union of India was not seeking a review or reconsideration of the judgment in the Second Judges case (that, it had accepted to treat as binding, the decision in the Second Judges case). And yet, during the course of hearing of the present case, the Union of India did seek a reconsideration of the Second Judges case."

84. In this regard, a passage from ***Sanjeev Coke Manufacturing Company v. M/s Bharat Coking Coal Limited and Another***[37] would be apt to quote:-

> "... The deponents of the affidavits filed into court may speak for the parties on whose behalf they swear to the statements. They do not speak for the Parliament. No one may speak for the Parliament and Parliament is never before the court. After Parliament has said what it intends to say, only the court may say what the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court is the only authentic voice which may echo (interpret) the Parliament. This the court will do with reference to the language of the statute and other permissible aids. The executive Government may place before the court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak for Parliament. No Act of Parliament may be struck down because of the understanding or misunderstanding of parliamentary intention by the executive Government or because their (the Government's) spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits. They do not and they cannot bind Parliament. Validity of legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the court may ultimatelyfind and more especially by what may be gathered from what the legislature has itself said..."

[36]2015(11) SCALE 1 [37](1983) 1 SCC 147

85. We have referred the said statement of law only to highlight that the affidavit sworn by the Joint Secretary could not have been relied upon by the High Court for the purpose of construction of Section 5 of the Orissa Act. Thus viewed, we have to understand, appreciate and interpret the provisions contained in Section 5 and Section 6 whether there is any scope for arbitrary use of power. 86. The language employed in Section 5 has to be appositely scrutinized. Section 5(1) of the Orissa Act provides that if the State Government is of the opinion that there is *prima facie* evidence of the commission of an offence alleged to have been committed by a person, who held high public or political office in the State of Orissa, the State Government shall make a declaration to the effect in every case in which it is of the aforesaid opinion. The Division Bench of the High Court on earlier occasion in ***Kishore Chandra Patel*** (supra) had struck down the part that stated "and that the said offence ought to be dealt with under the Act" and treated the rest of it as valid. The legislature, as is perceptible, has rightly deleted the said words. Interpretation of the stipulations in Section 5 are to be appreciated in the context of the scheme of the Orissa Act. Section 2(d) defines the term "offence" which means an "offence" of criminal misconduct within the meaning of clause (e) of sub-section (1) of Section 13 of the 1988 Act. Section 5(1) confers power on the State to form an opinion that there is *prima facie* evidence of commission of an offence alleged to have been committed by a person who has held high public or political office in the State of Orissa and then proceed to make the declaration to that effect. The key words, as we find, are "*prima facie* evidence of the commission of the offence alleged". In ***Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd.***[38] it has been ruled that interpretation must depend on the text and the context and they must form the basis of interpretation. The two-Judge Bench speaking through Chinnappa Reddy, J. has expressed that:-

> "...A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statutemaker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place..."

87. In ***Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama***[39] the Court has held that:-

[38]AIR 1987 SC 1023 [39]1990 AIR 981

> "The paramount object in statutory interpretation is to discover what the legislature intended. This intention is primarily to be ascertained from the text of enactment in question. That does not mean the text is to be construed merely as a piece of prose, without reference to its nature or purpose. A statute is neither a literary text nor a divine revelation. "Words are certainly not crystals, transparent and unchanged" as Mr Justice Holmes has wisely and properly warned. (*Towne* v. *Eisner,* 245 US 418, 425 (1918). Learned Hand, J., was equally emphatic when he said: "Statutes should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." (*Lenigh Valley Coal Co.* v. *Yensavage,* 218 FR 547, 553)."

88. In ***R.L. Arora v. State of Uttar Pradesh and Others***[40] the Constitution Bench dealt with the validity of amendments to Land Acquisition Act, 1894 as amended by Act 31 of 1962. The challenge therein was to the amendments of certain provisions in the Land Acquisition Act, 1894. While dealing with the concept of construction of a provision, the Court opined that a literal interpretation is not always the only interpretation of a provision in a statute and the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning, of the words used in a provision of the statute. The Court further ruled that it is permissible to control the wide language used in a statute if that is possible by the setting in which the words are used and the intention of the law-making body which may be apparent from the circumstances in which the particular provision came to be made, and therefore, a literal and mechanical interpretation is not the only interpretation which courts are bound to give to the words of a statute; and it may be possible to control the wide 'language in which a provision is made by taking into account what is implicit in it in view of the setting in which the provision appears and the circumstances in which it might have been enacted.

89. In ***TATA Engineering & Locomotive Co. Ltd. v. State of Bihar and Another***[41] emphasis was laid as regards the purposes which lie behind the words and to be too literal in the meaning of words is to see the skin and miss the soul.

90. In this regard, a passage from the Statutory Interpretation by Justice G.P. Singh, 9th Edn. 2004, at p. 86, would throw immense insight:-

> "No word", says PROFESSOR H.A. SMITH "has an absolute meaning, for no words can be defined in *vacuo*, or without reference to some context". According to SUTHERLAND there is a "basic fallacy" in saying "that words have meaning in and of themselves", and "reference to the abstract meaning of words", states CRAIES, "if there be any such thing, is of little value in interpreting statures". In the words of JUSTICE HOLMES : "A word is not a crystal transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the

[40]AIR 1964 SC 1230 [41](2000) 5 SCC 346

circumstances and the time in which it is used." Shorn of the context, the words by themselves are "slippery customers". Therefore, in determining the meaning of any word or phrase in a statute the first question to be asked is "what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase". The context as already seen in the construction of statures means the statute as a whole, the previous state of the law, other statutes in *pari materia*, the general scope of the statute and the mischief that it was intended to remedy."

91. In ***Union of India v. Sankalchand Himatlal Sheth***[42], Bhagwati, J. opined as follows:-

"I mean it in its widest sense 'as including not only other enacting provisions of the same statute but its preamble, the existing state of the law, other statutes in pari materia and the mischief which — the statute was intended to remedy' ".

92. The concept of context has also been emphasised in ***Maharaj Singh v. State of U.P.***[43].

93. Apart from the aforesaid interpretation, we are also of the view that regard being had to the text, context and the legislative intendment, the principle of reading down can be applied to save it from the constitutional invalidity. May it be mentioned that there are certain authorities which have held that such provisions are valid when the power isvested with high authority and there is guidance in the language employed in the provision. But we prefer to take this route as we find the legislature never intended to leave any offender. In ***Shreya Singhal v. Union of India***[44], the Court upheld the constitutional validity of Section 79 of the Information Technology Act, 2000 subject to Section 79(3)

(b) by stating as follows:-

"Section 79 is valid subject to Section 79(3)(*b*) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology "Intermediary Guidelines" Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment."

94. A passage from ***DTC v. Mazdoor Congress***[45] is also fruitful to extract:-

"...The doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from

[42](1977) 4 SCC 193 [43](1977) 1 SCC 155 [44](2015) 5 SCC 1 [45]AIR 1999 SC 101 = 1991 Supp (1) SCC 600

being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible--one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made..."

95. In ***Suresh Kumar Koushal v. Naz Foundation***[46], the Court held that:-

"Another significant 8canon of determination of constitutionality is that the courts would be reluctant to declare a law invalid or ultra vires on account of unconstitutionality. The courts would accept an interpretation, which would be in favour of constitutionality rather than the one which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the courts. The courts would preferably put into service the principle of "reading down" or "reading into" the provision to make it effective, workable and ensure the attainment of the object of the Act".

96. In ***Calcutta Gujarati Education Society v. Calcutta Municipal Corporation***[47], it has been held that:-

"The rule of "reading down" a provision of law is now well recognised. It is a rule of harmonious construction in a different name. It is resorted to smoothen the crudities or ironing out the creases found in a statute to make it workable. In the garb of "reading down", however, it is not open to read words and expressions not found in it and thus venture into a kind of judicial legislation. The rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. It is to be used keeping in view the scheme of the statute and to fulfill its purposes".

97. We have referred to the aforesaid authorities only to highlight that the interpretation placed by us can come within both the conceptions, namely, textual and contextual interpretation as well as also reading down the provision to save it from unconstitutionality. Be it stated, by such reading down no distortion is caused.

98. Applying the aforesaid principle, we are inclined to think that the State Government is only to be *prima facie* satisfied that there is an offence under Section 13(1)(e) and the accused has held high public or political office in the State. Textually understanding, the legislation has not clothed the State Government with the authority to scrutinize the material for any other purpose. The State Government has no discretion except to see whether the offence comes under Section 13(1)(e) or

[46](2014) 1 SCC 1 [47](2003) 10 SCC 533

not. Such an interpretation flows when it is understood that in the entire texture provision turns around the words "offence alleged" and "prima facie". It can safely be held that the State Government before making a declaration is only required to see whether the person as understood in the context of the provision is involved in an offence under Section 13(1)(e) of the Orissa Act and once that is seen, the concerned authority has no other option but to make a declaration. That is the command of the legislature and once the declaration is made, the prosecution has to be instituted in Special Court and that is the mandate of Section 6(1) of the Orissa Act. Therefore, while holding that the reference to the affidavit filed by the State Government was absolutely unwarranted, for that cannot make a provision constitutional if it is otherwise unconstitutional, we would uphold the constitutional validity, but on the base of above interpretation. The argument and challenge would fail, once on interpretation it is held that there is no element of discretion and only *prima facie* satisfaction is required as laid down hereinabove.

99. Having said that, we shall dwell upon the argument which is raised with regard to classification part, that is, that the persons holding "high public or political office" are being put in a different class to face a trial in a different court under a different procedure facing different consequences, is arbitrary and further the provision suffers from serious vagueness. The other aspect which has been seriously pyramided by the learned counsel for the appellants pertains to transfer of cases to the Special Court once declaration is made.

100. Learned counsel for the State has also referred to the rules to show that to avoid any kind of confusion a definition has been introduced in the rules. It is obligatory to make it immediately clear that the argument of the State that by virtue of bringing in a set of rules defining the term "high public or political office" takes away the provision from the realm of challenge of Article 14 of the Constitution is not correct. In this regard Mr. Vinoo Bhagat, learned counsel for the appellants, has drawn our attention to the authority in ***Hotel Balaji and Others v. State of A.P. and Others***[48]. In the said case, a question arose as to how far it is permissible to refer to the rules made in an Act while judging the legislative competency of a legislature to enact a particular provision. In that context, the majority speaking through Ranganathan, J. observed that a subordinate legislation cannot travel beyond the purview of the Act. The learned Judge noted that where the Act says that rules on being made shall be deemed "as if enacted in this Act", the position may be different. Thereafter, the learned Judge said that where the Act does not say so, the rules do not become a part of the Act. A passage from Halsbury's Laws of England (3rd Edn.) Vol. 36 at page 401 was referred to. It was contended on behalf of the State of Gujarat that the opinion expressed by Hedge J. in ***J.K. Steel Ltd. v. Union of India***[49], a dissenting opinion was pressed into service. The larger Bench dealing with the said submission expressed the view:-

"... Shri Mehta points out further that Section 86 which confers the rule-

[48]1993 Supp (4) SCC 536 [49]AIR 1970 SC 1173

> making power upon the Government does not say that the rules when made shall be treated as if enacted in the Act. Being a rule made by the Government, he says, Rule 42-E can be deleted, amended or modified at any time. In such a situation, the legislative competence of a legislature to enact a particular provision in the Act cannot be made to depend upon the rule or rules, as the case may be, obtaining at a given point of time, he submits. We are inclined to agree with the learned counsel. His submission appears to represent the correct principle in matters where the legislative competence of a legislature to enact a particular provision arises. If so, the very foundation of the appellants' argument collapses."

101. From the aforesaid, it is crystal clear that unless the Act provides that the rules if deemed as enacted in the Act, a provision of the rule cannot be read as a part of the Act.

102. In the instant case, Section 24 lays down that the State Government may, by notification, make such rules, if any, as it may deem necessary for carrying out the purposes of this Act. The said provision is not akin to what has been referred to in the case in ***Hotel Balaji*** (supra). True it is, the said decision was rendered in the case of legislative competence but it has been cited to highlight that unless the condition as mentioned therein is satisfied, rules cannot be treated as a part of the Act. Thus analysed, the submission of the learned counsel for the State that the Rules have clarified the position and that dispels the apprehension of exercise of arbitrary power, does not deserve acceptance.

103. Having not accepted the aforesaid submission, we shall proceed to deal with the real thrust of the submission on this score. It is urged by Mr. Padhi, learned senior counsel for the State of Odisha, that the principles stated in the decision in ***V.C. Shukla*** (supra) will apply on all fours.

104. In ***the Special Courts Bill, 1978*** (supra), may it be noted, the President of India had made a reference to this Court under Article 143(1) of the Constitution for consideration of the question whether the Special Courts Bill, 1978 (or any of its other provisions) if enacted would be constitutionally invalid. The Court referred to the text of the preamble. The preamble of the Bill was meant to provide for trial of a certain class of offences. Clause 4 of the Act which is relevant for the present purpose, provided that if the Central Government is of the opinion that there is prima facie evidence of the commission of an offence alleged to have been committed during the period mentioned in the Preamble by a person who held high public or political office in India and that in accordance with the guidelines contained in the Preamble, the said offence ought to be dealt with under the Act, the Central Government shall make a declaration to that effect in every case in which it is of the aforesaid opinion.

105. It was contended that Section 4(1) furnished no guidance for making the declaration for deciding who one and for what reasons should be sent up for trial to

the Special Courts. The Court referred to the various statutes with regard to classification and the concept of guidance and vagueness and opined that:-

> "... By clause 5 of the Bill, only those offences can be tried by the Special Courts in respect of which the Central Government has made a declaration under clause 4(1).
>
> That declaration can be made by the Central Government only if it is of the opinion that there is prima facie evidence of the commission of an offence, during the period mentioned in the preamble, by a person who held a high public or political office in India and that, in accordance with the guide-lines contained in the Preamble to the Bill, the said offence ought to be dealt with under the Act. The classification which Section 4(1) thus makes is both of offences and offenders, the former in relation to the period mentioned in the preamble that is to say, from February 27, 1975 until the expiry of the proclamation of emergency dated June 25, 1975 and in relation to the objective mentioned in the sixth para of the preamble that it is imperative for the functioning of parliamentary democracy and the institutions created by or under the Constitution of India that the commission of such offences should be judicially determined with the utmost dispatch; and the latter in relation to their status, that is to say, in relation to the high public or political office held by them in India. It is only if both of these factors co-exist that the prosecution in respect of the offences committed by the particular offenders can be instituted in the Special Court."

106. Thereafter, the Court referred to certain periods as mentioned in the preamble and in that context, opined that:-

> "... But persons possessing widely differing characteristic, in the context of their situation in relation to the period of their activities, cannot by any reasonable criterion be herded in the same class. The antedating of the emergency, as it were, from June 25 to February 27, 1975 is wholly unscientific and proceeds from irrational considerations arising out of a supposed discovery in the matter of screening of offenders. The inclusion of offences and offenders in relation to the period from February 27 to June 25, 1975 in the same class as those whose alleged unlawful activities covered the period of emergency is too artificial to be sustained."

107. The Court recorded its conclusion in paragraph 120 as follows:-

> "The Objects and Reasons are informative material guiding the court about the purpose of a legislation and the nexus of the differentia, if any, to the end in view. Nothing about Emergency period is adverted to there as a distinguishing mark. If at all, the clear clue is that all abuse of public authority by exalted public men, whatever the time of commission, shall be punished without the tedious delay which ordinarily defeats justice in the

case of top echelons whose crimes affect the credentials of democratic regimes."

108. In this context, reference may be made to ***V.C. Shukla*** (supra) upon which heavy reliance has been placed by the State Government. The appellants therein while challenging the conviction raised a number of preliminary objections including constitutional validity of the Special Courts Act [No. 22 of 1979] on several grounds, including contravention of Articles 14 and 21 of the Constitution. A three-Judge Bench referred to the order passed in the reference made by the President of India under Article 143(1) of the Constitution wherein majority of the provisions in the Bill were treated to be valid. Thereafter, the Bill ultimately got the assent of the President with certain changes. After the Act came into force, it assumed a new complexion. The Court in the latter judgment referred to clauses in the preamble and scanned the anatomy of the Act. It was contended that regard being had to the principles laid down by this Court in ***the Special Courts Bill, 1978*** (supra) the provisions fail to pass the test of valid classification under Article 14, for the classification which distinguishes persons who are placed in a group from others who are left out of the group is not based on *intelligible differentia*; that there was no nexus between the differentiation which was the basis of the classification and the object of the Act; and that such differentiation did not have any rational relation to the object sought to be achieved by the Act. The Court reading the opinion in ***the Special Courts Bill, 1978*** (supra) did not agree with the submissions of the learned counsel for the appellants that this Court had held that unless emergency offenders could be punished under the Special Courts Act and that no Act seeking to punish the offences of a special type not related to the emergency would be hit by Article 14. The Court addressed to the validity of Sections 5, 6, 7 and 11 of the Special Courts Act, 1979. One of the arguments advanced was that neither the words 'high public or political office' had been defined nor the offence being delineated so as to make the prosecution of such offenders a practical reality. Dealing with the said contention, the Court held:-

> "24. As regards the definition of "high public or political office" the expression is of well-known significance and bears a clear connotation which admits of no vagueness or ambiguity. Even during the debate in Parliament, it was not suggested that the expression suffered from any vagueness. Apart from that even in the *Reference case* Krishna Iyer, J. referred to holders of such offices thus : (SCC pp. 440, 441, paras 107, 111) "… heavy-weight criminaloids who often mislead the people by public moral weight-lifting and multi point manifestoes. . . *such super-offenders in top positions*.... No erudite pedantry can stand in the way of pragmatic grouping of *high-placed office holders separately*, for purposes of high-speed criminal action invested with early conclusiveness and inquired into by high-level courts.

25. It is manifest from the observations of Krishna Iyer, J., that persons holding high public or political offices mean persons holding top positions wielding large powers."

109. Thereafter, the three-Judge Bench referred to the description of persons holding high public or political office in American Jurisprudence (2d, Vol. 63, pp. 626, 627 and 637) Ferris in his Thesis on "Extraordinary Legal Remedies", Wade and Phillips in "Constitutional Law" and after referring to various meanings attributed to the words ruled:-

"28**.** A perusal of the observations made in the various textbooks referred to above clearly shows that "political office" is an office which forms part of a political department of the Government or the political executive. This, therefore, clearly includes Cabinet Ministers, Ministers, Deputy Ministers and Parliamentary Secretaries who are running the Department formulating policies and are responsible to the Parliament. The word High is indication of a top position and enabling the holder thereof to take major policy decisions. Thus, the term "high public or political office" used in the Act contemplates only a special class of officers or politicians who may be categorized as follows:

"(*1*) officials wielding extraordinary powers entitling them to take major policy decisions and holding positions of trust and answerable and accountable for their wrongs;

(*2*) persons responsible for giving to the State a clean, stable and honest administration;

(*3*) persons occupying a very elevated status in whose hands lies the destiny of the nation."

29. The rationale behind the classification of persons possessing the aforesaid characteristics is that they wield wide powers which, if exercised improperly by reason of corruption, nepotism or breach of trust, may mar or adversely mould the future of the country and tarnish its image. It cannot be said, therefore, with any conviction that persons who possess special attributes could be equated with ordinary criminals who have neither the power nor the resources to commit offences of the type described above. We are, therefore, satisfied that the term "persons holding high public or political offices" is self-explanatory and admits of no difficulty and that mere absence of definition of the expression would not vitiate the classification made by the Act. Such persons are in a position to take major decisions regarding social, economic, financial aspect of the life of the community and other far-reaching decisions on the home front as also regarding external affairs and if their actions are tainted by breach of trust, corruption or other extraneous considerations, they would damage the

interests of the country. It is, therefore, not only proper but essential to bring such offenders to book at the earliest possible opportunity."

110. After so stating, the Court referred to clause 4 of the preamble and opined thus:-

"31. The words "powers being a trust" clearly indicate that any act which amounts to a breach of the trust or of the powers conferred on the person concerned would be an offence triable under the Act. Clause (4) is wide enough to include any offence committed by holders of high public or political offices which amounts to breach of trust or for which they are accountable in law and does not leave any room for doubt. Mr Bhatia, however, submitted that even if the person concerned commits a petty offence like violation of municipal bye-laws or traffic rules he would have to be prosecuted under the Act which will be seriously prejudicial to him. In our opinion, this argument is purely illusory and based on a misconception of the provisions of the Act. Section 5 which confers powers on the Central Government to make a declaration clearly refers to the guidelines laid down in the preamble and no Central Government would ever think of prosecuting holders of high public or political offices for petty offences and the doubt expressed by the counsel for the appellant is, therefore, totally unfounded."

In view of the aforesaid enunciation of law, we are unable to accept the submission of the learned counsel for the appellants that the words "high public or political office" not being defined, creates a dent in the provision. The said words, we are absolutely certain, convey a category of public servants which is well understood and there is no room for arbitrariness.

111. The next aspect of challenge pertains to the classification made by the legislature in respect of the accused persons facing trial under Section 13(a) to (d) and the accused persons under Section 13(1)(e). It is urged by the learned counsel for the appellants that there is no *intelligible differentia* for making such a classification qua the offence and moreover by adopting a rigorous procedure.

112. First, we shall advert to the class of offence and the persons. It is submitted by Mr. Vinoo Bhagat, learned counsel appearing for some of the appellants, that when a person holding public office is accused of an offence under Section 13(1)(a) to (d), he will be tried by the Special Courts under the 1988 Act, but when Section 13(1)(e) is combined along with other offences, namely, Section 7 to 11 of the 1988 Act, he will be facing the trial under the Orissa Act or two trials. Mr. P.S. Narasimha, learned senior counsel, would contend that the bifurcation of offences defeats the concept of classification, for it pertains to a "stand alone offence", though no discernable principle is perceptible. Learned senior counsel would contend that there is no difference between Section 13(1)(a) to (d) and Section 13(1)(e) of the 1988 Act, but the legislature has made a special classification which the law does not countenance. It is also canvassed that a person not holding high public

or political office would be tried by the Special Judge under the 1988 Act, whereas the differentiated category will be tried by the Orissa Act as a consequence of which an unacceptable discrimination takes place. It is contended that the only basis of classification for choosing a different forum with a different procedure is that the accused persons held 'high public or high political office' though there can be cases where holders of low public office can amass assets by illegal means but they would not be liable to face confiscation proceedings as provided under the Orissa Act. It has been argued that the classification is not to be done on the basis of post which a public servant holds.

113. We have already referred to the term "offence". The Orissa Act defines the offence to make it come within the compartment of Clause (e) of sub-section 1 of Section 13 of the 1988 Act. The submission on behalf of the learned counsel for the appellants is that the classification is arbitrary, unwarranted and unjustified as there is no rationale behind it. Learned counsel have referred to the offences under Sections 7, 8, 9 and 12 of the 1988 Act. The said offences relate to different situations, whereas Section 13 deals with criminal misconduct by a public servant. The said provision reads as follows:-

> "**Section 13. Criminal misconduct by a public servant.** – (1) A public servant is said to commit the offence of criminal misconduct,-
>
> (a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in section 7; or
>
> (b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned; or
>
> (c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or
>
> (d) if he,-
>
> (i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage;
>
> or
>
> (ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

**Explanation.** – For the purposes of this section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than four years but which may extend to ten years and shall also be liable to fine."

114. The submission of Mr. Narasimha, learned senior counsel and others, as we have referred to earlier, is that it is a micro-mini classification and classification is on the base of a stand alone offence or to put it differently, it is a classification qua a singular class. It is to be noted that Section 13(1)(e) has its own significance in the context of the range of offences provided under the 1988 Act. Section 13(1)(e) covers a period which is called check period. It pertains to amassing of disproportionate assets. The condition precedent is that accused is *prima* facie found in possession of disproportionate properties or possessing resources not known to his sources of income. It is obligatory on the part of the accused in that case to explain his sources, which has been the basis for accumulating the assets which are alleged to be disproportionate. The offences under Section 13(1) (a) to (d) in a broad way can be called incident specific or situation specific whereas the offence under Section 13(1)(e) is period specific and it is not incident specific. There can be different check periods. A person holding high public office or political office has opportunities to accumulate disproportionate assets other than his known sources of income. It has been submitted by the learned counsel for the appellants that disproportionate assets can be accumulated by the persons working in the lesser rank or not holding such high offices. This submission is noted only to be rejected, for the holders of high post or high public office do definitely enjoy a distinguished position in contrast to other categories of officers or post holders. They form a separate class. The legislature, regard being had to the position the public servant holds, has put them in a different class. There is a manifest reason that sustains the said classification. The contention of the learned counsel for the appellants is that the provision suffers because of under-inclusive classification but the same does not impress us as in the instant case we are disposed to think that there is a perceptible differentia in such exclusion. The court cannot adopt an attitude to scrutinize a provision with mathematical exactitude. A pedantic approach in this regard cannot

be visualized. Learned counsel for the State of Odisha would submit that the distinction is writ large and the legislature in its wisdom has carved out the offence of Section 13(1)(e) to be tried by Special Courts in a speedy manner. It is urged by him that the onus is on the accused to prove that the asset is not disproportionate and within the known sources of his income. He has drawn inspiration from ***P. Nallamal v. Inspector of Police***[50], wherein it has been held that the words "known sources of income" have to be understood as "any lawful source". That apart, the explanation to Section 13(1)(e) further enjoins that receipt of such income should have been intimated by the public servant in accordance with the provisions of any law applicable to such public servant at the relevant time. Such a public servant cannot escape from Section 13(1)(e) of the 1988 Act by showing other 50 (1999) 6 SCC 559 legally forbidden sources, albeit such sources are outside the purview of clauses (a) to (d) of the sub-section.

115. Having so stated, we proceed to dwell upon the concept of classification as envisaged under Article 14 of the Constitution. In this regard, we may usefully refer to the authority in ***Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and others***[51] wherein this Court while dwelling upon the concept of permissible classification opined thus:-

> "It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

116. Recently, in ***Satyawati Sharma (Dead) by LRs v. Union of India and Another***[52], the Court, after reproducing the principles stated in ***Shri Ram Krishna Dalmai*** (supra), has referred to the various principles that have been enunciated in that case by Chief Justice S.R. Das. We may profitably reproduce the same:-

> "(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

[50](1999) 6 SCC 559 [51]AIR 1958 SC 538 [52](2008) 5 SCC 287

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and (f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

117. Having noted the aforesaid authorities, it is instructive to refer to the authority in ***Rehman Shagoo v. State of Jammu and Kashmir***[53], which dealt with a single offence legislation and treated it to be valid by observing thus:-

"The offence created by Section 3 of the Ordinance is not found as such in the Penal Code but is a new offence of an aggravated kind which may in the circumstances prevailing in the State mentioned above be treated as different from the ordinary offences and may well be dealt with by a drastic procedure without encountering the charge of violation of the equal protection clause. We are, therefore, of opinion that on the principles laid down by this Court in the large number of cases summarised in the *Dalmia case* the Ordinance cannot be said to be discriminatory and, therefore, violative of Article 14 of the Constitution."

118. In ***C.I. Emden v. State of Uttar Pradesh***[54], the Constitution Bench, while considering the presumption raised under Section 4(1) of the Prevention of Corruption Act, 1947 has ruled that:-

"Legislature presumably realised that experience in courts showed how difficult it is to bring home to the accused persons the charge of bribery; evidence which is and can be generally adduced in such cases in support of the charge is apt to be treated as tainted, and so it is not very easy to establish the charge of bribery beyond a reasonable doubt. Legislature felt

[53]AIR 1960 SC 1 [54]AIR 1960 SC 548

that the evil of corruption amongst public servants posed a serious problem and had to be effectively rooted out in the interest of clean and efficient administration. That is why the legislature decided to enact Section 4(1) with a view to require the raising of the statutory presumption as soon as the condition precedent prescribed by it in that behalf is satisfied. The object which the legislature thus wanted to achieve is the eradication of corruption from amongst public servants, and between the said object and the intelligible differentia on which the classification is based there is a rational and direct relation. We have, therefore, no hesitation in holding that the challenge to the vires of Section 4(1) on the ground that it violates Article 14 of the Constitution must fail."

119. While dealing with this facet, it would not be inappropriate to advert to certain passages from the concurring opinion of V.R. Krishna Iyer, J. in ***the Special Courts Bill, 1978*** (supra) which reads as under:-

"105. Right at the beginning, an exordial enunciation of my socio-legal perspective which has a constitutional bearing may be set out. I lend judicious assent to the broader policy of social justice behind this Bill. As I read it, this measure is the embryonic expression of a necessitous legislative project, which, if full-fledged, will work a relentless break-through towards catching, through the compulsive criminal process, the higher inhabitants of Indian public and political decks, who have, in practice, remained "untouchable" and "unapproachable" to the rule of law. "Operation Clean-Up" is a "consummation devoutly to be wished", although naive optimism cannot obfuscate the obnoxious experience that laws made *in terrorem* against those who belong to the top power bloc prove in action to be paper tigers. The pathology of our public law, with its class slant, is that an unmincing ombudsman or sentinel on the *qui vive*, with power to act against those in power, now or before, and offering legal access to the informed citizen to complain with immunity does not exist, despite all the bruited umbrage of political performers against peculations and perversions by higher echelons. Law *is* what law *does*, not what law *says* and the moral gap between word and deed menaces peopled faith in life and law. And then, the tragedy — democracy becomes a casualty.

111. No erudite pedantry can stand in the way of pragmatic grouping of high-placed office-holders separately, for purposes of high-speed criminal action invested with early conclusiveness and inquired into by high-level courts. This differentia of the Bill rings irresistibly sound. And failure to press forward such clean-up undertaking may be a blow to the rule of law and the Rule of life and may deepen the crisis of democracy among the millions — the men who make our nation — who today are largely disenchanted. So it is time, if peaceful transformation is the constitutional

> scheme, to begin by pre-emptive steps of quick and conclusive exposure and conviction of criminals in towers of power — a special class of economic offenders with abettors from the Bureaucracy and Big Business, as recent Commission Reports trendily portray and portent. Such is the simple, sociological substance of the classificatory discrimen which satisfies the egalitarian conscience of Article 14." [emphasis supplied]

120. From the above stated ratiocination, it is quite evincible that there is a difference, a demonstrable one, between the offence under Section 13(1)(e) and the rest of the offences enumerated in Section 13. Section 13(1)(e) targets the persons who have disproportionate assets to their known sources of income. This conceptually is a period offence, for it is not incident specific as such. It does not require proof of corruption in specific acts, but has reference to assets accumulated and known sources of income in a particular period. The test applicable and proof required is different. That apart, in the context of the present Orissa Act it is associated with high public office or with political office which are occupied by people who control the essential dynamics of power which can be a useful weapon to amass wealth adopting illegal means. In such a situation, the argument that they being put in a different class and tried in a separate special court solely because the alleged offence, if nothing else, is a self-defeating one. The submission that there is a sub-classification does not remotely touch the boundaries of Article 14; and certainly does not encroach thereon to invite its wrath of the equality clause.

121. The controversy can be looked from another angle. The special courts have been established on the basis of the law enacted by the State Legislature after obtaining the presidential assent. The legislature has spelt out a policy for the purpose of establishing the Special Courts. It relates to an offence of special kind. In this regard, reference to a Constitution Bench decision in ***Kedar Nath Bajoria v. The State of West Bengal***[55] may be usefully referred to. Speaking for the majority, Patanjali Sastri C.J. distinguished the decision in ***State of West Bengal v. Anwar Ali Sarkar***[56]. The Court referred to the Act which was brought into existence to provide for the more speedy trial and more effective punishment of certain offences. The Court while dealing with the equal protection of law guaranteed by Article 14 of the Constitution observed that there is a system which is brought into by introducing Special Courts dealing with special types of offences under a shortened and simplified procedure. The legislation is based on perfect intelligible principles of differentia having a clear and reasonable relation with the object sought to be achieved. The Court further observed that whether an enactment providing for a special procedure for trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for, no general rule applicable to all cases can safely be laid down. It has been further ruled that practical assessment of operation of the law in the particular circumstances is necessary. We

[55](1954) SCR 30 [56](1952) SCR 284

may state that the Court took note of the fact that in ***Kathi Raning Rawat v. The State of Saurashtra***[57] the decision in ***Anwar Ali Sarkar*** (supra) was distinguished and it was held that the provisions are not obnoxious to Article 14 as it has provided a special procedure regard being had to the gravity of the particular crime, the advantage to be derived by the State by recoupment of its loss, and other like considerations may have to be weighed before allotting a case to the special court which is required to impose a compensatory sentence of fine on every offence tried and convicted by it.

122. In ***J. Jaya Lalitha v. Union of India***[58] the validity of Section 3 of the 1988 Act insofar as it empowers the State Government "to appoint as many special judges as may be necessary for such or group of cases" as may be specified in the notification and the consequential exercise of power in appointing special judges to try exclusively on day to day basis the criminal cases filed against the writ petitioner therein, was called in question. Dealing with the said facet, the two-Judge Bench opined that the said provision is not arbitrary inasmuch as the provisions sufficiently indicated the intention of the legislature and also the object of the Act that the cases of corruption are required to be tried speedily and completed as early as possible. Be it stated, the Court referred to the authorities in ***the Special Courts Bill, 1978*** (supra), ***Kathi Raning Rawat*** (supra) and ***Jyoti Pershad v. Administrator for the Union Territory of Delhi***[59] to arrive at the said conclusion.

123. Thus, the submission which has been put forth forcefully by the learned counsel for the appellants pales into insignificance, and the irresistible conclusion is that the legislative policy behind establishment of Special Courts for trial of accused involved in the offence under Section 13(1)(e) of the 1988 Act in respect of certain categories of accused is absolutely impeccable and it is saved from the vice of Article 14 of the Constitution.

124. The next submission advanced by the learned counsel for the appellants pertains to the issue that the corruption is an all India phenomenon and persons in other States are prosecuted under the 1988 Act, whereas in the State of Odisha, they are tried in a more rigorous manner. It is submitted that the same brings in inequality which causes discomfort to Article 14 of the Constitution. We have already held that as the assent of the President under Article 254(2) of the Constitution has been obtained and the assent is valid in law, the State law will operate. Article 14 comes into play where equals are treated as unequals. The persons holding high public or political office in the State of Odisha are governed by the Orissa Act. The State legislature has passed the Orissa Act having regard to the obtaining situation in the State as the objects and reasons of the said Act do reflect. The legislature in its wisdom has enacted the law. The persons who are functioning in certain other States may be required to face trial under the 1988 Act, but on that score there can be no violation of Article 14 of the Constitution. The scale suggested, cannot be the scale

[57](1952) SCR 435 [58](1999) 5 SCC 138 [59]AIR 1961 SC 1602

to judge. A legislation passed by one State legislature cannot be equated with the legislation passed by another State legislature. Nor can its validity be tested on that foundation. The Constitution bench judgment in ***The State of Madhya Pradesh v. G.C. Mandawar***[60] long back had succinctly clarified the position in this regard laying down thus:-

> "The power of the Court to declare a law void under Article 13 has to be exercised with reference to the specific legislation which is impugned. It is conceivable that when the same legislature enacts two different laws but in substance they form one legislation, it might be open to the Court to disregard the form and treat them as one law and strike it down, if in their conjunction they result in discrimination. But such a course is not open where, as here, the two laws sought to be read in conjunction are by different Governments and by different legislatures. Article 14 does not authorise the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject its provisions are discriminatory. Nor does it contemplate a law of the Centre or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments. The sources of authority for the two statutes being different, Article 14 can have no application".

125. Similar view was reiterated in ***Prabhakaran Nair v. State of Tamil Nadu & Others***[61]. Therefore, the question of bringing in the concept of equality qua persons who function in the other States is an unacceptable proponement and it is impossible to accept the same. 126. Now, we shall advert to the challenge relating to the grievance which is fundamentally twin in nature. First, the appellants who were facing the trial before the Special Judge under the 1988 Act, their cases being transferred, are being compelled to be tried under the Orissa Act as a consequence of which they are constrained to face rigourism of confiscation as an interim punishment which was not in existence and second, the provisions pertaining to confiscation cause double jeopardy. It is urged that the provisions violate Article 14, 20(2) and 21 of the Constitution. Having regard to the submissions made, we think it necessary to produce the relevant provisions of the Act. The said provisions are Sections 13, 14, 15 and 16 of the Orissa Act. They occur in Chapter III of the Orissa Act that deals with confiscation of property. We have outlined the said provisions earlier. To appreciate the controversy in proper perspective, we reproduce the said provisions:-

> "**Section 13. Application for confiscation.** – (1) Where the State Government, on the basis of *prima facie* evidence, have reasons to believe that any person, who held high public or political office has committed the offence, the State Government may, whether or not the Special Court has

[60]AIR 1954 SC 493 [61]AIR 1987 SC 2117

taken cognizance of the offence, authorise the Public Prosecutor for making an application to the authorised officer for confiscation under this Act of themoney and other property, which the State Government believe the said person to have procured by means of the offence.

2. An application under sub-section (1) – (a) shall be accompanied by one or more affidavits, stating the grounds on which the belief, that the said person has committed the offence, is founded and the amount of money and estimated value of other property believed to have been procured by means of the offence; and (b) shall also contain any information available as to the location for the time being of any such money and other property, and shall, if necessary, give other particulars considered relevant to the context.

**Section 14. Notice for confiscation.** – (1)Upon receipt of an application made under Section 13 of this Act, the authorised officer shall serve a notice upon the person in respect of whom the application is made (hereafter referred to as the person affected) calling upon him within such time as may be specified in the notice, which shall not be ordinarily less than thirty days, to indicate the source of his income, earnings or assets, out of which or by means of which he has acquired such money or property, the evidence on which he relies and otherrelevant information and particulars, and to show cause as to why all or any of such money or property or both, should not be declared to have been acquired by means of the offence and be confiscated to the State Government.

(2) Where a notice under sub-section (1) to any person specifies any money or property or both as being held on behalf of such person by any other person, a copy of the notice shall also be served upon such other person.

(3) Notwithstanding anything contained in sub-section (1), the evidence, information and particulars brought on record before the authorised officer, by the person affected, shall not be used against him in the trial before the Special Court.

**Section 15. Confiscation of property in certain cases** –

(1) The authorised officer may, after considering the explanation, if any, to the show cause notice issued under section 14 and the materials available before it, and after giving to the person affected (and in case where the person affected holds any money or property specified in the notice through any other person, to such other person also) a reasonable opportunity of being heard, by order, record a finding whether all or any other money or properties in question have been acquired illegally.

(2) Where the authorised officer specifies that some of the money or property or both referred to in the show cause notice are acquired by means of the offence, but is not able to identify specifically such money or property, then it shall be lawful for the authorised officer to specify the money or property

or both which, to the best of his judgment, have been acquired by means of the offence and record a finding, accordingly, under sub-section (1).

(3) Where the authorised officer records a finding under this section to the effect that any money or property or both have been acquired by means of the offence, he shall declare that such money or property or both shall, subject to the provisions of this Act, stand confiscated to the State Government free from all encumbrances. Provided that if the market price of the property confiscated is deposited with the authorised officer, the property shall not be confiscated.

(4) Where any share in a Company stands confiscated to the State Government under this Act, then, the Company shall, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or the Articles of Association of the Company, forthwith register the State Government as the transferee of such share.

(5) Every proceeding for confiscation of money or property or both under this Chapter shall be disposed of within a period of six months from the date of service of the notice under sub-section (1) of section 14.

(6) The order of confiscation passed under this section shall, subject to the order passed in appeal, if any, under section 17, be final and shall not be called in question in any Court of law.

**Section 16. Transfer to be null and void.** – Where, after the issue of a notice under section 14 any money or property or both referred to in the said notice are transferred by any mode whatsoever, such transfer shall, for the purposes of the proceedings under this Act, be void and if such money or property or both are subsequently confiscated to the State Government under section 15, then, the transfer of such money or property or both shall be deemed to be null and void."

127. The said provisions, as has been stated earlier, have been attacked from two angles. The first one, these provisions violate Articles 14, 20(2), 20(3) and 21 of the Constitution. The second limb of submission is with regard to the accused persons who had been facing trial under the 1988 Act prior to coming into force of the Orissa Act as a result of the transfer of case, are compelled to face harsher penalty than what was provided at the time of commission of the alleged offence. Structuring the first submission, it is contended that reasonableness of pre-trial confiscation of a person's property before he has been found guilty makes the provision unjust, unfair and arbitrary. That apart, it being a punishment, the accused cannot be allowed to face double jeopardy. Additionally, it is contended that Section 13 confers the power on the State Government to authorize the Public Prosecutor for making the application to the authorised officer for confiscation of money and other property under the Orissa Act, if the State Government believes that the said person

to have been procured by means of the offence. The criticism advanced as regards the said provision is that unbridled and unrestricted power is conferred on the State Government to form an opinion. We have expressed our opinion with regard to formation of opinion as regards the *prima facie* case in the context of Section 5 of the Act. The said principles are applicable to Section 13. What is required to be scrutinized by the State Government that the offence exists under Section 13(1)(e) of the Orissa Act and thereafter it has to authorise the Public Prosecutor to make an application. The submission of the learned counsel for the appellants that the Public Prosecutor has no role. We are not adverting to the role of the Public Prosecutor that has been conferred on him under the Code of Criminal Procedure nor is it necessary to dwell upon, how this Court has time and again dwelt upon the role of the Public Prosecutor. It is because the application that is required to be filed in sub-section (1) of Section 13 itself postulates the guidelines. The application has to be accompanied by an affidavit stating the grounds on which the belief as regards the commission of the offence and the amount of money and many other aspects. An application has to be filed by the Public Prosecutor. The Public Prosecutor before he files an application under sub-section (1) of Section 13, is required to be first satisfied with regard to the aspects enumerated in sub-section (2). Sub-section (2) obliges the Public Prosecutor that requirements are satisfied for filing the application. In view of the said position, it cannot be said that there is lack of guidance. It is not that the authority has the discretion to get an application filed through the Public Prosecutor or not. It is not that a mere discretion is left to the Public Prosecutor. The authority has only been authorized to scrutinize the offence and authorize th e Public Prosecutor and thereafter the Public Prosecutor has been conferred the responsibility which is manifestly detailed, and definitely guided, to file the application. Thus scrutinized, the said provision does not offend Article 14 of the Constitution.

128. Having said about the guidance, we would like to make it clear that the word "may" used in Section 13 has to be understood in its context. It does not really relate to authorization of filing. To clarify that the authority does not have the discretionary power to authorise for filing against some and refrain from authorizing in respect of the other, it has to be construed that the said word relates to the purpose, that is, the application to be filed for the purpose of confiscation. This is in consonance with the legislative policy, the scheme of the Act and also the objects and reasons of the Act. The legislative policy, as declared, clearly indicates that there should not be any kind of discretion with the Government in these kinds of matters. The fulcrum of the policy, as is discernible, is that delinquent officers having disproportionate assets coming within the purview of Section 13(1)(e) have to face the confiscation proceedings subject to judicial scrutiny as the rest of the provisions do unveil. Learned counsel for the appellants would contend that the legislature has delegated such power on the authority which can act in an indiscriminate manner. The said submission in the context of this Act, is sans substance as we have already opined that there is no discretion to pick and choose

but to see the minimum requirement, that is, the offence and the status. Nothing beyond that.

129. Sections 14 and 15 have been criticized on the ground that they introduce concept of pre-trial confiscation. As indicated earlier, the submission is pyramided on the principle that the provisions are violative of Articles 14, 20(2) and 21 of the Constitution of India. Apart from this, the other assail is that they have been made retrospectively applicable because the cases of accused persons pending before the Special Courts under the 1988 Act are transferred and they are compelled to face the confiscation proceedings and further consequence thereof, which is not permissible in the constitutional scheme.

130. First we shall deal with the first attack. Section 14 requires the person in respect of whom the application is made to indicate his source of income, earnings or assets out of which he has acquired such money or property. He is entitled to adduce evidence on which he wants to place reliance and is also entitled to furnish other relevant information. Section 15 confers jurisdiction on the Authorised Officer to consider the explanation and the material available before it and proceed to record a finding whether all or any other money or properties in question have been acquired illegally. He is statutorily required to offord reasonable opportunity of being heard to the affected person. He is obliged under the law to declare that such money or property or both shall stand confiscated free from all encumbrances. Sub-section 5 of Section 15 stipulates that the proceeding for confiscation shall be disposed of within a period of six months from the date of notice issued under sub-section (1) of Section 14. The order of confiscation as envisaged under Section 15(6) is subject to appeal. Mr. R.K. Dash, learned senior counsel appearing for some of the appellants would contend that it is a draconian law taking the society back to the dark days. The provisions are criticized that once a confiscation takes place free from all encumbrances, the right, title and interest to the property or the money gets extinguished. It is urged that same cannot be done without a proper trial. Learned counsel for the State would lay emphasis on the ill-gotten wealth. He has referred to an extract of the 160$^{th}$ Law Commission Report. We have been commended to certain judgments of this Court that spoke of corruption at high places. The issue that has really emanated for consideration is whether there can be an interim confiscation when the trial is pending. It is argued with vehemence by the learned counsel for the appellants that it is "forfeiture" of property and it cannot be imposed without a trial. In this context, reference has been made to Section 53 of the Indian Penal Code which provides forfeiture of property as a punishment. It is also canvassed that the nomenclature would not make any difference when the impact tantamounts to a punishment. Emphasis is laid on the words "vest free from all encumbrances" to highlight that in its normal connotation, it would only mean that it shall stand transferred to the State.

131. Regard being had to the aforesaid submissions, it is absolutely essential to understand the concept of confiscation. In ***Maqbool Hussain v. State of Bombay***[62] the Constitution Bench was dealing with the issue whether the confiscation by the customs authorities is a punishment. Dealing with the said issue, the larger Bench ruled:-

> "17. We are of the opinion that the Sea Customs authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy.
>
> 18. It therefore follows that when the Customs authorities confiscated the gold in question neither the proceedings taken before the Sea Customs authorities constituted a prosecution of the appellant nor did the order of confiscation constitute a punishment inflicted by a court or judicial tribunal on the appellant. The appellant could not be said by reason of these proceedings before the Sea Customs authorities to have been "prosecuted and punished" for the same offence with which he was charged before the Chief Presidency Magistrate, Bombay, in the complaint which was filed against him under Section 23 of the Foreign Exchange Regulation Act."

132. Learned counsel for the State has drawn our attention to another Constitution Bench decision in the ***State of West Bengal v. S.K. Ghosh***[63]. The factual matrix in the said case was that the respondent therein was appointed as the Chief Refugee Administrator of Burma Refugee Organisation and he was believed to have embezzled large sums of money belonging to Government which were at his disposal. The prosecution was initiated under Sections 120-B and 409 of the Indian Penal Code before coming into force the Second Special Tribunal constituted under the Criminal Law Amendment Ordinance, No. 29 of 1943. During the pendency of the case, the Criminal Law Amendment Ordinance 30 of 1944 was passed. The Court took note of the fact that the object of the Ordinance was to prevent disposal or concealment of money or other property procured by means of certain scheduled offences punishable under the IPC and one of the offences to which the Ordinance applied was 409 IPC apart from other offences. The respondent was convicted by the Special Tribunal on August 31, 1949 by which Criminal Law (1943) Amendment amending Ordinance No. 12 of 1945 had come into force. Relying on the said Ordinance, the Special Tribunal apart from imposing a substantial sentence of rigorous imprisonment for five years, directed a fine of Rs. 45 lakhs to be paid on the charge of conspiracy. The respondent preferred an appeal before the High Court assailing his conviction and the High Court upheld the conviction and sentence of fine. However, the High Court opined that the Special Tribunal could have imposed the fine under the ordinary law but not under Section 10 of the 1943 Ordinance as

[62]AIR 1953 SC 325 [63]AIR 1963 SC 255 =1963 (2) SCR 111

amended in 1945 prescribing minimum limit of fine. The respondent had approached this Court in appeal which was dismissed on the ground that it was clear that Rs. 30 lakhs have been misappropriated by the respondent as a result of the conspiracy. On January 9, 1957, an application was made to the District Judge under Section 13 of the 1944 Ordinance for confiscation of the property. The property stood attached under Section 3 of the 1944 Ordinance. The learned District Judge held on a construction of Section 12 and Section 13(3) of the 1944 Ordinance that the amount of Rs. 30 lakhs together with the cost of attachment had first to be forfeited to the Union of India from the properties attached and thereafter the fine of Rs. 45 lakhs was to be recovered from the residue of the said attached property. However, as it was not possible to forfeit the properties to the value of Rs. 30 lakhs without valuation, the District Judge directed the receiver to report as to the cost of attachment including the cost of management of the property attached. He also directed the parties to submit their estimates as to the value of the property attached. The said order was assailed by the respondent in appeal and one of the Judges of the High Court opined that the fine amount was recoverable and no proceeding under Section 13 could be taken for forfeiture of Rs. 30 lakhs, the embezzled amount inasmuch as no action could be taken under the Ordinance. The other learned Judge opined that the District Judge had jurisdiction to forfeit properties worth Rs. 30 lakhs under Section 13 but he was of the opinion that Section 53 of the IPC referred to forfeiture as punishment is distinct from fine and as the punishment of forfeiture as contemplated by the 1944 Ordinance had yet to take place, Article 20(1) of the Constitution would apply. The reason for coming to such a conclusion was that 1944 Ordinance had come into force on August 23, 1944, while the real and effective period during which the offence was committed ended with July, 1944 and thereafter forfeiture was not prescribed as a punishment before the 1944 Ordinance. This Court referred to Section 13 of the 1944 Ordinance which deals with the disposal of attached property upon termination of criminal proceeding. The court referred to Section 5 that provides for investigation of objection to attachment and the authority of the District Judge under sub-section 3 of Section 5 to pass an order making the attachment absolute or varying it by releasing a portion of the property from attachment or withdrawing the order. In the said case, the District Judge had made the order absolute and the properties had continued under attachment. The Court referred to Section 3 to opine that there are two kinds of properties which are to be attached. The first property which has been procured by the commission of the offence, whether it be in the form of money or in the form of movable or immovable property, and second properties are other than the above. The respondent in the said case had been charged with embezzlement of money and that was why an application for attachment under Section 3 was made that he had used the money procured by commission of offence in purchasing certain properties. The Court referred to Section 13 and ruled that the District Judge has jurisdiction to deal with the property attached under Section 38 for the purpose of forfeiture provided Section

12 has been complied with. Thereafter, the larger Bench adverted to Section 12(1) and in that context held that:-

> "..... The sub-section lays down that before the judgment is pronounced by the court trying the offender and it is represented to the court that an order of attachment of property had been passed under Section 3 in connection with such offence, the court shall, if it is convicting the accused, record a finding as to the amount of money or value of other property procured by the accused by means of the offence. Clearly all that Section 12(1) requires is that the court trying the offender should be asked to record a finding as to the amount of money or value of other property procured by the accused before it by means of the offence for which he is being tried. There is no procedure provided for making the representation to the court to record a finding as to the amount of money or value of other property procured by the offence. In our view, all that Section 12(1) requires is that at the request of the prosecution the court should give a finding as to the amount of money or value of other property procured by the accused. Representation may be by application or even oral and so long as the court gives a finding as to the amount of money or value of other property procured by the offence that would in our opinion be sufficient compliance with Section 12(1). It is not necessary that the court when it gives a finding as to the amount of money or value of other property procured by means of the offence should say in so many words in passing the order that it is making that finding on a representation under Section 12(1). It is true that under Section 10 of the 1943 Ordinance as amended in 1945 the court when imposing a fine has to give a finding as to the amount of money or value of other property found to have been procured by the offender by means of the offence in order that it may comply with the provisions of Section 10 as to the minimum fine to be imposed. We see no reason however why a finding given for the purpose of Section 10 determining the amount of money or the value of other property found to have been procured by the offender by means of the offence should not also be taken as a finding under Section 12(1) of the 1944 Ordinance. The result of the two findings in our opinion is exactly the same, the only difference being that under Section 10 of the 1943 Ordinance, as amended in 1945, the court may do this suo moto while under Section 12(1) of the 1944 Ordinance it has to be done on the representation made by the prosecution."

133. Thereafter the Court noted the reasoning of the other learned Judge and opined that it was not necessary in the said appeal to decide whether the case would come within the ambit of Articles 20(1). This opinion was expressed principally on the ground that the forfeiture provided under Section 13(3) is not a penalty at all within the meaning of Article 20(1). In that context, the Court analyzed the provisions of the 1944 Ordinance and came to hold that:-

"....The forfeiture by the District Judge under Section 13(3) cannot in our opinion be equated to forfeiture of property which is provided in Section 53 of the Indian Penal Code. The forfeiture provided in Section 53 is undoubtedly a penalty or punishment within the meaning of Article 20(1); but that order of forfeiture has to be passed by the court trying the offence, where there is a provision for forfeiture in the section concerned in the Indian Penal Code. There is nothing however in the 1944 Ordinance to show that it provides for any kind of punishment for any offence. Further it is clear that the Court of District Judge which is a Principal Court of Civil Jurisdiction can have no jurisdiction to try an offence under the Indian Penal Code. The order of forfeiture therefore by the District Judge under Section 13(3) cannot be equated to the infliction of a penalty within the meaning of Article 20(1). Article 20(1) deals with conviction of persons for offences and for subjection of them to penalties. It provides firstly that "no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence". Secondly, it provides that no person shall be "subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence". Clearly, therefore Article 20 is dealing with punishment for offences and provides two safeguards, namely, (*i*) that no one shall be punished for an act which was not an offence under the law in force when it was committed, and (*ii*) that no one shall be subjected to a greater penalty for an offence than what was provided under the law in force when the offence was committed. The provision for forfeiture under Section 13(3) has nothing to do with the infliction of any penalty on any person for an offence. If the forfeiture provided in Section 13(3) were really a penalty on a convicted person for commission of an offence we should have found it provided in the 1943 Ordinance and that penalty of forfeiture would have been inflicted by the criminal court trying the offender."

[emphasis is added]

134. In this context reference to authority in ***Divisional Forest Officer and another v. G.V. Sudhakar Rao and others***[64] would be apt. In the said case, the confiscation under the Andhra Pradesh Forest Act arose for consideration. The question that was posed by the Court was whether where a Forest Officer makes a report of seizure of any timber of forest produce and produces the seized property along with a report under Section 44(2) that he has reason to believe that a forest offence has been committed in respect of such timber or the forest produce seized, could there be simultaneous proceedings for confiscation to the Government of such timber or forest produce and the implements, etc., if the Authorized Officer under Section 44(2A) of the Act is satisfied that a forest offence has been committed, along with a criminal case instituted on a complaint by the Forest Officer before a Magistrate of the commission of a forest offence under Section 20 of the Act.

[64](1985) 4 SCC 573

Answering the said issue, the Court scrutinized the amended provisions that were brought into force by Act of 1976 and came to hold that:-

> "The conferral of power of confiscation of seized timber or forest produce and the implements, etc., on the Authorized Officer under sub-section (2A) of Section 44 of the Act on his being satisfied that a forest offence had been committed in respect thereof, is not dependent upon whether a criminal prosecution for commission of a forest offence has been launched against the offender or not. It is a separate and distinct proceeding from that of a trial before the Court for commission of an offence. Under sub-section (2A) of Section 44 of the Act, where a Forest Officer makes report of seizure of any timber or forest produce and produces the seized timber before the Authorized Officer along with a report under Section 44(2), the Authorized Officer can direct confiscation to Government of such timber or forest produce and the implements, etc., if he is satisfied that a forest offence has been committed, irrespective of the fact whether the accused is facing a trial before a Magistrate for the commission of a forest offence under Section 20 or 29 of the Act."

135. In ***Director of Enforcement v. M.C.T.M. Corporation Pvt. Ltd & Others***[65] a two-Judge Bench was addressing the issue with regard to mens rea or criminal intent for establish contravention of Section 10 punishable under section 23 of Foreign Exchange Regulation Act, 1947. The other issue that arose for consideration was whether Section was an independent provision making its contravention by itself punishable under Section 23(1)(a) of FERA, 1947 or whether its contravention could arise only if there is a breach of some directions issued by the Reserve Bank of India under Section 10(2) of FERA, 1947. In the said case, the High Court had opined that Section 23 was a penal provision and the proceedings under Section 23(1)(a) were quasi criminal in nature and therefore existence of *mens rea* was a necessary ingredient for the commission of an offence under Section 10 of the Act. Dealing with the said facet the Court expressed:-

> "The proceedings under Section 23(1)(a) of FERA, 1947 are 'adjudicatory' in nature and character are not "criminal proceedings". The officers of the Enforcement Directorate and other administrative authorities are expressly empowered by the Act to 'adjudicate' only. Indeed they have to act 'judicially' and follow the rules of natural justice to the extent applicable but, they are not 'Judges' of the 'Criminal Courts' trying an 'accused' for commission of an offence, as understood in the general context. They perform quasi-judicial functions and do not act as 'courts' by only as 'administrators' and 'adjudicators'. In the proceedings before them, they do not try 'an accused' for commission of "any crime" (not merely an offence) but determine the liability of the contravener for the breach of his

[65](1996) 2 SCC 471

> 'obligations' imposed under the Act. They impose 'penalty' for the breach of the "civil obligations" laid down under the Act and not impose any 'sentence' for the commission of an offence. The expression 'penalty' is a word of wide significance. Sometimes, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a 'penalty'. When penalty is imposed by an adjudicating officer, it is done so in "adjudicatory proceedings" and not by way of fine as a result of 'prosecution' of an 'accused' for commission of an 'offence' in a criminal court. Therefore, merely because 'penalty' clause exists in Section 23(1)(a), the nature of the proceedings under that section is not changed from 'adjudicatory' to 'criminal' prosecution. An order made by an adjudicating authority under the Act is not that of conviction but of determination of the breach of the civil obligation by the offender".

136. In this regard, reference to a recent two-Judge Bench decision in ***Biswanath Bhattacharya v. Union of India & others***[66] would be apt. In the said case the Court was dealing with forfeiture under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976. A contention was advanced by the appellant therein that forfeiture is a penalty and, therefore, it could not be taken recourse to without a conviction. The stand of the Union of India was that the forfeiture contemplated under the said Act was not a penalty within the meaning of that expression occurring in Article 20, but only a deprivation of property to a legislatively identified class of persons – in the event of their inability to explain to the satisfaction of the State that they had legitimate sources of funds for the acquisition of such property. The two-Judge Bench, while explaining the stand of the Union of India, took note of the fact that the Act is made applicable to five classes of persons specified under Section 2 of the said Act. It also observed that the conviction or the preventive detention contemplated under the Act is not the basis or cause of confiscation, but the factual basis for a rebuttable presumption to enable the State to initiate proceedings to examine whether the properties held by such persons are illegally acquired properties. In the ultimate eventuate, the Court ruled that the forfeiture provided in the said enactment was not violative of Article 20 of the Constitution. It also proceeded to state:-

> "If a subject acquires property by means which are not legally approved, the sovereign would be perfectly justified to deprive such persons of the enjoyment of such ill-gotten wealth. There is a public interest in ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth. Such a deprivation, in our opinion, would certainly be consistent with the requirement of Articles 300-A and 14 of the Constitution which prevent the State from arbitrarily depriving a subject of his property."

[66](2014) 4 SCC 392

137. In the case at hand, the entire proceeding is meant to arrive at the conclusion whether on the basis of the application preferred by the Public Prosecutor and the material brought on record, the whole or any other money or some of the property in question have been acquired illegally and further any money or property or both have been acquired by the means of the offence. After arriving at the said conclusion, the order of confiscation is passed. The order of confiscation is subject to appeal under Section 17 of the Orissa Act. That apart, it is provided under Section 19 where an order of confiscation made under Section 15 is modified or annulled by the High Court in appeal or the where the person affected is acquitted by the special court, the money or property or both shall be returned to the person affected. Thus, it is basically a confiscation which is interim in nature. Therefore, it is not a punishment as envisaged in law and hence, it is difficult to accept the submission that it is a pre-trial punishment and, accordingly, we repel the said submission.

138. The next facet of the said submission pertains to retrospective applicability. The submission has been put forth on the ground that by transfer of cases to the Special Courts under the Orissa Act in respect of the accused persons who are arrayed as accused under the 1988 Act, have been compelled to face harsher punishment which is constitutionally not permissible. It is contended that there was no interim confiscation under the 1988 Act but under the Orissa Act they have to face confiscation. We have already opined that confiscation is not a punishment and, therefore, Article 20(1) is not attracted. Thus, the real grievance pertains to going through the process of confiscation and suffering the same after the ultimate adjudication of the said proceeding which is subject to appeal. In this context we are required to see the earlier provision. The 1988 Act provides for applicability of Criminal Law Amendment Ordinance, 1944. Section 2 refers to "interpretation" and in sub-section (1) it is stipulated that "Schedule offence" in the Ordinance means an offence specified in the Schedule to the Ordinance; Section 3 deals with the application for attachment of property; Section 4 provides for ad interim attachment; Section 5 deals with investigation of objections to attachment; Section 6 provides for attachment of property of *mala fide* transferees; Section 7 stipulates how execution of orders of attachment shall take place; Section 8 provides for security in lieu of attachment and Section 9 deals with administration of attached property. Section 10 deals with duration of attachment and Section 11 provides for appeals. Section 13 deals with disposal of attached property upon termination of criminal proceedings. Section 13(3) reads as follows:-

> "(3) Where the final judgment or order of the Criminal Courts is one of conviction, the District Judge shall order that from the property of the convicted person attached under this Ordinance or out of the security given in lieu of such attachment, there shall be forfeited to Government such amount or value as is found in the final judgment or order of the Criminal Courts in pursuance of Section 12 to have been procured by the convicted person by means of the offence, together with the costs of attachment as

> determined by the District Judge and where the final judgment or order of the Criminal Courts in pursuance of Section 12 to have been procured by the convicted person by means of the offence, together with the costs of attachment as determined by the District Judge and where the final judgment or order of the Criminal Courts has imposed or upheld a sentence of fine on the said person (whether alone or in conjunction with any other punishment), the District Judge may order, without prejudice to any other mode of recovery, that the said fine shall be recovered from the residue of the said attached property or of the security given in lieu of attachment."

139. Learned counsel for the appellants would submit that under the 1988 Act the accused were liable to face attachment during trial and forfeiture after conviction but by virtue of the Orissa Act they are compelled to face confiscation as a consequence of which they are deprived of the possession and the property goes to the State Government. Learned counsel for the State would submit that the forfeiture is provided after the conviction as the property has to be forfeited and embezzled amount requires to be realized but it does not debar the legislature to provide confiscation of property as an interim measure by providing an adequate adjudicatory process. It is also submitted that the offence under Section 13(1)(e) has its gravity and, therefore, the stringent interim measure is the requisite. Alternatively, it is argued that when forfeiture was prescribed, and attachment of property was provided as an interim measure, different arrangement, may be a stringent one, can always be provided by the legislature.

140. We have already held that confiscation is not a punishment and hence, Article 20(1) is not violated. Learned counsel for the State would lay stress on the decision in ***State of Andhra Pradesh and Others v. CH. Gandhi***[67]. In that case, the issue that arose for consideration when the disciplinary proceeding was initiated, one type of punishment was imposable and when the punishment was imposed due to amendment of rule, a different punishment, which was a greater one, was imposed. The High Court opined that the punishment imposed under the amended rule amounted to imposition of two major penalties which was not there in the old rule. Dealing with the issue the Court referred to the rule that dealt with major penalties and the rule making power. Reference was made to the decision in ***Pyare Lal Sharma v. Managing Director and others.***[68] wherein it has been stated that no one can be penalised on the ground of a conduct which was not penal on the date it was committed.Thereafter, the two-Judge Bench referred to the authority ***K. Satwant Singh v. State of Punjab***[69] wherein it has been held thus:-

> "… In the present case a sentence of imprisonment was, in fact, imposed and the total of fines imposed, whether described as 'ordinary' or 'compulsory', was not less than the amount of money procured by the appellant by means of his offence. Under Section 420 of the Penal Code an unlimited amount of fine could be imposed. Article 20(1) of the Constitution

[67](2013) 5 SCC 111 [68](1989) 3 SCC 448 [69]AIR 1960 SC 266

is in two parts. The first part prohibits a conviction of any person for any offence except for violation of law in force at the time of the commission of the act charged as an offence. The latter part of the article prohibited the imposing of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The offence with which the appellant had been charged was cheating punishable under Section 420 of the Penal Code which was certainly a law in force at the time of the commission of the offence. The sentence of imprisonment which was imposed upon the appellant was certainly not greater than that permitted by Section 420. The sentence of fine also was not greater than that which might have been inflicted under the law which had been in force at the time of the commission of the offence, as a fine unlimited in extent could be imposed under the section."

141. Thereafter, the Court referred to ***Maya Rani Punj v. CIT***[70], ***K. Satwant Singh*** (supra) and ***Tiwari Kanhaiyalal v. CIT***[71] and eventually held:-

"... The order of compulsory retirement is a lesser punishment than dismissal or removal as the pension of a compulsorily retired employee, if eligible to get pension under the Pension Rules, is not affected. Rule 9(*vii*) was only dealing with reduction or reversion but issuance of any other direction was not a part of it. It has come by way of amendment. The same being a lesser punishment than the maximum, in our considered opinion, is imposable and the disciplinary authority has not committed any error by imposing the said punishment, regard being had to the nature of charges. It can be looked from another angle. The rule-making authority has split Rule 9(*vii*) into two parts—one is harsher than the other, but, both are less severe than the other punishments, namely, compulsory retirement, removal from service or dismissal. The reason behind it, as we perceive, is not to let off one with simple reduction but to give a direction about the condition of pay on restoration and also not to impose a harsher punishment which may not be proportionate. In our view, the same really does not affect any vested or accrued right. It also does not violate any constitutional protection."

142. We are absolutely conscious that the said judgment was delivered in a different context. What is prohibited under Article 20(1) is imposition of greater punishment that might have been imposed and prohibition of a conviction of any person for violation of law at the time of commission of the act. We repeat at the cost of repetition that confiscation being not a punishment does not come in either of the categories. Thus viewed, the property of an accused facing trial under the 1988 Act could be attached and there can be administration by third party of the said property and eventual forfeiture after conviction. The term "attachment" has been understood by this Court in ***Kerala State Financial Enterprises Ltd. v. Official Liquidator, High Court of Kerala***[72] in the following manner:-

[70](1969) 1 SCC 445 [71](1975) 4 SCC 101 [72](2006) 10 SCC 709

> "The word "attachment" would only mean "taking into the custody of the law the person or property of one already before the court, or of one whom it is sought to bring before it". It is used for two purposes: (*i*) to compel the appearance of a defendant; and (*ii*) to seize and hold his property for the payment of the debt. It may also mean prohibition of transfer, conversion, disposition or movement of property by an order issued by the court."

143. The legislature has thought it proper to change the nature and character of the interim measure. The property obtained by ill-gotten gains, if *prima facie* found to be such by the authorised officer, is to be confiscated. An 72 (2006) 10 SCC 709 accused has no vested right as regards the interim measure. He is not protected by any constitutional right to advance the plea that he cannot be made liable to face confiscation proceedings of the property which has been accumulated by illegal means. That being the litmus test, the filament of reasoning has to rest in favour of confiscation and not against it. Therefore, we are of the considered view that the provision does not violate any constitutional assurance.

144. The next aspect we shall address to whether the procedure for confiscation as envisaged under Section 13 to Section 15 suffers from any lack of guidance. We have already opined that the State Government is only required to scrutinize the "offence" and authorises the Public Prosecutor for the purpose of filing an application for confiscation. The Public Prosecutor, as mandated under Section 13(2) is required to file an application indicating the reasons on the basis of which the State Government believes that the delinquent officer has procured the property by means of the offence. Thus, reasons have to be stated in the application and it has to be clearly averred that the property has been acquired by means of the offence as defined under the Orissa Act. The authorized officer is a judicial officer and is required to afford reasonable opportunity of hearing to the accused or any other person operating the property on his behalf. Discretion is also conferred on the authorised officer to record a finding whether all or any other money or property in question have been acquired illegally. The said authority can drop the proceedings or direct confiscation of all or some properties. Affording of a reasonable opportunity of hearing is not confined only to file affidavits. We are inclined to think that when the delinquent is entitled to furnish an explanation and also put forth his stand, he certainly can bring on record such material to sustain his explanation. Confiscation proceeding as provided under sub-section (3) of Section 15 is subject to appeal. In view of the scheme of the Orissa Act, there can be no shadow of doubt that there is ample guidance in the procedure for confiscation. It is not a proceeding where on the basis of launching of prosecution, the properties are confiscated. Therefore, the proceedings relating to confiscation cannot be regarded as violative of article 14 because conferment of unchecked power or lack of guidance.

145. Learned counsel for the appellants have laid emphasis on the phraseology used in Section 15(3) of the Orissa Act. The said provision stipulates that where the

authorised officer records a finding under the Section that any money or property or both have been acquired, by means of the offence, he shall make a declaration subject to the provisions of the Act, then they stand confiscated to the State Government "free from all encumbrances". It is submitted that once the property stands confiscated to the State Government free from all encumbrances, the right, title and interest of the person concerned is extinguished. The said submission, in our consideration, is on a very broad canvass. As the scheme of the Orissa Act would show, the confiscation is interim in nature. It does not assume the character of finality. Same is the position in Bihar Act. The accused is entitled to get return of the property or money in case he succeeds in appeal before the High Court against the order passed by the authorized officer or in the ultimate eventuality when the order of acquittal is recorded. The words "free from all encumbrances", in the context, are to be given restricted meaning. It is to repel third party claims and negate attempts to undo and invalidate the temporary or interim confiscation till the final decision. It cannot be equated with the provisions in other statutes where by operation of law the property vests with the State Government free from all encumbrances where the rights of the person concerned get obliterated.

146. While dealing with the word "encumbrance", this Court in ***State of Himachal Pradesh v. Tarsem Singh and others***[73] has opined that:-

> "... means a burden or charge upon property or claim or lien upon an estate or on the land. "Encumber" means burden of legal liability on property, and, therefore, when there is encumbrance on a land, it constitutes a burden on the title which diminishes the value of the land...

147. In ***Sulochana Chandrakant Galande v. Pune Municipal Transport and others***[74] dealing with the word "encumbrance", the Court has expressed thus:-

> "Encumbrance" actually means the burden caused by an act or omission of man and not that created by nature. It means a burden or charge upon property or a claim or lien on the land. It means a legal liability on property. Thus, it constitutes a burden on the title which diminishes the value of the land. It may be a mortgage or a deed of trust or a lien of an easement. An encumbrance, thus, must be a charge on the property. It must run with the property. (Vide *Collector of Bombay* v. *Nusserwanji Rattanji Mistri75, H.P. SEB* v. *Shiv K. Sharma76* and *AI Champdany Industries Ltd.* v. *Official Liquidator77).*"

In view of the aforesaid enunciation of law, the words "free from all encumbrances" in the provision under assail has to be conferred constricted meaning, for it is interim confiscation and definitely it is not equivalent to vesting. Hence, the contention on the said score founders.

148. The next plank of submission relates to creation of a dent in the basic concept of fair trial, which is an integral part of Article 21 of the Constitution. In

[73]AIR 2001 SC 3431 [74](2010) 8 SCC 467

***Dayal Singh v. State of Uttaranchal***[78] the Court, while dealing with the concept of fair trial, expressed the view that where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justiceto all, the accused, the society and a fair chance to prove to the prosecution; and then alone can law and order be maintained

149. In ***Rattiram v. State of M.P.***[79] it has been held:-

> "39. … Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism.
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> x x x x x
>
> 62. … Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury signifying nothing."

150. In the instant case, it is urged that when the concerned person/accused discloses his stand before the authorised officer serious prejudice is likely to be caused to him during trial. The principal grievance is that he is compelled to disclose his defence before trial though he is entitled in law not to do so. This submission is founded on the protection given under Article 20(3) of the Constitution.

151. There can be no cavil over the proposition that an accused has the right to maintain silence and not to disclose his defence before trial. It is worth noting here that the Authorised Officer is a judicial officer and he is required to deal with material for the limited purpose of confiscation. That apart, there is a statutory protection that the material produced before the Authorised Officer shall not be used during trial. If we understand the said provision appositely, it is graphically clear that the materials produced before the authorised officer are not to be looked into during trial, and the trial is to proceed in accordance with the Code of Criminal Procedure and subject to the provisions of the 1988 act as long as there is no inconsistency. The trial Judge is a senior judicial officer and has a trained judicial mind. If something is not to be looked into, it shall by no means be looked into. The constitutional protection under Article 20(3) is in no way affected. That apart, Article 20(3) of the Constitution speaks about the guarantee against "testimonial compulsion". In the case of ***M.P. Sharma v. Satish Chandra***[80] the court has observed thus:-

[78](2012) 8 SCC 263 [79](2012) 4 SCC 516 [80]AIR 1954 SC 300

> "Broadly stated the guarantee in Article 20(3) is against "testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in Article 20(3) is "to be a witness". A person can "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (See Section 119 of the Evidence Act) or the like. "To be a witness" is nothing more than "to furnish evidence" and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes.
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> * * *
>
> The phrase used in Article 20(3) is "to be a witness" and not to "appear as a witness". It follows that the protection afforded to an accused in so far as it is related, to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case".

152. Tested on the aforesaid enunciation of law, it can be stated with certitude that the right conferred on an accused under Article 20(3) is not violated. We reiterate that whatever is produced before the authorised officer is not to be looked into by the trial court and neither the prosecution nor the defence can refer to the same. That is the statutory command. Therefore, the submission astutely canvassed by the learned counsel for the appellants is sans substance.

153. The next aspect which needs to be addressed is the validity of Section 17 of the Orissa Act which deals with appeal. The said provision reads as follows:-

> "**Section 17. Appeal**:- (1) Any person. Aggrieved by any order of the authorised officer under this Chapter may appeal to the High Court within thirty days from the date on which the order appealed against was passed.
>
> (2) Upon any appeal preferred under this section the High Court may, after giving such parties, as it thinks proper, an opportunity of being heard, pass such order as it thinks fit.
>
> (3) An appeal preferred under sub-section (1) shall be disposed of within a period of three months from the date it is preferred, and stay order, if any,

passed in an appeal shall not remain in force beyond the prescribed period of disposal of appeal."

[underlining is ours]

154. Learned counsel for the appellants have seriously criticised Section 17(3) on the ground that the said provision interferes with the judicial proceeding by laying down that the said order shall not remain in force beyond the prescribed period of disposal of appeal. It appears that such a contention was not raised before the High Court, for the High Court has not dealt with the same. However, Mr. S.K. Padhi, learned senior counsel for the respondent-State, would submit that in the Orissa Special Courts Act, 1990 (Orissa Act 22 of 1992) contained a similar provision and the Division Bench in ***Kishore Chandra Patel*** (supra) construed the said provision by opining that the provision in Section 18(3) limiting the operation of stay order, if any, passed in appeal for a period of three months does not prohibit passing of a fresh stay order beyond that period, if a case for the same were to be made out to the satisfaction of the Court. At this stage, we may note with profit that the High Court of Patna has dealt with Section 17(3) of the Bihar Act which provides that an appeal shall be disposed of preferably within a period of six months from the date it is preferred, and stay order, if any, passed in an appeal shall not remain in force beyond the prescribed period of disposal of appeal. It has been held therein that it would not be proper to construe that the prescribed period of disposal of appeal is only six months but it is only desirable that the appeal should be disposed of within six months and the stipulation that the order of stay is not to remain in force beyond the period of disposal of appeal would not mean that the order of stay will lose its force during the pendency of the appeal. The High Court has laid emphasis on the word "preferably" to interpret that the intention of the legislature is that the appeal should be disposed of within six months but it does not mean that the appeal has to be disposed of within six months. The High Court has further observed that it would not be proper to construe that the prescribed period of disposal of appeal is only six months and, therefore, the stay order passed by the High Court will lose its force automatically on expiry of any particular period. It has placed the said interpretation to save the constitutionality of the provision. We have referred to the Bihar Act at this juncture as the provisions are similar to the Orissa Act except the word "preferably" used in Section 17(3) of the Bihar Act. There can be no doubt that no statutory provision can postulate that an order of stay shall not remain in force beyond the period meant for disposal of the appeal. The High Court of Patna has construed the provision by laying down stress on the word "preferably". We are disposed to think that the interpretation placed on the similar provision of the Orissa Act in ***Kishore Chandra Patel*** (supra) is correct and, therefore, we are disposed to hold that the order of stay if passed in an appeal would not debar or prohibit the High Court to pass a fresh stay order beyond that period, if a case is made out to the satisfaction of the court. We would like to add that the legislative intent is that an appeal has to be tried absolutely expeditiously regard being had to the scheme of the

Orissa Act as well as the Bihar Act and the person grieved by the order passed by the authorities should not enjoy an order of stay beyond that period. Proper construction that has to be placed would be that the High Court while exercising the power of appeal can extend the period of stay subject to its satisfaction unless there is justifiable reason for vacating the say. This provision, needless to say, has to be read in this manner to save it from the vice of unconstitutionality. However, we may clearly state that the High Court being a superior court having the power of judicial review shall see to it that the real purpose of the legislation is not defeated. It will be advisable and that the Chief Justice should demarcate a Bench for one day to hear these appeals. And accordingly, we so request. Needless to say, the learned Judge will endeavour to dispose of the appeal within the time frame.

155. Learned counsel for the appellants have seriously criticized the proviso appended to Section 18(1) of the Orissa Act. To appreciate the assail, Section 18(1) is reproduced in entirety:-

> "**Section 18(1)**. Where any money or property or both have been confiscated to the StateGovernment under this Act, the concerned authorised officer shall order the person affected, as well as any other person, who may be in possession of the money or property or both to surrender or deliver possession thereof to the concerned authorised officer or to any person duly authorised by him in this behalf, within thirty days of the service of the order:
>
> Provided that the authorised officer, on an application made in that behalf and being satisfied that the person affected is residing in the property in question, may instead of dispossessing him immediately from the same, permit such person to occupy it for a limited period to be specified on payment of market rent to the State Government and thereafter, such person shall deliver the vacant possession of the property."

Criticizing the said provision, it is urged by them that by virtue of the provision pertaining to confiscation the delinquent officer/accused is compelled to face a situation where he will be disposed from his dwelling house, the so called protection given under the proviso is an illusory one. It is argued that when the money is confiscated, it is wellnigh impossible on his part to deposit the market rent to occupy even for a limited period. The argument, if we permit ourselves to say so, suffers from a fundamental fallacy. Under the scheme of the Orissa Act, the confiscation does not take place immediately on lodging of an FIR. A detailed procedure has been stipulated which is contain adequate safeguards and thereafter the order is given effect to. The proviso appended to Section 18(1) of the Orissa Act is an exception to give protection to the concerned officer to remain in possession of the house where he resides for a certain period. The person concerned is given protection subject to certain terms. It is to be borne in mind that the confiscation is

associated with the property accumulated from the ill-gotten gain. It is urged that though proviso gives protection, it actually mocks at Article 21 of the Constitutions. We do not think so. The property is confiscated by way of an interim measure by taking recourse to law which we have held to be constitutionally valid. The submission that the man will be in the streets is an argument in frustration but not founded on reason. Be that as it may, when by determination of the authorised officer for the purpose of confiscation, the plea that he will be ousted from the dwelling house which would play foul of Article 21 of the Constitution, really does not commend acceptance. A person cannot be allowed to indulge in corruption and conceive of protection to his dwelling house after a finding is recorded in the proceeding for confiscation that it is constructed or purchased by way of corrupt means. The person concerned can satisfy the authorised officer or in appeal that the dwelling house where he is residing is acquired from his known sources of income. In such a situation, we are afraid that we cannot accept the submission advanced by the learned counsel for the appellants and, accordingly, the same stands rejected.

156. The next provision which is challenged is Section 19 of the Orissa Act that deals with refund of confiscated money or property in the event of the order of confiscation being modified or annulled by the High Court in appeal. The said provision is necessary to be reproduced:-

> "**19. Refund of confiscated money or property.-** Where an order of confiscation made under section 15 is modified or annulled by the High Court in appeal or where the person affected is acquitted by the Special Court, the money or property or both shall be returned to the person affected and in case it is not possible for any reason to return the property, such person shall be paid the price thereof including the money so confiscated with the interest at the rate of five per cent per annum thereon calculated from the date of confiscation." (underlining is ours)

157. The challenge of the appellants pertains to the part we have underlined. It is submitted that the said provision is confiscatory in nature and is violative of Article 300A of the Constitution. It is urged that the said provision enables the State Government to appropriate the property of a person who eventually succeeds in appeal or ultimately is acquitted. Learned counsel for the State would submit that when there is no possibility of being returned for a reason which is beyond the control of the State Government, then the said provision will come into play. The High Court of Patna while dealing with the similar provision contained in Section 19 of the Bihar Act in order to save its constitutionality has held that in case the confiscated property is not returned by showing good reasons that it is not possible to do so, the interest payable must be at the usual bank rate prevailing during the relevant period for a loan to purchase or acquire similar property. It has further observed that said direction is necessary in order to save the vires of Section 19 of the Bihar Act and otherwise the relevant provision would fall foul of provisions of

the Constitution. The view expressed by the High Court of Patna is not correct. The provision has to be construed in a seemly manner. The language used is "in case it is not possible for any reason to return the property". Mr. Ranjit Kumar, learned senior counsel appearing for the State of Bihar would submit that in case this Court read down the said provision, and, if it is not inclined to do so, it may apply doctrine of severability. Mr. A. Saran, learned senior counsel for the appellants, *per contra*, would contend that it is the obligation of the State Government to return the money as it is and there cannot be a stipulation to return the value with five per cent interest, for it is absolutely obnoxious.

158. The language employed in Section 19 of the Orissa Act has to be appreciated regard being had to the scheme of the said Act. The legislative intent is to curb corruption at high places and requires the accused persons to face trial in the Special Court constituted under the Orissa Act in a speedier manner and also to see that the beneficiaries of ill-gotten property or money do not enjoy the property or money during trial. That apart, the intention is also clear that the Government should not appropriate the money or the property to itself in any manner. Confiscation, we have already opined, is done as an interim measure. The words "free from all encumbrances" have been given a restricted meaning by us as it follows from the language used in the Orissa Act. Section 19 clearly lays down return of the confiscated money or property or both. It conceives of three situations, namely, modification of the order of confiscation, or annulment of confiscation, or the eventual acquittal. In these conditions, the money or property or both are required to be returned. The words, which we have underlined in Section 19, seem to us, cannot be conferred a wide meaning. They cannot be allowed to convey that the State will not return the property. The key words are "in case it is not possible" and "for any reason". It will be an assumption to think that "for any reason" would mean any kind of subjective reason. In certain statutes or enactments the words "for any reason" can be attributed a wide meaning to subserve the legislative purpose. The term "possible", in our considered opinion, may not be given the stature or status of "impossible", which is absolute in its connotation, but the word "possible", as we perceive, in itself contains certain concept of reason. The reason ascribed by the State has to withstand scrutiny in the strict sense. As indicated before, it may not be conceived in absolute terms like the word "impossible", for law does not countenance an impossible thing to be done. Therefore, the construction that is required to be placed on this provision is that the State must clearly demonstrate that it has a real and acceptable reason and hence, it is not possible not to return the money or property or both. Such an interpretation shall save the provision from the vice of unconstitutionality. We think so as there may be situations where it may not be possible on the part of the State to return the property. No illustration need be given because it would depend upon facts of each case. The argument by the appellants is that in such a situation the payment of value determined and the rate of interest provided in the provision is absolutely irrational and the State can

appropriate the property. The aforesaid submission, though on a first blush, may look quite attractive, but on a deeper scrutiny, is bound to melt into insignificance. It is to be remembered that the proceeding is initiated for confiscation in respect of the property acquired by the offence as described under the Act. It is done on the basis of certain material brought on record. Ultimately the proceedings may not be successful but if it is not possible to return the property the State cannot be asked to compensate more than what the legislature has thought to be appropriate. It cannot be equated with acquisition. The entire proceeding is initiated regard being had to the rampant corruption at high places in the present day society. Therefore, to think that submission that there has to be adequate compensation would be against the larger public interest. Thus understood, the challenge to the provision on the backdrop of Article 300A has to be treated as unacceptable and we do so. We may hasten to add that any order passed under this provision is always subject to judicial review by the superior courts.

159. We have at the beginning had mentioned that both the Orissa Act and the Bihar Act are almost similar and, wherever required we have adverted to the same while dealing with the Orissa Act. Barring the same, we do not find there is any distinction between the two enactments and, therefore, analysis made by us as regards the Orissa Act will apply to the Bihar Act.

160. It is significant to note here that before the High Court of Patna the validity of a Rule was assailed but the application was not pressed and the High Court has made certain observations. We intend to put the controversy to rest. Rule 12 of the 2010 Rules provides for Special Courts to follow summary procedure. Rule 12(a) and (f) read as under:-

> "(a) On institution of a case or transfer of pending proceeding to the Special Courts, trial shall be held in summary manner.
>
> (f) The delinquent public servant shall be put on trial and shall be afforded opportunity to lead evidence in support of his defence. If the special court, on the evidence of delinquent public servant is, prima facie, satisfied that he has been able to discharge his onus, the prosecution shall be called upon to lead its evidence to prove the charges against the delinquent public servant."

161. When the Bihar Act provides to follow the warrant procedure prescribed by the Code for trial of cases before a Magistrate, the 2010 Rules could not have prescribed for summary procedure. The rules have to be in accord with the Act. The rules can supplement the provisions of the Act but decidedly they cannot supplant the same. Therefore, we declare that part of Rule 12 which lays down that the learned Special Judge shall follow summary procedure, is *ultra vires* the Bihar Act.
162. In view of the foregoing analysis, we proceed to summarise our conclusions:-

(i) The Orissa Act is not hit by Article 199 of the Constitution.

(ii) The establishment of Special Courts under the Orissa Act as well as the Bihar Act is not violative of Article 247 of the Constitution.

(iii) The provisions pertaining to declaration and effect of declaration as contained in Section 5 and 6 of the Orissa Act and the Bihar Act are constitutionally valid as they do not suffer from any unreasonableness or vagueness.

(iv) The Chapter III of the both the Acts providing for confiscation of property or money or both neither violates Article 14 nor Article 20(1) nor Article 21 of the Constitution.

(v) The procedure provided for confiscation and the proceedings before the Authorised Officer do not cause any discomfort either to Article 14 or to Article 20(3) of the Constitution.

(vi) The provision relating to appeal in both the Acts is treated as constitutional on the basis of reasoning that the power subsists with the High Court to extend the order of stay on being satisfied.

(vii) The proviso to Section 18(1) of the Orissa Act does not fall foul of Article 21 of the Constitution.

(viii) The provisions contained in Section 19 pertaining to refund of confiscated money or property does not suffer from any kind of unconstitutionality

(ix) Sub-rules (a) and (f) Rule 12 of the 2010 Rules being violative of the language employed in the Bihar Act are *ultra vires* or anything contained therein pertaining to the summary procedure is also declared as *ultra vires* the Bihar Act.

163. Consequently, the appeals arising out of the judgment and order passed by the High Court of Orissa are dismissed and the appeals which have called in question the legal validity of the judgments and order passed by the High Court of Patna are allowed to the extent indicated hereinbefore. Regard being had to the facts and circumstances of the case, we refrain from imposing any costs in the civil appeals.

Civil appeals disposed of.

2016 (I) ILR - CUT- 892

**SUPREME COURT OF INDIA**

**ANIL R.DAVE, J., A.K.SIKRI, J., R.K.AGRAWAL, J., ADARSH KU. GOEL, J. & R. BANUMATHI, J.**

REVIEW PETITION (C) NOS. 2159-2268 OF 2013
AND 2048-2157 OF 2013

**MEDICAL COUNCIL OF INDIA** ……..Petitioner (s)

*.Vrs.*

**CHRISTIAN MEDICAL COLLEGE VELLORE & ORS.** ……...Respondent (s)

**CIVIL PROCEDURE CODE, 1908 – O-47, R-1**

**Review – The Five-Judge Bench hearing the review petition were of the view that the judgment sought to be reviewed needs re-consideration – Moreover the majority view has not taken into consideration some binding precedents and there was no discussion among the members of the Bench before pronouncement of the judgment – However the Review Bench did not propose to state reasons in detail as it may prejudicially affect re-hearing of the case – Held, review petitions allowed – Impugned judgment Dt. 18.07.2013 passed by the Three-Judge Bench is recalled for hearing the matters afresh.**

**Case Laws Referred to** :-

1. (2014) 2 SCC 305 : Christian Medical College, Vellore & Ors. -V- Union of India & Ors.
2. (2013) 8 SCC 320 : Kamlesh Verma -V- Mayawati & Ors.
3. (2013) 10 SCC 359 : Union of India -V- Namit Sharma
4. (1987) 1 SCC 288 : Sheonandan Paswan -V- State of Bihar & Ors.

For Petitioner(s) : Mr. Gaurav Sharma
For Respondent(s) : Mr. K.K.Mani

Date of Order: 11.4. 2016

**ORDER**

***ANIL R.DAVE, J.***

These review petitions have been filed against the judgment of this Court dated 18th July, 2013 passed in Christian Medical College Vellore & Ors. Vs. Union of India & Ors. reported in (2014) 2 SCC 305. The review petitions were placed before a Three-Judge Bench and notices were issued on 23rd October, 2013 and thereafter, it was brought to the notice of the Bench that Civil Appeal No .4060/2009 and connected matters involving an identical issue, had been referred to a Five-Judge Bench. Accordingly, on 21st January, 2016, these review petitions were ordered to be heard by a Five-Judge Bench.

On 21st January, 2016, notice was ordered to be served through substituted service and in pursuance of the said order, necessary publication was made in two newspapers and proof thereof was filed on 15th February, 2016. Thereafter, we have heard the matters.

Civil Appeal No.4060/2009 and its connected matters have been heard and order has been reserved on 16th March, 2016.

We have heard the counsel on either side at great length and also considered the various judgments cited by them, which include judgments cited by the non-applicants on the scope of review in Kamlesh Verma vs. Mayawati and Others (2013) 8 SCC 320, Union of India vs. Namit Sharma (2013) 10 SCC 359 and Sheonandan Paswan vs. State of Bihar and others (1987) 1 SCC 288.

After giving our thoughtful and due consideration, we are of the view that the judgment delivered in Christian Medical College (supra) needs reconsideration. We do not propose to state reasons in detail at this stage so as to see that it may not prejudicially affect the hearing of the matters. For this purpose we have kept in mind the following observations appearing in the Constitution Bench judgment of this Court in Sheonandan Paswan (supra) as under:

> ".... If the Review Bench of the apex court were required to give reasons, the Review Bench would have to discuss the case fully and elaborately and expose what according to it constitutes an error in the reasoning of the Original Bench and this would inevitably result in pre-judgment of the case and prejudice its re-hearing. A reasoned order allowing a review petition and setting aside the order sought to be reviewed would, even before the re-hearing of the case, dictate the direction of the re-hearing and such direction, whether of binding or of persuasive value, would conceivably in most cases adversely affect the losing party at the re-hearing of the case. We are therefore of the view that the Review Bench in the present case could not be faulted for not giving reasons for allowing the Review Petition and directing re-hearing of the appeal. It is significant to note that all the three Judges of the Review Bench were unanimous in taking the view that "any decision of the facts and circumstances which … constitutes errors apparent on the face of record and my reasons for the findings that these facts and circumstances constitute errors apparent on the face of record resulting in the success of the review petition, may have the possibility of prejudicing the appeal which as a result of my decision has to be re-heard...."

Suffice it is to mention that the majority view has not taken into consideration some binding precedents and more particularly, we find that there was no discussion among the members of the Bench before pronouncement of the judgment.

We, therefore, allow these review petitions and recall the judgment dated 18th July, 2013 and direct that the matters be heard afresh. The review petitions stand disposed of as allowed.

Review petitions allowed.

**2016 (I) ILR - CUT- 894**

**VINEET SARAN, C.J. & DR.B.R.SARANGI, J.**

W.P.(C) NO. 20466 OF 2015

**M/S. EAST COAST CONSTRUCTIONS INDUSTRIES LTD. ODISHA** ……..Petitioner

*.Vrs.*

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

**CONSTITUTION OF INDIA, 1950 – ART.226**

**Contract – Notice issued to the petitioner to show cause as to why action shall not be taken to rescind the contract – Petitioner filed two replies stating detailed reasons for not completing the work in time – However the opposite parties vide order Dt. 16.11.2015 rescinded the contract, forfeited the entire security deposit and directed to realize 20% of the value of the leftover work from the petitioner on the ground that the petitioner failed to achieve the target – Action challenged – It is seen that extension granted by the opposite parties from time to time without imposing any cost or penalty on the petitioner, so the delay was not due to the fault of the petitioner but due to the fault of the opposite parties – Once a show cause notice was given and detailed replies were furnished the authority was duty bound to pass an appropriate/reasoned order on considering the contents of the reply and not by whimsically stating that the reply furnished was not found to be satisfactory – Why it was not found satisfactory ought to have been disclosed – Non compliance of the principles of natural justice – Held, the impugned order is quashed – The opposite parties may pass fresh order in accordance with law after considering the replies of the petitioner.** (Paras 4 to 7)

For Petitioner : M/s. Santanu Ku. Sarangi & S.K.Sarangi
For Opp. Parties: Mr B.P.Pradhan, A.G.A.
Mr.P.K.Bhuyan

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Date of judgment: 04.04.2016

**JUDGMENT**

***VINEET SARAN, CJ.***

The petitioner, which is a construction company, had entered into a contract with Orissa Water Supply and Sewerage Board (OWSSB)-opp. parties nos.2 and 3, for performance of contract works in respect of Design, Construction, Testing and Commissioning Gravity Sewers in Sewage

Districts I & II of Bhubaneswar City, in connection with the work "Comprehensive Sewerage System of Bhubaneswar City under 12th Finance Commission Award". Admittedly, the contract was initially for a period of two years, which was to commence on 01.02.2008 and to end on 31.01.2010. However, the same was extended from time to time and, lastly, on 21.04.2014, it was extended for a period of five months i.e. up to 21.09.2014. This extension, as well as the previous extensions, were given after considering the fact that certain facilities were required to be provided by the opp. parties, which were not provided by them to the petitioner. The last extension order dated 21.04.2014 would itself make it clear that even though there was delay, no penalty was imposed at the time of grant of extension, meaning thereby that the delay was not on account of the petitioner.

2 Prior to expiry of the extended period, the petitioner had applied for further extension on 14.08.2014, which application remained pending, and the petitioner was permitted to continue with the work beyond the extended period of 21.09.2014. Then on 25.07.2015, a show cause notice was issued by the opp. party no.3-Project Engineer to the petitioner, requiring it to show cause as to why appropriate action to rescind the contract be not taken. A detailed reply dated 13.08.2015 was submitted by the petitioner within time, followed by another reply dated 20.08.2015 and then by order dated 16.11.2015, the contract has been rescinded on the ground of the petitioner having failed to achieve the target. By the said order, the entire security deposit has been forfeited and 20% of the value of the left over work was to be realized from the petitioner. Initially, a petition was filed by the petitioner challenging the notice of show cause dated 25.07.2015. However, during pendency of this writ petition, the impugned order was passed on 16.11.2015, which has been challenged by way of amendment.

3. We have heard Shri S.K. Sarangi, learned counsel for the petitioner, Shri B.P. Pradhan, learned Addl. Govt. Advocate for State-opp. party no.1 and also Shri P.K. Bhuyan, learned counsel for the contesting opp. parties nos. 2 and 3 (OWSSB) and perused the record. Pleadings between the parties have been exchanged and on consent of the learned counsel for the parties, we are disposing of this petition at the admission stage.

4. Though this matter has a chequered history of contract having been initially awarded in 2008, which was to be completed within a period of two years, but what we notice is that time and again extension had been granted to the petitioner, which was lastly extended up to 21.09.2014. However, it is not disputed by the learned counsel for the opp. parties, and is also clear

from the language of the show cause notice dated 25.07.2015, that the petitioner continued to work even after 21.09.2014. Shri P.K. Bhuyan, learned counsel for opp. parties nos. 2 and 3 has admitted that the payment for the work done after 21.09.2014 was also made to the petitioner. The notice of show cause dated 25.07.2015 also makes it clear that the performance of the petitioner after 21.09.2014 was also taken into consideration, and the petitioner was required to show cause as to why the contract be not rescinded under the provisions of the agreement, meaning thereby that the contract continued to be in operation. Two replies had been filed by the petitioner within the stipulated time of thirty days as provided in the show cause notice, which gave detailed reasons for not being able to complete the work in time and also seeking further extension of time. However, all that has been stated in the impugned order dated 16.11.2015 with regard to the show cause notice and the reply of the petitioner is that "a show cause notice was served to them *(petitioner)* for reply, but the reply furnished by them was far from satisfactory."

5. Once a show cause notice was given and detailed reply furnished by the parties, it is expected of the authorities to pass an appropriate order after considering the reply, and not merely stating that the reply was perused which was not found to be satisfactory. Why it was not found to be satisfactory ought to have been disclosed, which has not been done in the present case. Issuance of notice to show cause and requirement of furnishing reply is not to be an empty formality. The purpose would not be achieved if the reply is not considered while passing the order.

6. As we have already stated, the contract was in operation at the time when the impugned order was passed, or else the question of rescinding the contract would not have been there. The extension granted by the opp. parties from time to time, without imposing any cost or penalty on the petitioner, would itself make it clear that the delay was not due to the fault of the petitioner but because of the shortcoming or fault of the opp. parties.

7. However, on merits, we find that the impugned order is devoid of any reason and on this ground alone the order deserves to be quashed. Merely completing the formality of giving notice is not sufficient for complying with the principles of natural justice, as once after the notice is issued and a detailed reply is given by the party, the authority is duty bound to pass a reasoned order only after considering the contents of the reply, and not by whimsically stating that the reply furnished was not found to be satisfactory.

In view of the aforesaid, we are of the opinion that this writ petition deserves to be allowed and, accordingly, it is allowed. The order dated 16.11.2015 passed by the Project Engineer-opp. party no.3 is quashed. The said opp. party shall, however, have liberty to pass fresh order in accordance with law after considering the two replies of the petitioner dated 13.08.2015 and 20.08.2015 filed in response to show cause notice dated 25.07.2015 and meeting the grounds taken in the said replies. There shall be no order as to costs.

Writ petition allowed.

**2016 (I) ILR - CUT- 897**

**VINEET SARAN, C.J., DR.B.R.SARANGI, J.**

W.P.(C) NO. 5004 OF 2016

**SREE METALLICKS LTD.** .....Petitioner

*.Vrs.*

**KOTAK MAHINDRA BANK & ANR.** .....Opp. Parties

**CONSTITUTION OF INDIA, 1950 – ART.226**

**Whether one bank can request another bank to freeze the account of a party ? – Held, No.**

**In this case the petitioner is an account holder with O.P.No.1-Kotak Mahindra Bank, without any default – In the other hand he availed loan from O.P.No.2-ICICI Bank and became a defaulter – Owing to a request of O.P.No.2-Bank, O.P.No.1-Bank issued letter Dt. 14.03.2016 to the petitioner for freezing of his bank account and to transfer the amount lying in balance to O.P.No.2-Bank – Hence the writ petition – Both the banks joined hands together to take action against the petitioner without any authority of law and in the absence of any circular or guidelines issuded by the Reserve Bank of India – Held, impugned letter Dt. 14.03.2016 issued to the petitioner by O.P.No.1-Kotak Mahindra Bank is quashed.** (Paras8,9,10)

For Petitioner : M/s. S.S.Das, (Sr.Adv.) S.Das & B.Sahu.

For Opp. Parties : Sri R.Roy, M/s.S.P.Mishra, (Sr.Adv.) N.K.Das

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Date of Judgment : 05.04.2016

**JUDGMENT**

***VINEET SARAN, C.J.***

The petitioner is a Company incorporated under the Companies Act, 1956 and is engaged in the business of manufacturing steel. On 25.05.2009, the petitioner had opened a current account with the opposite party no.1-Kotak Mahindra Bank. After a gap of more than two years, i.e. on 17.09.2011, the petitioner had availed a credit facility to the tune of Rs.30 crore from the opposite party no.2-ICICI Bank. Admittedly, the petitioner-Company ran into financial distress and could not pay the loan of ICICI Bank, regarding which proceedings are pending before various courts/Forums. Besides winding up petition having been filed by ICICI Bank before the Calcutta High Court, the matter is also pending consideration before the Board for Industrial and Financial Reconstruction (BIFR) under the Sick Industries Companies Act. It is not in dispute that the account of the petitioner-Company with the opposite party no.1-Kotak Mahindra Bank is a regular account, wherein there is no default.

2. The grievance of the petitioner is with regard to the letter dated 14.03.2016 (Annexure-5) issued by opposite party no.1-Kotak Mahindra Bank, freezing the bank account on the basis of communication having been made by the opposite party no.2-ICICI Bank. Challenging the said communication by which the account of the petitioner with opposite party no.1-Kotak Mahindra Bank has been frozen, and being under threat that the amount lying in credit in Kotak Mahindra Bank account of the petitioner may be transferred to ICICI Bank, the petitioner has filed this writ petition.

3. We have heard Sri S.S. Das, learned Sr. Counsel along with Ms. S. Das, learned counsel appearing for the petitioner, Sri R. Roy, learned counsel for the opposite party no.1-Kotak Mahindra Bank and Sri S.P. Mishra, learned Sr. Counsel along with Sri N.K. Das, learned counsel appearing for the opposite party no.2-ICICI Bank and perused the records.

4. With the consent of learned counsel for the parties, this petition has been heard at this stage and is being finally disposed of without calling for counter affidavit.

5. The specific case of the petitioner is that admittedly there is no default by the petitioner in payment of any dues of Kotak Mahindra Bank, and the account of the petitioner with the said bank is absolutely regular, and thus the Kotak Mahindra Bank cannot act on any communication of another bank with regard to freezing of the said account of the petitioner, or transfer of the balance of the said account to any other bank. Learned Sr. Counsel for

the petitioner has specifically submitted that the opposite party-Banks have to transact their business in terms of the banking regulations and guidelines issued by the Reserve Bank of India from time to time, which in no way provides for one bank to direct or ask another bank to freeze the account of a particular party, even when the account maintained by that party with the Kotak Mahindra Bank is not in default.

6. Sri R. Roy, learned counsel for the opposite party no.1-Kotak Mahindra Bank, has tried to justify the issuance of the letter dated 14.03.2016 on the ground that since there was irregularity in the account of the petitioner maintained with the ICICI Bank, it had in turn, on 22.02.2016, written to the Kotak Mahindra Bank to freeze the account of the petitioner maintained with it, relying upon Clause-5.11 of the R.B.I. Master Circulars Customer Service in Banks dated 1.7.2015. During course of the argument, Sri Roy has very fairly admitted that the said Clause-5.11 does not strictly apply to the present case, but since it had come to their knowledge that the petitioner-Company was in some default, they had issued the letter directing for freezing the current account of the petitioner maintained with Kotak Mahindra Bank, and required the petitioner to furnish information as to how they opened the account with Kotak Mahindra Bank without disclosing that they were enjoying the credit facility from the ICICI Bank. However, Mr. Roy, learned counsel for opposite party no.1, does not dispute the fact that the account of the petitioner with Kotak Mahindra Bank was opened much prior to the petitioner availing the credit facility from the ICICI Bank and as such, according to the own statement of the opposite party-Bank, the same could not have been a valid ground for freezing the account of the petitioner. Sri Roy also could not justify the suggestion in the said letter that in case the reply of the petitioner was not satisfactory, then the balance in the petitioner's account maintained with the Kotak Mahindra Bank can be transferred to the ICICI Bank.

7. Sri S.P. Mishra, learned Sr. Counsel appearing for opposite party no.2, ICICI Bank also could not justify the issuance of the communication by his client on 22.02.2016, requiring the Kotak Mahindra Bank to freeze the account of the petitioner. He has also submitted that the same was based on the circular of the Reserve Bank of India, but could not justify the applicability of the relevant Clause 5.11 of the said circular in case of the petitioner.

8. There is no doubt about the fact that the Scheduled Banks like both the opposite parties are required to function as per the R.B.I. Guidelines and

other Banking Norms. Learned counsel for the opposite parties-Banks could not justify the action of one bank requesting the other bank to freeze the account of a particular party, who has not committed any default while maintaining the account in the Bank, which has been requested to freeze the account. In our view, if a bank account of a party is to be frozen, the same can only be done in accordance with law and by an order passed by the competent court or an authority like the B.I.F.R. or D.R.T. In the present case, there is no such direction issued by any court of law or any authority requiring the Kotak Mahindra Bank to freeze the account of the petitioner-Company, or to transfer the amount lying in balance with Kotak Mahindra Bank to ICICI Bank, which may be a creditor, but realization of the dues of ICICI Bank is also to be made in accordance with law for which ICICI Bank had already approached the B.I.F.R., and has also filed winding up petition, which is pending before the Calcutta High Court. Resorting to the methods other than which are not permissible under law cannot be permitted.

9. This is a clear case where two private Scheduled Banks have joined hands and proceeded to take action against the petitioner without any authority of law and without such action being backed by any circular or guidelines issued by the Reserve Bank of India. The submission of learned counsel Mr. Roy appearing for Kotak Mahindra Bank that since the company had been incorporated in 1995 and had started commercial production in 1998, they must have taken loan from other banks for the purpose of their business prior to the opening of the account with Kotak Mahindra Bank in the year 2009, and on the basis of such presumption they have started an inquiry with regard to the correctness of declaration given by the petitioner-Company at the time of the opening of the account, cannot justify the issuance of the direction as has been given in the impugned letter dated 14.03.2016, as the same would be nothing but a fishing and roving inquiry being conducted without there being any basis and merely on apprehension. If at all any such action is to be taken, it should be done only after enquiry, and when some substance is found against the petitioner, then alone suitable action, permissible in law, could have been taken with regard to the bank account of the petitioner-Company maintained with the opposite party-Kotak Mahindra Bank.

10. For the reasons given herein above, we are of the considered opinion that the issuance of the direction by Kotak Mahindra Bank vide communication dated 14.03.2016 cannot be justified in law and is thus liable to be quashed. Accordingly, we allow the writ petition and quash the letter

dated 14.03.2016 passed by the opposite party no.1-Kotak Mahindra Bank. No order as to costs.

Writ petition allowed.

**2016 (I) ILR - CUT- 901**

**VINOD PRASAD, J. & S.K.SAHOO, J.**

MATA NO. 104 OF 2011

**USHARANI PRADHAN** ……..Appellant

*.Vrs.*

**BRAJAKISHORE PRADHAN** ……..Respondent

**(A) HINDU MARRIAGE ACT, 1955 – S. 13(1) (i a)**

**Divorce – Cruelty – Meaning of – Not defined in the Act – However, it may be physical or mental or both – Burden lies on the aggrieved party to make out a case of cruelty and the act of cruelty must be such, which would cause reasonable apprehension in the mind of the aggrieved party that it would be harmful or injurious on his/her part to live with the other party – In this case the appellant-wife instituted two police cases causing arrest of the husband – She had also alleged that her husband had illicit relationship with a home guard and failed to substantiate in evidence – She was also living in another house in the same town away from her husband and children – All these factors are not only humiliating but also amounts to cruelty – Held, the learned Family Judge was justified in allowing the divorce petition filed by the respondent-husband.** (Paras 6,9,10,11)

**(B) HINDU MARRIAGE ACT, 1955 – S. 13(1) (i b)**

**Divorce – Desertion – Meaning of – It means separation of one party by the other to the marriage without reasonable cause and consent with an intention to put an end to the matrimonial relation and cohabitation for a continuous period of not less than two years immediately preceeding the presentation of the petition – To prove "desertion" it is not always necessary for separate living by the parties as it could be proved while living under the same roof – So question of desertion is a matter of inference to be drawn from the facts and circumstances of each case – In the present case the wife has left the company of her husband, small children and lived separately since 2007 without reasonable cause, consent and wish of her husband and**

**failed to perform her matrimonial duties and obligations and the marriage has remained only for the name sake – Held, the impugned order of divorce is affirmed.** (Paras 10, 11)

**Case Laws Referred to** :-

1. AIR 2002 SC 2582 : Praveen Mehta -Vrs.- Inderjit Mehta
2 ( AIR 1964 SC 40) : Lachman Utamchand Kirpalani v. Meena alias Mota
3. AIR 2002 SC 88 : Adhyatma Bhattar Alwar –Vrs.- Adhyatm Bhattar Sri Devi
3. (AIR 1957 SC 176) : Bipinchandra Jaisinghbhai Shah v. Prabhavati

For Appellant : M/s. Debi Prasad Dhal, S.K.Dash, A.Behera
For Respondent : M/s.Dinesh Ku. Mohanty, Deepak Ku. Rath.

Date of argument : 29.10.2015
Date of Judgment :19.11. 2015

**JUDGMENT**

***S.K.SAHOO, J.***

> "A home with a loving and loyal husband and wife is the supreme setting in which children can be reared in love and righteousness and in which the spiritual and physical needs of children can be met."
>
> -David A. Bednar

This case depicts the sordid episode of the life of a woman who spoiled her homely environment and family relationships running after the politics and politicians forgetting her solemn duties and responsibilities of a matrimonial life and neglecting her husband and children. She was cautioned and reminded of her pious obligations but she was mesmerized so much by the political thoughts and quite adamant that she failed to understand the consequence of her negligent attitude. When she faced the reality and started realizing her wrongdoings, by that time it was too late and much water had flowed under the bridge.

This matrimonial appeal has been filed by Usharani Pradhan (hereafter "the appellant") under section 28 of Hindu Marriage Act, 1955 read with section 19(1) of Family Courts Act, 1984 challenging the impugned judgment and order dated 23.09.2011 passed by the learned Judge, Family Court, Puri in Civil Proceeding No.162 of 2010 in allowing the petition filed by Brajakishore Pradhan (hereafter "the respondent") under section 13 of Hindu Marriage Act, 1955 and dissolving the marriage between the parties with a

decree of divorce subject to payment of alimony of monthly maintenance @ Rs.3,000/- by the respondent-husband to the appellant-wife.

2. It is the case of the respondent-husband that he married the appellant on 22.05.1991 in accordance with the caste, custom and rites and both of them stayed together as husband and wife and out of the wedlock, they were blessed with a daughter and a son. It is the further case that since the appellant was interested in political activities, she neglected the family and she used to return back home in the late hour of the night. Even though the respondent raised objection but the appellant did not bother about the same. She was not preparing food for her family members and behaving very badly with her husband and even gone to extent of instituting false police cases against him for which he was taken into custody. The appellant left her in-laws' house on 07.03.2007 and started residing at another place. After desertion of the appellant for a period of more than two years, the respondent instituted a divorce proceeding on the ground of cruelty and desertion.

3. On being noticed, the appellant appeared and filed her written statement and denied the averments made in the divorce petition. She put forth a case that after her maternal aunt expired giving birth to a female child, she and her husband adopted that child as their own daughter but when both of them were blessed with a daughter and son, the respondent lost interest in the adopted child and pressed the appellant to hand over the child back to her father. As the appellant did not agree to such proposal of her husband, there was dissention between the couple and for that reason the respondent started taking liquor and assaulting the appellant mercilessly causing serious injuries for which she instituted G.R. cases. The respondent also started maintaining distance from the appellant as a result of which their relationship deteriorated. It is her further case that after being mercilessly assaulted, she was driven out of her in-laws house with her adopted daughter for which she was constrained to take shelter in her paternal place at Jatani. The appellant denied the allegations leveled against her by the respondent regarding cruelty and desertion and it is her case that such allegations have been concocted just to get a decree of divorce and prayed to dismiss the divorce petition.

4. The learned Family Judge formulated the following points for determination:-

> (i) Whether the respondent was entitled to divorce the appellant on the ground that she had treated him with cruelty?

(ii) Whether the appellant had deserted the respondent for a continuous period of not less than two years immediately preceding the presentation of the petition?

5. In order to prove his case, the respondent examined himself as P.W.1 and proved certain documents. Ext.1 and Ext.3 are the certified copies of the FIR, Ext. 2 and 4 are the certified copies of the charge-sheet, Ext.5 series is the notice issued by Mahila Commissioner and Ext.6 series is the cash receipt issued by Sovaniya Sikhashram.

The appellant examined himself as R.W.1.

6. The learned Family Judge while discussing the evidence on record has been pleased to observe that the case of the appellant that the respondent had kept the seized articles in the house of a Muslim at Tiadi Sahi which was seized by police is not correct inasmuch as the articles were seized from the house of the respondent as per seizure list and was left in the Zima of the appellant.

It was further held that the allegation that the respondent had history of contact with home guard Netramani Dei has not been substantiated anywhere rather such allegation amounts to cruelty to her better half. It was further held that the claim of the appellant-wife about her separate living since 2009 or 2010 is contradicted by the recital in the FIR vide Ext.1 which indicates that they were living separately since 2007. It was further held that living in another house in the same town away from her husband is humiliating to the husband and it also amounts to cruelty.

The learned family Judge further held that the appellant had deserted her husband since the year 2007 by living separately from her husband and children which might be due to her involvement in Mahila Samiti work or any other office work at Puri beyond the normal office hour. It was further held that it is abundantly clear that the appellant had deserted her since 2007 for a period of more than two years by the time of filing of the petition in the year 2010 and she had also subjected her husband to cruelty beyond repair and toleration with unsubstantiated allegation of involvement with another woman.

7. On 29.10.2015 both the spouses and their children were present before us in person. We had a long deliberation with each of them and when we asked the children, who are staying in the company of their father as to whether they are interested to stay with their mother, both of them bluntly denied and stated that when they were small kids, their mother had left them and their father is treating them with all care and affection and they are

prosecuting their studies and the girl is staying in a hostel and her father used to visit her regularly. Though the appellant expressed her willingness to stay in the company of her husband but the manner in which she responded to our query indicated that she had also no real inclination to stay in the company of her husband. The respondent also denied to stay in the company of the wife and according to him, he and his children are living peacefully and happily and they do not want any further disturbance in their life.

8. The learned counsel for the appellant-wife while challenging the impugned judgment and order of the learned Family Judge contended that there was no proper conciliation which is mandated in the statute and the factum of desertion as alleged has not been proved with cogent evidence. It was also urged that the learned Family Judge has failed to appreciate that the respondent was torturing and humiliating the appellant and inspite of that she was living with her husband and looking after the children. It was further urged that when the appellant is still interested to live in the company of her husband and children to save her marriage, it was not proper on the part of the learned Family Judge to pass a decree of divorce in favour of the respondent and it would also not be proper for this Court to give a stamp of approval to such a decree.

The learned counsel for the respondent on the other hand while supporting the impugned judgment and order contended that the findings are based on the materials available on record and from the evidence, the respondent appears to have discharged his burden of proof regarding desertion by the appellant. It was further urged that the manner in which the appellant neglected to perform her duty as a wife, as a mother keeping high ambition of becoming a politician and also instituted false cases against the respondent after deserting him, the Family Judge was quite justifed in granting decree of divorce.

9. Adverting to the contentions raised by the learned counsels for the respective parties, perusing the materials available on record and the documents proved by the respondent, we find that the appellant had instituted two police cases i.e. one in the year 2005 and the other in the year 2007 which led to the arrest of the respondent. The case of the appellant that she was driven out of the house in the year 2009 which she had pleaded in her written statement as well as in the year 2010 which she has stated in her evidence appears to be not acceptable in view of the institution of aforesaid two police cases and the averments made in the F.I.R. The appellant alleged that the respondent had illicit relationship with a home guard namely

Netramani Dei which she had mentioned in the FIR dated 19.04.2007 vide Ext.1. This allegation has not been substantiated by any evidence. The materials available on record rather indicate that the appellant was involved in Mahila Samiti activities for which she was neglecting her family. She did not even bother to take care of her small children and deserted her husband for which since last eight years, the respondent was looking after the children with all care and attention and also providing them good education. It further appears that the case of the appellant is inconsistent with her pleadings and contradicted by the two FIRs vide Exts.1 and 2.

10. Desertion of one of the spouses by the other for a continuous period of not less than two years immediately preceding the presentation of the divorce petition as well as treating the spouse with cruelty are some of the grounds of divorce.

According to the Explanation provided under Section 13 of Hindu Marriage Act, 1955, "desertion" means the desertion of the one party by the other party to the marriage without reasonable cause and without consent or against the wish of such party and includes willful neglect of the petitioner by the other party to the marriage.

In case of **Adhyatma Bhattar Alwar –Vrs.- Adhyatm Bhattar Sri Devi reported in AIR 2002 SC 88,** it is held as follows:-

> "6. 'Desertion' in the context of matrimonial law represents a legal conception. It is difficult to give a comprehensive definition of the term. The essential ingredients of this offence in order that it may furnish a ground for relief are :
>
> 1. The factum of separation;
>
> 2. The intention to bring cohabitation permanently to an end- animus deserendi;
>
> 3. The element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period;
>
> 8. The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately proceeding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include 'willful neglect' of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence, desertion must be without reasonable cause and

without the consent or against the wish of the petitioner. From the Explanation, it is abundantly clear that the legislature intended to give to the expression a wide import which includes willful neglect of the petitioner by the other party to the marriage. Therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly, two elements are essential so far as the deserted spouse is concerned; (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period."

In case of Savitri Pandey -Vrs.- Prem Chandra Pandey reported in 2002 (1) Kerala Law Journal 193, the Hon,ble Supreme Court held as follows:-

"7. "Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In the other words, it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e., not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalizes the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to host of authorities and the views of various authors, this Court in **Bipinchandra Jaisinghbhai Shah v. Prabhavati ( AIR 1957 SC 176)** held that if a spouse abandons the other in a state of temporary passions, for example, anger or disgust without intending permanently to cease cohabitation, it will be amount to desertion. It further held:

For the office of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The Petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law, those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time: for example; when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decide to come back to the deserted spouse by the bona fide offer of resuming the matrimonial home with all the implications of marital life, before the

statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refused to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce, the Plaintiff must prove the offence of desertion like other matrimonial offence beyond all reasonable doubt. Hence, though corroboration is not required is in absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court.

8. Following the decision in Bipinchandra's case (supra), this Court again reiterated the legal position in **Lachman Utamchand Kirpalani v. Meena alias Mota ( AIR 1964 SC 40)** by holding that in its essence, desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. For the offence of desertion so far as deserting spouse is concerned, two essential conditions must be there (1) the factum of separation and (2) the intention to bring co-habitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion proved, the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation.

9. To prove desertion in matrimonial matter, it is not always necessary that one of the spouse should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case."

Thus keeping in view the aforesaid settled position of law that there can be no desertion without animus deserendi and it implies not only factum of separation but also intention to separate permanently and to put an end to matrimonial relationship and cohabitation, on scanning of the materials on record, we found that the conduct of the appellant in leaving the company of her husband and their small children and living separately for so many years since 2007 for pursuing her so-called political ambition clearly indicates that she had deserted the respondent without reasonable cause and without his consent and against the wish of the respondent.

The evidence on record further indicates that the appellant treated the respondent with cruelty. She had not only neglected to perform her matrimonial duties and obligations but also instituted one after another case against her husband. The manner in which she had conducted herself for so many years and harassed and humiliated her husband has caused reasonable apprehension in the mind of the respondent that it would be harmful and injurious on his part to live in the company of the appellant and that is the probable reason why the respondent is not interested to live in the company of the appellant.

Section 13(1)(i-a) of the 1955 Act states that any marriage solemnized can be dissolved by a decree of divorce on a petition presented either by the husband or the wife on the ground that the other party after solemnization of marriage had treated the petitioner with cruelty.

The expression 'cruelty' has not been defined under Section 13 of the 1955 Act. Law is well settled that the cruelty may be physical or mental or both. The expression 'cruelty' has got an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status. The burden of proof lies on the aggrieved party to make out a case of cruelty. The act of cruelty must be such which would cause reasonable apprehension in the mind of the aggrieved party that it would be harmful or injurious on his part to live with the other party. A particular conduct which may amount to cruelty in one case may not necessarily amount to cruelty in the other case due to change of various factors and different set of circumstances.

In case of **Praveen Mehta –Vrs.- Inderjit Mehta reported in AIR 2002 SC 2582**, it is held as follows:-

> "21. Cruelty for the purpose of Section 13(1)(ia) is to be taken as a behavior by one spouse towards the other which causes reasonable

> "apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical cruelty, the mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty, it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behavior is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

The case of the appellant has not been substantiated and the contents of the FIR, the pleadings in the written statement as well as her evidence in Court contradict each other.

Accordingly, we are of the view that the learned Family Judge is quite justified in holding that the respondent has proved desertion and cruelty against the appellant.

11. In view of what we have discussed above, we are of the view that when the reconciliation between the parties is not possible and the parties are living separately since 2007 and the marriage has remained only for the name sake, the learned Family Judge was justified in allowing the divorce petition and therefore we do not find any infirmity, impropriety in the impugned judgment. The quantum of alimony which was awarded in favour of the appellant has not been challenged before us. We therefore affirm the decree of divorce and the dissolution of the marriage between the parties including the payment of monthly maintenance @ Rs.3,000/- by the respondent to the appellant from the date of the decree. In the result, the MATA application stands dismissed. The parties are directed to bear their own costs.

Appeal dismissed.

**2016 (I) ILR - CUT- 912**

**INDRAJIT MAHANTY, J. & DR.D.P.CHOUDHURY, J.**

W.P.(C) NO. 24215 OF 2013

**RAMA CHANDRA PADHI** ……..Petitioner

*.Vrs.*

**CHAIRMAN-CUM-M.D., NALCO BHAWAN, BHUBANESWAR & ORS.** ……..Opp. Parties

**(A) SERVICE LAW – "Sealed Cover Procedure" – When adopted – It is adopted when an employee is due for promotion but due to pendency of disciplinary/criminal proceedings against him at the relevant time, the findings of his entitlement to such benefit are kept in a sealed cover to be opened after the proceedings are over.**

(Para 22)

**(B) SERVICE LAW – Promotion – Sealed Cover Procedure – When permissible – It can be resorted to when a charge-memo in a disciplinary proceeding or a charge-sheet in a criminal proceeding is issued to the employee – Mere filing of F.I.R. or mere allegation resulting initiation of departmental proceeding will not be sufficient to adopt the said procedure.**

**In this case DPC was held in June 2008 and charge sheet in the criminal case was supplied to the petitioner on 17.10.2008 – So when DPC was held no criminal proceeding was pending against the petitioner – Held, the sealed cover procedure was illegal – Impugned order passed by the CAT is set aside – Petitioner should be given retrospective promotion to the grade E-07 from 1.7.2008 with all arrear salary and other service benefits as admissible from time to time.**

(Paras 30,31,32)

**Case Laws Referred to** :-

1. AIR 1991 SC 2010 : Union of India v. K.V. Jankiraman
2. (1998) 4 SCC 598 : S.P.Shivprasad Pipal v. Union of India and others
3. (2015) 42 SCD 530 : Dholey Govind Sahebrao & others v. Union of India & Ors.
4. AIR 1991 SC 2010 : Union of India v. K. V. Jankiraman
5. (2014) 10 SCC 610 : State of Madhya Pradesh and others v. Ramananda Pandey,
6. (1998)3 SCC 394 : Dr. (Smt.) Sudha Salhan v. Union of India
7. AIR 2007 SC 1708 : Coal India Ltd. & Ors Vs. Saroj Kumar Mishra

For Petitioner : In person
M/s.Swayam P. Kar, D.R.Mohapatra,

S.Satpathy & J.P.Tripathy
M/s. Umesh Ch. Patnaik, S.D.Mishra
M/s. Prasant Kishora Roy, S.Pattnaik,
M.R. Sahoo & S.Rahem.

For Opp. Parties : M/s. Milan Kanungo, S.K.Mishra, Y.Mohanty, S.N.Das & P.S.Acharya
M/s. Manoj Ku. Mishra, T.Mishra, J.K.Mohapatra, S.Mishra & Sonak Mishra.

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Date of hearing : 02.02.2016
Date of judgment: 26.02.2016

**JUDGMENT**

***DR. D. P. CHOUDHURY, J.***

Challenge is made to the order dated 9.10.2013 passed by Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 59 of 2012 filed by the present petitioner under section 19 of the Administrative Tribunal Act, 1985.

**Facts of the case** :

**2.** The case of the unsuccessful petitioner in brief is as follows :

The petitioner was working as Chief Manager, Captive Power Plant, National Aluminium (hereinafter called 'NALCO') w.e.f. 1.1.2000. While working as such, in the month of November, 2006, some juniors of petitioner, namely, Sanjeev Ray and Bal Subramanium were promoted superseding petitioner by Departmental Promotion Committee (hereinafter called 'DPC') held in the month of June, 2008. It is also stated that the petitioner along with other junior officers had appeared in interview and also before the DPC and the performance of the petitioner was well to consider his promotion. In the said DPC of 2008, promotion of present petitioner was kept in sealed cover without any sort of legal process being adopted.

**3.** It is stated by the petitioner that the petitioner was implicated in a CBI case by the opposite parties under section 13(2) and 13(1)(e) of Prevention of Corruption Act, 2008 on the false allegation as the petitioner was fighting against the corruption in the public sector unit NALCO. Although CBI submitted charge sheet in late, the name of the petitioner was kept in sealed cover in the month of June, 2008. Petitioner challenged the illegal action of the opposite parties and DPC before the Central Vigilance Commissioner (hereinafter called 'CVC'), New Delhi. The CVC referred the matter to the Chief Vigilance Officer (hereinafter called 'CVO'), NALCO for enquiry. It

is stated that the CVO after completion of enquiry recommended for promotion of the petitioner with retrospective effect with reference to DPC held in the year 2008 vide Annexure-1. The opposite parties also sent additional documents to the CVO against the petitioner and that was also enquired and the CVO submitted additional report on 26.10.2009 before the CVC. It is alleged that the CVO and the CVC after going through the reports, recommended the DPC to give promotion to the petitioner with retrospective effect. Thereafter purportedly a meeting was held on the application made by the petitioner with the Secretary, Ministry of Mines, Union Government. In that meeting the authorities of NALCO and the officials of the Ministry of Mines prepared Minutes of the meeting vide Annexure-4 whereunder, the Ministry sought report from the opposite parties. It is further alleged that the NALCO sought legal opinion from the Legal Advisor of NALCO and the Legal Advisor opined on 19.11.2008 that the sealed cover procedure adopted by the DPC ignoring the promotion of the petitioner was not proper as it has not followed the decision of the Apex Court in **Union of India v. K.V. Jankiraman, AIR 1991 SC 2010**. In spite of opinion of the Legal Advisor, recommendation of the CVC and the instruction of the Secretary, Mines, petitioner were not given his due promotion with retrospective effect for which the petitioner was compelled to file Original Application No. 486 of 2011 before the Central Administrative Tribunal (hereinafter called 'CAT') and prayed therein to declare his promotion to the post of DGM with retrospective effect i.e. from 1.7.2008 and grant all arrear benefits from that date.

**4.** It is stated by the petitioner that the learned Tribunal asked the petitioner to make a comprehensive detailed petition, the same shall be considered by O.P. No.1. Accordingly petitioner made detailed representation with relevant documents to the opposite party no.1 on 27.8.2011 by Annexure-7. To the ill luck of the petitioner that representation was disposed of by O.P. No.1 with a conclusion that there is no lapse on the part of the DPC recommendation. Apparently the petitioner being charge-sheeted in October, 2008, his case was kept in sealed cover and cover could be opened only after exoneration from charge. Since the order of the O.P. No.1 was not in consonance with the recommendation of the CVC, the decision of the Ministry and it is against principle of law decided by the Hon'ble Apex Court, petitioner again preferred OA No.59/12 before CAT, Cuttack Bench, Cuttack. Learned Tribunal after hearing learned counsel for the parties did not accept the contention raised by the petitioner and confirmed the order

dated 1.10.2011 of O.P. No.1 in rejecting the representation of the petitioner. As such the CAT passed impugned order on 9.10.2013.

**5.** It is alleged by the petitioner that the Tribunal has erred by ignoring the legal principles as enumerated in Janaki Raman's case (supra) and also failed to appreciate the report of the CVC as well as the observation of the Ministry of Mines. It is the bone of contention of the petitioner that the learned Tribunal has erred in law by not appreciating the case of the petitioner in proper perspective and without discussing any fact or law, rejected the Original Application of the petitioner. Petitioner challenged the said order of the Tribunal and hence the writ petition.

**6.** The contesting opposite parties representing NALCO filed counter reviewing the allegation made by the petitioner. It is stated in the counter that all the executives of NALCO are recruited under Recruitment and Promotion Rules, 1997 (in short referred to as 'R & P Rules, 1997'). Under Clause 1.1.22.0 of the R & P Rules, 1997 of NALCO, promotion from E-4,E-5, E-6 & E-7 and above grades are based on vacancy and on merit only. The case of the petitioner along with other executives in E-6 were considered for promotion by the DPC 2008 on taking into account vacancy in E-7 grade. DPC, 2008 empanelled petitioner along with 22 executives in his grade for the promotion to the next higher grade, i.e., E-7 to fill up future vacancy. The CVO while giving vigilance clearance for the executives eligible for promotion in June, 2008 has mentioned about the prosecution initiated against the petitioner as has been accorded by the CMD on 31.5.2008 filed by the CBI pursuant to a Disproportionate Asset case. Since the prosecution was pending against the petitioner, the case of the petitioner was kept in sealed cover on 13.8.2008 by the DPC of 2008 for which it cannot be said that the seal cover procedure is illegal. It is also averred that the recommendation of DPC 2008 with reference to the petitioner was kept in seal cover on the basis of the charge sheet filed by CBI before competent court of law on 30.6.2008. Thereafter the petitioner made representation to the CMD of NALCO on 18.8.2008 to open his seal cover and give promotion. On the request of the petitioner, it was opened and found that the petitioner was suitable for promotion against future vacancies along with others. On the report of the CVO, CVC gave advise to give retrospective promotion to the petitioner after obtaining legal opinion. Accordingly, NALCO sought opinion from Additional Solicitor General and Assistant Solicitor General. It is made clear in the counter that both the law officers of the country opined that due to prosecution charges pending against the petitioner and charge-sheet being

filed in the Departmental Proceeding, the action taken by the opposite parties is proper and legal. Accordingly opposite parties-NALCO sent a report to the Ministry of Mines. In the meantime charge sheet was issued by the CBI Court to the petitioner on 28.10.2008. So in the next promotion in 2009 the case of the petitioner was also kept in seal cover.

**7.** It is further averred that the DPC, 2008 had never recommended Shri Padhi for next higher grade but it empanelled him for the next higher grade in case of future vacancies along with 22 other executives of the same grade. The submission of the petitioner that he was not promoted, is false because 17 executives who were empanelled along with the petitioner, were also not promoted. The Assistant Solicitor General and Additional Solicitor General have also advised to follow the rules of the company to consider the case of the petitioner. As per clause 1.1.29 of the R & P Rules, 1997 if an executive is completely exonerated of the charges, i.e., no blame whatsoever is attached to him, he will be promoted from due date after a recommendation by the DPC. Although the petitioner was acquitted by the CBI Court but the DPC, 2008 has not recommended the petitioner for promotion. So his case was not considered. It is also stated that all the promotion in vacancy based posts are considered on merit only, concept of supersession in promotion for filling up vacancy on post based has no meaning. Moreover, on 1.10.2011 O.P. No.1 passed a reasoned and speaking order pursuant to the order of the CAT. In that order, the O.P. No.1 has taken into consideration all the documents, facts, legal opinions obtained at various occasions, opinion of the Ministry of Mines and CVC, after which, found the petitioner has no merit in his case for which refused to give promotion retrospectively. It is the bone of contention of the opposite parties that since the action has been taken according to rules, law of the land and opinion of the law officers of the country, the writ petition filed by the petitioner bears no merit for which it should be rejected.

**SUBMISSIONS :**

**8.** Mr. Roy, learned Senior Counsel for the petitioner has initiated the argument and allowed the petitioner to submit his case. The petitioner while appearing in person, strenuously argued that the seal cover procedure as propounded in Jankiraman case (supra) by the Hon'ble Apex court, has not been properly followed by the opposite parties for which the said seal cover procedure is wholly wrong. He further submitted that he having secured higher mark in interview and found to be eligible for promotion from E-06 to E-07, there is no point in refusing his promotion, having kept his case in seal cover. He further submitted that as he is a whistle blower, exposing

corruption in NALCO, he was made to suffer by withholding his promotion in a fictitious manner.

**9.** It is also stated that the officers junior to him, were promoted in the DPC, 2008 for no fault of him although the Annexures-D of the R & P Rules, 1997 specifically enshrines that the E-07 & E-08 posts are integrated posts and there cannot be promotion from E-06 to E-07 for the officers working in particular discipline or cadre. Moreover, he submitted that the DPC was convened in June, 2008 but the cognizance of the offence in the criminal case filed by the CBI was taken on 08.07.2008. According to him, as per decision in Jankiraman case (supra), as propounded by the Hon'ble Apex Court, the DPC cannot keep the case of the petitioner in seal cover, in absence of cognizance of the offence taken against the petitioner. As the petitioner has been found suitable and empanelled for promotion in June, 2008 and CVO has also no comment against the petitioner, seal cover procedure followed by the opposite parties is illegal. He also stated that the legal opinion of the law officers of the Government of India have been obtained by suppressing the material facts for which the said legal opinion is not correct. Not only this but also he submitted that the regular charge-sheet was submitted only after the DPC was held. According to the departmental rules, there cannot be seal cover procedure to be maintained as long as charge sheet in departmental proceeding is not being issued to the delinquent. He submitted that he has been harassed by the opposite parties in spite of the opinion of the CVC and CVO by not giving his promotion with retrospective effect. Even if another interview was held in 2009, he was also ignored by not calling him to the interview. It discloses that the opposite parties have got apathy towards him. Legal opinion has also been collated from Legal Advisor of NALCO who opined that he should be given promotion with retrospective effect and in accordance with the opinion of the CVC. In spite of the legal opinion of the law officer of the NALCO, opposite parties turned deaf to the request of the petitioner. They also did not listen to the advise of Secretary, Mines, Ministry of Mines, Government of India for which he has to approach CAT but the CAT erred in law by dismissing his writ petition. He submitted that the order of the CAT in OA, is illegal, improper by not following the principle of law as enunciated by the Hon'ble Apex Court. The impugned order of the CAT also suffers from illegality by not considering the case of the petitioner to give him promotion with retrospective effect. In toto, he submitted that the impugned order of the CAT should be set aside and the

opposite parties may be directed to give promotion to the petitioner w.e.f.1.07.2008 to the cadre of E-07 with arrear service benefits.

**10.** Mr. Mishra, learned Senior Counsel for Opp. Party submitted that the promotion of the Executives of the NALCO are guided by P & R Rules, 1997 and according to such Rules on the date of DPC, the case of the petitioner was considered and given promotion for the future vacancy. He further submitted that by the date of D.P.C. convened prosecution has already initiated a criminal case against the petitioner and was pending and Disciplinary Proceeding was also pending for which his case was kept in sealed cover. According to him, a person has no right to claim promotion but has a right to be considered in the zone of selection for promotion. It is also submitted by Mr. Mishra, learned Senior Advocate that the seal cover procedure in this case is absolutely applicable because on the date when D.P.C. declared result on 13.08.2008 Charge-sheet was already submitted by the C.B.I. in the Court of C.B.I, Bhubaneswar on 30.06.2008 for which the question of consideration of the case of the petitioner without following seal cover procedure, does not arise.

**11.** Mr. Mishra, learned Senior Counsel for NALCO further submitted that the allegation of the petitioner that in spite of he securing higher mark, the Officers securing lesser mark are given promotion illegally, is not correct in as much as under the P & R Rules, 1997, while the Officers are given promotion from E-06 to E-07, they are to be given promotion according to vacancy occurred in the particular discipline of allied cadre even though the petitioner secured higher mark than the persons who got promoted. On the other hand, petitioner is an electrical and instrumental engineer being in the grade of E-06 in 2000 whereas the vacancy occurred in E-07 with regard to chemical engineer cadre for which the officers securing less marks were found suitable to be promoted by the DPC. Petitioner and others were eligible for promotion and found suitable but the promotion was made to E-07 basing on the persons available in such particular cadre where E-07 posts were vacant. Thus he submitted that the claim of the petitioner that he was found suitable, but not promoted whereas the officers securing less marks than him are promoted, is a misconceived one. Moreover, he submitted that the sealed cover procedure being adopted in his case, is wholly legal and proper and in the event of his selection also, he could not have been promoted by then. So he submitted to dismiss the writ petition and uphold the order of the CAT.

**Points for discussion :**

**12.** The points for consideration are :

I. Whether the petitioner is entitled to be promoted by the DPC of NALCO held in June,2008?

II. Whether the sealed cover procedure adopted by the DPC of NALCO held in June, 2008 is correct and legal ?

**Point No.I**

**13.** It is not disputed that the petitioner was an executive under NALCO being in the scale or grade of E-06 in 2000. It is also not disputed that there is Recruitment & Promotion Rules, 1997 (in short 'R & P Rules, 1997) governing the recruitment and promotion of the executives of NALCO. It is admitted that the petitioner was in the electrical and instrumentation cadre (E & I) while working in grade E-06. It is also admitted by both the parties that DPC was held in June, 2008 and there was an FIR lodged against the petitioner under section 13(2) & 13(1)(e) of the P C Act, 2008. It is also not disputed that the result of the DPC was declared on 13.8.2008, where the case of petitioner was kept in a sealed cover.

**14.** In course of hearing, this Court has called for the proceedings of the DPC for better appreciation. It is the allegation of the petitioner that he was being superseded by juniors. He was empanelled for promotion to the scale of E-07 in future vacancies. On the other hand it is contention of the learned counsel for the opposite parties that the promotion was given basing on the marks awarded in the interview and the cadres to which the petitioner and other candidates belong to. Essentially it is contended that according to the cadre, the promotion to E-07 has taken place and as such the petitioner not being in the cadre of electrical, could not be promoted whereas the officer securing less marks than him, being in the cadre of chemical, has been promoted and it has been done according to rule. We, therefore, went through the documents of the DPC. Before discussing about document let us discuss about concerned Department Rules of Promotion.

**15.** As per Rule 1.1.19.3 of R and P Rules, 1997 the channels of promotion upto and including the level of E-6 shall be as per the centralized cadre scheme detailed at Annexure-C of the said Rule. Rule 1.1.19.4 of R and P Rules, 1997 speaks as follows :

> "1.1.19.4 Integrated allied cadres at E-7 and E-8 level (on promotion from E-6 level) shall be as per integrated allied cadre scheme at Annexure-D and cadres at E-9 shall be the cadre known as the General Management Cadre."

**16.** In terms of the above clear condition in above Rule, it is only asserted that in the scale E-6 vide Annexure-C centralised cadre scheme is available with prescribed qualification for appointment. But it is only restricted upto E-6. The integrated allied cadres at E-7, E-8 are taken up on promotion from E-6 level vide Annexure-D of said Rule. For better appreciation, Annexure-D is spelt out hereunder :

"ANNEXURE-D

INTERGRATED ALLIED CADRES
(E-7 & E-8 GRADE)

| SL. NO. | Integrated cadre | Included Allied cadres |
|---|---|---|
| 1. | Engineering & Allied Service | Chemical<br>Metallurgical<br>Mechanical/Production<br>Electrical<br>Civil Engineering including Architecture or Ceramics<br>Electronics and Instrumentation including telecommunication<br>Management Services(including Corporate Planning, Quality Management Services, Business Development, Industrial Engg. And EDP/System)<br>Environmental Engineering |
| 2. | Mining & Geology | Mining & Geology |
| 3. | Commercial Management | Materials, Marketing, Despatch, Excise, Traffic, Shipping & Transport. |
| 4. | Human Resource, Personnel, administration, Management | Training, HRD, PR & Corporate Communication & Law |
| 5. | Finance & Accounts | Finance & Accounts and Internal Audit. |

*Notes:*
*1. Disciplines not covered above, shall be independent cadres for promotion to posts upto E-8 level.*
*2. Vigilance and R & D: May be taken on deputation from other cadres.*

Sd/-
(S. Mohanty)
AGMCV-II,CO"

**17.** From the above table, it appears that engineering and allied services under integrated cadre contained 12 allied cadres. The petitioner has also filed copy of the report of the Chief Vigilance officer vide Annexure-2 where the CVC has cited the name of 17 persons who were considered for promotion from E-6 to E-7 out of integrated allied cadres in following manner:-

| Sl. No. | Name S/Sri | Dt. Of joining in E6 grade | Interview Marks | Total Marks | Status |
|---|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) | (6) |
| 01 | S. Saha | 1.7.2002 | 9.50 | 87.05 | Promoted to E7 grade w.e.f. 01.7.2008 |
| 02 | S Choudhury | 1.7.2002 | 9.50 | 86.10 | -do- |
| 03 | R. Brahma | 1.1.2003 | 5.50 | 85.86 | -do- |
| 04 | AK Pattnaik | 1.1.2000 | 7.50 | 88.59 | -do- |
| 05 | B Minz | 1.1.1999 | 7.00 | 85.88 | Promoted to E-7 grade w.e.f. 05.02.2009 |
| 06 | AK Shaw | 1.7.1999 | 7.00 | 87.68 | -do- |
| 07 | PR Parija | 1.1.2000 | 6.50 | 87.58 | Not Promoted |
| 08 | SC Mishra | 1.7.2001 | 6.50 | 89.39 | -do- |
| 09 | MP Mishra | 1.1.2002 | 7.00 | 88.99 | Not Promoted |
| 10 | SK Jena | 1.1.2002 | 6.50 | 89.20 | -do- |
| 11 | Ch. PK Saran | 1.1.2002 | 6.00 | 88.80 | -do- |
| 12 | AK Patra | 1.7.2001 | 6.00 | 88.64 | -do- |
| 13 | M. Quasim | 1.1.2000 | 6.00 | 86.30 | -do- |
| 14 | MK Mohapatra | 1.1.1998 | 6.00 | 89.29 | -do- |
| 15 | BP Acharya | 1.1.1999 | 6.00 | 88.88 | -do- |
| 16 | RC Padhy | 1.1.2000 | 6.00 | 87.46 | -do- Kept in sealed cover |
| 17 | RS Das | 1.7.2002 | 8.50 | 88.44 | Not Promoted |

It appears Shri S. Shah, S. Choudhury, R. Brahma and A.K. Partnaik were promoted to E-7 from 1.7.2008 whereas from Sl.no.5 to 17 were not promoted. But sl. No.5 B Minz was promoted on 5.2.2009. Of course there is remark that the present petitioner was not promoted being kept in seal cover. On going through DPC papers about the total marks secured, it appears that the petitioner has secured more marks than Shri S. Saha, S. Choudhury, R. Brahma and others who were promoted in 2008. No doubt S. Saha, S. Choudhury belong to chemical cadre. But the petitioner belong to electronics and instrumentation. On going through the Original DPC papers, it appears that Shri S.K.Satpathy who kept marks more than the petitioner, has been also promoted to E-7. It also appears that there are other officers who have secured less marks than petitioner from the allied cadres under Annexure-D of R & P Rules, 1997 were also found promoted. When the R & P Rules, 1997 states that promotion to E-7 and E-8 grade is under integrated allied cadres and Annexure-D states that Engineering and Allied Service contain 12 allied cadre, it is not understood as to why Officer of particular cadres were chosen to be promoted but not as per marks secured in interview even though petitioner was otherwise suitable and has secured more marks

than officers of other cadre of Allied Service. The petitioner although was found suitable for promotion, is ignored bereft of the fact that his case is kept under seal cover. On the other hand there is no notification or the order or instruction produced by the O.P. to show that promotion from E-6 to E-7 is only as per vacancy occurred in cadres of allied service.

**18**. In **S.P.Shivprasad Pipal v. Union of India and others, (1998) 4 SCC 598**, Their Lordships have observed in the following manner :

> "14. The Cadre Review Committee after examining the kinds of duties discharged by these officers decided that since they all worked in the area of labour welfare, it would be desirable that they could widen their experience. This would be possible if the cadres were integrated and the posts were made interchangeable so that the members of the cadre could get a more varied experience in different areas of labour welfare, thus making for a better-equipped cadre. Therefore, although the exact nature of work done by the three cadres was different, it would be difficult to say that one cadre was superior or inferior to the other cadre or service.
>
> 15. A decision to merge such cadres is essentially a matter of policy. Since the three cadres carried the same pay scale at the relevant time, merging of the three cadres cannot be said to have caused any prejudice to the members of any of the cadres. The total number of posts were also increased proportionately when the merger took place so that the percentage of posts available on promotion was not in any manner adversely affected by the merger of the cadres.
>
> 16. The appellant, however, contends that as a result of the merger his promotional chances have been very adversely affected because his position [pic]in the seniority list has gone down. Rule 9 of the Central Labour Service Rules, 1987 under which the merger is effected, lays down the rules of seniority. It provides that the inter se seniority of the officers appointed to the various grades mentioned in Schedule I at the initial constitutional stage of the service shall be determined according to the length of regular continuous service in the grade subject to maintenance in the respective grade of inter se seniority of officers recruited in their respective original cadres. The proviso to this Rule prescribes that although Assistant Labour Commissioner (Central), Labour Officer and Assistant Welfare Commissioner shall be equated, all Assistant Labour Commissioners (Central) holding

such posts on or before 31-12-1972 shall be en bloc senior to Labour Officers and (2) Senior Labour Officers and Regional Labour Commissioners shall be equated. But all Regional Labour Commissioners holding such posts on or before 2-3-1980 shall be en bloc senior to the Senior Labour Officers.

17. Explaining the proviso the respondents have said that before 31-12- 1972 Assistant Labour Commissioners were in a higher pay scale than Labour Officers. The parity between their pay scales came about only from January 1973. That is why to preserve their inter se position, Assistant Labour Commissioners appointed prior to 31-12-1972 have been placed above Labour Officers. Similarly, Regional Labour Commissioners drew a higher pay scale than Senior Labour Officers prior to 1980. The parity has come about in 1980 and hence Regional Labour Commissioners holding such posts on or before 2-3-1980 have been placed above Senior Labour Officers.

18. The seniority rules have thus been carefully framed taking all relevant factors into consideration. The respondents have also pointed out that as a matter of fact, by reason of the merger, the appellant has not, in fact, suffered any prejudice and he has also received promotions.

19. However, it is possible that by reason of such a merger, the chance of promotion of some of the employees may be adversely affected, or some others may benefit in consequence. But this cannot be a ground for setting aside the merger which is essentially a policy decision. This Court in Union of India v. S.L. Dutta, (1991) 1 SCC 505, examined this contention. In S.L. Dutta case a change in the promotional policy was challenged on the ground that as a result, service conditions of the respondent were adversely affected since his chances of promotion were reduced. Relying upon the decision in the State of Maharashtra v. Chandrakant Anant Kulkarni, (1981) 4 SCC 130, this Court held that a mere chance of promotion was not a condition of service and the fact that there was a reduction in the chance of promotion would not amount to a change in the conditions of service."

**19**. The above decision has been followed in **Dholey Govind Sahebrao & others v. Union of India and others,(2015) 42 SCD 530** where Their Lordship observed at para-35:

35. It is in the background of the aforesaid submission advanced at the hands of learned counsel, that we would consider the validity of the merger of cadres contemplated by Rule 4 of the TA Rules, 2003 and Rule 5 of the STA Rules, 2003. The position in the present controversy is not comparable to the position examined by this Court in the judgments referred to hereinabove. It needs to be understood, that the cadre of Data Entry Operators, was created out of the original ministerial cadre. It is, therefore apparent, that the members of the two cadres were originally discharging similar duties. It is only as a consequence of the administrative decision to computerize the functioning of the Customs and Central Excise Department, that a separate cadre of Data Entry Operators came to be created. The newly created cadre, exclusively functioned towards giving effect to the decision to computerize the functioning of the department. There was thereafter a division of duties discharged by the original members of the ministerial cadre. One cadre of employees exclusively thereafter discharged procedural duties of the department, whereas, the other cadre of employees exclusively thereafter discharged duties aimed at computerization of the functioning of the department. Even though, it is apparent, that the Data Entry Operators exclusively functioned towards the process of computerization of the functioning of the Customs and Central Excise Department, yet that could not be possible without their existing experience in the erstwhile ministerial cadre. Consequent upon the merger of posts, consequent, upon the promulgation of the TA Rules, 2003, and the STA Rules, 2003, the nature and duties of the two cadres were combined. Consequent upon their appointment as Tax Assistants and Senior Tax Assistants, members of the erstwhile ministerial cadre, and members of the cadre of Data Entry Operators, were required to perform both procedural duties and duties relating to computer applications. The deficiencies in the two cadres sought to be merged, were sought to be overcome, by subjecting the members of the two cadres to different examinations, whereby, the two cadres were trained for discharging their duties efficiently, on merger, whilst holding the posts of Tax Assistants/Senior Tax Assistants. It is, therefore, not possible for us to accept, that there was any serious difference between the two merged cadres, either on the issue of nature of duties, or on the subject of powers exercised by the officers holding the post, or the extent of territorial or other charge held, or responsibilities discharged by them,

> or for that matter, the qualifications prescribed for the posts. On account of the aforesaid, by and large similarity, we are satisfied, that the merger of the cadres, and the determination of the inter se seniority on merger, were justifiably determined, on the basis of the different pay- scales of the cadres merged, under the TA Rules, 2003 and the STA Rules, 2003. By the mandate of the above Rules, all posts in equivalent pay-scales were placed at the same level. Posts in the higher scale of pay, were given superiority on the subject of inter se seniority, with reference to posts in the lower scale of pay. In our considered view, the above determination, at the hands of the rule framing authority, on the issue canvassed before us, cannot be termed either arbitrary or discriminatory. We are, therefore satisfied in concluding, that the provisions of Rule 4 of the TA Rules, 2003 and Rule 5 of the STA Rules, 2003, cannot be faulted on the touchstone of Articles 14 and 16 of the Constitution of India.

20. With due respect to the aforesaid decisions of the Hon'ble Apex Court, we are of the view that the integrated allied cadres as created under R & P Rules, 1997 vide Annexure-D is reasonable and the promotion from E-06 to E-7 cannot be ipso facto made to keep the officers of different cadres remain as such as in E-06. On the other hand, the purpose of integration of the cadres will be frustrated if at all the promotion is given only taking into consideration the officers of particular cadres available in E-6 which are of different cadre. On the other hand, the promotion of the petitioner vis a vis promotion of other officers of E-6 should be considered marks secured in interview and assessment as made by DPC. Since the petitioner is from the Electronic and Instrumentation including Telecommunnication cadre has got more mark than Sri Saha, S. Choudhury and others of allied service as per Annexure-D of R and P Rules, 1997 in the interview and also found suitable, he should be promoted to the grade E-07. The contention of the learned Senior counsel for the NALCO that the mark wise promotion could not be given as the officers of different cadres were required to be promoted to E-07 cannot be tenable. When there is R & P Rules, 1997 showing promotion to E-07 and E-08 under integrated cadre, the case of the petitioner has to be considered under said Rule. It is also contended that other officers like petitioner were not promoted even if they have secured more marks in the interview and assessment than the officers promoted for which petitioner cannot claim any discrimination, do not hold good inasmuch as illegality caused to petitioner has to be corrected and cannot be made in perpetuity,

more so other officers are not parties to it and consideration of their case is academic only for the time being. Moreover, the purpose of interview and assessment is to award marks on their performance so that it can be based on merit only as per rules of company. We are thus of the considered view that the promotion of the petitioner from E-06 to the grade E-07 should be made from the date when the officers securing less marks than him in E-06 during DPC 2008 June have been promoted. So the petitioner is entitled to get his promotion to E-07 from1.7.2008 when Shri Saha and others securing less marks than him got promotion. The point no.I is answered accordingly.

**Point No.II**

**21.** We have already held in the aforesaid para that the petitioner is entitled to be promoted from E-06 to E-07 and it appears from the DPC papers that he has been empanelled for promotion for future vacancy but his promotion was kept in sealed cover because of the prosecution pending against him under the Prevention of Corruption Act. At this stage, the law on the seal cover procedure has to be dealt, after which it will be required to opine whether his name should be kept in seal cover or not.

**22.** In **Union of India v. K. V. Jankiraman reported in AIR 1991 SC 2010**, Their Lordships observed in the following manner :

> "2. (3) To what benefits an employee who is completely or partially exonerated is entitled to and from which date?' The ,'sealed cover procedure" is adopted when an employee is due for promotion, increment etc. but disciplinary/criminal proceedings are pending against him at the relevant time and hence, the findings of his entitlement to the benefit are kept in a sealed cover to be opened after the proceedings in question are over'. Hence. The relevance and importance of the questions.
>
> xx xx xx
>
> 6. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure.
>
> xx xx xx
>
> We are of the view that even 'if the results in the sealed cover entitle the employees to promotion from the date their immediate juniors were promoted and they are, therefore, so promoted and given notional 'benefits of seniority etc., the. employees in no case should

be given any arrears of salary. The denial of the benefit of salary will, of course, be in addition to the penalty,.if any,. imposed on the employees at the end of the disciplinary proceedings. We, therefore, allow these appeals as above with no order as to costs."

**17.** With due respect to the aforesaid decision, it is found that the seal cover procedure is only to be resorted to after charge is framed and issued to the delinquent in department proceeding or charge sheet has been issued to the accused. Such decision has been also followed in the decision reported in **State of Madhya Pradesh and others v. Ramananda Pandey**, **(2014) 10 SCC 610** where Their Lordships observed at para-5 in the following manner :

"5. In 1991 SC 2010 (sic) (Union of India Vs. K.V. Jankiraman), the Apex Court held that the sealed cover procedure can also be resorted to only in the event a charge sheet in a disciplinary proceeding and a challan in a criminal case is issued/filed. In the present case, the respondents are not in a position to demonstrate that on the date of consideration of petitioner for promotion and issuance of order Annexure P-2, the petitioner was either facing disciplinary action or criminal case. Needless to mention that respondent department is custodian of the entire record including service record of the petitioner. In this view of the matter, merely because petitioner has made a bald statement in Annexure R-1, it was not sufficient to cancel the petitioner's promotion order. In absence of any material to show that petitioner was facing a disciplinary action or criminal case, the order Annexure P-1 cannot be upheld. There is no other justiciable reason assigned in the return for cancelling the said order." The appellants herein preferred writ appeal against this order and the Division Bench has dismissed the appeal on the same ground, namely, there was no material on record to show that the respondent was facing any disciplinary proceeding or criminal case on the date of consideration of his name for promotion. The Division Bench, thus, observed that the learned Single Judge had not committed any illegality while passing the order impugned."

**24.** In the case of **Dr. (Smt.) Sudha Salhan v. Union of India, (1998)3 SCC 394,** Their Lordshhips observed in the following manner :

"xx xx We are also of the opinion that if on the date on which the name of a person is considered by the Departmental Promotion Committee for promotion to the higher post, such person is neither under suspension nor

has any departmental proceedings been initiated against him, his name, if he is found meritorious and suitable, has to be brought on the select list and the "sealed cover" procedure cannot be adopted. The recommendation of the Departmental Promotion Committee can be placed in a "sealed cover' only if on the date of consideration of the name for promotion, the departmental proceedings had been initiated or were pending or on its conclusion, final orders had not been passed by the appropriate authority. It is obvious that if the officers, against whom the departmental proceedings were initiated, is ultimately exonerated, the sealed cover containing the recommendation of the Departmental Promotion Committee would b e opened, and the recommendation would be given effect to."

**25.** In **Coal India Ltd. & Ors Vs. Saroj Kumar Mishra** reported in **AIR 2007 SC 1708** Their Lordship observed:

> "A departmental proceeding is ordinarily said to be initiated only when a charge sheet is issued"

**26**. With due respect to the aforesaid decisions, we are of the view that seal cover procedure is only to be followed if there is charge-sheet issued to the delinquent in disciplinary proceeding or charge sheet is issued to petitioner in criminal case against the petitioner. Mere filing of F.I.R. or mere allegation resulting initiation of departmental proceeding without issue of charge-sheet to delinquent is not enough to adopt seal cover procedure.

**27**. Now adverting to this case, it appears that in June, 2008, the DPC was held and same facts are also admitted by the petitioner and opposite parties. In fact charge-sheet in criminal case was supplied to the petitioner only on 17.10.2008. When the DPC was held, there is no criminal proceeding pending as there is no charge-sheet supplied to the petitioner in terms of the decision as discussed above.

**28**. It appears from the counter that charge for regular departmental action was issued to the petitioner on 14.10.2008 after framing same basing on the CBI recommendation. So it is made clear that in the month of June, 2008 when the DPC was held for promotion, no charge-sheet in prosecution nor in departmental proceeding has been issued to the petitioner. On the other hand on the date of DPC held, there was neither charge-sheet in the department proceeding issued to the petitioner nor prosecution is allegedly to have any criminal charge pending against the petitioner according to law. Even assuming that DPC result was declared on 13.08.2008, on that day also

neither any criminal proceeding was pending as per law nor any charge in Departmental Proceeding was issued to the petitioner.

**29.** As per Rule 1.1.29.0 of R & P Rules, 1997 following procedure will be followed while an employee is facing disciplinary proceeding.

"1.1.29.0 PROCEDURE WHILE FACING DISCIPLINARY PROCEEDINGS

1.1.29.1 Where an executive otherwise eligible for promotion is:
(a) under suspension; or
(b) a charge sheet has been issued and disciplinary proceedings are pending against him; or
(c) prosecution proceeding in respect of such employee for a criminal cl pending:

1.1.29.4 The case of the concerned executive may be placed before the DPC to decide his suitability or otherwise for provisional promotion. The DPC will consider his case as per the normal policy without taking into account the pending disciplinary case against him. Based on the recommendations of the DPC provisional promotion may be given to the concerned executive with the approval of Chief Executive. The provisional promotion will be valid until further orders and shall not confer any right for regular promotion. The concerned executives shall not be confirmed in the higher post until promotion is regularized. In case the executive is fully exonerated, the promotion will be regularized and confirmation order in the higher post issue effective from due date. Wherever sealed covers are kept, the same shall be opened and the promotion shall count from the date the executive was first found fit for promotion. In case the executive is not fully exonerated, the provisional promotion shall stand withdrawn and the executive shall be deemed to have not been promoted. The penalty, if any, imposed shall count in his original post.

1.1.29.5 The executive on whom any penalty other than censure is imposed shall not be considered for promotion in subsequent two DPCs when it is due. An executive who has been censured shall not be considered for promotion in subsequent one DPC when it is due.

1.1.29.6 However, the position will be different, if prosecution has been launched and the same has resulted in some punishment inflicted by the competent court and the Central Government guidelines/instructions in this connection will be adhered to."

**30.** Now applying the provisions in this case, it is reiterated that there is neither charge-sheet issued in disciplinary proceeding to petitioner nor petitioner was facing criminal charge showing pendency of criminal proceeding on the date of DPC convened in June,2008. Hence we are of the opinion that the case of the petitioner should not have been kept in seal cover as the procedure followed by the opposite parties neither gets approval from

the R & P Recruitment Rules, 1997 nor gets approval of the decisions of the Hon'ble Apex Court.

**31.** We are further of considered view that keeping the name of the petitioner under seal cover by the DPC, 2008 is wholly illegal and unjust. When the sealed cover procedure adopted in 2008 is illegal, subsequent continuance of his name in seal cover procedure in 2009 is equally illegal. It is submitted by learned Senior Counsel for opp. party that in departmental proceeding petitioner was awarded punishment of censure in 2011 as revealed from record and same should be considered to disallow the prayer of promotion of the petitioner. It is submitted by petitioner that on the date of DPC no such punishment was awarded and it was inflicted later on to which he has protested. In spite of such remark, he was promoted in 2011 as revealed from the submissions of parties. We are of the considered view that if any punishment is awarded subsequent to DPC convened, that will not legalize the seal cover procedure which we hold as illegal and unjust. So there is no force with the submissions of learned counsel for opp. party.

The point no.II is answered accordingly.

**CONCLUSION**

**32**. In view of the aforesaid discussion, we find that the petitioner is entitled to get promotion to the grade of E-07 from 1.7.2008 when his juniors are promoted and the seal cover procedure was illegal. It appears CAT has not made thread bare analysis of facts properly for which landed in wrong conclusion by affirming the order dated 1.10.2011 passed by the opposite party no.1. We, disapprove the conclusion of Center Administrative Tribunal. We hereby observe that the impugned order dated 9.10.2013 under Annexure-9 passed by learned CAT and the order dated 1.10.2011 under Annexure-8 passed by opp. party No.1 are equally unjust, illegal and liable to be set aside. We, therefore, set aside the orders dated 1.10.2011 passed by opp. party No.1 and dated 9.10.2013 passed by the CAT and at the same time it must be held that the petitioner should be given retrospective promotion to the grade E-07 from 1.7.2008 for which we hereby direct the opposite parties to give promotion to the petitioner w.e.f. 1.7.2008 with all arrear salary and other service benefits as admissible from time to time. The writ petition is disposed of accordingly.

Writ petition disposed of.

**2016 (I) ILR - CUT-931**

**INDRAJIT MAHANTY, J. & DR.D.P.CHOUDHURY, J.**

OTAPL NO. 8 OF 2012

**THE COMMISSIONER, CENTRAL EXCISE, CUSTOMS & SERVICE TAX, BHUBANESWAR** ……..Appellant

*.Vrs.*

**M/S. BALLARPUR INDUSTRIES LTD.** ……...Respondent

**CENTRAL EXCISE ACT, 1944 – S. 35-B (2)**

**Whether the word "May" appearing in sub-section (2) of section 35-B is directory or mandatory? Held, the word "May" should be read as "Shall", hence the statutory provision is mandatory but not directory – So opinion by the committee of Commissioner of Central Excise is mandatory besides authorization given by such committee to any officer to file appeal on behalf of the department.** (Para 19)

**Case Laws Referred to** :-

1. Montreal Street Railway Co. v. Normandin 1917 AC 170
2. AIR 1961 SC 200 : L. Hazari Mal Kuthiala v. Income-tax Officer, Special Circle, Ambala Cantt. & Anr.
3. AIR 2003 SC 511 : Bhavnagar University v. Palitana Mill Pvt. Ltd.
4. 1917 AC 170 : Montreal Street Railway Co. v. Normandin
5. AIR 1961 SC 200 : L. Hazari Mal Kuthiala v. Income-tax Officer, Special Circle, Ambala Cantt. and another
6. AIR 2003 SC 511 : In Bhavnagar University v.Palitana Mill Pvt.Ltd.

For Appellant : M/s. Bismay Anand Prusty
For Respondent : M/s. S.C.Mohanty, P.Rath & J.Mohanty

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Date of hearing : 28.1.2016
Date of judgment : 4.3.2016

**JUDGMENT**

***DR. D. P. CHOUDHURY, J.***

The captioned writ appeal is preferred challenging the order dated 25.4.2012 passed by learned Customs, Excise & Service Tax Appellate Tribunal(hereinafter called CESTAT), Eastern Zonal Bench, Kolkata in Excise Appeal No. 674 of 2006 in dismissing the appeal being infructuous.

**Facts of the case** :

2. The factual matrix of the case of the appellant is that respondent-assessee is manufacturer of paper and board products, classified under Chapter No.48 of Central Excise Tariff Act, 1985. The officers of the appellant-Department visited the premises of the unit of the respondent from 18.10.1997 to 22.10.1997 and conducted joint stock verification of its finished products and MODVATABLE inputs, vis-à-vis the stocks recorded in its statutory prescribed record and found a shortage of 6.607 metric ton in the NSS ML and 0.788 metric ton in SS ML variety of paper. It is also stated that a quantity of 204 Kg. of SS ML was found excess and the same was seized under a panchnama. There are also some deficiencies detected by the officers of the appellant. It was noticed by the officers of the appellant that sludge had been removed without reversing of his price in scrap arising out of MODVATABLE capital goods without payment of central excise duty. They found 62.314 metric tons of paper in excess without having been accounted for in its RG -1 and the same was seized. Show-cause notice dated 15.4.2008 was issued to the appellant and its Manager(Commercial) and Executive (Central Excise) as to why :

I. duty of Rs.21,398/- for clearance of capital goods should not be recovered from them under Rule 57U of the Central Excise Rule, 1944 (hereinafter called "the Rule");

II. duty of Rs.98,462/-(B.D.) and Rs.531(Cess) for clearance of different varieties of papers;

III. duty of Rs.2,14,049/- for clearance of packing material on MODVAT inputs;

IV. duty of Rs.3,17,960/- for clearance of capital goods on which MODVAT duty was availed;

V. duty of Rs.6,68,173/- on the MODVAT inputs unutilized in the manufacture of finished goods; and

VI. an amount Rs.4,740/- reversible on the clearance of exempted goods which are not paid by the party at the time of clearance of these goods but paid by them later, should not be confirmed under section (1) of section 11A of the Central Excise Act, 1944 (hereinafter called 'the Act') and relevant rules of the Rule.

3. Notice to show-cause was also issued as to why the penalty should not be imposed on the assessee under section 11A of the Act and relevant

Rules made thereunder for suppression of the facts and in contravention of the aforesaid Rules with intent to evade payment of duty. It is also stated that a notice was also issued to show-cause as to why interest should not be paid under section 11AB of the Act and Rules made thereunder for the said reasons, as to why a quantity of 62.314 metric ton valued at Rs.15,40,135/- seized for not having accounted for in the RG-1 should not be confiscated under relevant Rule of the Rule and penalty should not be imposed under Rule 173Q of the Rules for the same; and the Manager(Commercial) and Executive (Central Excise) of the assessee-company will not be penalised under Rule 209A of the Rule. The said notice was adjudicated by the Joint Commissioner (ADJN), CESTAT, Bhubaneswar-I by order dated 30.6.2005. In the said adjudication, the concerned authority confirmed the demand of central excise duties for (i) Rs.21,398/- on capital goods, (ii) Rs.98,462/- and Rs.531/- (Cess) on clearance of different varieties of paper, and (iii) Rs.3,17,960/- on the clearance of capital goods on which MODVAT credits had been availed, (iv) Rs.6,68,173/- on MODVATABLE inputs unutilized in the manufacture of finished goods and (v) rs.4,740/- on exempt goods (sludge), and recovery of further interest under section 11AB and a penalty of Rs.11,00,000/- imposed thereon. The said adjudication authority confirmed the central excise duty as demanded by the Department on capital goods, cess and other infraction as pointed out by the Department in the show-cause. That apart the concerned adjudication authority confiscated a quantity of 62,314 metric ton of paper and imposed penalty of Rs.1,00,000/- on the assessee besides imposition of additional penalty of Rs.1,00,000/- on its Manager(Commercial) and Executive (Central Excise).

4. Challenging the said order-in-original, the assessee along with its officers preferred appeal before the Commissioner (Appeals), Central Excise, CESTAT, Bhubaneswar but the order of the concerned authority was upheld in appeal vide order dated 20.1.2006 in respect of NSS Map Litho paper but set aside the balance portion of the adjudication order including the personal penalty imposed on the Manager(Commercial) and Executive (Central Excise) of the respondent company.

5. Challenging the said order dated 20.1.2006 passed by the Commissioner (Appeals), Central Excise, CESTAT, Bhubaneswar, the present appellant filed three separate appeals along with stay petition before the learned CESTAT which are registered as Excise Appeal No. 674 of 2006-against the appellant, Excise Appeal No. 250 of 2007-against the Manager(Commercial) and Excise Appeal No. 251 of 2007-against the

Executive (Central Excise) of respondent-company. Be it stated that vide common order dated 13.5.2008 learned CESTAT dismissed the Excise Appeal Nos. 250 and 251 of 2007 with observation that the appeal filed pursuant to the authorization from the Commissioner, Bhubaneswar-I instead of filing appeal petition by the present appellants along with valid authorization, signed by the Committee of Commissioners, the same, is not maintainable and rejected. On 25.4.2012 learned CESTAT also dismissed the Excise Appeal No. 674 of 2006 as infructuous by referring to the orders passed by the Tribunal in the above two appeals. Challenging the said order dated 25.4.2012 passed learned CESTAT in Excise Appeal No. 674 of 2006, the present appeal has been filed with the following three substantial questions of law :

> 1) Whether, in the facts and circumstances of the case, the Ld. CESTAT is correct in dismissing the appeal preferred by the Appellant/Department, on mere technical ground of lack of proper authorization by the Committee of Commissioners in term of Sub Sec.2 of Sec. 35B of the Act, though a plain reading of Sec.35-B and more specifically presence of word "may", in its Sub Sec.2, gives a very clear and unambiguous inference that, such an authorization by the Committee of Commissioners is a mandatory requirement for the Appellant/Department to maintain an Appeal before the Ld. CESTAT?
>
> 2) Whether, in the facts and circumstances of the case, the Ld. CESTAT is correct in dismissing the appeal preferred by the Appellant/Department, on mere technical ground of lack of proper authorization by the Committee of Commissioners in term of Sub Sec. 2 of Sec. 35 B of the Act, though the very Sec.35-B(1)(b) of the Act, gives right to any person, which very much includes the Appellant/Department to prefer an appeal before the Appellate Tribunal, if aggrieved by the any order passed by the Commissioner (Appeals) under Sec.35-A?
>
> 3) Whether, in the facts and circumstances of the case, the Ld. CESTAT is correct in dismissing the appeal preferred by the Appellant/Department, on mere technical ground of lack of proper authorization by the Committee of Commissioners in term of Sub Sec. 2 of Sec. 35 B of the Act, though it is well settled principle of law that, on mere technical grounds, substantial justice should not be

vitiated and the very same authorization by the Committee of Commissioners was very much present in the records of the Ld. CESTAT below, in other connected appeals ?

**SUBMISSIONS**

6. Learned counsel for the appellant-Department strenuously argued that the impugned order passed by the learned CESTAT is erred in law by not accepting settled principle of law. He further submitted that the learned CESTAT has failed to apply judicial mind to the facts of the case and landed in a wrong conclusion. Learned CESTAT has erred in law to appreciate that presence of authorisation by Commissioner of Central Excise in the record itself and at the same time dismissed the appeal without going through the same. The authorization as appearing in sub-section (2) of Section 35B of the Act is more directory one but not mandatory and learned CESTAT has failed to appreciate this principle of law.

7. Relying upon the decisions in **Montreal Street Railway Co. v. Normandin 1917 AC 170, L. Hazari Mal Kuthiala v. Income-tax Officer, Special Circle, Ambala Cantt. and another reported in AIR 1961 SC 200 and Bhavnagar University v. Palitana Mill Pvt. Ltd., AIR 2003 SC 511** learned counsel for the appellant-Department submits that provision of sub-Section (2) of Section 35B of the Act being directory, have not been properly appreciated by CESTAT.

8. It is the bone of contention that the grant of authorization of the Committee of Commissioners in terms of sub-section(2) of Section 35B of the Act is completely an intra-departmental administration decision making procedure and there is no scope of advancing pleadings and deciding any lis between the parties for which non-compliance of the said administrative flaw, cannot be fatal to the quasi-judicial proceeding initiated. He also strenuously argued that the dismissal order passed by the learned CESTAT only on the ground of lack of authorization by the Committee of Commissioners is completely without jurisdiction. In the present case, Committee of Commissioners in terms of sub-section (2) of section 35 of the Act was constituted by the Commissioner of Central Excise, Customs and Service Tax, Bhubaneswar-I under Commissionerate and Commissionerate of Central Excise, Customs and Service Tax, Bhubaneswar-II, but at the time of filing of Excise Appeal No. 674 of 2006 before the learned Tribunal, the Commissioner of Central Excise, Customs and Service Tax, Bhubaneswar-I under Commissionerate being in charge of Bhubaneswar-II Commissioner,

made authorisation in due capacity and has to be treated as valid authorization in this appeal. It is also submitted by the learned counsel for the appellant-department that common authorization dated 24.6.2008 of all the three appeals including the present appeal against the respondent was signed by both the Commissioners of Bhubaneswar-I & II Commissionerate and the same are also available on records of the connected Excise Appeal Nos.250 & 251 of 2007 but without taking cognizance of the same, the order was passed in the Excise Appeal No. 674 of 2006 with a finding that the same is infructuous which is nothing but non-application of mind by the learned CESTAT. So he submitted to allow the appeal in deciding the substantial questions of law as proposed by the appellant and remit the matter back to the learned CESTAT for fresh adjudication on merit.

9. Learned counsel for the respondent submitted that no authorization by the Committee of Commissioners as required under sub-section (2) of Section 35B of the Act was filed while the appeal was preferred by the learned CESTAT for which the order passed by learned CESTAT can neither be said that it is without application of mind nor it is without jurisdiction. It is further submitted by learned counsel for the respondent that the compliance of sub-section (2) of Section 35B of the Act in preferring appeal is mandatory and at no stretch of imagination, it is directory. Since the mandatory provision has not been followed by the appellant/Department, rightly learned CESTAT has passed the impugned order observing that it is infructuous and subsequent rectification of such defect cannot cure the mandatory provision as required under law. He submitted that decision of the Hon'ble Apex Court cannot be pressed into service in the present facts and circumstances inasmuch as the said decisions were rendered on different facts and circumstances but not identical issues raised in this case. According to him after amendment of concerned provision of the Central Excise Act, 2005 , the Committee of Commissioners have been entrusted the task of authorization of either Commissioner or any Officer to file the appeal and the purpose of such authorization is not merely authorization of Officer but also take decision to file appeal after deliberating on the facts and law involved in the particular case. So mere observance of the provision of law cannot be said to be empty formality but it is to be taken as a mandatory provision to be complied. So, he submitted to confirm the order of the learned CESTAT and dismiss the appeal.

**Points for Discussion**

10. At the time of admission, the matter is taken up to find out the question of law raised in this case, but in a preliminary hearing, on consent of parties, we decided to find out whether there is compliance of sub-section (2) of Section 35B of the Act.

**DISCUSSION**

11. It is admitted by both the parties that the Commissioner of Appeals disposed of the appeal filed by the respondent-company and his two officials for which the Commissioner of Appeals disposed of the Excise Appeal No. 674 of 2006 by the Commissioner on 25.6.2012 against respondent-company whereas the learned Tribunal disposed of the Excise Appeal Nos.250 & 251 of 2007 preferred by two officers of the company respectively on 13.5.2008. It is not disputed that in the impugned order dated 25.4.2012, against which present appeal arises, has been decided in the following manner :

> "Per Shri S.K. Gaule:
>
> Heard both sides. The Revenue filed this appeal against the O/A No.8-10/B-1/06 dated 20.01.06. At the outset, the ld. Advocate for the respondent has brought to our notice that the appeal field against this Order-in-Appeal has already been decided against the Department Vide Tribunal's Final Order No.S-369-370/A-557-558/Kol/08 dated 13.05.2008.
>
> 2. The ld. A.R. appearing for the Department, reiterated the grounds of appeal.
>
> 3. We find that the appeal against the O/A No.8-1-/B-I/06 dated 20.1.06, has already been decided Vide Tribunal's Final Order No.S-369-370/A-557-558/Kol/08 dated 13.5.2008. In these circumstances, the present appeal is infructuous and the same is accordingly, dismissed.
>
> Dictated and pronounced in the open Court.
>
> | | |
> |---|---|
> | Sd/- | Sd/- |
> | 26.4.2012 | 26.4.2012 |
> | (DR. D.M.MISRA) | (S.K.GAULE) |
> | JUDICIAL MEMBER | TECHNICAL MEMBER" |

12. It is also not disputed that in the order dated 13.5.2008 passed in the Excise Appeal Nos.250 & 251 of 2007 has been decided in the following manner :

"Per Dr. Chittaranjan Satapathy:

Heard the ld. SDR for the appellant Revenue. The respondents are not represented. Instead of required authorization from the Committee of Commissioners, an authorization from the Commissioner, BBSR I, has been filed. As such, the appeal filed pursuant to such an authorization, is not maintainable. Accordingly, the appeals along with the stay petitions are dismissed as not maintainable.

(Dictated and pronounced in the open Court.)

| | |
|---|---|
| Sd/- | Sd/- |
| 16.5.2008 | 16.5.2008 |
| (DR. D.M.MISRA) | (Dr. Chittaranjan Satapathy) |
| JUDICIAL MEMBER | TECHNICAL MEMBER" |

13. From the foregoing orders, it appears that the impugned order in this appeal has been passed on 25.4.2012 relying upon the order dated 13.5.2008 passed in Excise Appeal Nos.250 & 251 of 2007. Both the orders only indicate that no proper authorization has been filed by the appellant-Department to file the appeal, resulting in disposal of the appeals. It is the contention of the learned counsel for the appellant that they have filed the authorization dated 24.6.2008 vide Annexure-3 with the affidavit by the appellant in CESTAT on 29.1.2013. On going through the said authorization, it appears that the same was purportedly made to file appeal against the order dated 20.1.2006 passed by the learned Commissioner of Appeals before the CESTAT on the ground specified in another document and authorized the Additional Commissioner of Central Excise, Bhubaneswar-I to file appeals before the CESTAT, Kolkata. On going through the order dated 13.5.2008 passed in Excise Appeal Nos.250 & 251 of 2007, it appears it was passed much before the authorisation was made. The impugned order shows that relying on the order dated 13.5.2008 passed in Excise Appeal Nos.250 & 251 of 2007, the impugned order has been passed dismissing the appeal in 2012. The impugned order does not disclose whether cognizance of the authorisation dated 24.6.2008 has been taken by the learned CESTAT, if it is filed. In absence of any indication of filing the same in the impugned order, it cannot be said that the said authorisation has been filed in the impugned appeal while appeal was preferred. Thus, on materials on record, authorization neither finds place in the impugned order nor in the order passed in other two appeals.

14. Now let us discuss the provisions of law to find out whether the same is mandatory or directory. Sub-sections (1) & (2) of Section 35B of the Act is reproduced herein below :

**"THE CENTRAL EXCISE ACT 1944**

**35B. Appeals to the Appellate Tribunal.-** (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order—

(a) a decision or order passed by the Commissioner of Central Excise as an adjudicating authority;

(b) an order passed by the Commissioner (Appeals) under section 35A;

(c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate Commissioner of Central Excise under section 35, as it stood immediately before the appointed day;

(d) an order passed by the Board or the Commissioner of Central Excise, either before or after the appointed day, under section 35A, as it stood immediately before that day:

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to,—

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse, or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty;

(d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the

rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998;

Provided further that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where—

(i) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(ii) the amount of fine or penalty determined by such order, does not exceed fifty thousand rupees.

(2) The Committee of Commissioners of Central Excise may, if it is of opinion that an order passed by the Appellate Commissioner of Central Excise under section 35, as it stood immediately before the appointed day, or the Commissioner (Appeals) under section 35A, is not legal or proper, direct any Central Excise Officer authorised by him in this behalf (hereafter in this Chapter referred to as the authorised officer) to appeal on its behalf to the Appellate Tribunal against such order.

Provided that where the Committee of Commissioners of Central Excise differs in its opinion regarding the appeal against the order of the Commissioner (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Chief Commissioner of Central Excise who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner (Appeals) is not legal or proper, direct any Central Excise Officer to appeal to the Appellate Tribunal against such order.

Explanation- For the purposes of this sub-section, "jurisdictional Chief Commissioner" means the Chief Commissioner of Central Excise having jurisdiction over the adjudicating authority in the matter."

15. In terms of the aforesaid provisions, appeals against the decision or order passed by the Commissioner, Central Excise (Appeals) can be preferred to CESTAT. Opinions under sub-section (2) of Section 35B of the Act is a condition precedent for filing appeal inasmuch as only after the opinion,

by the Committee of Commissioners of Central Excise, the appeal can be filed against the impugned order besides authorization given by the Committee of Commissioners Commissioner of Excise to any officer to file appeal on behalf of the Department. Sub-section (2) of section 35B of the Act has been substituted in 2005 by amending the said provision. Before 2005, the Commissioner of Central Excise alone was given power to decide whether the appeal would be filed against the order of the Commissioner of Excise Appeals passed under section 35A of the Act ? So the present amendment has made the task more onerous by delicating the power for opinion to file appeal by cluster of Commissioners. The said provision has been made for the reason that opinion of single officer may not be enough for the Department to decide as it is said that two opinions are better than one. Also there is reason to bring the amendment to reduce number of filing of appeals on justifiable grounds instead of filing frivolous appeals. So the amendment brought in sub-section (2) of section 35B of the Act cannot be said an empty formality. Since the litigations have been multiplied on various quarters, the noble idea of bringing such amendment in sub-section (2) of section 35B of the Act cannot be made to be fraustrated by arraying the same as directory provision. When the group of Commissioners apply their mind to the order in appeal passed under section 35A of the Act, there may be difference of opinions and accordingly the grounds for appeal will be examined on the proper question of fact and law.

16. It is reported in the decision of Privy Council in **Montreal Street Railway Co. v. Normandin 1917 AC 170** where Their Lordships have observed :

> "....……The question whether provisions in a statute are directory or imperative has very frequently arisen in this country., but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in *Maxwell on Statutes*, 5th Edn., p. 596 and the following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

17. The aforesaid observation has also been followed by the Hon'ble Supreme Court in **L. Hazari Mal Kuthiala v. Income-tax Officer, Special Circle, Ambala Cantt. and another reported in AIR 1961 SC 200.** In **Bhavnagar University v. Palitana Mill Pvt. Ltd., AIR 2003 SC 511** Their Lordships have observed :

> **"23.** It is the basic principle of construction of statute that the same should be read as a whole, then chapter by chapter, section by section and words by words. Recourse to construction or interpretation of statute is necessary when there is ambiguity, obscurity, or inconsistency therein and not otherwise. An effort must be made to give effect to all parts of the statute and unless absolutely necessary, no part thereof shall be rendered surplusage or redundant."

18. With due respect to the above decisions, it is made clear that when the statute has entrusted the performances of public duty upon the public officer having great importance and the dereliction of such purpose will cause serious inconvenience to the general public and State exchequer. Such statutory provision cannot be said to be mere directory but it is mandatory. Moreover, for interpretation or the construction of statute, it should be read as whole to find out the purposive interpretation as observed by the Hon'ble Supreme Court.

19. The word "may", appearing in sub-section (2) of section 35B of the Act should not be misconceived as submitted by learned counsel for the appellant. The proviso to sub-section (2) of section 35B of the Act also postulates that in the case of difference of opinion between the Commissioner of Central Excise, they will make reference to the Chief Commissioner of Central Excise who after considering the facts, if found that the order of the Commissioner of Central Excise (Appeals) is not legal and proper, direct the Central Excise Officer to appeal before the Tribunal of such order. On the other hand, the Central Excise Officer will be always authorized either on concurrent view of Committee of Commissioners of Central Excise or difference of opinion is given to file appeal, but the fact remains, authorization is a must under sub-section (2) of Section 35B of the Act to prefer appeal. It is needless to say that application of judicial mind to the facts and law of the case by the concerned Committee of Commissioners of Central Excise is a condition precedent for filing appeal. Any non-application of mind in rendering opinion to file appeal may cause serious impact on the public exchequer or on the economic growth of the country. Since the

authorization would be to one of the Central Excise Officers, the word "may" as appearing in sub-section (2) of Section 35B of the Act cannot be said to be discretionary or directory but it is a mandatory provision and should be read as "shall". We do not find force with the submission of learned counsel for the appellant-Department to the effect that such word "may" is a directory one and as such the contention is jettissioned. Since it is a fiscal statute, it requires strict interpretation, no word can be construed otherwise and purposive interpretation is the call of the day.

**CONCLUSION**

20. Now adverting to the facts of the case and points of law as discussed by us, we are of the view that the authorisation made in Annexure-3 of the affidavit filed by the appellant to prefer appeal without same being filed along with appeal is surely an incurable defect and the same cannot be rectified by filing an authorization later on in the appeal Nos. 250 & 251 of 2007 as stated by the learned counsel for the appellant. Similarly as the authorization by the Committee of Commissioners of Central Excise is not found in the impugned order, it must be observed that the impugned order passed by the CESTAT is correct, legal and proper. Hence we are of the considered view that the impugned order passed by the learned CESTAT being valid, legal and proper, cannot be interfered with. Accordingly the OTAPL is dismissed being devoid of merit.

Appeal dismissed.

**2016 (I) ILR - CUT-943**

**S. C. PARIJA, J.**

ARBA NO. 29 OF 2012

**UDAYANATH ROUT** .....Appellant

*.Vrs.*

**PARADIP PORT TRUST** .....Respondent

**ARBITRATION AND CONCILIATION ACT, 1996 – S.34**

**Whether the learned District Judge has power U/s. 34 of the Act to decide the validity of appointment of an arbitrator by the Hon'ble Chief Justice U/s. 11(6) of the Act ? Held, No – The learned District Judge was only required to see whether the award passed by the Arbitrator is hit by the vice of Section 34(2) of the Act – Learned District**

**Judge has exceeded his jurisdiction in gross disregard of the well established norms of judicial discipline by sitting in judgment over the appointment of the Arbitrator made by the Hon'ble Chief Justice – Held, the impugned order is set aside.** (Paras 20 to 25)

**Case Laws Referred to** :-

1. (2005) 8 SCC 618 : M/s. S.B.P. & Co. -V- M/s. Patel Engineering Ltd. & Anr.
2. (2015) 3 SCC 49 : Associate Builders -V- Delhi Development Authority
3. (2009) 1 SCC 267 : National Insurance Co. Ltd. -V- Boghara Polyfab Pvt. Ltd.
4. (2011) 13 SCC 258 : APS Kushwaha (SSI Unit) -V- Municipal Corpn., Gwalior & Ors.
5. (2013) 15 SCC 414 : Arasmeta Captive Power Company Pvt. Ltd. & Anr. -V- Lafarge India Private Ltd.

For Appellant :M/s. V.Narasingh, S.K.Senapati & S. Das
For Respondent :M/s. S.D.Das, Sr. Adv.
with M.M.Swain, S.Biswal, H.K.Behera & H.P.Mohanty

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Date of Judgment : 04.3.2016

**JUDGMENT**

***S.C.PARIJA, J.***

This appeal under Section 37 of the Arbitration and Conciliation Act, 1996, is directed against the order dated 21.3.2012, passed by the learned District Judge, Cuttack, in Arbitration Petition No.202 of 2008, setting aside the award passed by the sole Arbitrator, in exercise of power under Section 34 of the said Act.

**2.** The brief facts of the case is that the Paradip Port Trust ("PPT" for short)-respondent floated a tender for execution of the work "Pitching of side slope from the Oil Jetty by the North side of approach channel", in which the appellant was a bidder. In the said bid, the appellant being the lowest tenderer, PPT-respondent awarded him the work by executing an agreement with him, containing the terms and conditions for execution of the work. The subsequent agreement executed between the parties on 26.6. 2001 provided that neither of the parties shall be competent to resort to arbitration under the Arbitration and Conciliation Act, 1996, for adjudication of the claim and no suit or claim shall be brought in any place outside the State of Orissa. The total value of the work was Rs.79,54,162/- and the work, which commenced

on 07.5.2001 was required to be completed on 06.11.2001. The aforesaid period of completion of work was subsequently extended, but the appellant without completing the work left the said work. In view of the same, the PPT rescinded the contract and floated a fresh tender at an additional cost of Rs.38,38,310/-. Subsequently, PPT filed a money suit against the appellant before the learned Civil Judge (Senior Division), Jagatsinghpur, for recovery of the additional cost incurred in completion of the work amounting to Rs.37,64,239/-, after deducting the security amount with 10% interest, which was registered as Money Suit No.1 of 2004. While the said suit was pending between the parties, the appellant-contractor filed an application before this Court under Section 11(6) of the Act, 1996, for appointment of an Arbitrator, which was registered as Arbitration Petition No.19 of 2004. The said application of the appellant was disposed of by the Chief Justice of this Court vide order dated 14.7.2006, appointing Shri Bibudhendra Mishra, Senior Advocate, as the sole Arbitrator.

**3.** The appellant-contractor filed his claim statement before the learned Arbitrator, claiming an amount of Rs.51,17,729.68 paise towards loss and compensation, with interest at the rate of 18% per annum.

**4.** The same was resisted by the respondent-PPT by filing statement of defence, raising a counter claim of Rs.37,64,239.00 for the loss sustained due to non-execution of the contract work. It appears that the respondent-PPT filed an application under Order 14, Rule 2, of the Code of Civil Procedure before the learned Arbitrator, questioning the maintainability of the arbitration proceeding, in absence of an arbitration clause in the agreement.

**5.** On the pleadings of the parties, the learned Arbitrator framed the following issues:

> i. Whether the claimant has any cause of action to initiate the proceeding against the defendants?
> ii. Whether the claimant is entitled to the claimed amount as demanded in his claim statement?
> iii. Whether the counter claim filed by the respondent is maintainable by law and facts in the present proceeding?

**6.** Considering the evidence available on record, both oral and documentary, learned Arbitrator proceeded to pass an award in favour of the claimant-appellant for Rs.23,74,417.40 paise on different heads.

**7.** Being aggrieved by the award passed by the learned Arbitrator, the PPT-respondent filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act" for short), before the learned District Judge, Cuttack, for setting aside the said award, which was registered as Arbitration Petition No.202 of 2008.

**8.** It appears that the main plea of the PPT-respondent before the learned District Judge was that there was no arbitration clause in the agreement entered into between the parties and therefore, the appointment of the Arbitrator by the Chief Justice of this Court is invalid and void. It was the case of the PPT-respondent before the learned District Judge that the order appointing the Arbitrator having been obtained by practicing fraud and deception, the order of appointment is void. On the basis of such plea raised by the PPT-respondent, learned District Judge has proceeded to set aside the award on the ground that the order of appointment of the Arbitrator having been obtained by practising fraud and deception, the award is non-est in the eye of law. The operative portion of the impugned order reads as under:-

> "16. In view of the aforesaid law laid down, I have no hesitation to say that in this case, since the claimant-contractor approached under section 11 of the A & C Act to the Hon'ble Chief Justice, which from the very beginning was tainted with fraud and deception, if I may be permitted to say so with due respect to their Lordships in the Hon'ble Apex Court in the case of SBP & Co.(supra) so also the Hon'ble Chief Justice of our Hon'ble High Court in the order passed under Section 11(6) of the A & C Act, the award, which owes its existence to the very order under Section 11(6) of the A & C Act, as such, cannot enure to the benefit of the claimant-contractor. Therefore, the same deserves to be set aside being nonest in the eye of law."

**9.** Learned counsel for the appellant submits that as the order passed by the Chief Justice under Section 11(6) of the Act is a judicial order against which only an appeal lies to the Supreme Court under Article 136 of the Constitution, learned District Judge had no authority or jurisdiction to hold that the appointment of the Arbitrator by the Chief Justice was invalid or void and to set aside the award on that score, in exercise of power under Section 34 of the Act. In this regard, reliance has been placed on the Constitution Bench decision of the apex Court in ***M/s. S.B.P. & Co. v. M/s. Patel Engineering Ltd. and Anr.***, (2005) 8 SCC 618, where the Hon'ble Court held that once the Chief Justice or his designate had appointed the Arbitrator

in exercise of powers under Section 11(6) of the Act, the Arbitrator has no competence to rule upon its own jurisdiction and about the existence of the arbitration clause.

It is accordingly submitted that as the order of the Chief Justice of this Court is final and binding, subject to appeal provided under Article 136 of the Constitution, learned District Judge misdirected itself in coming to hold that the order appointing the Arbitrator had been obtained by practising fraud and deception and therefore, the same is invalid and void. It is further submitted that even otherwise, the appointment of the Arbitrator made under Section 11(6) of the Act does not come within the ambit of Section 34 of the Act and therefore, there was no scope for the learned District Judge to set aside the award by sitting in judgment over the order of the Chief Justice, passed under Section 11(6) of the Act.

**10.** Learned counsel for the PPT-respondent while supporting the impugned order submits that the same having been passed on appreciation of the materials available on record, no interference is warranted. It is submitted that as the agreement entered into between the parties did not contain an arbitration clause, no order appointing an Arbitrator under Section 11(6) of the Act could have been passed and therefore, the learned District Judge was fully justified in holding that the order of appointment of the Arbitrator had been obtained by fraud and deception. It is further submitted that in a case where the appointment of the Arbitrator is per se invalid and contrary to law, the award passed by such an Arbitrator can be questioned under Section 34 of the Act, being against justice and morality and is therefore patently illegal. In this regard, reliance has been placed on the decision of the apex Court in ***Associate Builders v. Delhi Development Authority***, (2015) 3 SCC 49.

**11.** In the application filed by the claimant-appellant under Section 11(6) of the Act, on the consent of the parties, the Chief Justice of this Court vide order dated 14.7.2006, appointed Shri Bibudhendra Mishra, Senior Advocate, as the Arbitrator to adjudicate the dispute between the parties. The said order reads as under :-

> "Heard learned counsel for the petitioner as well as learned counsel for opposite parties.
>
> Learned counsel for both sides fairly submit that Shri Bibudhendra Mishra, Senior Advocate of this Court may be appointed as an Arbitrator and the dispute between the parties in terms of the

arbitration clause may be referred to the said Arbitrator for adjudication.

Accordingly, Shri Bibudhendra Mishra, Senior Advocate of this Court is appointed as Arbitrator and the dispute between the parties in terms of the arbitration agreement is referred to him for adjudication. He is directed to conclude the proceeding within a period of six months from the date of communication of this order. The parties shall produce certified copy of this order and the relevant papers before the learned Arbitrator within seven days from today. The Arbitrator shall be entitled to a fee of Rs.6000/- per sitting and another sum of Rs.500/- per sitting towards clerkages. The parties shall bear the fees as aforesaid equally.

The petition is thus disposed of.

Urgent certified copy of the order be granted on proper application."

**12.** In *M/s.S.B.P. & Co.* (supra), a seven-Judge Constitution Bench of the Supreme Court while considering the scope of Section 11 of the Act, held as follows:

"xxxx xxxx The question, in the context of sub-section (7) of Section 11 is, what is the scope of the right conferred on the arbitral tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case. Prima facie, it would be difficult to say that in spite of the finality conferred by sub-section (7) of Section 11 of the Act, to such a decision of the Chief Justice, the arbitral tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to us to be incongruous to say that after the Chief Justice had appointed an arbitral tribunal, the arbitral tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. xxxx xxxx."

**13.** Hon'ble Court also examined the competence of the Arbitral Tribunal to rule upon its own jurisdiction and about the existence of the arbitration clause, when the Chief Justice or his designate had appointed the Arbitral

Tribunal under Section 11 of the Act, after deciding upon such jurisdictional issue. Hon'ble Court held:

> "12. … We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal……
>
> xxx xxx xxx
>
> 20. Section 16 is said to be the recognition of the principle of *Kompetenz-Kompetenz*. The fact that the Arbitral Tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can, and possibly, ought to decide them. This can happen when the parties have gone to the Arbitral Tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these sections, before a reference is made. Section 16 cannot be held to empower the Arbitral Tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the Arbitral Tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act, are incapable of being reopened before the Arbitral Tribunal."

**14.** Accordingly, the Hon'ble Court proceeded to hold as under:-

> "Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11(6) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach to the Supreme Court under Article 136 of the Constitution of India. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Supreme Court designated by him and he will have to participate in

> the arbitration before the Tribunal only on the merits of the claim. Obviously, the dispensation in our country, does not contemplate any further appeal from the decision of the Supreme Court and there appears to be nothing objectionable in taking the view that the order of the Chief Justice of India would be final on the matters which are within his purview, while called upon to exercise his jurisdiction under Section 11 of the Act. It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act."

**15.** In ***National Insurance Company Limited v. Boghara Polyfab Private Limited***, (2009) 1 SCC 267, the apex Court has reiterated the ratio laid down in M/s SBP & Co., that if the Chief Justice or his designate decides on the appointment of the Arbitrator in exercise of powers under Section 11(6) of the Act, the Arbitrator will have no competence to rule upon its own jurisdiction and about the existence of the arbitration clause.

**16.** The aforesaid conclusion arrived at by the apex Court in M/s.S.B.P. & Co. (supra) has again been reiterated in ***APS Kushwaha (SSI Unit) v. Municipal Corporation, Gwalior and others***, (2011)13 S.C.C. 258, wherein the Hon'ble Court has held that once the Chief Justice or his designate appoints an Arbitrator in an application under Section 11 of the Act, after satisfying himself that the conditions for the exercise of power to appoint an Arbitrator are present, the Arbitral Tribunal cannot go behind such decision and rule on its own jurisdiction or on the existence of an arbitration clause.

**17.** Similar is the view expressed by the apex Court in ***Arasmeta Captive Power Company Private Limited and another v. Lafarge India Private Limited***, (2013)15 SCC 414, that once an issue has been examined and decided by the Chief Justice or his designate under Section 11(6) of the Act, the Arbitrator cannot re-examine the same issue.

**18.** In the present case, it is seen from the impugned order that the learned District Judge has taken note of the aforesaid ratio laid down by the Constitution Bench of the apex Court in M/s. S.B.P. & Co. (supra) and has come to hold as under:

> "In view of the aforesaid law laid down by the Lordships in the case of M/s. S.B.P. & Co.(supra), I am unable to accept the contention of the counsel for the P.P.T. that since in this case there is no adjudication with regard to the existence of the arbitration agreement,

> the Arbitral Tribunal was not bereft of jurisdiction to decide on the same and admittedly, there being no arbitration agreement, this Court can set aside the award on the said ground. Hence this contention fails."

**19.** It is rather strange that the learned District Judge after having come to hold that the Arbitrator had no jurisdiction to adjudicate with regard to existence of the arbitration clause and therefore the award cannot be set aside on that ground, he has entered into a lengthy discussion as to whether the order passed by the Chief Justice under Section 11(6) of the Act appointing the Arbitrator was tainted with fraud. Referring to some decisions of the apex Court regarding the effect of fraud and misrepresentation in Court proceedings, learned District Judge has proceeded to hold that the order appointing the Arbitrator having been obtained by fraud and deception, the same is non-est in the eye of law and has accordingly set aside the award, without going into the merits of the application filed under Section 34 of the Act.

**20.** This approach of the learned District Judge is not only erroneous and misconceived but wholly improper and unwarranted. In an application filed under Section 34 of the Act, the validity or otherwise of an appointment of the Arbitrator made under Section 11(6) of the Act could not have been gone into. Learned District Judge was only required to see whether the award passed by the Arbitrator is hit by the vice of Section 34(2) of the Act. In a case of this nature, where the appointment has been made by the Chief Justice on the consent of the parties, even the Arbitrator could not have adjudicated on its own jurisdiction under Section16 of the Act and therefore, the learned District Judge has completely misdirected itself in going into the question of appointment of the Arbitrator and setting aside the award on that score.

**21.** It is pertinent to note that in the instant case, the order appointing the Arbitrator was passed by the Chief Justice in exercise of power under Section 11(6) of the Act, on the consent of the parties. The respondent-PPT not only accepted the said order by participating in the proceeding before the Arbitrator but also filed its counter claim and contested the matter on merit. Having faced with an award, it has sought to challenge the same in an application filed under Section 34 of the Act, questioning the very appointment of the Arbitrator and its jurisdiction to adjudicate the dispute. Therefore, the respondent-PPT with open eyes and with full knowledge of all circumstances having participated in the arbitration proceeding and even filed

its counter claim, choosing to take the chance of an award in its favour, it cannot subsequently resile from that stand to render the entire arbitral proceeding futile. This in essence is the principle underlying the term "waiver", which is a deliberate and intentional act with knowledge and an intentional relinquishment of a right or conduct leading to an inference of such relinquishment of right.

**22.** The concept of "waiver" has been explained in HALSBURY'S LAWS of England in the following words:

> "Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist."

**23.** This Court is constrained to observe that the learned District Judge, in his exuberance has entered into an arena, which was not his domain. The appointment of the Arbitrator having been made by the Chief Justice of this Court on the consent of the parties, in exercise of power under Section 11(6) of the Act, even the Arbitrator could not have re-examined the said issue. Therefore, learned District Judge had no business to go into the same while adjudicating an application filed under Section 34 of the Act and set aside the award on the ground that the very appointment of the Arbitrator was invalid and void. It is a clear case of the learned District Judge having exceeded his brief in gross disregard of the well established norms of judicial discipline, by sitting in judgment over the appointment of the Arbitrator made by the Chief Justice.

**24.** For the reasons as aforestated, the impugned order cannot be sustained and the same is accordingly set aside.

**25.** As the learned District Judge has not considered the application filed under Section 34 of the Act on merit, he is directed to consider the same afresh, giving opportunity of hearing to the parties and decide the same in accordance with law expeditiously. ARBA is accordingly allowed. No costs.

Application allowed.

**2016 (I) ILR - CUT-953**

**B. K. NAYAK, J.**

W.P.(C) NO. 14199 OF 2009

**Sk. JABAR @ Sk. ABDUL JABAR** .....Petitioner

*.Vrs.*

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

**ODISHA SURVEY AND SETTLEMENT ACT, 1958**

**Power of review or recall – Power of review is a creature of statute and unless the statute confers such power, no court, tribunal or quasi-judicial authority can review its own order – Admittedly the O.S.S.Act does not confer power of review on the settlement authorities – However, under certain circumstances an order can be recalled by the authority which may not strictly amount to review, even though no specific power for recall is provided for – Such limited power to recall is inherent in the Court or Tribunal – Held, it is thus manifest that a court or Tribunal may recall an order if the order suffered from inherent and patent lack of jurisdiction, or it has been obtained by practicing fraud on the court or collusion, or there has been a mistake committed by the court which prejudicially affects the party, or the order was passed in ignorance of the fact that a necessary party had not been served with notice or had died and the estate was not represented or the order sought to be recalled was passed without hearing the petitioner – However, such power to recall is not available if the ground on which recall of the order and reopening of the proceeding is sought for was available to be pleaded during the proceeding but was not done, or where any other alternative remedy by way of appeal or revision is available but not availed.**

(Paras 7 to 11)

**Case Laws Referred to** :-

1. (1996) 5 SCC 550 : Indian Bank -V- Satyam Fibres (India) Pvt. Ltd.
2. 88(1999) C.L.T. 673 (SC) : Budhia Swain & Ors. -V- Gopinath Deb & Ors.

For Petitioner : Mr. Soumya Mishra

For Opp. Parties : Additional Govt. Advocate

Date of hearing : 15.07.2015

Date of judgment: 30.07.2015

**JUDGMENT**

***B.K.NAYAK, J.***

Common order dated 27.12.2007 passed by the Settlement Officer, Cuttack Major Settlement (opposite party no.3) in Appeal Case Nos.455 of 2003, 658 of 2003 and 363 of 2004 rejecting the petitioner's application to recall final appellate order dated 31.08.2006 and to hear the appeals afresh, has been assailed in this writ application.

2. The final common appellate order dated 31.08.2006 passed in all the three appeals had not been filed along with the writ petition, but subsequently on the direction of the court, the certified copy of the said order has been filed along with additional affidavit of the petitioner dated 17.04.2015.

3. The petitioner's case is as follows :

(A) The disputed land in toto involved in all the three appeals measuring Ac.5.00 appertaining to Hal plot no.4969 under Hal khata no.1076 in mouza-Gadakana, P.S.Mancheswar, Dist-Khurda corresponds to sabik plot no.4047 under khata no.918. It is stated that the said land originally belonged to the Raja of Kanika, the Ex-intermediary, who had leased out the same in favour of the father of the petitioner on 03.02.1944 by way of 'rayati patta'. The petitioner's father possessed the said property and continued to pay rent to the Ex-intermediary. After vesting of the intermediary interest the landlord submitted 'Ekapadia', on the basis of which Tenants Ledger (Jamabandi) as per Annexure-3 was prepared in favour of the father of the petitioner by the Tahasildar, Cuttack Sadar as by then the land in question was within the jurisdiction of the Cuttack Sadar Tahasil. It is further stated that during the settlement operation after vesting the petitioner and his father were never noticed and the property was recorded in the name of the State Government with the kisam "Unnata Jojana Jogya" in the record of rights published in 1973-74. By then the petitioner's father was no more and, therefore, the petitioner filed Revision Case No.1824 of 1993 under Section 32 of the Orissa Survey and Settlement Act (in short 'the Act') before the Commissioner, Land Records & Settlement, Orissa, Cuttack. By his order dated 07.07.1993 (Annexure-5), the Commissioner Land Records & Settlement, Orissa having found that there was no earlier appeal by the petitioner, remanded the revision petition to the Additional Settlement Officer, Bhubaneswar/Puri with a direction to treat the same as a petition (appeal) under Section 22 of the Act.

(B) On receipt of the remand order in the R.P. Case, the Settlement Officer registered the same as Appeal Case No.109 of 1993 and after hearing, by his final order dated 26.05.1995 (part of Annexure-9) allowed the appeal and directed to record the disputed land (Hal plot no.4969, Ac.5.00) in the name of the appellant, being satisfied about the grant of lease by the ex-landlord in favour of the petitioner's father and submission of Ekpadia by the landlord after vesting and preparation of Jamabandi by the Tahasildar, Cuttack Sadar.

(C) It is stated that soon after the final publication of Settlement of ROR in favour of the State in 1973-74 a further settlement operation commenced since 1975 in which the property in question was bifurcated to several plots and recorded in the name of the State Government. Having come to know of such recording at a belated stage the petitioner preferred Appeal Case Nos.455 of 2003, 658 of 2003 and 363 of 2004, which were dismissed by the Settlement Officer by his common order dated 31.08.2006. The petitioner thereafter filed applications to recall the said order dated 31.08.2006 and to give him opportunity of filing relevant documents in his favour and to re-hear the appeals. The recall petitions were rejected by the impugned common order as per Annexures-6 to 8.

4. Learned counsel for the petitioner submits that in view of grant of Rayati Patta in respect of the land by the Ex-landlord in favour of the petitioner's father and the submission of Ekapadia in respect thereof by the landlord after vesting and preparation of Jamabandi register on that basis by the Tahasildar, Cuttack Sadar and in view of the direction of the Settlement Officer in the previous Appeal Case No.109 of 1993 the land should be directed to be recorded in favour of the petitioner.

5. The State-opposite party no.4 has filed a counter affidavit in which it is stated that the Estate "Killa Gadakana" comprising of village-Gadakana was never a part of Kanika Estate and it was false that the Ex-intermediary of Kanika Estate granted Rayati Patta in favour of the petitioner's father. It is stated that the Estate "Killa Gadakana" was jointly held by the Raja of Kanika and his mortgagees in possession, namely, Choudhury Chakradhar Mohapatra, Choudhury Chintamani Mohapatra, Choudhury Rama Krishna Mohapatra, Rajani Kanta Ray and Adity Ch. Ray and that the Raja of Kanika had no authority to grant lease out the case land to the petitioner's father without the consent of the other co-intermediaries. It is stated tha t the so

called Hat Patta dated 03.02.1994 (Annexure-4) appears to be forged and fraudulent document as it does not bear the signatures of the ex-intermediaries. It is also stated that the assertion that the petitioner's father was in occupation of the property in question by way of "constructing homestead" and planting of trees are blatant lies inasmuch as the enquiry report of the Assistant Settlement Officer (Technical) in Appeal Case No.658 of 2003 indicate that neither the petitioner nor his father was at any point of time in possession of the case land, which was of the kisam of "Jhudi Jungle" as per the sabik records. It is asserted that the Government vide notification dated 31.12.1975 (Annexure-D/4) issued under Section 18 (1) of the Act directed only for settlement of rent. But irregularities having been noticed in the settlement operation pursuant to the said notification dated 27.11.1997, Government directed for taking up simultaneous proceedings relating to survey, preparation of record of rights and settlement of rent under Section 36 (1) (c) of the Act afresh within the limits of village- Gadakana, setting all previous proceedings and orders at naught. It is also stated that mere issuance of a Hat Patta and/or preparation of Zamabandi in favour of a person in respect of the land does not create or confer title on him.

6. Learned counsel for the petitioner submits that since the Settlement Officer in the earlier Appeal Case No.109 of 1993 had passed order for recording the case land in favour of the petitioner, the same would operate as res-judicata and the appellate authority could not have dismissed the subsequent appeal cases bearing no.455 of 2003, 658 of 2003 and 363 of 2004. It was also submitted that in the appeals, the petitioner could not produce some relevant documents and, therefore, prayed for recall of the common appellate order passed in the three appeals and for rehearing of the appeals and that in the interest of justice the Settlement Officer should have allowed the same.

The learned State Counsel, on the other hand, submitted that the petitioner had ample opportunity to produce all materials before the appellate authority and after the appeals were dismissed by the common order he cannot be given further opportunity for production of documents and fresh hearing of the appeals as that would amount to review of the earlier order which power the appellate authority does not possess.

7. Power of review is a creature of statute and unless the statute confers such power, no court, tribunal or quasi judicial authority can review its own order. Admittedly the OSS Act does not confer power of review on the settlement authorities. However, under certain circumstances an order can be

recalled by the authority which may not strictly amount to review, even though no specific power for recall is provided for. Such limited power to recall is inherent in the Court or Tribunal.

8. The Hon'ble apex Court in the decision reported in ***(1996) 5 SCC 550: Indian Bank v. Satyam Fibres (India) Pvt. Ltd.*** have held that the National Consumer Disputes Redressal Commission has inherent power to recall its judgment and order if found to be obtained by fraud/forgery inasmuch fraud amounts to abuse of process of the Commission.

The apex Court in the case reported in ***88 (1999) C.L.T. 673 (SC): Budhia Swain and others v. Gopinath Deb and other*** have held as follows :

> "**8.** In our opinion a Tribunal or a Court may recall an order earlier made by it if (i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent, (ii) there exists fraud or collusion in obtaining the judgment, (iii) there has been a mistake of the Court prejudicing a party or (iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented. The power to recall a judgment will not be exercised when the ground for reopening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence."

9. It is thus, manifest that a Court or Tribunal may recall an order if the order suffered from inherent and patent lack of jurisdiction, or it has been obtained by practising fraud on the court or collusion, or there has been a mistake committed by the court which prejudicially affects the party, or the order was passed in ignorance of the fact that a necessary party had not been served with notice or had died and the estate was not represented. Such power to recall is however not available if the ground on which recall of the order and reopening of the proceeding is sought for was available to be pleaded during the proceeding but was not done, or where any other alternative remedy by way of appeal or revision is available but not availed.

10. In the instant case after the final publication of the settlement record of rights in the year 1973-74, the petitioner instead of challenging the same under the appropriate provision of the Act, filed a revision under Section 32

of the Act before the Commissioner of Settlement which was legally not entertainable. The Commissioner of Settlement was however free to treat the said revision as one under Section 15(b) of the Act and decide the matter finally. Instead he remanded the revision to the Settlement Officer directing to treat the same as an appeal under Section 22 of the Act, which was not permissible.

11. After such remand by the Commissioner of Settlement the Settlement Officer registered the same as Appeal Case No.109 of 1993. In the meantime, fresh settlement operations in respect of the village in question started in pursuance of the Notifications of 1975 and 1997 issued vide Annexure-D/4 and Annexure-E/4 in which apparently, the disputed land was bifurcated to several plots and admittedly some part of it was recorded in the name of the Utkal University. Apparently, the rent settlement proceeding that started in pursuance of Notification of 1975 did not reach finality and notification for fresh settlement was issued in 1997. Therefore, the order passed in Appeal No.109 of 1993 cannot operate as res-judicata.

The common order passed in the three appeals could have been challenged in revision before the Member, Board of Revenue, Orissa, Cuttack. Instead of doing the same, the petitioner filed recall petition before the appellate authority praying to re-hear the appeals on the ground that he could not produce some relevant documents at the time of hearing. The petitioner was himself the appellant and the common appellate order was passed after hearing him and perusing the documents filed by him. There is no indication of what other relevant documents could not be produced and even if the appellant could not produce some materials, that would not furnish a ground for recalling the final order as has been held by the apex Court in the case of ***Budhia Swain and others*** (supra). It is not a case where the order sought to be recalled was passed without hearing the petitioner. That apart, admittedly some part of the disputed property has been recorded in the name of the Utkal University forming part of the University Campus. Probably, those properties were leased out to the Utkal University by the State Government in whose favour the property was recorded in 1973-74 Settlement R.O.R. Utkal University was a party to Appeal Case No.363 of 2004. But the University has not been made a party to this writ petition. Further, the petitioner had the opportunity to challenge the common appellate order in revision and has also a further right of revision under Section 15(b) of the Act to challenge the correctness of record of rights to be finally published in the ongoing settlement operation. Therefore, rejection of the

recall petition by the impugned orders is justified and warrants no interference. Hence, the writ petition is dismissed. No costs.

Writ petition dismissed

**2016 (I) ILR - CUT-959**

**S. K. MISHRA, J.**

CRLMC NO. 4819 OF 2015

**ANTARYAMI BARIK & ANR.** .....Petitioners

*.Vrs.*

**STATE OF ORISSA & ANR.** .....Opp. Parties

**CRIMINAL PROCEDURE CODE, 1973 – Ss.82, 83**

**Order, issuing proclamation, declaring the accused persons as absconders and to attach their property – Order challenged – Magistrate only believed the version of the Police that in spite of several raids conducted by the I.O. the accused persons remained untraced – He has not given any finding expressing his satisfaction that the person against whom warrant has been issued has absconded or is concealing himself so that such warrant can not be executed – In the other hand no affidavit was filed by the I.O. to the effect that the proclaimed person is about to dispose of or remove his whole or any part of property belonging to him – Non compliance of the provisions of law as no reasons have been given in the order – It is well established that reasons is the heartbeat of orders passed by the Court – Reasons always show the basis on which the learned Court came to a particular conclusion and absence of reason in an order itself is violative of principles of natural justice – Held, the impugned order being cryptic is liable to be quashed.** (Paras 4 to 6)

For Petitioners : M/s. Partha Sarathi Nayak
For Opp. Parties:

Date of Order : 03.12.2015

**ORDER**

***S.K.MISHRA, J.***

1. Heard learned counsel for the petitioners and learned Addl. Standing Counsel for the State.

2. The petitioners, being the accused persons in G.R. Case No.235/2004 of the court of learned S.D.J.M., Udala, has assailed the order dated 10.11.2005 passed by the said court issuing processes under Sections 82 and 83 of the Cr.P.C. declaring them as absconders and to attach their property, without specifying the property, to compel them for their appearance on 9.12.2003. The offences alleged in this case are 420/294/506/34 of the I.P.C.

2. Learned counsel for the petitioners drawing attention of this Court to the provisions of Sections 82 and 83 of the Cr.P.C. contends that the very basic requirements of Sections 82 and 83 of the Cr.P.C. have not been satisfied in this case and the order of the learned S.D.J.M., Udala is silent on that score. Bare reading of Section 82 of the Cr.P.C. reveals that if any Court has reason to believe, whether after taking evidence or not, that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation. So in order to issue a proclamation under sub-section (1) of Section 82 of the Cr.P.C., the Court must be satisfied that a person against whom a warrant has been issued has absconded or is concealing himself so that such warrant cannot be executed, the Court may issue a proclamation under sub-section (1) of Section 82 of the Cr.P.C.

3. Now, in this case it is apparent from the record that the learned S.D.J.M., Udala has observed that the I.O. has prayed to issue processes under Sections 82 and 83 of the Cr.P.C. against the petitioners. He further observed that both are residents of village Garadihi, P.S.-Berhampur, District Balasore and as the accused persons are yet to be arrested though N.B.W. has been issued on 30.4.2005, in spite of several raids conducted by the I.O. and the accused persons are untraced. The learned S.D.J.M. was satisfied from the case diary that the O.I.C. has taken sincere steps to arrest the accused persons. Accordingly the learned S.D.J.M., Udalala allowed the prayer. There is no finding by the learned S.D.J.M. that the persons have absconded or concealing themselves so that warrant cannot be executed. So the order issuing proclamation under sub-section (1) of Section 82 of the Cr.P.C. is not complied with.

4. Moreover, in order to issue an order of attachment of property of a person absconding under Section 83 of the Cr.P.C., the Court issuing a proclamation under Section 82 of the Cr.P.C., may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person, provided that the Court is satisfied that the person in relation to whom the proclamation is to be issued; (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local jurisdiction of the Court. Only on satisfaction of such condition, the Court may order the attachment simultaneously with the issue of the proclamation. The order passed by the learned S.D.J.M., Udala is cryptic one. No reasons have been given in the order. It is also not apparent from the record that an affidavit has not been filed to the effect that the proclamation is about to dispose or remove the whole or any part of his property belong to him, the order cannot be sustained. It is well settled law of land that reason is the heartbeat of orders passed by the Court. Reasons always show the basis on which the learned Court came to a particular conclusion and absence of reasons in an order itself is violative of principles of natural justice.

5. In that view of the matter, the order dated 10.11.2005 passed by learned S.D.J.M., Udala, in G.R. Case No.235/2004 is hereby quashed. However, the Investigating Officer may file an appropriate application giving affidavit, so that the conditions laid down under Sections 82 and 83 of the Cr.P.C. shall be complied with. On such event, the learned S.D.J.M. shall apply his mind and dispose of the same by a reasoned order in the light of the observations made in the preceding paragraphs of the order.

6. The CRLMC is, accordingly, disposed of.

Application disposed of.

**2016 (I) ILR - CUT-962**

**DR. A. K. RATH, J.**

W.P.(C) NO. 8435 OF 2007

**RATIKANTA PANDA** ……..Petitioner

*.Vrs.*

**U.CO. BANK & ORS**. ……..Opp. Parties

**CIVIL PROCEDURE CODE, 1908 – O-17, R-2(d)**

**Adjournment of suit – Advocate for the plaintiff fell ill – Prayer rejected as illness of the pleader is not a sufficient ground – Order challenged – Engagement of another counsel at the spur of the moment is risky and unrealistic which may also require further adjournment – So at least reasonable time should be granted when a counsel suddenly fell ill for making alternative arrangement even with costs to the other side – However it must be without encouraging protraction of the trial – Held, the impugned order rejecting the application of the petitioner is quashed.** (Paras 6,7,8)

For Petitioner : Mr. D.P.Mohanty
For Opp. Parties : Dr. Sujata Dash

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Date of hearing : 17.08.2015
Date of judgment : 26.08.2015

**JUDGMENT**

***DR. A.K.RATH, J***

By this petition under Article 227 of the Constitution of India, the petitioner assails the order dated 20.04.2001 passed by the learned Civil Judge (Senior Division), 1st Court, Cuttack in T.S. No.220 of 1995, whereby and whereunder the learned trial court rejected the application filed by the petitioner to recall the order dated 4.4.2001 and to allow him to examine the witnesses.

**2.** The petitioner as plaintiff filed a suit for a declaration that the gold ornaments found from Locker No.113 in the defendant no.1-Bank belongs to him, for a direction to the defendant no.1 to deliver the gold ornaments and for permanent injunction restraining the defendant no.4 from claiming over the gold ornaments in the court of learned Civil Judge (Senior Division), 1st Court, Cuttack, which is registered as T.S. No.220 of 1995. He filed a petition to issue summons to two witnesses, namely, Sri B.B. Talapatra and Sri S.K. Ghosh. The same was allowed. The summons were issued to the

aforesaid witnesses after deposit of the cost by him. On 10.4.2001, the witnesses were present in the court for examination. Since the advocate for the plaintiff fell ill, he filed a petition for adjournment of the suit. Learned trial court dispensed with the examination of the said witnesses and debarred the plaintiff to examine them in future. Thereafter, the plaintiff filed a petition to recall the order and allow him to examine the witnesses named above, which was eventually disallowed on 20.04.2001.

**3.** The learned trial court came to hold that on 23.11.2000 the plaintiff filed a list of witnesses with a prayer to summon the witnesses as per serial nos.1 to 4. The said prayer was allowed. Two witnesses had already been examined and cross-examined. Sri B.B. Talapatra and Sri S.K. Ghosh were to be examined besides the plaintiff. The witnesses filed their haziras in the court, but the petition was filed by the counsel for the plaintiff to adjourn the suit on the ground of illness. It was further held that one of the witnesses, namely, Sri B.B. Talapatra attended the court from West Bengal. It was further observed that inconvenience of the counsel of a party is not a sufficient ground to adjourn the suit. Further, the suit was to be disposed of by end of June, 2001 since it was a targeted one. The learned court below took strong exception that the plaintiff has engaged three lawyers and none of them conducted the case and the plaintiff adopted a dilatory tactics to prolong the suit.

**4.** Heard Mr. D.P. Mohanty, learned counsel for the petitioner and Dr. Sujata Dash, learned counsel for the opposite party.

**5.** Order XVII CPC deals with adjournments of suit. Rule 1 of Order XVII provides as follows:

> "**1. Court may grant time and adjourn hearing.-** (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the Suit for reasons to be recorded in writing:
>
> xxx xxx xxx"

Clause (d) of sub-rule (2), which is the hub of the issue, is quoted hereunder:

> "(2) Costs of adjournment—in every such case the Court shall fix a day for the further hearing of the suit, and shall make such order as to costs occasioned by the adjournment or such higher costs as the Court deems fits.

Provided that,—

(a) to (c) xxx xxx xxx

(d) where the illness of a pleader or his inability to conduct the case for any reason, other than his being engaged in another Court, is put forward as a ground for adjournment, the Court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time"

**6.** On an interpretation of clause (d) of sub-rule (2) of Rule 1 Order XVII CPC, the apex Court, in the case of Bashir Ahmed v. Mehmood Hussain Shah, (1995) 3 SCC 529, held that protraction of trial of the suit should not be encouraged and the court shall try the suit as expeditiously as possible. If the adjournment has occasioned on any sufficient ground, then it may, in an appropriate case, adjourn to a shorter date asking the party seeking adjournment to pay costs incurred by the party who got the witnesses produced and was ready to proceed with trial. It was further held that clause (d) of the proviso specifically mentions that if the court is satisfied that illness of the counsel or inability of the counsel to proceed with the case was put forward, except when the counsel was engaged in another case as a ground for adjournment, it shall not grant adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time. The relevant paragraphs 5 and 6 are quoted hereunder:

"**5.** The rule thus indicates that protraction of trial of the suit should not be encouraged and the court shall try the suit as expeditiously as possible. If the adjournment has occasioned on any sufficient ground, then it may, in an appropriate case, adjourn to a shorter date asking the party seeking adjournment to pay costs incurred by the party who got the witnesses produced and was ready to proceed with trial. Clause (d) of the proviso specifically mentions that if the court is satisfied that illness of the counsel or inability of the counsel to proceed with the case was put forward, except when the counsel was engaged in another case as a ground for adjournment, it shall not grant adjournment.

**6.** Therefore, the court is enjoined to satisfy itself in that behalf. If the party engages another counsel as indicated therein, then the need for further adjournment would be obviated. The words ''in time'' would indicate that at least reasonable time may be given when a counsel suddenly becomes unwell. There would be reasonable time for the

> parties to make alternative arrangement, when sufficient time intervenes between the last date of adjournment and the next date of trial. In such a case, adjournment on the ground of counsel's ill health could be refused and the party would bear the responsibility for his failure to make alternative arrangements. Take for instance, a suit was adjourned for trial for a period of one week and the counsel appears to have suddenly become indisposed which would be known to the party. Therefore, the party, in advance, has to make alternative arrangement to proceed with the trial engaging another counsel The words "in time" would, therefore, indicate that reasonable time would be required for making alternative arrangements."

**7.** On the anvil of the decisions cited supra, the case is required to be examined. On the date of hearing of the suit, the counsel for the plaintiff had filed a petition for time on the ground of his illness. Learned trial court observed that inconvenience of the counsel of a party is not a sufficient ground to adjourn the suit. Learned trial court has not kept in view the provision of Clause (d) of Rule 2 of Order XVII CPC while rejecting the petition. Unless there was time for the new counsel to be engaged, it would be difficult to proceed with the examination of the witnesses present in the court on the spur of the moment. The plaintiff had no time to make an alternative arrangement. Engaging a new counsel to proceed with trial would be fraught with grave risk and unrealistic. The trial court should have adjourned the case for the next date enabling the plaintiff to engage another counsel to proceed with the examination of the witnesses.

**8.** In the wake of the aforesaid, the order dated 20.4.2001 passed by the learned Civil Judge (Senior Division), 1st Court, Cuttack in T.S. No.220 of 1995 is quashed. The learned trial court is directed to issue fresh summons to the witnesses at the cost of the plaintiff. The plaintiff shall make an endeavourance to bring those witnesses within a period fixed by the learned trial court. In the event of failure of the plaintiff to bring the witnesses or non-attendance of the witnesses, the learned trial court shall proceed with the suit. The learned trial court is directed to conclude the hearing of the suit by end of February, 2016. The petition is disposed of.

Writ petition disposed of.

**2016 (I) ILR - CUT-966**

**DR. A. K. RATH, J.**

W.P.(C) NO. 13346 OF 2003

**PADMA CHARAN SAHOO** ……...Petitioner

*.Vrs.*

**HURA SAHOO & ORS.** ……...Opp. Parties

**CIVIL PROCEDURE CODE, 1908 – O-8, R-1A & O-13, R-1(1)**

**Production of document by defendant at the time of hearing – Acceptance of – If the defendant assigns good cause for not filing the document at the time of presentation of the written statement or before settlement of issues and the document is vital and would assist the court in deciding the case the same should be accepted – Here, the document in question, though material for a just decision of the case learned trial court rejected the petition filed by the defendant – Held, the impugned order is quashed – Direction issued to the learned trial court to accept the document subject to payment of cost of Rs. 3750/- to the learned counsel for the plaintiff.** (Paras 9, 10, 11)

For Petitioner : Mr. N.P. Parija
For Opp. Parties: Mr. B.K. Dagara

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Date of hearing : 27.11.2015
Date of judgment : 27.11.2015

**JUDGMENT**

***DR. A.K.RATH, J***

This is an application under Article 227 of the Constitution of India. The petitioner has challenged, inter alia, the order dated 23.6.2000 passed by the learned Civil Judge (Senior Division), Jagatsinghpur in T.S. No.125 of 1988. By the said order, learned trial court rejected the application of the petitioner to accept the document at the time of hearing of the suit.

**2.** Opposite party no.1 as plaintiff instituted T.S. No.125 of 1988 in the court of learned Civil Judge (Senior Division), Jagatsinghpur impleading the present petitioner and opposite parties 2 and 3 as defendants for declaration of title and permanent injunction. The case of the plaintiff is that Jhari Sahoo, father of defendant nos.2 to 4 had inducted defendant no.1 as a tenant in the year 1985. After his death, opposite party no.2 son of defendant no.2 realized the rent fromthe petitioner. While the matter stood thus, to press the legal necessity, the legal heirs of Jhari Sahoo transferred the suit schedule land in

favour of plaintiff on 10.5.1988. When defendant no.1 disturbed in his possession, the suit was filed.

**3.** Pursuant to issuance of summons, defendant no.1 entered appearance and filed written statement denying the assertions made in the plaint. The case of the defendant no.1 is that Jhari Sahoo incurred a loan of Rs.4500/- from him in the year 1981 for the marriage ceremony of his daughter. Since loan was not paid, Jhari Sahoo entered into an oral agreement in the year 1982 with him to sell the land. After payment of Rs.5500/- towards rest consideration amount, possession was delivered. Further, Jhari Sahoo received a sum of Rs.5000/- from him for his treatment and executed a deed of agreement to sell the land in his favour. But then, after execution of the deed he expired. It is further stated that the defendant no.2 with an oblique motive executed a nominal and void sale deed in favour of the plaintiff, paternal uncle of defendant no.2. Neither any consideration money was paid nor any delivery of possession was made.

**4.** During examination of the plaintiff as P.W.4, defendant no.1 produced the unregistered agreement dated 5.1.1986 said to have been entered into between Jhari Sahoo and him and filed a petition to receive the said document as evidence. The plaintiff filed an objection to the same. Learned trial court came to hold that in the written statement there is a reference to the document in question. Defendant no.1 bases his defence upon the said document. He has not assigned any reason as to why he could not file the document in question earlier. Having held so, learned trial court by order dated 23.6.2000 rejected the application.

**5.** Heard Mr. N.P.Parija, learned counsel for the petitioner and Mr. B.K. Dagara, learned counsel for the opposite party no.1.

**6.** Order 8 Rule 1-A CPC deals with duty of the defendant to produce document upon which relief is claimed or relied upon by him. The same is quoted hereunder:

" **ORDER – VIII**

**WRITTEN STATEMENT, SET-OFF AND COUNTER-CLAIM**

**1-A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him.-** (1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set off or counter-claim, he shall enter such document in a list, and shall

produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement. (2) Where any such document is not in possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents—

(a) produced for the cross-examination of the plaintiff's witnesses, or

(b) handed over to a witness merely to refresh his memory."

**7.** Sub-Rule (1) of Rule 1 of Order 13 CPC provides that the parties or their pleader shall produce, on or before the settlement of issues, all the documentary evidence of in original where the copies thereof have been filed along with plaint or written statement.

**8.** On a bare perusal of the aforesaid provisions, it is evident that where defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him. Where the document is not in possession or power of the defendant, he shall state in whose possession or power it is. In the event the document is not produced at the time of presentation of the written statement, the same can be filed before settlement of the issues. A document which ought to be produced in Court by the defendant, but is not so produced shall not without leave of the Court be received in evidence on his behalf at the time of hearing of the suit. Sub-rule (4) carves out exceptions and declares that the provision of the rule shall not apply to certain documents.

**9.** If the defendant assigns good cause for not filing the documents at the time of presentation of the plaint or on or before settlement of the issues and the documents are vital and would assist the Court in coming to the conclusion, the documents should be accepted. The provision is not to penalize the defendant. A lenient view has to be taken for accepting the documents, which are material for the decision of the case.

**10.** In the instant case, the application was filed to accept the document on the ground that the document was not in his possession. The document is material for the decision of the case.

**11.** In view of the same, the order dated 23.6.2000 passed by the learned Civil Judge (Senior Division), Jagatsinghpur in T.S. No.125 of 1988 is quashed and the learned trial court is directed to accept the document subject to payment of cost of Rs.3750/- to the learned counsel for the plaintiff. The petition is disposed of.

Writ petition disposed of.

**2016 (I) ILR - CUT- 969**

**Dr. A. K. RATH, J.**

WP(C) NO. 11611 OF 2003

**JAYANTA KUMAR RATH**
**(SINCE DEAD) THROUGH L.Rs** ……..Petitioners

*.Vrs.*

**PRAVAS KUMAR RATH**
**(SINCE DEAD) THROUGH L.Rs** ……..Opp. Parties

**CIVIL PROCEDURE CODE,1908 – S.152**

**Whether compromise decree can be corrected by the Court in exercise of the power U/s 152 CPC, when mistake has been committed by the parties ? - Held, No.**

**Section 152 CPC can be pressed into service, if the error is on the part of the Court – However it does not comprehend the correction of any error on the part of any of the litigating parties**.

(Para 11)

For Petitioners : M/s. S.P.Mishra, Sr Adv. Miss D. Priyanka
For Opp. Parties : Mr. Ashok Kumar Mohapatra-1

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Date of hearing : 07.12. 2015
Date of judgment: 14.12. 2015

**JUDGMENT**

***DR. A.K.RATH, J***

In this petition under Article 227 of the Constitution of India, the petitioners challenge the order dated 24.1.2003 passed by the learned Civil Judge (Senior Division), 1st Court, Cuttack in Misc. Case No.316 of 1997. By the said order, learned trial court rejected the application of the plaintiff for correction of compromise decree dated 30.6.1991.

**2.** The original petitioner along with opposite parties 3 to 5 instituted a suit for partition impleading opposite parties 1 and 2 as defendants in the court of learned Civil Judge (Senior Division), 1st Court, Cuttack, which was registered as T.S No.435 of 1988. The suit was ended in compromise on 30.6.1991. While the matter stood thus, the petitioner-plaintiff no.2 filed an application under Section 152 CPC for correction of the decree. It is stated that a large number of properties was the subject-matter of the suit. While drafting the compromise petition, certain mistakes were crept in. The allotment of land at Puri town had been disputed on the ground that Khata No.298 had been inadvertently mentioned as 321. Though he got an area of Ac.0.073 dec. of land out of Plot No.68, Ac.0.185 dec. out of Plot No.69, but the same had been mentioned as Ac.0.195 dec. and Ac.0.168 dec. respectively. Similarly though he got Ac.0.87 dec. of land out of Plot No.70, the said plot had been totally omitted from Schedule 'Ka' Lot-1. That apart, defendant no.2 has got only Ac.0.03 dec. of land out of Plot No.70, but inadvertently the entire plot had been allotted in his favour. Further, though he got an area of Ac.0.182 dec. of land out of Plot No.68, the same has been mentioned as Ac.0.101 dec. It is further stated that the respective allotments of the properties had been shown in sketch map marked in blue colour for the plaintiff and the red colour for defendant no.2, which was a part and parcel of the decree. The boundary mentioned in allotment sheet, its area and sketch map do not tally. With the factual scenario, the application was filed.

**3.** Defendant no.2 filed an objection to the same contending, inter alia, that the petition is not maintainable. It is stated that there is no clerical or arithmetical error in the decree. Further, pursuant to the final decree, he alienated the entire land in favour of Namita Dash and Sukanti Jagdev, who have not been made parties to the petition. It is further stated that in the first petition, the petitioner claimed an area of Ac.0.62 dec. out of Plot No.70, but in the subsequent petition, he claimed an area of Ac.0.87 dec. from the said plot. In the suit bearing C.S. No.142/2001 of the court of the learned Civil Judge (Senior Division), Puri, he claimed Ac.0.082 dec. from the said plot. With regard to Plot No.69, initially the petitioner was silent, but in the subsequent petition, he claimed an area of Ac.0.185 dec. The specific case of

the defendant no.2 is that the total area of the petitioner as per spot verification mentioned in the compromise petition as well as in the sketch map is Ac.0.345 dec., whereas the area allotted to him is Ac.0.185 dec. The petitioner has sought for amendment in respect of lands in Mouza-Patapur, which he abandoned later on. It is further stated that the contents of the compromise petition is fully correct but not the map. By order dated 24.1.2003, the learned trial court dismissed the application.

**4.** Heard Mr. S.P. Mishra, learned Senior Advocate for the petitioners and Mr. A.K. Mohapatra-I, learned counsel for the opposite party no.2.

**5.** Mr. Mishra, learned Senior advocate for the petitioners, argued with vehemence that the boundary mentioned in the allotment sheet, its area and the sketch map do not correspond to each other, which renders the decree ineffective and the same requires correction of the order. Criticising the order, he submitted that the conclusion of the learned trial court that the mistake committed by the petitioner cannot be termed as clerical errors, is contrary to the materials on record and, as such, the learned trial court has committed material irregularity in exercising the jurisdiction. He further submitted that under Order 7 Rule 7 CPC, the description of the properties, which is the subject-matter of the suit, must be sufficient to identify it. If there is a dispute between the plot number, khata number and boundary, the latter will prevail. According to him, in order to quietus the issue, learned trial court ought to have exercised its power under Section 152 CPC to amend the decree.

**6.** Per contra Mr. Mohapatra-1, learned counsel for the opposite party no.2, supported the impugned order passed by the learned trial court. He cited the decision of this Court in the case of Papu Khan v. Fatima Babi and others, AIR 1973 Orissa 235 and the decision of the apex Court in the case of Niyamat Ali Molla v. Sonargon Housing Co-operative Society Ltd. & others, AIR 2008 SC 225.

**7.** The seminal point that hinges for consideration of this Court is as to whether the compromise decree can be corrected by the court in exercise of the power under Section 152 CPC when the mistake has been committed by the parties ?

**8.** In Papu Khan (supra), this Court held that when there is no clerical or arithmetical mistake or error arising from any accidental slip or omission, Section 152 CPC has no application.

**9.** In Niyamat Ali Molla (supra), the apex Court held that a decree may be corrected by the court both in exercise of its power under Section 152 CPC as also under Section 151 CPC.

**10.** In Bishnu Charan Das v. Dhani Biswal and another, AIR 1977 Orissa 68, this Court held that if the decree is not in conformity with the judgment it must be allowed to be amended under Sections 152 and 151 CPC to bring it in line with the judgment and that in exercising the power under Sections 151 and 152 CPC the Court merely corrects the mistake of its ministerial officer by whom the decree was drawn up. Paragraph-4 of the report is quoted hereunder:

> "Section 152, CPC is based on two important principles. The first of them is the maxim that an act of the Court shall prejudice no party and the other that the Courts have a duty to see that their records are true and that they represent the correct state of affairs. In proceedings for amendment of a decree, the inquiry is confined only to seeing whether the decree correctly expresses what was really decided and intended by the Court. Order 20, Rule 6 clearly provides that the decree shall agree with the judgment. If the decree is not in harmony with the judgment the Court has no alternative but to rectify the mistake which has been committed. As the power to amend is exercised for the promotion of justice, it should be exercised liberally so as to make the decree conform to the judgment on which it is founded. I am fortified in this view by an earlier decision of this Court reported in AIR 1966 Ori 225, (Sagua Barik v. Bichinta Barik) wherein it was held on a review of the authorities that if the decree is not in conformity with the judgment it must be allowed to be amended under Sections 152 and 151 to bring it in line with the judgment and that in exercising the power under Sections 151 and 152 the Court merely corrects the mistake of its ministerial officer by whom the decree was drawn up."

**11.** The case of the petitioners may be examined on the anvil of the decisions cited supra. On a bare perusal of Section 152 CPC, it is evident that clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either on its own motion or on the application of any of the parties. If clerical or arithmetical mistakes in the judgments, decrees or orders or errors arising therein from the accidental slip or omission has been committed by the court, then the court may correct the same on its own

motion or on the application of any of the parties. It does not comprehend the correction of any error on the part of any of the litigating parties. The error must be on the part of the court. In an application under Section 152 CPC, the Court cannot ascertain the intention of the parties making the compromise and filing the application. The said section cannot be invoked for the purpose of explaining as to what was the intention of the parties in arriving at the compromise. Since the parties have filed a compromise petition admitting the contents to be correct and thereafter the court has recorded the same, Section 152 CPC cannot be pressed into service to correct the compromise petition and decree.

**12.** Resultantly the petition sans merit deserves dismissal. Accordingly, the same is dismissed. No costs

Writ petition dismissed.

**2016 (I) ILR - CUT-973**

**DR. A.K. RATH, J.**

W.P.(C) NO. 4431 OF 2006

**CHATTARPAL SINGH** ……..Petitioner

*.Vrs.*

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

**SERVICE LAW – Petitioner was working as a constable in CISF – Unauthorised absence from duty – Dismissal from service by the disciplinary authority – Punishment confirmed by the appellate authority as well as the revisional authority – Hence the writ petition – Petitioner remained absent from duty for 35 minutes without taking prior permission from the authorities – Punishment of dismissal is too disproportionate – Held, impugned orders are quashed – The matter is remitted back to the disciplinary authority to substitute a lesser punishment.** (Paras 13 to 17)

**Case Laws Referred to** :-

1. AIR 1996 SC 484 : B.C. Chaturvedi vs. Union of India & Ors.
2. AIR 1997 SC 3387 : Union of India and another vs. G. Ganayutham (Dead) by LRs.
3. AIR 1963 SC 1723 : Andhra Pradesh and others vs. S. Sree Rama Rao

For Petitioner : Mr. J.Tewari
For Opp. Parties : Mr. B.Dash, (Central Govt.Counsel)

Date of Hearing :10.02.2016
Date of Judgment:24.02.2016

**JUDGMENT**

***DR. A.K. RATH, J.***

The petitioner, a condemned employee, approached the portals of this Court under Article 226 of the Constitution of India to quash the order of punishment of dismissal passed by the disciplinary authority, which was upheld by the appellate authority as well as the revisional authority.

2. The petitioner was working as a Constable in Central Industrial Security Force (in short "C.I.S.F.") Unit, Rourkela Steel Plant, Rourkela. On 31.5.2000, the Deputy Commandant, CISF, Rourkela Steel Plant issued a memorandum of charges. The charges included;

> "(i) Gross misconduct and dereliction of duty in that No.912292412 Constable Chattar Pal Singh of 'C' Coy CISF Unit, RSP Rourkela who was detailed for duty in 'B' Shift at Tarapur Filter House from 1300 hrs to 2100 hrs on 06.5.2000, absented from his duty post unauthorisedly without obtaining any permission from his superior authority between 1720 hrs to 2005 hrs.
>
> (ii) Gross misconduct and indiscipline in that No.912292412 Constable Chattar Pal Singh of 'C' Coy CISF Unit, RSP Rourkela has violated the lawful orders of his superiors in which he unauthorisedly entered the Plant through Material Traffic Gate at about 1930 hrs on 06.5.2000 on his motor cycle alongwith a civilian who was sitting behind him and remained inside the Plant unauthorisedly for a period of about 35 minutes and left the plant at about 2005 hrs on 06.5.2000 leaving the civilian inside the plant. Further he violated the orders by making his entry/exit from plant through the gates other than permitted for CISF Personnel.
>
> (iii) Gross misconduct and indiscipline in that No.912292412 Constable Chattar Pal Singh of 'C' Coy CISF Unit, RSP Rourkela alongwith a civilian visited PS-II area unauthorisedly on 06.5.2000 at about 1930 hrs and worked out the theft of Zinc lead from PS-II Area of RSP Rourkela, as a result of which attempt of theft of Zinc lead

took place on 07.5.2000 at about 0950 hrs which was foiled by the Crime wing personnel from this area.

(iv) Gross misconduct in that No.912292412 Constable Chattar Pal Singh of 'C' Coy CISF Unit, RSP Rourkela has developed an irresistible habit of committing acts of indiscipline and failed to show any improvement in his work and conduct in spite of Ten punishments, i.e, two major and eight minor punishments awarded to him from time to time during the tenure of his service. Hence his past bad service records is being made a subject of charge for deciding the quantum of punishment in the instant case."

3. The petitioner submitted his written statement of defence denying the charges. The disciplinary authority was not satisfied to the explanation submitted by the petitioner and appointed one Mr. R.S. Chauhan as Enquiry Officer to enquire into the charges. After holding enquiry, the Enquiry Officer submitted report holding inter alia that the charges had been proved. A copy of the enquiry report was supplied to the petitioner. On 29.7.2000, the petitioner sent a letter contending that the report is perverse and based on no evidence. The Enquiry Officer had placed him under suspension and conducted enquiry and as such the report is vitiated. Further the copies of certain documents asked for by him had not been supplied to him.

4. The disciplinary authority concurred with the findings of the Enquiry Officer and dismissed the petitioner from services on 12.8.2000. Aggrieved by and dissatisfied with the order of the disciplinary authority, the petitioner preferred an appeal before the DIG, CISF with a prayer to impose lesser punishment. But then, the appellate authority dismissed the appeal on 11.9.2000. It was held that the punishment awarded by the disciplinary authority commensurate with the gravity of the proven misconduct. The petitioner unsuccessfully challenged the order passed by the appellate authority in revision before the IG, Eastern Sector Hqrs., CISF, Patna, which was eventually dismissed on 24.6.2001. Thereafter he filed a declaratory suit, being Suit No.252/03 in the court of the learned Civil Judge (Sr. Divn), Delhi. By judgment dated 11.5.2005, the learned Civil Judge (Sr. Divn.), Delhi came to hold that the court has no territorial jurisdiction to try the suit. With this factual scenario, the instant application has been filed to quash the order of punishment dated 12.8.2000 passed by the disciplinary authority vide Annexure-4, the order dated 11.9.2000 passed by the appellate authority vide Annexure-5 and the order dated 24.6.2001 passed by the revisional authority vide Annexure-6 respectively.

5. Heard Mr. J. Tiwari, learned counsel for the petitioner and Mr. B. Dash, learned Central Government Counsel for the opposite parties.

6. Mr. Tiwari, learned counsel for the petitioner submitted that Mr. R.S. Chauhan, who was appointed as Enquiry Officer to enquire into the charges had placed the petitioner under suspension and as such he was biased. Thus the enquiry report smacks mala fide. He further submitted that the charges levelled against the petitioner had not been proved. Further the petitioner had asked with certain documents, but the same were not supplied to him. It was further submitted that for non-examination of the material witnesses, the proceeding is vitiated. Finally, he submitted that even if the charges had been proved, the punishment awarded by the disciplinary authority and upheld by the appellate authority as well as the revisional authority is disproportionate with the gravity of the charges.

7. Per contra, Mr. B. Dash, learned Central Government Counsel submitted that as per the requirement the charge-sheet along with the list of witnesses and list of documents basing on which charges were framed had been supplied to the petitioner. In his written statement of defence, the petitioner had never asked for any document. During the enquiry, the petitioner had never questioned the integrity and impartiality of the Enquiry Officer nor before the disciplinary authority requesting the latter to change the Enquiry Officer. Almost all the witnesses corroborated about the unauthorised absence of the petitioner from the duty post, unauthorised entry and stay inside the plant for 35 minutes with a civilian. Though a copy of the enquiry report had been furnished to the petitioner whereafter he made a representation, but he had taken a ground that it was not supplied. Considering the gravity of the charges and previous ten punishments imposed on him, the disciplinary authority imposed the punishment of dismissal from services. The appellate authority as well as the revisional authority considered the matter in the proper perspective and concurred with the finding of the disciplinary authority.

8. The scope of interference of the High Court under Article 226 of the Constitution of India to the order passed by the disciplinary authority is no more res integra.

9. In the case of *State of Andhra Pradesh and others vs. S. Sree Rama Rao,* AIR 1963 SC 1723, the Supreme Court in paragraph 7 of the report held:

> "7. There is no warrant for the view expressed by the High Court that in considering whether a public officer is guilty of the misconduct charged against him, the rule followed in criminal trials that an offence is not established unless proved by evidence beyond reasonable doubt to the satisfaction of the Court, must be applied, and if that rule be not applied, the High Court in a petition under Article 226 of the Constitution is competent to declare the order of the authorities holding a departmental enquiry invalid. The High Court is not constituted in a proceeding under Article 226 of the Constitution a Court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent Officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. The High Court may undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution."

10. On the anvil of the decision cited supra, the case of the petitioner may be examined.

11. The submission of Mr. Tiwari, learned counsel for the petitioner that the petitioner had asked for certain documents and the same had not been supplied to him has no legs to stand. All the documents were supplied to the petitioner along with the charge examined. The petitioner had not filed any application before the disciplinary authority for supply of any other document. Four charges were framed against the petitioner. During enquiry, the management had examined as many as ten witnesses. The petitioner had examined three witnesses in support of his defence. The petitioner had been afforded opportunity of cross-examination the management witnesses and examined the witnesses on his behalf. A bald plea had been taken that no opportunity of hearing was provided to him. Rather the record reveals that sufficient opportunity was provided to him. True it is Mr. R.S. Chauhan, Enquiry Officer had placed the petitioner under suspension, but the same was approved by the higher authorities. The petitioner had not filed any application before the Enquiry Officer nor the higher authorities to change the Enquiry Officer. Rather he participated in the enquiry. Since the report is not palatable him, at a latter point of time he made frivolous allegation against the Enquiry Officer without any basis. The allegations have no legs to stand. Scanning of evidence is beyond the purview of the writ court, unless the same is perverse. The High Court is not an appellate authority. The witnesses examined on behalf of the management as well as the petitioner unequivocally stated that the petitioner was absent from duty hours. This is lapse on the part of the petitioner. He belongs to a disciplined force. He remained unauthorised absence for 35 minutes without taking prior permission from the authorities. With regard to the charge that the petitioner had entered into the Steel Plant through Material Traffic Gate on his motor cycle along with a civilian, who was a pillion rider and there was attempt of theft of zinc, the said pillion rider was not apprehended. Moreover one B.K. Kumar, Constable was caught in a suspicious condition along with a gunny bag of zinc at PS-I on 7.5.2000. The same was reported by one witness. Thus, it cannot be said that one civilian remained in the Steel Plant till the next date.

12. Though Mr. Das, learned Central Government Counsel submitted that the disciplinary proceeding was initiated against Mr. B. Kumar, who was caught red handed along with a gunny bag of zinc and he was dismissed from services. The petitioner is no way concerned with the theft of materials. So far as the charge no.4 is concerned, the same pertains to previous conduct of the petitioner. Some minor punishment had been imposed. But the authorities allowed the petitioner to remain in service.

13. On taking a holistic view of the matter, this Court is of the opinion that for unauthorised absence from duty for 35 minutes the punishment of dismissal from services is too disproportionate.

14. The question does arise as to whether this Court can substitute the punishment imposed by the disciplinary authority ? This is not a virgin ground so far the question is concerned ?

15. In *B.C. Chaturvedi vs. Union of India and others,* AIR 1996 SC 484, the Supreme Court in paragraphs 17 and 18 held as follows:-

> "**17.** The next question is whether the Tribunal was justified in interfering with the punishment imposed by the disciplinary authority. A Constitution Bench of this Court in State of Orissa v. Bidyabhushan Mohapatra, AIR 1963 SC 779 held that having regard to the gravity of the established misconduct, the punishing authority had the power and jurisdiction to impose punishment. The penalty was not open to review by the High Court under Article 226. If the High Court reached a finding that there was some evidence to reach the conclusion, it became unassessable. The order of the Governor who had jurisdiction and unrestricted power to determine the appropriate punishment was final. The High Court had no jurisdiction to direct the Governor to review the penalty. It was further held that if the order was supported on any finding as to substantial misconduct for which punishment "can lawfully be imposed", it was not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. The court had no jurisdiction, if the findings prima facie made out a case of misconduct, to direct the Governor to reconsider the order of penalty. This view was reiterated in Union of India v. Sardar Bahadur, (1972) 2 SCR 218 : (1972) Lab IC 627). It is true that in Bhagat Ram v. State of Himachal Pradesh, AIR 1983 SC 454, a Bench of two Judges of this Court, while holding that the High Court did not function as a court of appeal, concluded that when the finding was utterly perverse, the High Court could always interfere with the same. In that case, the finding was that the appellant was to supervise felling of the trees which were not hammer marked. The Government had recovered from the contractor the loss caused to it by illicit felling of trees. Under those circumstances, this Court held that the finding of guilt was perverse and unsupported by evidence. The ratio, therefore, is not an authority to conclude that in every case the Court/ Tribunal is

empowered to interfere with the punishment imposed by the disciplinary authority. In Rangaswami v. State of Tamil Nadu, AIR 1989 SC 1137, a Bench of three Judges of this Court, while considering the power to interfere with the order of punishment, held that this Court, while exercising the jurisdiction under Article 136 of the Constitution, is empowered to alter or interfere with the penalty; and the Tribunal had no power to substitute its own discretion for that of the authority. It would be seen that this Court did not appear to have intended to lay down that in no case, the High Court/Tribunal has the power to alter the penalty imposed by the disciplinary or the appellate authority. The controversy was again canvassed in State Bank of India's case (1994 AIR SCW 1465) (supra), where the court elaborately reviewed the case law on the scope of judicial review and powers of the Tribunal in disciplinary matters and nature of punishment. On the facts in that case, since the appellate authority had not adverted to the relevant facts, it was remitted to the appellate authority to impose appropriate punishment.

**18.** A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

16. The same view was taken in the case of *Union of India and another vs. G. Ganayutham (Dead) by LRs.,* AIR 1997 SC 3387. The Supreme Court held that unless the Court/Tribunal opines in its secondary role, that the administrator was, on the material before him, irrational the punishment cannot be quashed. Even then, the matter has to be remitted back to the appropriate authority for reconsideration. It was further held that the

principles in *B.C. Chaturvedi* (supra) that only in very rare cases Court might to shorten litigation think of substituting its own view as to the quantum of punishment in the place of the punishment awarded by the competent authority has been made in exercise of the power of the Supreme Court under Article 136 of the Constitution, which is different.

17. In the wake of aforesaid, the order of punishment dated 12.8.2000 passed by the disciplinary authority vide Annexure-4, the order dated 11.9.2000 passed by the appellate authority vide Annexure-5 and the order dated 24.6.2014 passed by the revisional authority vide Annexure-6 respectively are quashed. The matter is remitted back to the disciplinary authority to substitute a lesser punishment. The entire exercise shall be completed within three months. The petition is allowed. No costs.

Writ petition allowed.

**2016 (I) ILR - CUT-981**

**DR. B.R.SARANGI, J.**

O.J.C. NO. 4625 OF 2001

**JAYADEV PARIDA** ……..Petitioner

*.Vrs.*

**BALASORE GRAMYA BANK, RENAMED AS ODISHA GRAMYA BANK & ORS.** ……..Opp. Parties

**DISCIPLINARY PROCEEDING – Petitioner works as Messenger in Gramya Bank – Allegation of misappropriation of depositors money – Removal from Service – Punishment confirmed in appeal – Hence the writ petition – There was neither any entrustment nor any scope for the petitioner to handle the cash and maintain the accounts – Rather the cashier of the bank who was lawfully entrusted with the job has been punished and removed from service – Imposition of penalty on the petitioner cannot sustain in the eye of law and accordingly the same is quashed – Direction issued to the authorities to reinstate the petitioner in service and extend all consequential benefits in accordance with law.** (Paras 8, 10)

**Case Laws Referred to** :-

1. AIR 1966 SC 269 : The State of Bombay -V- Nurul Latif Khan
2. 2005 (II) OLR 663 : Gangadhar Mishra -V- Director, Text Book Production and Marketing & Ors.

3. 2006 (I) OLR 144 : Dwijabar Bhuyan -V- Konark Television Ltd. & Anr.

For Petitioner : M/s. S.K.Rath, B.K.Parida, R.K.Parida
For Opp. Parties: M/s. A.K.Mishra, J.Sengupta, D.K.Panda, A.Mishra, P.R.J.Dash, G.Sinha.
M/s. S.C.Samantray, U.K.Sahoo & S.Pattnaik.

Date of hearing :29.10.2015
Date of judgment:24.11.2015

**JUDGMENT**

***DR. B.R.SARANGI, J.***

The petitioner, who was working as Messenger at Badapokhari Branch of Balasore Gramya Bank has filed this application challenging the order dated 6.6.2000 passed by the disciplinary authority awarding the punishment of removal from service under Annexure-11 under Regulation 30 (2) of Balasore Gramya Bank (Staff) Service Regulations, 1980 and confirmation thereof by the appellate authority vide Annexure-13 dated 13.03.2001 under Regulation 32 (b) of Balasore Gramya Bank (Staff) Service Regulations, 1980

2. The short fact of the case in hand is that the petitioner being an under matriculate was engaged on daily wage basis as Messenger in Balasore Gramya Bank on 5.3.1986. Pursuant to which, he joined in the said post and subsequently his services were regularized in the year 1992. Thereafter he was posted at Balasore Branch and while he was discharging his duty at the said branch, having committed certain irregularities while functioning as Messenger, charge sheet was issued to him on the allegation of misappropriation of depositors money amounting to Rs.20952/- in sixteen numbers of savings bank accounts by issuing fake deposit receipts/counterfoils to the depositors, borrowing of Rs.6000/- from two numbers of IRDP beneficiaries, misappropriation of Rs.6000/- by encashing withdrawal slip of Smt. Padmabati Rout in her S.B. Account No.919 without her knowledge, misappropriation of Rs.25500/- from two numbers of IRDP loanees by issuing fake counterfoils/receipts, non-adjustment of sundry debtors advance of Rs.928/- availed of by him against T.A./L.F.C. and taking away of bank's petromax light from Badapokhari branch. Therefore, he was placed under suspension along with one Sudarsan Dehuri, Cashier of the very same branch on the selfsame charge as per Rule 30 (4) of Balasore Gramya Bank (Staff) Service Regulation, 1980 (hereinafter referred as 'the Regulation 1980') vide letter dated 14.6.1997 under Annexure-4 by the

Chairman of the bank. Accordingly, articles of charges and memorandum of charges/allegations were served on the petitioner vide letter dated 11.12.1997 under Annexure-5 with instruction to submit his explanation/written statement in defence within a period of 15 days and such charge sheet had been issued without prejudice to the bank's right for issuing further charge sheet/supplementary charge sheet in respect of other irregularities, misconduct, if any, noticed during the course of further investigation. In response to the same, the petitioner filed written statement of defence vide Annexure-6 dated 22.12.1997 denying the allegations made against him and stating that he being a messenger is not legally authorized to make any transaction to any of the books of account nor has he been lawfully entrusted to execute any transaction in the pass book or any books of account so used in the banking transaction. Therefore, any irregularity so committed in the books of accounts and for the resulted loss to banks money only person or incumbent so lawfully authorized would be liable and as such Sri Sudarsan Dehury, Cashier, who was also placed under suspension has committed all the irregularity and he being the author of all such documents so referred is liable for punishment. Therefore, the petitioner is no way concerned with such allegation and accordingly sought for exoneration from the charges levelled against him. But without considering such contention raised by the petitioner, the order of removal has been passed by the disciplinary authority vide Annexure-11 as a major punishment as per provisions contained under Regulation 30 (2) of the Regulations, 1980. Being aggrieved by the said order, the petitioner preferred an appeal before the appellate authority, but the appellate authority without considering the grievance of the petitioner in proper perspective has confirmed the order of removal passed by the disciplinary authority vide Annexure-13 dated 13.03.2001 under Regulation 32 (b) of the Regulations, 1980. Hence, this application.

3. Mr. S.K. Rath, learned counsel for the petitioner strenuously urged that admittedly the petitioner has discharged his duty of a messenger and he has not been entrusted with the job of handling of bank accounts or the register so as to commit irregularity or illegality in misappropriating the bank money in any manner. It is stated that the Chairman being the disciplinary authority has imposed the punishment of removal from service and he is also the Chairman of the Board of Directors of the bank, the appellate authority, and being one of the members of the appellate authority he has confirmed his own order in appeal. Therefore, the Board of Director being biased against the petitioner has confirmed the punishment imposed by the disciplinary

authority. It is further stated that in view of the admission of the manager and cashier that they are the custodian of seal, receipts and they authenticated the books of accounts, no liability is attributable on the messenger as he is no way connected with the alleged misappropriation of bank's money and as such proceeding as against the cashier Sri Sudarsan Dehury was initiated by putting him under suspension and thereafter he has also been removed from service. He has also admitted in the proceeding that he has committed such irregularity and illegality and thereafter deposited the amount before the bank. It is stated that the charges were proved and order has been passed on no evidence. It is stated that the material witnesses namely Maya Marandi and Asu Hansda have not been examined so far as charge no.2 is concerned. Similarly, so far as charge nos.3 and 4 are concerned, Smt. Padmabati Rout and Dasaya Singh were not examined. Therefore, the punishment of removal of service imposed by the authority is shockingly disproportionate to the allegation made against the petitioner as the petitioner being a messenger is not authorized to deal with bank's money. Therefore, he seeks for quashing of the order passed by the disciplinary authority and confirmed by the appellate authority in appeal vide Annexures-11 and 13 respectively and grant of all consequential relief as due and admissible to the petitioner in accordance with law. To substantiate his contention, reliance has been placed on the judgments in ***The State of Bombay v. Nurul Latif Khan,*** AIR 1966 SC 269, ***Gangadhar Mishra v. Director, Text Book Production and Marketing and others,*** 2005 (II) OLR 663 and ***Dwijabar Bhuyan v. Konark Television Ltd. and another,*** 2006 (I) OLR 144.

4. Mr. G. Sinha, learned counsel for the opposite party-bank justified the action taken against the petitioner by stating that in the inquiry proceeding vide Annexure-8 considering the evidence of the witnesses who have deposed that they have handed over the cash to the petitioner which he received and consequentially issued counterfoils to them and accordingly the petitioner made entry in their pass book, it was proved that the petitioner has misappropriated the deposit money and acted in contravention to the relevant provision of bank's norm. It is stated that all the six charges levelled against the petitioner were proved and accordingly the disciplinary authority passed order of removal from service as per Regulation 30 (2) of Balasore Gramya Bank (Staff) Service Regulations, 1980. So far as charge no.5 is concerned, the same having been proved, the disciplinary authority stated that non-adjustment of sundry debtors advance recovered from the petitioner with interest @17.5% per annum was well within the complete domain of the

authority and as such no illegality and irregularity has been committed by the bank in the disciplinary proceeding. He has relied upon the inquiry report and also stated that basing upon the evidence available on record, punishment has been imposed by the disciplinary authority and having found the same justified, the appellate authority confirmed the same vide impugned order in Annexure-13 dated 13.03.2001. Therefore, there is no illegality and irregularity in awarding the punishment against the petitioner.

5. On the basis of the facts pleaded above, it should be examined:-

i. whether the petitioner being a messenger has been entrusted with the work of maintaining the bank accounts, register and utilize the seals;

ii. whether the Chairman as disciplinary authority has passed impugned order of removal from service in Annexure-11 and also was a party to the order of passed by the appellate authority or not;

6. In answering issue no.i, admittedly the petitioner was discharging duty of messenger and as such there was no entrustment to any of the messengers to handle the bank documents, maintain the records of books of account and utilize the seal of the bank. The custodian of the records being the manager and the cashier of the bank, the petitioner is no way connected with the charge of alleged fraudulent misappropriation and unauthorized borrowings of the bank borrowers etc. May be while discharging the duty of messenger, the petitioner might have carried the deposit slips to the depositors on instruction of the cashier so as to facilitate speedy movement of the customers, but that ipso facto cannot be construed that the petitioner has been entrusted with the duty and responsibility of maintaining the bank accounts and documents so as to become liable for misappropriation of banks money unauthorizedly and irregular borrowings from the bank borrowers. While conducting inquiry though the witnesses have been examined, who have unequivocally stated that they have handed over the bank deposit slips and received the counterfoils from him. That itself cannot be sufficient to prove that the petitioner has in any manner misappropriated the money when the counterfoils are not signed by the petitioner in any manner. The deposits made by the customer having been duly acknowledged by the cashier and accordingly counterfoils being granted, the disciplinary authority has failed to appreciate the fact that there is no entrustment of the money to the petitioner so as to prove the allegation of misappropriation of banks money by the

petitioner. Both the inquiry officer as well as the disciplinary authority have committed gross error apparent on the face of the record that if the entrustment of the work has not been done in favour of the petitioner, he cannot be found guilty of the charges levelled against him. Therefore, the basic requirement of law is to prove the entrustment in favour of the petitioner and in absence of such entrustment, any findings, in contra, cannot sustain and as such no punishment can be imposed against the petitioner. Since the cashier is being entrusted with the work and admittedly proceeding has been initiated against him and he has been removed from service, the finding of the inquiry officer that the petitioner is responsible because he has been allowed to carry some deposit slips and pass counterfoils to the depositors that ipso facto cannot be sufficient to proceed against the petitioner on the ground of misappropriation of bank's money. In absence of any scope on the part of the petitioner to handle the cash and maintain the accounts, this Court fails to understand how the petitioner can be held guilty of charges of misappropriation of the banks money. If any assistance has been rendered by the petitioner to the cashier to facilitate the customers to expedite the deposits by handing over the deposit slips on acceptance by the cashier all the deposits made, it cannot be said that the petitioner has indulged in misappropriation of bank's money. More so, when the cashier, who has been lawfully entrusted with the job has been punished and removed from service for the illegality and irregularity committed by following disciplinary proceeding against him, no fault can be found with the petitioner for the alleged charges levelled against him.

7. Similar question has been considered by this Court in ***Gangadhar Mishra*** and ***Dwijabar Bhuyan*** (supra) and this Court on consideration of the same, quashed the imposition of punishment by the disciplinary authority and also the appellate authority. So far as reliance placed on the judgment in ***The State of Bombay*** (supra) is concerned, the ratio decided therein has no application to the present context.

8. Applying the same analogy to the present context, the petitioner having not been entrusted with the job of maintaining the bank account and records, this Court is of the considered view that the imposition of penalty of removal from service by the disciplinary authority and confirmation thereof by the appellate authority cannot sustain in the eye of law.

9. So far as issue no.2 is concerned, it is urged that the Chairman being the disciplinary authority imposed punishment of removal from service against the petitioner and he being one of the members of the Board of

Director in which the Chairman is a member acted as the appellate authority considered the appeal. Therefore, the appellate authority while confirming the punishment imposed by the disciplinary authority was grossly biased against the petitioner. But on perusal of the records, it appears that in the appeal proceeding, the appellate authority Sri S.K. Chakraborty, being the regular incumbent of the post of Chairman remained absent during the deliberation and the said appeal matter of the petitioner was deliberated under the chairmanship of Sri U.K. Mishra, sponsor Bank nominee director. Therefore, no bias can be attributable to the decision of the appellate authority. In that view of the matter, this Court is of the considered view that the order passed by the appellate authority does not suffer from the vice of bias as the chairman who has passed the order of removal as disciplinary authority was not a party to the proceeding of the appellate authority which considered the appeal of the petitioner. Issue no.ii is answered accordingly.

10. In view of the foregoing reasons, this Court is of the considered view that since there was no entrustment to the petitioner as a messenger to maintain the banks account record, books of accounts and documents, the order of punishment of removal from service vide Annexure-11 and confirmation thereof vide Annexure-13 cannot sustain. Accordingly, the same are quashed. The opposite party-authorities are directed to reinstate the petitioner in service forthwith and extend all consequential benefits within a period of three months from the date of communication of this judgment in accordance with law.

11. The writ petition is allowed. However, there is no order to costs.

Writ petition allowed.

2016 (I) ILR - CUT-988

**DR. B.R. SARANGI, J.**

W.P.(C) NO. 13421 OF 2014

**PRAFULLA KU. SAMANTARAY** ……..Petitioner

*.Vrs.*

**R.T.O., ROURKELA & ORS.** ……..Opp. Parties

**ODISHA MOTOR VEHICLES TAXATION ACT, 1975 – Ss. 3, 13**

**Seizure of vehicle by forest authority from 22.01.2011 till 22.04.2014 – Whether the registered owner of the vehicle is liable to pay tax and penalty for the above period ? - Held, No.**

**In this case the petitioner is unemployed and earns his livelihood by plying the vehicle but he has not intimated the authority for off road of the same, which was a statutory lapse – However since the vehicle seized in connection with a forest offence and was in the custody of the state, the petitioner though in legal possession was not in physical possession of the vehicle – Held, the impugned order imposing tax and penalty for the period the vehicle was under seizure is quashed.** (Para 17)

**Case Laws Referred to** :-

1. 2015 (I) OLR 576 : Ishwar Chandra Prusti -V- R.T.O., Sambalpur & Ors.
2. 2014 (2) OLR 1070 : Sujit Kumar Dhir -V- State of Orissa
3. AIR 1974 SC 1863 : State of Mysore -V- Allum Karibasuppa
4. AIR 1974 SC 1248 : S.V.Cooperative Bank Ltd. -V- K.Panduranga
5. 2006 (10) JT 159 : Regional Provident Fund Commissioner -V- Sanatan Dharam Girls Secondary School

For Petitioner : Mr. Satya Bhusan Das
For Opp.Parties : Mr. B.K.Sharma, Standing Counsel, Transport Department

Date of hearing :16.02.2016
Date of judgment:10.03.2016

**JUDGMENT**

***DR. B.R.SARANGI, J.***

The petitioner, who is a registered owner of the vehicle (Mini Truck) bearing registration No.OR-02Q-7167, has filed this petition seeking to quash the demand notice No.4920 dated 04.07.2014 for payment of additional tax amounting to Rs.42,124/-, vide Annexure-4, within a period of fifteen days, failing which action under Section 17(2) of the Orissa Motor

Vehicle Taxation Act, 1975 shall be initiated against him, otherwise R.C./Permit of the vehicle would be cancelled.

2. The fact leading to filing of this petition is that the petitioner is an unemployed person and is maintaining his livelihood out of the income derived from his vehicle after paying tax and keeping all the motor vehicle documents in order. The aforesaid vehicle of the petitioner bearing registration No.OR-02Q-7167 was seized by Forest Range Officer, B.J.P. Range, Keonjhar, Opposite party no.2 and subsequently pursuant to the order of the District Judge, Keonjhar in F.A.O. No. 1 of 2012, the vehicle was released by the D.F.O., Keonjhar, opposite party no.3 on 22.04.2014. The case of the petitioner is that since the vehicle was not in possession of the petitioner between the period 22.01.2011 and 22.04.2014 and he has not plied the vehicle, he was not liable to pay the motor vehicle tax and he could not have also intimated the off road of the vehicle as it was seized by the Forest Authority. However, demand notice has been issued vide Annexure-4 demanding tax of Rs. 14,866/- and penalty of Rs. 27,258/-, which is double the amount of tax, in total Rs.42,124/-, for the period during which the vehicle was under the custody of the forest authority and therefore, the case of petitioner is that he is not liable to pay the said amount. Hence, this petition.

3. Mr. S.B.Das, learned counsel for the petitioner urged that the petitioner being a registered owner of the vehicle, could not ply the same for the period from 22.01.2011 to 22.04.2014 during the period the vehicle was in the custody of the Forest Authority and therefore, he is not liable to pay the tax and penalty as demanded vide Annexure-4. He further submits that the claim of the petitioner is covered by the ratio of the judgment of this Court in **Ishwar Chandra Prusti Vrs. R.T.O., Sambalpur and others**, 2015(I) OLR -576. It is further urged that the distinguishing feature of the reference made to Ishwar Chandra Prusti (supra) is that Ishwar Chandra Prusti is an auction purchaser, whereas, the petitioner is the owner of the vehicle in question. Even if the petitioner is the owner of the vehicle, since the vehicle was seized by the Forest Authority and it was under the possession of the State Authority, no intimation of off road is required to be given to the Registering Authority and the petitioner is not liable to pay the tax and penalty demanded by the authorities vide impugned demand notice in Annexure-4. Section 12 of the Motor Vehicle Taxation Act stipulates that tax and penalty can be levied against a person who was in possession or control over the vehicle and in the present case since after seizure the vehicle in

question was in possession of the Forest Authority, it was not under the possession and control of the petitioner and therefore, he is not liable to pay the demand so raised by the authority concerned.

4. Mr. B.K. Sharma, learned Standing Counsel for the Transport Department raises preliminary objection with regard to maintainability of the writ petition on the plea that in view of the judgment reported in **Sujit Kumar Dhir Vrs. State of Orissa,** 2014(2) OLR 1070, when there is availability of alternative remedy under the statute, the petitioner instead of approaching the appropriate authority, should not have invoked the extraordinary jurisdiction of this Court under Articles 226 & 227 of the Constitution of India. He further submits that when adequate remedy has been prescribed under Sections 18 and 19 of the OMVT Act, by providing appeal or revision, as against demand so raised by the authority, the petitioner has to approach the appropriate authority ventilating his grievance instead of approaching this Court. He further urged that as required under Section 20 of the OMVT Act, the petitioner being a registered owner, if the vehicle was seized by the forest authority in that case the petitioner had to intimate the off road of the vehicle and non-providing such information as per Sub-Section(3) of Section 10 of the said Act, the petitioner is liable to pay the tax and penalty for vehicle in question and the demand so raised in Annexure-4 is wholly and fully justified.

5. Considering the above pleadings available on record, the following question emerges for consideration;

(i) Whether the registered owner of the vehicle is liable to pay tax and penalty for the period the vehicle was under seizure by the forest authority and consequential release of vehicle pursuant to a proceeding initiated under the Forest Act"

(ii) To what relief?

6. The State legislature enacted the " Orissa Motor Vehicles Taxation Act, 1975" to consolidate and amend the law relating to Taxation on Motor Vehicles. To give effect to the provisions of the Act, Rules have been framed called "Orissa Motor Vehicles Taxation Rules, 1976". Section 3 of the Act deals with levy of tax which reads as follows:

> "3. Levy of tax- (1) Subject to the other provisions of this Act, there shall be levied on every motor vehicle used or kept for use within the State a tax at the rate specified in Schedule-I and Schedule-III.

(2) The State Government may by notification from time to time, increase the rate of tax specified in Schedule-I and Schedule-III;

Provided that such increase shall not exceed fifty percent of the rate specified in Schedule-I and Schedule-III.

(3) All references made in this Act to Schedule-I and Schedule-III shall be construed as reference to Schedule-I and Schedule-III for the time being amended in exercise of the powers conferred by this section."

7. Levy of additional tax can be imposed in view of the provision contained in Section 3-A of the Act, which has been inserted vide Section 3 of the Orissa Act No.2 of 1986 and given effect to from 18.10.1985. Section 4 deals with payment of tax and declaration of liability. Section 4-A of the Act has been inserted by way of amendment vide Orissa Act No.8 of 1989 w.e.f. 01.06.1989 empowering levy and payment of onetime tax. Admittedly, Section 3 is a charging Section under which power has been vested for levy of tax on every motor vehicle used or kept for use within the State at the rate specified under Schedule-I and Schedule-III. Under sub-Section(2) of Section 3, the State Government may by notification from time to time increase the rate of tax in Schedule-I and Schedule-III with a rider that such increase shall not exceed 50% of the rate specified. Section 4 makes it obligatory on the part of the use of the vehicle or kept for use to pay tax and declaration of liability. Therefore, the tax in question has to be paid in advance within such time and in such manner as may be prescribed to the taxing officer by the registered owner or person having possession or control of the vehicle. Sub-Section (2) of Section 4 prescribed the period in respect of which tax is to be paid under Sub-Section (1) of Section 47. On consideration of the entire provisions contained in Section 4, it appears that there may not be requirement of issuance of demand notice, rather it is a self-assessment process for which the registered owner or a person having possession or control over the vehicle is to deposit the tax to the taxing authority. As per Schedule-I, time and amount have been fixed for different categories of vehicles used by the registered owner. Section 4-A which has been inserted by way of amendment, deals with levy and payment of onetime tax by using a *non obstante* clause, i.e., notwithstanding anything contained in Sections 3 and 4 of the Act, but subject to other provisions of the said Section, on every motor vehicle (being a motor car, Omnibus and Motor Cab) covered by items 6 of Schedule-I which is used personally or kept for personal use, onetime tax at the rate equal to the standard rate as specified in

Schedule-III or five percentum of the cost of the vehicle whichever is higher is to be paid. Therefore, as per the provisions contained in Sections 4 and 4-A, a registered owner is to pay tax in accordance with the said provision. If the tax due in respect of any motor vehicle has not been paid as specified in Sections 4 and 4-A, the registered owner or the person having possession or control thereof shall, in addition to payment of tax due, be liable to pay penalty which may extend to twice the tax due in respect of that vehicle to be levied by such officer by order in writing and in such manner as may be prescribed under Section 13 of the Act. Sub-section (2) of Section 13 reads as follows :

> "13(2). The penalty imposed under Sub-sec.(1) shall be without prejudice to the liability, if any, that may be incurred under any of the other provisions of this Act or the rules made thereunder but no such penalty shall be imposed without giving the party concerned a reasonable opportunity of being heard."

8. In view of sub-section (2) of Section 13 mentioned above, no penalty shall be imposed without giving the party concerned a reasonable opportunity of being heard.

9. Sections 18 and 19 of the Act deal with appeal and revision, which read as follows :

> "18. Appeal-(1) Any person aggrieved by any order or direction of the Taxing Officer or by seizure made under Sub-sec.(2) of Sec.17 may, within prescribed time and in the prescribed manner, prefer an appeal to such authority on payment of such fees, if any, as may be prescribed.
>
> (2) Every appeal shall be heard and disposed of in the prescribed manner;
>
> (3) Every decision on such appeal shall, subject to the provisions of Sec.19, be final and shall not be called in question in any Court of law."

10. The vehicle in question having been involved in a forest offence has been seized at Anjar check gate in connection with the illegal transportation of char coal of 80 bags, on 21.01.2011 and proceeding as contemplated under Section 56 of Forest Act has been initiated against the said vehicle in OR Case No. 102BJ/2010-2011. In appeal in FAO No. 1 of 2012 arising out of OR Case No. 102BJ/2010-2011, the learned District Judge, Keonjhar directed release of the vehicle in favour of registered owner after observing

due formalities. The admitted fact is that the vehicle was under seizure by the Forest Authority for the period 22.01.2011 to 22.04.2014. The basic consideration for levy of tax is that in view of Section 3 tax can be levied on every motor vehicle used or kept for use within the State. The petitioner being a registered owner of the motor vehicle, whether he used the vehicle or kept the same for use within the State, is liable to pay the tax as per the provisions contained under Section 3 of the O.M.V.T. Act. The liability to pay tax rests on a person till he ceased to be in possession or control of such vehicle.

11. In the present case the vehicle which had been seized in connection with commission of forest offence has been directed by the learned District Judge, Keonjhar in appeal under Sub-Section (2-e) of Section 56 of the Orissa Forest Act to be released in favour of the registered owner. The only question for consideration is that during the period of seizure, since the vehicle has remained with the possession and under the control of the forest department, which is a State authority, whether the registered owner is liable to pay the tax and penalty so demanded in Annexure-4. When the vehicle was under seizure, it has neither been used nor kept for use by the registered owner for which tax can be leviable under Section 3 of the OMVT Act. More so, seizure having been made by the State Authority, the registered owner has no occasion to use the same. If the same has not been used or kept for use by the registered owner during the period of seizure by the State authority, the registered owner may not be liable to pay tax. But at the same time the registered owner owes a responsibility to communicate to the registering authority with regard to seizure of vehicle under Section 10 of the Orissa Forest Act. As it appears in the present case, no communication about seizure of the vehicle by the Forest Authority has been issued by the registered owner to the registering authority. The vehicle having been seized by the State authority with eyes wide open to the registering authority. When the vehicle in question has not been used or kept for use by the registered owner, nor was he in possession or control over the vehicle during the period of seizure, he is not liable to pay the tax and penalty as claimed in Annexure-4.

12. In **Madan Lal v. State of Uttar Pradesh,** (2003) 7 SCC 465, the word 'Possession' has been defined to mean

> "the legal right to possession. Possession need not be physical possession but can be constructive, having power and control over the

article in the case in question, while the person to whom physical possession is given holds it subject to that power or control."

13. In **Halsbury's Laws of England (4th Edn., Vol. 35, p. 617, para 1111),** which has been cited in **Sadashiv Shyama Sawant v. Anita Anant Sawant,** (2010) 3 SCC 385 (394), the words " possession, physical and legal" have been distinguished as under :

> " 'possession' is a word of ambiguous meaning, and its legal senses do not coincide with the popular sense. In English law it may be treated not merely as a physical condition protected by ownership, but as a right in itself. The word 'possession' may mean effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called de facto possession or detention as distinct from a legal right to possession.
>
> 'Possession' may mean legal possession : that possession which is recognized and protected as such by law. The elements normally characteristic of legal possession are an intention to possessing together with that amount of occupation or control of the entire subject-matter of which it is practically capable and which is sufficient for practical purposes to exclude strangers from interfering. Thus, legal possession is ordinarily associated with de facto possession; but legal possession may exist without de facto possession, and de facto possession is not always regarded as possession in law. A person who, although having no de facto possession, is deemed to have possession in law is sometimes said to have constructive possession."

14. In **State of Mysore v. Allum Karibasuppa,** AIR 1974 SC 1863, the apex Court while considering Section 54 of the Karnataka Cooperative Societies Act, held that the word 'control' suggests check, restraint or influence. Control is intended to regulate and hold in check a restrain from action.

15. In **S.V. Cooperative Bank Ltd. v. K. Panduranga,** AIR 1974 SC 1248, it is held that the word '*control'* is synonymous with superintendent, management, or authority to direct, restrict or regulate. Similar view has also been taken in **Regional Provident Fund Commissioner v. Sanatan Dharam Girls Secondary School**, 2006 (10) JT 159.

16. The vehicle having been under seizure with the forest authority, the petitioner lost his superintendence, management and authority to direct and

restrict, regulate such vehicle. Even though, he was in legal possession of the vehicle he having no control over the same, and the vehicle being in custody of the forest authority, who is one of the State authorities, question of liability of the petitioner to pay tax and penalty should have been considered by the authority while issuing the demand notice in Annexure-4 for the period from 22.01.2011 to 22.04.2014.

17. In view of the aforesaid provision even though the petitioner was not in physical possession of the vehicle in question during the period of seizure, but he is legal possession of the same. Once he is in legal possession, he is obliged under the OMVT Act to intimate the authority with regard to off road of the vehicle. In view of the fact that the petitioner has not intimated the authority with regard to the off road of the vehicle, he has committed lapse under the OMVT Act itself. But the fact remains that the vehicle having been seized in connection with the forest offence and was in the custody of the State Authority, there was no occasion on the part of the petitioner to use the vehicle. More so the vehicle was not under the control of the petitioner during the period of seizure. Taking into consideration the contention of the petitioner that he is young person and earns his livelihood by plying the vehicle having suffered a lot, this Court is inclined to quash Annexure-4 instead of relegating the matter to the alternative forum available under the Act to exhaust. Accordingly the impugned demand in Annexure-4 is quashed.

18. With the aforesaid observation and direction, the writ petition stands disposed of. No cost.

Writ petition disposed of.

2016 (I) ILR - CUT- 996

**DR. B. R. SARANGI, J.**

W.P.(C) NO. 16852 OF 2015

**HEMANTA KUMAR GHADEI** .....Petitioner

*.Vrs.*

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

**SERVICE LAW – Transfer of Gana Sikshyak – Contrary to rationalization policy of teachers – Petitioner's transfer from Itamundali Primary School to Inda Primary School questioned – Even after the Order of transfer petitioner vide office order Dt. 2.3.2013 was directed to take classes at Itamudali Primary School on deputation which was subsequently cancelled on 18.3.2013 without any reason – Held, the impugned order of transfer quashed – Petitioner is allowed to continue at Itamundali Primary School with all consequential benefits admissible to him under law**. (Paras 5, 6, 7)

For Petitioner : M/s. Dhuliram Pattanaik, N.S.Pana & N.Biswal
For Opp. Parties: Mr. A.K.Pandey (Standing Counsel S.M.E.Deptt.)
M/s. P.K.Chand, G.S.Das

Date of hearing :15.03.2016
Date of judgment :29.03.2016

**JUDGMENT**

***DR. B.R.SARANGI, J.***

The petitioner, who is working as a Gana Sikshyak, has filed this petition, seeking to quash the order dated 09.09.2015 passed by the Block Education Officer, Mahanga in Annexure-9, rejecting his claim to continue at Itamundali Primary School and directing him to join at Inda Primary School and further seeking for a direction to allow him to continue at Itamundali Primary School under Mahanga Block as per the rationalization policy i.e. P.T.R. norms by quashing the order of transfer passed by the District Inspector of Schools, Salipur dated 13.06.2012 in Annexure-2.

2. The epitome of the facts is that, the petitioner having been duly selected, was appointed as Gana Sikshyak and posted at Itamundali Primary School under Mahanga Block on 28.06.2008 and thereafter he was transferred to Inda Primary School vide office order dated 13.06.2012. He made a representation to the Chief Executive Officer, Zilla Parishad -cum-

Collector, Cuttack ventilating his grievance that he was illegally shown surplus violating the rationalization policy. Similarly the parents of the students of Itamundali Primary School ventilated their grievance before the Collector, Cuttack alleging therein that the order of transfer of the petitioner is contrary to law. Considering the representation as well as the grievance made by the parents of the students of Itamundali Primary School, the District Inspector of Schools, Salipur, pursuant to the direction of the Collector, Cuttack by office order dated 02.03.2013 directed the petitioner to take classes at Itamundali Primary School. But subsequently the District Inspector of Schools, Salipur by office order dated 18.03.2013 cancelled the office order dated 02.03.2013 directing the petitioner to take classes at Itamundali Primary School and in the said order the petitioner was directed to join in his former post at Inda Primary School. Assailing the said order, the petitioner approached this Court in W.P.(C) No. 6731 of 2013 and this Court by order dated 04.08.2015 disposed of the writ petition directing the authority to consider the representation of the petitioner in accordance with law within a period of one month from the date of communication of the order. In response to the same the Block Education Officer, Mahanga passed the office order on 09.09.2015 justifying his action stating, inter alia, that the claim of the petitioner to continue at Itamundali Primary School has no merit and accordingly directed him to join at Inda Primary School immediately. Hence this petition.

3. Mr.N.Biswal, learned counsel for the petitioner strenuously urged that the order of transfer of the petitioner from Itamundali Primary School to Inda Primary School dated 13.06.2012 is contrary to the rationalization policy of teachers and further stated that the petitioner being a Gana Sikshyak cannot be transferred vide office order dated 13.06.2012 in view of the direction issued by the Government in School & Mass Education Department vide letter dated 15.05.2012. He further submitted that the order dated 9.9.2015 passed by the District Education Officer cancelling the deputation of the petitioner without considering the aforesaid letter of the Government cannot sustain in the eye of law. He further submitted that the post held by the petitioner being not a transferable post as per the aforesaid letter of the Government dated 15.05.2012, the petitioner should not have been transferred to Inda Primary School from Itamundali Primary School.

4. Mr.A.K.Pandey, learned Standing Counsel for the School and Mass Education Department, stated that in compliance to the order of transfer dated 13.06.2012 in Annexure-2, the petitioner having joined in his new

place of posting, i.e. Inda Primary School and has been discharging his duties and the same having been acted upon, he cannot turn around and say that the order of transfer is bad. It is further urged that the petitioner made a grievance before the Collector, Cuttack and on consideration of the same, the District Inspector of Schools, Salipur issued office order dated 02.03.2013 deputing the petitioner to take classes at Itamundali Primary School under the same Block. But subsequently, the same was cancelled vide office order dated 18.03.2013 and the petitioner was directed to work at Inda Primary School, which was challenged before this Court and this Court directed to consider his representation. Consequently the impugned office order dated 09.09.2015 rejecting the claim of the petitioner to continue at Itamundali Primary School has been passed. It is further urged that, it is the employer's prerogative to allow the persons to continue on deputation on administrative exigency and cancel the same. Therefore, the action taken by the authorities is wholly and fully justified.

5. On the basis of the facts pleaded above, admittedly the petitioner was working as a Gana Sikshyak at Itamundali Primary School and while he was so continuing, he was transferred to Inda Primary School on 13.06.2012 pursuant to which he joined there. But subsequently on the grievance of the petitioner as well as the parents of the students of the said School, though the petitioner was posted at Inda Primary School, he was allowed to take classes at Itamundali Primary School on deputation basis. It is also admitted fact that the students' strength of Itamundali Primary School is 88 whereas the strength at Inda Primary School is only 29. When there is requirement of a teacher at Itamundali Primary School, the order of transfer has been made directing the petitioner to join at Inda Primary School, which is contrary to the student- teacher ratio. For rationalization of Elementary Teachers/Zilla Parishand Teachers/Sikshya Sahayaks/ Gana Sikshyaks in Govt. Primary and Upper Primary Schools during the academic session 2012-13, the Government of Odisha in the School & Mass Education Department issued a guide line on 15.05.2012. Clause 9 thereof reads as follows :

> "9. Regular teachers who are working in New Primary Schools/ New Upper Primary Schools under deployment may be allowed to continue. Otherwise the practice of deployment shall be stopped altogether and in case of exigency prior approval of Director, Elementary Education, Odisha shall have to be taken for deployment of teachers."

As per the above mentioned provision, only regular teachers, who are working in new primary School and new upper primary School, have been allowed to continue on deployment, but there is no mention in the rationalization policy with regard to transfer or deployment of Gana Sikshyaks. On consideration of the grievance made by the petitioner when the Collector directed the D.E.O., to allow the petitioner to take classes at Itamundali Primary School on deputation, the same has been done by office order dated 02.03.2013. But subsequently on 18.03.2013 the same has been cancelled without any reason. Consequently the petitioner approached this Court in W.P.(C) No. 6731 of 2013 and this Court by order dated 04.08.2015 directed the authorities to consider the representation of the petitioner in accordance with law. Thereafter, the impugned order in Annexure-9 has been passed. As per the letter dated 15.05.2012 of the Government of Odisha, School & Mass Education Department issued to all the Collectors/CEOs, Zilla Parishads, no deployment of teachers shall be made without necessary approval of the Director, Elementary Education, Odisha. In the case of the petitioner, no approval of the Director to the deputation of the petitioner to Itamundali Primary School was taken and the said order of deputation passed in favour of the petitioner has been cancelled and the petitioner's representation has been rejected by the Block Education Officer, Mahanga. The Government of Odisha in School & Mass Education Department issued a Circular on 18.05.2013 to all Collectors-cum-CEOs Zilla Parishads with regard to Rationalization of Elementary Teachers/Zilla Parishad Teachers/ Shikshya Sahayaks/Gana Sikshyaks in Govt. Primary and Upper Primary Schools during the academic session 2013-14. Clause 3 whereof states as follows:

> "3. Gana Sikhyak/Sikhya Sahayak were recruited to be posted in difficult areas to address of issue of shortage of teachers in these areas. However, in few districts they were transferred. Transfer of these categories of teachers is highly objectionable. Even while calculating the station seniority the Sikhya Sahayak/Gana Sikhyak should not be disturbed."

On perusal of the aforementioned clause, it clearly reveals that transfer of Gana Sikhyak/Sikhya Sahayak is highly objectionable and while calculating the station seniority, the Gana Sikhyak/Sikhya Sahayak should not be disturbed. Therefore, the Government on consideration of the fact that Gana Sikshyak cannot be transferred, any action taken by the authorities transferring the petitioner from Itamundali Primary School to Inda Primary

School cannot sustain in the eye of law. Apart from the same, the subsequent direction issued in favour of the petitioner to take classes at Itamundali Primary School pursuant to Annexure-5, otherwise could not have been cancelled vide order dated 18.03.2013. If by virtue of the circular issued on 18.05.2013, the Government as a matter of principle decided not to transfer Gana Sikshyaks, applying the same to the present case, the petitioner could not have been transferred and after joining in the transferred place, he could not have been directed to take classes in the previous place of posting.

6. In view of the aforesaid facts and circumstances, this Court is of the considered view that since under the rationalization policy of 2012-13 of the Government, only regular teachers who are working in new primary school or new upper primary school on deployment have been allowed to continue and such rationalization policy does not provide for transfer and/or deployment of Gana Sikshyaks and the position is more clarified in the subsequent rationalization policy of the Government for the year 2013-14 wherein the Government has decided not to transfer Gana Sikshyaks, the present order of transfer in favour of the petitioner vide Annexure-2 cannot sustain and accordingly the impugned order in Annexure-9, rejecting the claim of the petitioner to continue at Itamundali Primary School also cannot sustain.

7. For the foregoing discussions, the impugned order of transfer dated 13.06.2012 (Annexure-2) transferring the petitioner from Itamundali Primary School to Inda Primary School as Gana Sikshyak and the order of cancellation of deputation from Inda Primary School to Itamundali Primary School on consideration of the representation dated 09.09.2015 in Annexure-9 are hereby quashed and it is directed that the petitioner be allowed to continue at Itamundali Primary School as before with all the consequential benefits as due and admissible to him in accordance with law.

8. With the aforesaid observation and direction, the writ petition is allowed. No order as to cost.

Writ petition allowed.

**2016 (I) ILR - CUT-1001**

**DR. B.R.SARANGI, J.**

O.J.C. NO. 4872 OF 2001

**SUBASH CHANDRA NAYAK** ……..Petitioner

*.Vrs.*

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

**(A) TELEGRAPH ACT, 1885 – S. 7-B**

**Dispute regarding telephone bill – Asst. Director General (T.R.) appointed Sri B.Mallik, the then Director (RTTC) Bhubaneswar as the Arbitrator to resolve the dispute – Arbitrator passed award – Award challenged on the ground that it is without jurisdiction as the Arbitrator has not been appointed by the Central Government as required U/s. 7-B of the Act – Even if power has been delegated by the President of India in favour of the Asst. Director General (T.R) to appoint the Arbitrator while exercising executive function, the same is not in consonance with the provisions contained U/s. 7-B of the Act – Held, the impugned award being without jurisdiction can not sustain in the eye of law.** (Paras 9,10)

**(B) TELEGRAPH ACT, 1885 – S. 7-B**

**Dispute regarding telephone bill – Award passed without reasons – Action challenged – Award passed U/s. 7-B of the Act is final and can not be questioned in a Court of Law – Moreover when it affects public interest reasons are required to be recorded – Held, the impugned award not being sustained in the eye of law is set aside – Matter is remitted back to central Government to adjudicate the dispute in consonance with section 7-B of the Act.** (Paras 12 to 15)

**Case Laws Referred to** :-

1. AIR 1995 Delhi : M/s/ Fly Wings Travels (P) Ltd. -V- M.T.N.L. & Anr.
2. AIR 1996 SC 2476 : M.L. Jaggi -V- Mahanagar Telephones Nigam Ltd.
3. AIR 1936 PC 253(2) : Nazir Ahmad v. King Emperor
4. (1999) 3 SCC 422 : Babu Verghese v. Bar Council of Kerala
5. (2015) 7 SCC 690 : Zuari Cement Limited v. Regional Director, Employees' State Insurance Corporation, Hyderabad & Ors.
6. AIR 1990 SC 1426 : Raipur Development Authority v. M/s. Chokamal Contractors.

For Petitioner : M/s. S.K.Dash, S.K.Mishra, B.Mohapatra, S.Dash & Ms. A.Dhalsamanta

For Opp. Parties : Mr. Chandrakanta Pradhan,

Central Govt. Standing Counsel
M/s. P.R.Barik, P.Chandan, P.K.Jena

Date of hearing :15.03.2016
Date of judgment:29.03.2016

**JUDGMENT**

***DR. B.R.SARANGI, J.***

The petitioner, being the claimant, has filed this application seeking to quash the award dated 13.07.2000 passed by the Arbitrator-cum-Area Manager, Telecom (City), Office of the G.M. Telecom, Cuttack under section 7B of the Indian Telegraph Act, 1885, directing to pay the outstanding amount of Rs.8,40,568.00 in forty equal installments, the last date of each installment will be 7th of every month starting from the month of August, 2000.

2. The factual matrix of the case, in hand, is that the petitioner is the former member of Parliament (10th Lok Sabha) from Kalahandi Constituency in the State of Odisha. He continued in office from 1991 upto 15th May, 1996. Being a member of Parliament, he was provided with certain privileged facilities including telephone facility. Such facility is governed under the Housing and Telephone Facilities (Members of Parliament) Rules 1956. The said Rule has been framed in exercise of the power conferred by the Central Government under the Salary and Allowances of Member of Parliament's Act, 1954. In terms of the aforesaid Rules, as it stood prior to the amendment on 30th August, 1997, a Member of Parliament was entitled to have one telephone at his residence or office at New Delhi and another telephone at his usual place of residence or at a place selected by him and was provided with 25,000 free calls per annum, from each telephone. The calls made from the said two telephones are pooled together and thus, a Member of Parliament is not required to make the payment in respect of 50,000 calls from the two telephones, during a year. The excess calls made over and above the pooled 50,000 free calls per annum can also be adjusted against the 50,000 free calls for the next year. In terms of Rules 444 to 453 of P & T Manual (Volume-XIV), the charges for the local calls to the extent of 50,000 calls in respect of the two telephones in a year are borne by the Lok Sabha/ Rajya Sabha Secretariat, as the case may be, and the charges for the calls in excess thereof, are billed against the concerned Member of Parliament and are deducted from his/her salary through the Secretariat. Accordingly, the petitioner by virtue of his status as a Member of Parliament,

was provided with one telephone bearing No. 379-2116 at New Delhi and another telephone bearing No. 330353 at his Constituency at Bhawanipatna. The telephone at New Delhi operated from 25.6.91 till 23.5.96 and during his tenure as a Member of Parliament, he was never served with any bill nor any amount was ever deducted from his salary towards the charges for excess call and as such, the petitioner was all along under a bonafide impression that the calls made from the two telephones are well within the permissible limit of 50,000 calls per annum. However, after dissolution of the 10th Lok Sabha, the petitioner was served with a bill of Rs. 4,26,963/- towards the charges for the alleged excess calls over and above the free calls as aforesaid. Consequently, the petitioner made a representation to the then Minister of Communications, Govt. of India and also raised a dispute before the appropriate authority for correction of the bills. In the mean time the bill amount has been increased up to Rs. 8,40,568/- out of which the petitioner has already paid Rs.53,000/- without prejudice to his contention and after lot of persuasion, the Assistant Director General (TR) in the Department of Telecommunication, by a letter dated 17.9.99, appointed Sri B.Mallick, the then Director (RTTC), Bhubaneswar as the Arbitrator to resolve the dispute. The Arbitrator passed the impugned award on 13.07.2000 by which the petitioner has been made liable to pay a sum of Rs.8,40,568/- in 40 equal installments payable within 7th of each month, starting from August, 2000. Hence this application.

3. Mr. S.K. Dash, leaned counsel for the petitioner assails the award passed by the Arbitrator under Section 7B of the Indian Telegraph Act, 1885, (hereinafter referred to as "the Act") on the ground that the Arbitrator has passed an unreasoned award, more so, the award so passed is without jurisdiction as the Arbitrator has not been appointed by the Central Government as required under Section 7B of the Act, thereby the award having been passed by the authority having no jurisdiction, is a nullity in the eye of law. To substantiate his contention, he has relied upon the judgments in **M/s. Fly Wings Travels(P) Ltd. v. Mahanagar Telephone Nigam Ltd. and another,** AIR 1995 Delhi, 71, **M.L. Jaggi v. Mahanagar Telephones Nigam Ltd.,** AIR 1996 SC 2476.

4. Per contra, Mr. P.R. Barik, learned counsel appearing for opposite party nos. 2 to 4 states that the petitioner being a member of Parliament was using the telephone beyond the limit prescribed and he used both local and STD facilities. For such use, liberal bills were issued to the Lok Sabha Secretariat, the petitioner being a liberal user facilities exhausted its quota

and went into arrears of the dues and supported the award stating that the petitioner having submitted to the jurisdiction of the Arbitrator and having participated in the proceeding, cannot be allowed to contend that the Arbitrator has no jurisdiction to pass the award, which is absolutely a misconceived one, He further stated that the award passed by the Arbitrator is just and reasonable one and does not suffer from any legal infirmity, therefore, he seeks for dismissal of the writ petition being devoid of any merits.

5. On the basis of the facts pleaded above, the following questions emerges for consideration.

(i) Whether the award so passed is in violation of Section 7B of the Act as he has not been appointed by the Central Government?

(ii) Whether an unreasoned award passed by the Arbitrator can sustain in the eye of law?

(iii) To what relief?

6. Section 7B of the Act reads as follows:

> "7B. Arbitration of disputes.—(1) Except as otherwise expressly provided in this Act, if any dispute concerning any telegraph line, appliance or apparatus arises between the telegraph authority and the person for whose benefit the line, appliance or apparatus is, or has been provided, the dispute shall be determined by arbitration and shall, for the purposes of such determination, be referred to an arbitrator appointed by the Central Government either specially for the determination of that dispute or generally for the determination of disputes under this Section.
>
> (2) The award of the arbitrator appointed under sub-section (1) shall be conclusive between the parties to the dispute and shall not be questioned in any court."

7. On perusal of the above mentioned provisions, it appears that a statutory remedy is provided under the Act and therefore, in a dispute as regards to the amount claimed in the demand raised, the only remedy provided is by way of arbitration under Section 7B of the Act. By operation of sub-section (2) thereof, the award of the Arbitrator made under sub-section (1) shall be conclusive between the parties to the dispute and shall not be questioned in any Court. It is apparent from Section 7B of the Act that if any dispute arises between a subscriber and the telegraph authority in regard to payment of telephone bills that shall be referred to an Arbitrator to

be appointed by the Central Government. This being the statutory provision governing the field, issue no.(i) is to be considered in the light of the said provision.

8. As it appears vide Annexure-1 dated 17.09.1999, the Asst. Director General (TR) appointed Mr. B. Mallik, the then Director (RTTC), Bhubaneswar as an Arbitrator. The order was passed for and on behalf of the President of India.

9. Mr. P.R. Barik, learned counsel for opposite party nos. 2 to 4 strenuously urged that in view of the power delegated by the President of India in favour of Asst. Director General (TR), the Arbitrator having being appointed pursuant to Annexure-1, dated 17.09.1999, the requirement of the provisions contained under Section 7B of the Act has been complied with. There is no infirmity in appointing Mr. B. Mallik, the then Director (RTTC), Bhubaneswar as Arbitrator pursuant to Annexure-1 and such appointment can be construed as an appointment by the Central Government as required under law. Such argument has been duly controverted by Mr. S.K. Dash, learned counsel for the petitioner who stated that even if power has been delegated by the President of India in favour of the Asst. Director General (TR) to appoint the Arbitrator, the same is not in consonance with the provisions contained under Section 7B of the Act, rather, the executive function of President of India has been delegated in favour of the Asst. Director General (TR), which is not the requirement of law under Section 7B of the Act. It is further urged that the provision contained under Section 7B of the Act is very clear, thereby if the statute prescribes a thing to be done in a particular manner, the same has to be adhered to in the same manner or not at all. The origin of the Rule is traceable to the decision in **Taylor v. Tailor,** (1875) LR I Ch D 426, which was subsequently followed by Lord Roche in **Nazir Ahmad v. King Emperor,** AIR 1936 PC 253(2). But the said principle has been well recognized and holds the field till today in **Babu Verghese v. Bar Council of Kerala,** (1999) 3 SCC 422 and **Zuari Cement Limited v. Regional Director, Employees' State Insurance Corporation, Hyderabad and others,** (2015) 7 SCC 690 and the said principle has been referred to by this Court in **Manguli Behera v. State of Odisha and others** (W.P.(C) No. 21999 of 2014 disposed of on 10.03.2016).

10. In view of the aforesaid law laid down by the apex Court as well as this Court, appointment of the Arbitrator having not been done in consonance with the provisions contained under Section 7B of the Act, meaning thereby, it is the Central Government alone can appoint Arbitrator,

the same having not been done in consonance with the said provisions the award so passed in Annexure-5 is without jurisdiction and therefore, cannot sustain in the eye of law.

11. Similar question came up for consideration in **M/s. Fly Wings Travels(P) Ltd.** (supra) wherein, the Delhi High Court having come to the conclusion that the Arbitrator having not been appointed in consonance with the provisions contained under Section 7B of the Act, set aside the award passed by the said incompetent Arbitrator. In the present case the Arbitrator has not been appointed by the Central Government as required under Section 7B of the Act. In view of the discussions made above the issue no.(i) is answered accordingly.

12. Coming to the question in issue no. (ii), on perusal of the award indicates that no reason has been assigned, rather, the Arbitrator who is obliged under law to pass a reasoned award has resolved the dispute without assigning any reason. It is well settled law that in public law remedy when the order visits with civil consequences, natural justice required recording the reasons as they are bridge between the order and its maker to indicate how his mind was applied to the facts presented and the decision reached.

13. In **M.L. Jaggi** (Supra) referring to **Raipur Development Authority v. M/s. Chokamal Contractors,** AIR 1990 SC 1426, the apex Court held as follows:

> But arbitral awards in dispute to which the State and its instrumentalities are parties affect public interest and the matter of the manner in which Government and its instrumentalities allow their interest to be affected by such arbitral adjudications involve larger questions of policy and public interest. Government and its instrumentalities cannot simply allow large financial interests of the State to be prejudicially affected by non-reviewable — except in the limited way allowed by the statute — non-speaking arbitral awards. Indeed, this branch of the system of dispute resolution has, of late, acquired a certain degree of notoriety by the manner in which in many cases the financial interests of Government have come to suffer by awards which have raised eyebrows by doubts as to their rectitude and propriety. It will not be justifiable for Governments or their instrumentalities to enter into arbitration agreements which do not expressly stipulate the rendering of reasoned and speaking awards. Governments and their instrumentalities should, as a matter of policy

> and public interest — if not as a compulsion of law — ensure that wherever they enter into agreements for resolution of disputes by resort to private arbitrations, the requirement of speaking awards is expressly stipulated and ensured. It is for Governments and their instrumentalities to ensure in future this requirement as a matter of policy in the larger public interest. Any lapse in that behalf might lend itself to and perhaps justify, the legitimate criticism that Government failed to provide against possible prejudice to public interest. In regard to the arbitration of disputes concerning the claim against the Government, this Court has emphasised the need for recording reasons in the awards touching the public exchequer. In other words, when the public law element is involved, in a public law remedy, public interest demands that reasons should be given even in the award."

14. In view of the aforesaid law laid down by the apex Court, reasons are required to be recorded when it affects the public interest. It is seen that under Section 7B, the award is conclusive but when the citizen complains that he was not correctly put to bill for the calls he had made and disputed the demand for payment, the statutory remedy opened to him is one provided under Section 7B of the Act. By necessary implication, when the arbitrator decides the dispute under Section 7B, he is enjoined to give reasons in support of his decision since it is final and cannot be questioned in a court of law. However, the only remedy available to the aggrieved person against the award is judicial review under Article 226 of the Constitution. In paragraph-8 of the decision in **M.L. Jaggi** (supra) the apex Court held as follows:

> "x x x x x x x If the reasons are not given, it would be difficult for the High Court to adjudge as to under what circumstances the arbitrator came to his conclusion that the amount demanded by the Department is correct or the amount disputed by the citizen is unjustified. The reasons would indicate as to how the mind of the arbitrator was applied to the dispute and how he arrived at the decision. The High Court, though does not act in exercising judicial review as a court of appeal but within narrow limits of judicial review it would consider the correctness and legality of the award."

In view of the aforesaid analysis, since the award does not contained any reasons, the same cannot sustain in the eye of law. Issue no. (ii) is answered accordingly.

15. In the light of what has been discussed above, the appointment of Arbitrator, having been made, in derogation of the provisions contained under Section 7B of the Act and such Arbitrator having passed the award in Annexure-5 without assigning any reasons, the same cannot sustain. Accordingly, the impugned award passed by the Arbitrator in Annexure-5 is set aside and the matter is remitted back to the Central Government to adjudicate the dispute in consonance with Section 7B of the Act.

16. The writ application is accordingly allowed but, in the circumstances, with no order as to costs.

Writ petition allowed.

**2016 (I) ILR - CUT-1008**

**S. PUJAHARI, J.**

CRLA NO. 170 OF 2015

**KUNAL SINGH BARIHA** ……..Appellant

*.Vrs.*

**STATE OF ORISSA** ……..Respondent

**CRIMINAL PROCEDURE CODE, 1973 – S.273**

**Evidence shall be taken in presence of the accused – In this case the appellant having absconded, the trial of Co-accused persons started first – Whether the evidence of P.W.s. 24 to 37 who had been examined in the case of the Co- accused persons shall be adopted in the case of the appellant ? – Held, No**. (Paras 7 to 8)

**Case Laws Referred to** :-

1. 1. AIR 1971 SC.1630 : Ratilal Bhanji Mithani vrs. State of Mahahashtra & Ors.
2. 1967 Cri.L.J. 1702 : Sukan Raj vrs. The State of Rajasthan.
3. 1988 (3) Crimes 596 : Annamma Cherian vrs. The State of Kerala.

For Appellant : M/s. H.S. Mishra & Associates.
For Respondent : Mr. D.K.Mishra, A.G.A.

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Date of judgment : 19.01.2016

**JUDGMENT**

***S.PUJAHARI, J.***

This appeal is directed against a judgment of conviction and order of sentence passed against the appellant in C.T. Case No.212/124 of 2012-14 on

the file of the Additional Sessions Judge-cum-Presiding Officer, Special Court, Padampur. The learned Additional Sessions Judge-cum-Presiding Officer, Special Court, Padampur vide the impugned judgment and order held the appellant guilty of the charge under Sections 342/354/376(2)(g) of the Indian Penal code (for short "I.P.C.") and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.20,000/-, in default to undergo rigorous imprisonment for two years under Section 376(2)(g) of I.P.C., rigorous imprisonment for two years and to pay a fine of Rs.5000/-, in default to undergo rigorous imprisonment for six months under Section 354 of I.P.C. and rigorous imprisonment for one year and to pay a fine of Rs.1000/-, in default to undergo rigorous imprisonment for three months under Section 342 of I.P.C.

**2.** The prosecution placed a case before the trial court that on 10.05.2009 at about 4 p.m., when the victim, a lady belonging to scheduled caste community, had been to the Block Office at the instance of one Mahesh Kumar Agrawal, then working as Block Chairman at Paikmal to meet him there to get a job of Anganwadi worker, her modesty was outraged by him there and thereafter said Mahesh Kumar Agrawal called one Guna Nag and advised the victim to accompany him to an unknown place and said Guna Nag took the victim to an isolated place, i.e., Manbhang Dam side surrounded by jungle and there she was raped by the present appellant along with Mahesh Kumar Agrawal, Guna Nag and Kamalesh Sribastab and thereafter they left her in the godown of co-accused - Sajan Agrawal where she was also subjected to rape by Sajan Agrawal, Pintu Pradhan and Guna Nag. But, the victim was rescued from there by the police and she reported the matter to the police vide Ext.13, pursuant to which, investigation was taken up by the local police which was subsequently transferred to the Crime Branch and charge-sheet was placed.

**3.** After submission of the charge-sheet, the case of the co-accused persons of the appellant was committed to the court of Sessions and charge was framed against them. But the appellant having absconded, his case was committed later and he also faced his trial in the said case as he pleaded not guilty to the charge. During the trial, the evidence of twenty three witnesses including the victim (P.W.1) was independently recorded in this case. But, the evidence of the rest witnesses, such as, P.Ws.24 to 37 who had been examined in the case of co-accused persons, i.e., C.T. Case No.75/42 of 2010-2014 was adapted in the case of the appellant and ultimately, the arguments in both the cases were heard and a common judgment was

delivered. In the common judgment, the appellant was convicted along with his co-accused persons in other case and sentenced, as stated earlier.

**4.** Learned counsel for the appellant has submitted that the judgment of conviction and order of sentence against the appellant are unsustainable in view of the fact that the trial against the appellant is vitiated as the evidence in other case which was recorded in the absence of the appellant, has been adopted in this case oblivious to the mandate of Section 273 of the Code of Criminal Procedure (for short "Cr.P.C."), in recording the judgment of conviction and order of sentence against the appellant. Otherwise also, it has been submitted that the evidence of the victim being full of material contradictions and suffering from embellishment, so also no convincing evidence being there disclosing the involvement of the present appellant, the trial court erred in convicting the appellant and, as such, the impugned judgment of conviction and order of sentence passed against the appellant are unsustainable. Hence, he has submitted, the impugned judgment of conviction and order of sentence are liable to be set-aside and the appellant is entitled to an order of acquittal.

**5.** In response, the learned counsel for the State has submitted that no doubt, the evidence of P.Ws.24 to 37 in this case was not recorded in presence of the appellant, but the same was recorded in the other case wherein the co-accused persons of the appellant were facing their trial on similar charge arising out of the same incident and the appellant having no objection regarding adoptability of the said evidence in the trial court, the contention challenging the sustainability of the conviction on the ground of non-compliance of Section 273 of Cr.P.C. in recording the evidence, as such, is devoid of merit. So far as the merit of the conviction is concerned, it has been submitted that since in this case, the version of the victim in substratum with regard to the fact that she was subjected to rape by some of the convicts and the appellant being present with them then and played a role in the commission of the crime, the conviction of the appellant, as such, unquestionable on a charge of gang rape on the ground of some trivial discrepancies on her version. When the victim in no uncertain terms deposed that she was raped, in which more than one including the appellant were involved and she deposed the same to be without her consent, a presumption under law being there in favour of her evidence that the same was without her consent under Section 114-A of the Indian Evidence Act, the same was sufficient enough to come to a conclusion that she was gang raped and the appellant was guilty of the charges, inasmuch as the same has not been

rebutted in any manner by the appellant or the appellant has not brought anything that he was not present there. Therefore, even if the evidence of the witnesses, i.e., P.Ws.24 to 37 were effaced off the record of the case in which the appellant was facing trial as the same was not recorded in presence of the appellant, the conviction is not vitiated as the evidence of the remaining witnesses is sufficient enough to record a conviction against the appellant. Hence, it has been submitted by the learned A.G.A. that this criminal appeal is devoid of merit and liable to be dismissed.

**6.** It is not in dispute that in this case, the evidence of some of the material witnesses, i.e., P.Ws.1 to 23 was recorded independently in respect of the present appellant and they were subjected to cross-examination at the instance of the appellant. But, so far as the evidence of other witnesses, i.e., P.Ws.24 to 37 is concerned, it appears that the same was recorded in case of the co-accused persons and those witnesses were as such not subjected to cross-examine by the appellant in this case. However, the trial court adopted such evidence, as no objection was raised by the present appellant, in the case of the appellant and concluded the trial. The trial court in this regard, therefore, appears to this Court to have applied a procedure which is foreign to a criminal trial and not permissible under the Code of Criminal Procedure, 1973, which can be visualized from Section 273 of Cr.P.C. which reads as thus :-

> "**273. Evidence to be taken in presence of accused –** Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader:
>
> Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.
>
> *Explanation*- In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code."

**7.** A bare perusal of the aforesaid would go to show that the aforesaid section is mandatory and any omission of any evidence recorded in absence

of the accused unless excepted by the express provision in the Cr.P.C., is an error, omission or irregularity which is not covered under Section 465 of Cr.P.C. and, as such, the said illegality vitiates the trial.

**8.** The Apex Court in the case of ***Ratilal Bhanji Mithani vrs. State of Mahahashtra and others,*** reported in AIR 1971 Supreme Court 1630, have held as follows :-

"4. xxxxx xxxxx xxxxx

In every criminal trial the accused is entitled o have the witnesses examined in his presence and if a departure is made and witnesses cannot be brought here for one reason or the other whether due to the action of the appellant or the inaction or want of diligence on the part of the prosecution, and they have to be examined on commission beyond the frontiers of this Country it is incumbent upon the prosecution and the Court in ensuring a fair and impartial trial to afford to the accused the same facilities for employment of a lawyer, the payment of his to and fro air fare to the place where the Commission will examine witnesses and his daily expenses while he is engaged in the work of the Commission.

xxxxx xxxxxx xxxxxx"

In the case of ***Sukan Raj vrs. The State of Rajasthan,*** reported in 1967 Cri.L.J. 1702, the Rajasthan High Court in paragraph-5 have held as follows :-

> "5. Section 353 Cr.P.C. provides that "except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader." It is urged by learned Deputy government Advocate that the copies were made out in the presence of the accused but in my opinion mere physical presence of the accused is not necessary. He must be given all opportunities to defend himself by testing the veracity of the witness through the process of cross examination. There is nothing on the record to show that opportunity was afforded to the accused to cross-examine the witnesses when the copies of their statements were taken from one case to another.

In my opinion the procedure adopted in taking on record the copies of the statements of the witnesses from one case to another and then to treat these copies as evidence is a serious departure from the usual and proper procedure prescribed by the Code of Criminal Procedure. Even if it is

assumed for the sake of argument that the accused had given his consent to the adoption of such a novel procedure such a consent, in my opinion, cannot give any legal sanctity to this type of evidence which has been brought on record in clear violation of the mandatory provision of the law. It is a well established rule of law that neither the accused nor his counsel can validate by giving his consent anything which is not authorized by law.

The procedure adopted by the trial court to bring the evidence on record is clearly in derogation to the express provision of the law and therefore, it is difficult for me to accept the contention of learned Deputy Government Advocate that the defect is curable as no prejudice has been caused to the accused. In my opinion the provisions of Section 537 of that Code of Criminal Procedure cannot be attracted to cure a defect of procedure which infringes the mandatory requirement of the Code. This violation is clearly an illegality and not an irregularity. Such an illegality vitiates the trial and no amount of consent of the accused or his counsel can cure the illegality."

**9.** It appears that there is no departure to such mandate of the Old Criminal Procedure Code in the new Criminal Procedure Code except the specific circumstances provided in Sections 291, 292, 293, 299 and 317 of the Cr.P.C.

**10.** In the case of ***Annamma Cherian vrs. The State of Kerala***, reported in 1988 (3) Crimes 596, the Kerala High Court have also held that "where a new person is added as an accused, the evidence already recorded cannot be used against him because that was not recorded in his presence".

**11.** I am persuaded with the views taken in the case of ***Sukan Raj (supra) and Annamma Cherian (supra)*** by the Rajasthan High Court and Kerala High Court respectively.

**12.** Therefore, in view of the aforesaid mandate of Section 273 of Cr.P.C. and the law laid down by the Apex Court in the case of ***Ratilal Bhanji Mithani (supra)*** and the Rajasthan High Court and Kerala High Court in the case of ***Sukan Raj (supra)*** and ***Annamma Cherian (supra)***, the trial court erred in adapting the evidence of other case while rendering the judgment of conviction and order of sentence against the present appellant. Hence, the impugned judgment of conviction and order of sentence are unsustainable as the trial is vitiated for the aforesaid reasons.

**13.** Since the trial in the present case is vitiated for the aforesaid reasons, question of placing reliance on the remainder of the evidence to test the sustainability of the conviction does not arise.

**14.** In such premises, I set-aside the impugned judgment of conviction and order of sentence passed against the present appellant and remit back the matter to the trial court to proceed against the appellant afresh from the stage of recording of the evidence of the last witness, i.e., P.W.23 independently. Since I have already set-aside the impugned judgment of conviction and order of sentence and remitted back the matter for trial afresh from the aforesaid stage against the appellant and it being not in dispute that the appellant was on bail at the time of trial, he be also released on bail on such terms and conditions as the trial court may deem just and proper in the facts and circumstances of the case.

**15.** L.C.R. received be sent back forthwith to the trial court for proceeding in accordance with law.

Appeal disposed of.

**2016 (I) ILR - CUT-1014**

**BISWANATH RATH, J.**

C.M.P. NO. 418 OF 2015

**MEENA KUMARI BHAGAT** .....Petitioner

*.Vrs.*

**SMT. KUNTALA NAYAK & ORS.** .....Opp. Parties

**CIVIL PROCEDURE CODE, 1908 – O-39, R-3**

**Whether the learned trial court, while rejecting an application under Order 39, Rule 3 C.P.C. can pass an order of status quo in exercise of power U/s. 151 C.P.C. – Held, No.** (Para 11)

**Case Laws Relied on** :-

1. AIR 1962-SC-527 : Manohar Lal Chopra -V- Rai Bahadur Rao Raja Seth Hiralal

**Case Laws Referred to** :-

1. AIR 2000(SC) 3032 : A.Venkatasubbiah Naidu -V- Chellappan & Ors.

2. 1992(1)Current Civil Cases-483 : Purna Ch.Digal -V- Tube Digal & Sila Digal & Anr.

For Petitioner : M/s. U.C.Pattanaik, S.D.Mishra, S.Pattnaik, M.R.Sahoo & S.M.Rehan.

For Opp. Parties : M/s. Girija Sankar Panda, S.Chakraverty & T.Sinha.
M/s. Damodar Deo, Maheswar Deo, A.K.Mallick & Debadutta Dhal.

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Date of Hearing :18.01.2016
Date of Judgment:18.01.2016.

**JUDGMENT**

***BISWANATH RATH,J.***

In filing this Civil Miscellaneous petition, the petitioner has assailed the impugned order dated 18.05.2012 passed by the Civil Judge (Senior Division) First Court, Cuttack in I.A.No.311 of 2012 arising out of C.S.No.138 of 2008 considering an application under Order 39 Rule 3,C.P.C and while rejecting the said application, passed an order of statusquo pending consideration of the I.A.

**2.** In assailing the impugned order, Mr. Pattnaik, learned counsel for the petitioner contended that when the trial Court rejected the application under Order 39 Rule 3, C.P.C, it had no jurisdiction to pass a further order of injunction in the nature of statusquo in a dismissal case and it is in this circumstance, Mr. Pattnaik, learned counsel further contended that the impugned order is in excess of jurisdiction and should be interfered with by this Court.

**3.** Per contra, Mr. Deo, learned counsel for the Opposite party Nos.1 to 6 opposing the submissions made by Mr. Pattnaik, learned counsel for the petitioner, raises a preliminary question of objectionregarding maintainability of this proceeding referring to the decisions in the case between ***A.Venkatasubbiah Naidu –vrs- Chellappan and others*** as reported in ***AIR 2000(SC) 3032*** as well as a decision of this Court in the case between ***Purna Chandra Digal –vrs- Tube Digal & Sila Digal and another*** reported in ***1992 (1) Current Civil Cases-483*** and contended that in view of the provision for appeal against such order and keeping in view of Section 94 of the Code of Civil Procedure, this Civil Miscellaneous Petition is not maintainable and the matter should be dismissed as not maintainable.

**4.** There is no denial to the fact that the impugned order is an out come of consideration of an application under Order 39, Rule 3, C.P.C pending consideration of an application under Order 39, Rules 1 and 2 of the Code of Civil Procedure. There is also no dispute that the order of statusquo has been passed by the trial court even after rejecting the application under Order 39,Rule 3,C.P.C.

**5.** Looking to the disputes involved in the matter, this Court is now to consider as to whether this Civil Miscellaneous Petition is maintainable or not and further in the event the Civil Miscellaneous Petition is maintainable, then whether the trial court had any jurisdiction to pass an order of prohibition while dismissing an application under Order 39, Rule 3 of the Code of Civil Procedure.

**6.** In support of the case, on the question of maintainability, Mr.Pattnaik, learned counsel for the petitioner referring to a decision of the Hon'ble Apex Court in the case between ***Manohar Lal Chopra-vrs- Rai Bahadur Rao Raja Seth Hiralal*** reported in ***AIR 1962-SC-527*** contended that in view of the decision laid down by the Hon'ble Apex Court, the petitioner has no other alternate than to move this Court as the impugned order is passed in exercise of power under Section 151 of the C.P.C. In support of his case, on merit of the order, Mr.Pattnaik, learned counsel for the petitioner also referring to the very same decision submitted that in considering an application under Order 39, Rule 3 of the Code of Civil Procedure, the trial court had no jurisdiction to exercise the power under Section 151 of the C.P.C particularly when it decides to reject the application under Order 39, Rule 3 of the C.P.C.

**7.** In opposition, Mr.Deo, learned counsel for Opp.party Nos.1 to 6 on the other hand taking resort to the decision of the Hon'ble Apex Court in ***AIR 2000(SC) 3032*** and the decision reported in ***1992 (1) Current Civil Cases-483*** contended that in view of the ratio decided that the petitioner has a clear alternate remedy and therefore the present litigation is not maintainable.

**8.** Before proceeding to the maintainability of the present application looking to the tenure of the order, this Court makes it clear that the impugned order is passed in exercise of power under Section 151 of the C.P.C and the trial court has dismissed the application under Order 39, Rule 3 of the C.P.C and therefore there is no scope for Appeal and the present petition is very much maintainable. Perused the decisions cited at the Bar. Looking to the decision reported in ***AIR 1962-SC-527***,this Court finds under

the observation of the Hon'ble Apex Court in paragraph-53 of the said decision that there is a clear bar for exercise of inherent jurisdiction in exercise of power under Section 151 of the C.P.C particularly while considering an application under Order 39,Rule 3,C.P.C. In presence of a clear provision under the Code, this Court finds since the trial court was considering an application under Order 39, Rule 3 of the C.P.C, the consideration of the trial court should have been within the provision of Order 39, Rule 3 of the C.P.C and in view of exercise of power under specific provision under the Code, the trial court had no scope to exercise the power under Section 151 of the Code. In this view of the matter, this Court finds the decision cited (Supra) supports the submission of Mr.Pattnaik, learned counsel for the petitioner.

**9.** Now coming to the decision cited by Mr.Deo, learned counsel for Opp.party Nos.1 to 6, after perusing the judgment vide AIR 2000 SC 3032, this Court finds in view of the fact and situation available in both the cases, remained altogether different and the said decision is not applicable to the case at hand. Similarly looking to the decision cited by Mr.Deo vide **1992(I) C.C.C-483**,this Court finds that this Court in deciding a dispute as to whether appeal lies in an order arising out of application under Order 39,Rule 3,C.P.C in paragraph-4 of the said judgment held as follows:

> " xxx xxxxx xxx
>
> Right of appeal is a creature of the statute. Unless such right is vested in a party by law, there is no scope for an appeal. When a party makes an application for an exparte order of temporary injunction, order refusing to exercise discretion is disposal of such application only. Application under Order 39, Rules 1 and 2 remain as they are without being considered. Therefore, in cases where application under Order 39, Rule 3, C.P.C is considered and Court considers the application for injunction exparte and passes an exparte order of temporary injunction, it consists of two parts. One part is relating to satisfaction that it is a fit case for passing exparte order and the other, the exparte order itself. That part of the order where exparte temporary injunction is passed, an appeal lies. It has been held by this Court in *Padmanav Das and others –vrs- Dhabaleswar Satpathy* that an exparte order of injunction is to be considered as an order passed under Rule 1 and Rule 2 of Order 39,C.P.C and as such, an appeal lies under order 43,Rule (r) C.P.C, where a Court declines to consider such an application before issue of notice, such an order is not an

order under Order 39,Rule 1 or 2,C.P.C.Accordingly,no appeal lies against such an order. My view is supported by a decision of this Court reported in *Naliniprava Patnaik and another –vrs- Smt.Jyotirmayee Das and others*.

xxx xxxxx xxx"

**10.** In the case at hand, the trial court has rejected the application under Order 39, Rule 3, C.P.C. Hence the decision referred to hereinabove rather supports the petitioner's case. Further considering the submissions placed by Mr.Deo that in view of the interlocutory order passed by the trial court, petitioner still has a chance to file a petition to the very same court for discharge, variation or setting aside of the order of injunction. This Court after going through the provision contained under Order 39, Rule 4 of the C.P.C is of the view that Rule 4 of Order 39 is applicable only in the contingency in the event allowing an application under Order 39, Rules 1 and 2 of the Code of Civil Procedure or under Order 39, R.3 of the C.P.C. In the present case, from the impugned order, this Court finds the trial Court has rejected the application under Order 39, Rule 3 of the C.P.C and the contingency under Order 39, Rule 4 of the C.P.C is not available for the petitioner.

**11.** In view of the discussion made herein above, the observations made and following the ratio involved in ***A.I.R 1962-S.C-527*** as well as in ***1992 (I) C.C.C-483*** this Court while finding the Civil Miscellaneous Petition maintainable as against the impugned order, further finds the grant of interim order of statusquo even after rejecting the application under Order 39,Rule 3 of the Code of Civil Procedure is per se illegal and therefore while interfering in the impugned order, this Court sets aside the impugned order. Further since the application under Order 39, Rules 1 and 2 of the Code of Civil Procedure is pending consideration of the trial court and since all the parties are contesting in the court, this Court directs the trial court to consider the application under Order 39, Rules 1 and 2 of the Code of Civil Procedure at the instance of the plaintiff by giving opportunity of hearing to the respective parties and take a decision thereon within a period of three weeks from today.

**12.** Parties are directed to produce the copy of this order before the trial court for his proceeding in the matter.

**13.** Civil Miscellaneous Petition stands allowed with the observation and direction made hereinabove.

Petition allowed.

2016 (I) ILR - CUT-1019

**B. RATH, J.**

O.J.C. NO. 1681 OF 2000

**GOURANGA CHANDRA DAS** ……..Petitioner

*.Vrs.*

**ZEENA DAS & ANR.** ……Opp. Parties

**CIVIL PROCEDURE CODE,1908 – S.20 (C)**

**Opposite parties filed application under the Hindu Adoption and Maintenance Act before the Judge, Family Court Rourkela – Petitioner-husband raised objection that the application is not maintainable since marriage and last place of residence of the parties was at west Bengal – No provision in the Act with regard to jurisdiction of the Court – presently wife is residing and given birth to the child at Rourkela – Held, since the cause of action for the opposite parties arose at Rourkela, Judge Family Court, Rourkela has Jurisdiction to decide the matter – Learned trial Court is justified in rejecting the application of the husband.**

**Case Laws Referred to** :-

1. AIR 1989 S.C. 1239 : ABC Laminart Pvt. Ltd. & Anr. Vrs. A. P. Agencies, Salem
2. 41(1975) CLT 571 : Narayan Nanda-Vs- Sankar Sahu

For petitioner : M/s. G Mukherji
For opposite parties : M/s. S.K. Padhi

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Date of Order : 07.12.2015

**ORDER**

***B. RATH, J.***

Heard Ms. J. Rath, learned counsel for the petitioner and Mr. Panigraphi, learned counsel for the opposite parties.

This matter arises against an order dated 19.11.1999 passed by the Judge Family Court, Rourkela in C. P. No. 75 of 1999, a challenge by the husband on the territorial jurisdiction of the court.

After closure of the evidence, petitioner-husband filed the petition stating that the marriage so also last place of residence is at village Lakshmipur, P.O.-Gabardanga, P.S.-Hawarha,Dist-24-Praganas (North), West Bengal an application under the premises is not maintainable at Rourkela.

This petition was contested by the opposite party-wife on the premises that since the present is an application under Hindu Adoption and

Maintenance Act, the cause of action having arisen on the birth of the child at Rourkela and their claim on the premises of the resident of the wife at Rourkela, the cause of action for the case arose at Rourkela. The case is very much maintainable in the court at Rourkela. Further said application was also challenged on the premises that the suit having progressed till the end of evidence from the side of the petitioner such an application at this end of the trial, is not maintainable at that stage.

Hearing the respective parties, the trial court taking into consideration the submissions made by the parties as well as the citations cited at the bar on the provision of the Hindu Marriage Act as well as Hindu Marriage and Adoption Act, 1958, rejected the application at the instance of the husband on 13.10.1999. Hence the present writ petition. In assailing the impugned order apart from reiterating the grounds taken in the court below, the learned counsel for the petitioner also submitted that since there has been no cause of action involved in the matter at Rourkela, the dispute is not maintainable in the court of Judge Family Court, Rourkela.

Mr. Panigraphi, learned counsel for Opp. Party apart from reiterating the stand taken in the court below submitted that the cause of action having taken place at Rourkela, the case is very much maintainable in the court of Judge Family Court, Rourkela. Further such an application is also not maintainable at the fag end of the proceeding when the evidence from the side of the applicant was already over. Further the petitioner having submitted to the jurisdiction of the court till end of recording of evidence has no authority to raise the question of jurisdiction at this stage and such attempt is only to linger the proceeding and harass the applicant-wife and minor children. For the pendency of the proceeding till now the husband has already succeeded in his such attempt.

It appears that the application at the instance of the opposite party was filed under Section 18 and 20 of the Hindu Adoption and Maintenance Act. On my query to the learned counsel for the petitioner, it is fairly submitted that the wife is residing at Rourkela and given birth to a male child at Rourkela who is also a party to the C. P. No. 75 of 1999. The application was filed under Section 18 of Hindu Adoption and Maintenance Act, as well as Section 20 of the Hindu Adoption and Maintenance Act, 1958 praying therein for a direction to the present petitioner to pay a sum of Rs. 4500/- P.M to the petitioner and sum of Rs. 1000/- P.M only to the petitioner No. 2 through his mother guardian. Even though the Hindu Adoption and

Maintenance Act. 1956 did not make any specific provision with regard to the jurisdiction of the court but considering that provisions of Code of Civil Procedure in the matter regarding institution of suit are applicable in the present circumstances. Section 20 of the Civil Procedure Code comes into play which reads as follows:

> ***20. Other suits to be instituted where defendants reside or cause of action arises.-***
>
> *Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—*
>
> *(a) The defendant, or each of the defendants where there are more than one, at the time of the commencement of the Suit, actually and voluntarily resides, or carries on business, or personally works for gain; or*
>
> *(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or*
>
> *(c) the cause of action, wholly or in part, arises.*

Reading of the above, particularly the provision as contained in Section 20(c) of the Civil Procedure Code, it is observed that the suits be instituted in the court where the cause of action wholly or in part, arises.

In a case between ***(ABC Laminart Pvt. Ltd. and another Vrs. A. P. Agencies, Salem)*** *reported in* ***AIR 1989 S.C. 1239,*** Hon'ble Apex Court held a cause of action means every fact which if traversed, it would be necessary for the plaintiff to prove, in order to support his right to a judgment of the court and it must include some act done by the defendants since in absence of such an act, no cause of action can possibly accrues. Similarly in another decisions in the case of ***Narayan Nanda-Vs- Sankar Sahu*** as reported in ***41(1975) CLT 571*** this Court held cause of action means bundle of essential facts which is necessary for the plaintiff to prove before he can succeed in the suit.

Considering the submission of the parties and taking into consideration the citations indicated hereinabove, this Court finds that in the

present case, cause of action for the opposite parties since arose at Rourkela, this Court is of the view that the Judge Family Court, Rourkela has jurisdiction to decide the matter and under the circumstances, this Court finds the trial court did no wrong in rejecting the application at the instance of the husband. Consequently, this Court declines to interfere in the impugned order and dismiss the writ petition accordingly. However since this matter pending since 1999, this Court directs the Judge Family Court, Rourkela to dispose of the dispute within a period of three months from the date of production of this order and both parties are directed to appear in the Court below on 21.12.2015 with the certified copy of order of this Court.

The writ application stands dismissed but however with the observation and direction made hereinabove.

Writ petition dismissed.

**2016 (I) ILR - CUT-1022**

**S. K. SAHOO, J.**

CRLMA NO. 31 OF 2014

**RAMESH PRADHAN** ……..Petitioner

*.Vrs.*

**STATE OF ORISSA & ANR.** ……Opp. Parties

**CRIMINAL PROCEDURE CODE, 1973 – S.439 (2)**

**Cancellation of bail – Offence U/ss. 147, 148, 364, 302, 307, 201/149 I.P.C. – Earlier application of O.P.No.2 was rejected on merit – He filed another bail petition subsequently on the ground of illness without any supporting document – Learned Court below granted bail on the ground that O.P.No.2 is suffering from chronic diabetes and no prior criminal antecedent is available against him – Order challenged – Record reveals that there are materials showing participation of O.P.No.2 in the heinous crime and there are number of criminal cases pending against him – Learned Court below should have considered the reasons on which the earlier bail petition was rejected and should have recorded fresh reasons which persuade him to take a different view – Grant of bail ignoring material evidence on record and without assigning reasons is nothing but wrong and arbitrary exercise of judicial discretion – Held, the impugned order granting bail in favour of O.P.No.2 is cancelled.** (Paras 8, 9, 10)

**Case Laws Referred to** :-

1. 1999 (Vol.1) O L R 115 : Lingaraj Khandayat Ray -Vrs.- Bibhu
2. 1996 (Vol. II) O L R 26 : Gandu Mallia –Vrs.- Kanhu @ Mahendra Mallia & Anr.
3. (2006) 34 O C R. (SC) 423 : Bibhuti Nath Jha -V- State of Bihar
4. (2008) 5 S C Cases 66 : Dinesh M.N. –Vrs.- State of Gujarat
5. 62 (1986) C L T 699 : Chhaila Pradhan –Vrs.- Bansidhar Pradhan Vol.
6. (2009) 44 O C R (SC) 604: Hazari Lal Das -Vrs.- State of West Bengal
7. (2008) 41 O C R 108 : Manjit Prakash –Vrs.- Shobha Devi
9. (2012) 51 OCR 472 : Jetha Bhaya Odedara -Vrs.- Ganga Maldebhai Odedara
10. Hazari Lal Das -Vrs.- State of West Bengal (2009) 44 OCR (SC) 604.

. For Petitioner : M/s. K.B.Kar, S.Pattanayak, D.K.Pattnaik

For Opp. Parties : Mr. Prem Kumar Pattnaik (Addl. Govt. Adv.)
Dr. Ashok Kr. Mohapatra (Senior Advocate)
S.Mangaraj, Tej Kumr, S.Samal, R.C.Pattnaik

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Date of Argument:30.09.2015
Date of judgment :03.11.2015

**JUDGMENT**

***S.K. SAHOO, J.***

This is an application under section 439 (2) read with section 482 Cr.P.C. for cancellation of bail granted to opposite party No.2 Raju Bhola @ Rajkishore Bhol granted by learned 1st Addl. Sessions Judge, Puri vide order dated 01.07.2013 in Bail Application No.616 of 2013.

2. The prosecution case as per the First Information Report lodged by the petitioner Ramesh Pradhan before Inspector-in-Charge, Sadar police station, Puri is that on 20.11.2012 at about 5.00 p.m. while the brother of the informant namely Subash Pradhan who was working at Surat had come to Puri with his five friends, the opposite party no.2 along with other co-accused persons being armed with deadly weapons obstructed them near Batamangala in front of the shop of Dhanu Pradhan and attacked them and took away their vehicle, mobile phone and cash. One of the injured expired due to assault and then the accused persons kept his dead body inside a train and fled away. It is further stated in the First Information Report that the injured persons were under treatment at Sakhigopal Hospital and the whereabouts of the brother of the informant could not be ascertained. The vehicle which was taken away by the accused persons was left on the road which was subsequently seized. The

informant suspected that the man who was killed by the accused persons and whose dead body was placed in the Jagannath Express might be his brother. It is further mentioned in the FIR that the accused persons were previously implicated in the assault of the brother of the informant for which a case was pending in the Court of learned Chief Judicial Magistrate, Puri.

On receipt of such First Information Report from the petitioner, Puri Sadar P.S. Case No.234 dated 24.11.2012 was registered under section 147/148/364/302/307/201 read with section 149 of IPC which corresponds to S.T. Case No.60/426 of 2013 pending in the Court of learned 1st Addl. Sessions Judge, Puri.

3. The Inspector-in-charge, Sadar Police station, Puri himself took up investigation of the case. During course of investigation on 25.11.2012, the I.O. arrived at GRPS, Cuttack and came to know that Cuttack GRPS U.D. Case No.83 of 2012 was registered on 21.11.2012 as one Ajit Kumar Mishra, Station Superintendent of East Coast Railway intimated that on that day one unknown male person in an intoxicated condition was found lying dead on platform No.1. The dead body was sent for post mortem examination. The post mortem report indicated that the deceased had sustained number of contusions which were ante mortem in nature and could have been caused by hard and blunt weapons and the cause of death was opined as asphyxia resulting from regurgitation of food materials into the respiratory passage which could have been due to trauma.

The Investigating Officer seized two numbers of the digital photographs of the unknown male person (dead) taken by the Inquiry Officer. The identification of the deceased was made. The opposite party No.2 was taken into custody on 27.11.2012 as prima facie case was found against him for commission of offences under sections 147/148/364/307/302/201 read with section 149 of IPC. Test Identification Parade was also conducted in which the witness Sankar Sethy participated and he identified the opposite party No.2 as one of the culprits. It was also found that the opposite party no.2 has been implicated in a number of criminal cases. It was also found during investigation that the accused persons abducted the deceased and other injured persons from Batamangala and assaulted them in the brick kiln of Ekadasi Jena @ Balia.

After receipt of the supervision report of S.D.P.O, Sadar, Puri, the Investigating Officer submitted charge sheet under sections 147/148/364/302/201/307/149 IPC keeping the investigation open under section 173 (8) Cr.P.C.

4. The petitioner moved an application for bail which was heard by learned 1st Addl. Sessions Judge, Puri who vide order dated 01.07.2013 observed that there is no prior criminal antecedent available against the petitioner and that the petitioner is constantly under medical attention and he is fighting for his survival for which three extensions were given by the Court in anticipation of his recovery but no sign of improvement was noticed as per the medical documents available on record. However the learned Court has been pleased to grant bail even though he has observed that the offences are heinous in nature and it has got hazardous impact on the society.

5. Mr. K.B. Kar, learned counsel for the petitioner while challenging the order of grant of bail to the opposite party no.2 emphatically contended that the bail has been granted illegally and by wrong and arbitrary exercise of judicial discretion and after being enlarged on bail, the opposite party no.2 has misutilized his liberty and therefore the bail granted to him should be cancelled.

He further contended that since sufficient materials are available on record showing participation of the opposite party No.2 in the crime, it was not proper on the part of the learned Court to grant him bail accepting the plea of illness.

Mullifying his contentions, the learned counsel for the petitioner further urged that the opposite party no.2 had earlier moved petition for bail in the Court of Session and it was dismissed on merit. It is further contended that the observations made by the learned 1st Addl. Sessions Judge, Puri that there was no criminal antecedent available against the opposite party no.2 is apparently an error of record in as much as the case diary discloses that the petitioner is involved in a number of cases.

It is further contended that it is a case of gruesome murder and there are also injured persons in the case and therefore grant of bail only on the health ground was not proper particularly when the petitioner was not suffering from any serious ailments. The learned counsel further contended that in the bail petition of the opposite party no.2, it is mentioned that he was suffering from chronic diabetes and undergoing treatment since 2010 and his physical condition was serious as reported by the doctor and Superintendent of Jail. According to the learned counsel for the petitioner, mere suffering from diabetes is not a ground for grant of bail which could have been treated while remaining in custody. He further contended that the medical documents which have been filed along with the counter affidavit pertains to the year

2013 and it indicate that the disease is diabetes and therefore the observation of the learned 1st Addl. Sessions Judge that the opposite party no.2 was fighting for his survival and there is no chance of improvement is palpably wrong.

The learned counsel for the petitioner relied upon decision of this Court reported in **1999 (Vol.1) Orissa Law Reviews 115, Lingaraj Khandayat Ray -Vrs.- Bibhu** whrein it is held as follows:-

> "14…….For the sake of discussion even if admitting the illness to be genuine, then also that could not have been a ground to release the opposite party no.1 on bail in as much as the opposite party no.1 could have been sent for specialised treatment as an U.T.P. even if such facilities are not available in the Sub-Jail at Jagatsinghpur and in that respect appropriate direction could have been passed by the Court. Therefore, the reasoning recorded by the learned Addl. Sessions Judge that because of the said illness he had no other alternative, but to allow the petitioner to go on bail so as to save his life does not appear to be a reasonable or sound reason and it appears that such a finding was recorded only to support his conclusion in support of releasing the petitioner on bail".

The leaned counsel for the petitioner further placed reliance in case of **Gandu Mallia –Vrs.- Kanhu @ Mahendra Mallia and another reported in 1996 (Vol. II) Orissa Law Reviews 26** wherein it is held as follows:-

> "5. When the petition for bail in the present case was moved on the first occasion, illness of the opposite party no.1 was not taken as an additional ground for his release. Only after the Court rejected the prayer, second petition was filed stating therein that he being an asthma patient should be admitted to bail or else the disease may prove fatal……... True it is, sickness of an Under Trial Prisoner sometimes weighs with the Court while deciding the question of bail, but it is not every sickness or infirmity that entitles him to be enlarged on bail. The nature and seriousness of the sickness, the availability of necessary treatment and reasonable amenities provided in jail are to be taken into consideration along with other circumstances before granting bail on the ground of illness. If asthma is considered to be a serious disease for admitting a person, accused of serious crime to bail, we may not blame the people commenting that there is no justice in the world and law always supports the accused and not the victim of the crime".

The petitioner further placed reliance in case of **Bibhuti Nath Jha -V- State of Bihar reported in (2006) 34 Orissa Criminal Reports (SC) 423** wherein the Hon'ble Supreme Court refused bail to the accused even though plea of illness was taken for grant of bail and directed the accused to be referred to the hospital for specialized treatment.

He further contended placing reliance in case of **Dinesh M.N. –Vrs.- State of Gujarat reported in (2008) 5 Supreme Court Cases 66** that if bail is granted on untenable grounds, the plea of absence of supervening circumstances has no leg to stand. While placing reliance in case of **Chhaila Pradhan –Vrs.- Bansidhar Pradhan reported in Vol.62 (1986) Cuttack Law Times 699**, the learned counsel contended that when bail was granted illegally or improperly by wrong and arbitrary exercise of judicial discretion, it can be cancelled by the High Court under section 439 (2) Cr.P.C. even if there is no new or additional circumstances appearing against the accused after the grant of bail.

He further placed reliance in case of **Sirla Kakaji –v- Sasapalli Vanu reported in Vol.33 (1991) Orissa Judicial decision 403 (criminal)**, wherein repelling the contention advanced on behalf of the accused that nearly two years have elapsed since his release, it would not be proper to send him to custody even though bail was granted illegally, the learned Court held that where bail has been granted illegally, passage of time could not stand on the way for cancellation of bail.

6. Mr. Prem Kumar Pattnaik, learned Addl. Govt. Advocate appearing for the State while supporting the contentions raised on behalf of the petitioner submitted that since it is a case of illegal, improper and arbitrary exercise of judicial discretion by the Court in granting bail to the opposite party No.2, even in absence of any supervening circumstances, the bail order is liable to be cancelled. He also urged that mere passage of time would not stand on the way for cancellation of bail.

7. Dr. Ashok Kumar Mohapatra, learned Senior Advocate while supporting the bail order submitted that in the meantime the trial has already commenced and out of 38 chargesheet witnesses, 17 witnesses have already been examined and since there is no material on record to indicate any interference or attempt to interfere with due course of administration of justice by the accused or that he had misutilised concession granted to him in any manner and there is no supervening circumstances for cancelling the bail, it would not be proper to cancel the bail. He placed reliance in case of **Hazari Lal Das -Vrs.- State of West Bengal reported in (2009) 44 Orissa Criminal Reports (SC) 604.**

Mr. Mohapatra, further contended that cancellation of bail is a harsh order and it takes away the liberty of an individual granted and should not be lightly resorted to. Concept of setting aside the unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that accused has misconducted himself or because of some new facts requiring such cancellation. He placed reliance in case of **Manjit Prakash – Vrs.- Shobha Devi reported in (2008) 41 Orissa Criminal Reports 108**.

It is submitted that since no irrelevant materials were taken into consideration while granting bail to the opposite party no.2, it would not be proper to cancel the bail granted particularly in view of the passage of time. The learned counsel placed reliance in case of **Sri Chandradhwaja Mishra –Vrs.- Kautuka Chhatria reported in (2010) 47 Orissa Criminal Reports 881** and **Ram Babu Tiwari –Vrs.- State of M.P. reported in (2009) 43 Orissa Criminal Reports (SC) 392**.

It is urged that there is no material on record that the opposite party no.2 either tried to tamper with the evidence or committed any other overt act which would affect the fairness of trial. The learned counsel placed reliance in case of **Jetha Bhaya Odedara -Vrs.- Ganga Maldebhai Odedara reported in (2012) 51 Orissa Criminal Reports 472**.

8. Law is well settled that rejection of bail in a non-bailable offence at the initial stage and the cancellation of bail already granted have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted. For illustration, broadly the grounds for cancellation of bail are as follows:-

(i) arbitrary and wrong exercise of discretion by the Court ignoring material evidence on record and passing a perverse order granting bail in a heinous crime which has a very serious impact on the society without giving any reason;

(ii) interference or attempt to interfere with the due course of administration of justice; evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner.

Concept of setting aside an unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that accused has misconducted himself or because of some new facts or certain supervening circumstances requiring such cancellation. There is distinction between the parameters for grant of bail and cancellation of bail.

If a Court of Session has granted bail to an accused, the State may move the Sessions Judge for cancellation of bail if certain new circumstances have arisen which was not earlier known to the State. However, when no new circumstances have cropped up except those already existed, the State if aggrieved by the order of the Sessions Judge granting bail has to approach the High Court being the superior Court under Section 439 (2) Cr.P.C. to commit the accused to custody. If the order granting bail is a perverse one or passed on irrelevant materials, it can be annulled by the superior court.

Grant of bail requires consideration of the nature of accusation, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and other similar considerations. At that stage, the prosecution is required to produce prima facie evidence in support of the charge and not the evidence establishing the guilt of the accused beyond reasonable doubt.

It is the settled law that an order granting bail, by ignoring material evidence on record and without giving reasons, would be perverse and contrary to principles of law and such an order would itself provide a ground for moving an application for cancellation of bail.

An accused has a right to make successive applications for grant of bail but while entertaining such subsequent bail applications, the Court has a duty to consider the reasons and grounds on which the earlier bail applications were rejected and to record what are the fresh grounds which persuade it to take a view different from the one it had taken in the earlier applications.

9. Adverting to the materials available on record, it is apparent that there are eye witnesses to the occurrence. One of such witnesses namely Sankar Sethi, who is the friend of the deceased Simanchal Gauda has stated as to how he, the deceased and others were assaulted by split wood and iron rods. He also identified the opposite party No.2 as one of the culprit in the test identification parade. The statements of Subash Pradhan, Loknath Sethi, Naresh Pradhan and Budhi Pradhan prima facie make out the case against the opposite party no.2. The post mortem report indicates that the deceased had sustained number of injuries on different parts of his body. The manner in which the deceased and his friends were abducted, assaulted and the body of

the deceased was kept in a train which was detected at Cuttack Railway Station clearly makes out a prima facie case against the petitioner. Every effort was made to cause disappearance of evidence of offence.

Apart from availability of prima facie case, it appears that the opposite party no.2 had got a number of criminal antecedents i.e. Puri Sadar P.S. Case No. 152 of 2004, Puri Sadar P.S. Case No. 87 of 2005, Puri Sadar P.S. Case No. 32 of 2007, Puri Sadar P.S. Case No. 38 of 2007, Puri Sadar P.S. Case No. 48 of 2007, Puri Sadar P.S. Case No. 74 of 2007 and Chandanpur P.S. Case No. 58 of 2009. In view of criminal antecedents of the opposite party No.2, the observation of the learned Court that there is no prior criminal antecedent available against the opposite party No.2 is a complete error of record.

The records of Bail Application No.81/616 of 2013 was called for from the Court of learned 1st Addl. Sessions Judge, Puri which was received. While going through the records of the bail application, it appears that in paragraph 5, it is mentioned regarding the rejection of earlier bail application. It is mentioned in paragraph 6 that the opposite party no.2 is a chronic diabetic patient undergoing treatment since 2010 and that his physical condition had become serious as has been reported by the doctor and Superintendent of Jail for which interim bail was granted on 10.04.2013. In Paragraph 7, it is mentioned that interim bail was extended on few occasions and finally the opposite party no.2 surrendered before learned S.D.J.M., Puri after expiry of last extension period. In paragraph 8 and 9 of the bail petition, health grounds have been taken for grant of bail.

No medical documents were submitted by the opposite party no.2 along with the bail application. The learned Court has also not called for the report from the jail authorities regarding the health condition of opposite party no.2 prevailing at the time of adjudication of the bail application. It seems that the earlier medical reports which were called for at the time of granting interim bail were considered and bail order was passed. Thus it is apparent that at the time of passing the impugned order, the learned Court has no medical documentary proof regarding the health condition of the opposite party no.2 prevailing then.

When the bail application was earlier rejected on merit and no fresh grounds have been made out to take a different view and there was no material before the Court regarding the health condition of the opposite party no.2 prevailing then, it was not proper on the part of the Court to grant bail

only on the health ground in spite of observing that the offences are heinous in nature and it has got hazardous impact on the society and that to committing an error of record that the opposite party no.2 has got no prior criminal antecedent.

10. After bestowing my anxious, painstaking and careful consideration to the tactical and enthralling contentions raised at the Bar as well as the materials available on record and on perusal of the case-laws cited, I am of the considered view that the exercise of judicial discretion in granting bail to the opposite party no.2 was illegal, improper and arbitrary and therefore bail granted to the opposite party no.2 should be cancelled.

Accordingly, the CRLMA application is allowed and the impugned order dated 01.07.2013 passed by learned Ist Addl. Sessions Judge, Puri in Bail Application No.616 of 2013 is hereby set aside. The bail order stands cancelled. The opposite party no.2 is directed to surrender before the trial Court forthwith failing which necessary steps be taken by the trial Court for immediate apprehension of the opposite party no.2. Any observation made in this order shall not influence the trial Court while adjudicating the trial of the case. A copy of the order be sent to the learned trial Court for compliance.

Application allowed.

**2016 (I) ILR - CUT-1031**

**S. N. PRASAD, J.**

W.P.(C) NO. 3434 OF 2005

**BASUDEV CHATERJEE** .....Petitioner

*.Vrs.*

**GRID CORPORATION OF ORISSA & ORS.** .....Opp. Parties

**SERVICE LAW – Petitioner is an employee of GRIDCO – While in service show cause notice Dt. 27.01.1998 was issued to him with draft charges alleged to have been committed in the year 1995 – He retired from service on 31.12.2001 and departmental proceeding initiated against him on 19.08.2002 – Hence the writ petition – Show cause notice issued to him by the Superintending Engineer (Civil) but not by the disciplinary authority – Departmental proceeding having not been initiated for the events occurring in the last four years service as per**

**Rule 17(6) of the GRIDCO Officers Service Regulations, the same is without jurisdiction being barred by limitation – Held, the departmental proceeding against the petitioner is quashed – Direction issued to release all consequential benefit to the petitioner for which he is legally entitled.** (Paras 24,25,30,31)

For Petitioner : M/s. Jayant Ku. Rath, S.N.Rath, P.K.Rout, S.Mishra, C.K.Rajguru & D.N.Rath

For Opp. Parties : M/s. Pradipta Mohanty, G.S.Satpathy, Smt. S. Mohanty (for GRIDCO)
Mr. Manoj R.Dhal, D.N.Mahapatra, Vijayshree (Caveator)

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Date of hearing : 10.2.2016
Date of judgement : 10.2.2016

**JUDGMENT**

***S.N. PRASAD, J.***

This writ petition is for quashing of the order as contained in Annexure-8 which is the show cause notice with a drafted punishment of imposing penalty of reduction of 20% of pension on permanent basis and Rs.50,000/- to be deducted out of gratuity to be paid to the petitioner in exercise of power conferred under Rule-7 of the Orissa Pension Rules, 1992 read with Rule 6 (4) (a) of the Pension Rules 1992.

2. Case of the petitioner is that he was appointed as Civil Overseer by the Chairman of the Orissa State Electricity Board vide Memo No.1053 (2) dated 27.02.1964. After coming into effect Orissa Electricity Reforms Act, 1995 which came into force on 10th January, 1996 all the employees of the State Electricity Board were brought into the control of establishment namely Hydro Power Corporation and Grid Corporation of Orissa Ltd., the petitioner was brought in as an employee of the Grid Corporation of Orissa which was created in pursuance of the provision as contained in Section 13 of the Orissa Electricity Reforms Act, 1995, the Grid Corporation of Orissa has formulated its own service regulations having the service conditions and discipline and appeal rule.

3. The petitioner being brought under the jurisdiction of GRIDCO the regulation formulated by the GRIDCO will also be applicable to him. After service of the petitioner having been placed under the control of the GRIDCO, the petitioner came under E-2 category since he was holding the post of Junior Manager at that time. **According to the provision of**

**Regulation 8(2), the appointing authority of Junior Manager is the Functional Director/Director (HR).**

4. When the petitioner's service was under the Orissa State Electricity Board (hereinafter referred to as 'OSEB'), his appointing authority was Chief Engineer since he was holding the post of Junior Engineer but **after service of the petitioner having been placed in the GRIDCO, the Functional Director/Director (HR) has become the authority and as such he became the disciplinary authority.**

Accordingly, when the petitioner was in the service of OSEB the provision of Orissa Pension Rules and the CCA Rules, 1992 was applicable but after the service of the petitioner having been placed under GRIDCO, the provision of service regulation formulated by the GRIDCO has become applicable.

5. The petitioner after rendering service under the GRIDCO, has been superannuated from service w.e.f. 31.12.2001. According to the petitioner, while he was in service no departmental proceeding was initiated and it is only after his superannuation i.e., w.e.f. 31.12.2001 a departmental proceeding has been initiated vide Departmental Proceeding No.263 dated 19.08.2002. However, while the petitioner was in service show cause notice was issued against him asking therein to give reply regarding misconduct alleged to have been committed and he has given due reply but for one reason or the other regular departmental proceeding has not been initiated during the course of his service tenure and it is only after his retirement departmental proceeding has been initiated vide letter dated 19.08.2002.

6. The petitioner although has participated in the enquiry proceeding but questioned the maintainability of the departmental proceeding by raising the issue that the departmental proceeding initiated against the petitioner vide order dated 19.08.2002 is contrary to the provision of Regulation 17(6) of GRIDCO Officers Service Regulation which provides that the company has right to initiate a departmental proceeding who has retired or even not in the list of Officers service but according to the petitioner he has been superannuated from service w.e.f. 31.12.2001 and during his service tenure, no departmental proceeding has been initiated, hence departmental proceeding should have been initiated only after superannuation if the cause of action will be for the period of four years from the date of service of the petitioner but according to the petitioner, the alleged offence has occurred in the year 1995 and as such this is barred by the provision of Regulation 17(6) of the GRIDCO Officers Service Regulation.

7. The GRIDCO has appeared and filed counter affidavit representing GRIDCO Mr. Pradipta Mohanty has stated that while the petitioner was in service, show cause notice was issued on 27.01.1998 which was replied by the petitioner but thereafter the competent authority has thought it proper to get more material by asking the audit team to conduct enquiry in this regard and accordingly audit was conducted and submitted a report on 17.11.2001 and thereafter the departmental proceeding was initiated vide order dated 19.08.2002.

8. He submits that since show cause notice was issued on 27.01.1998 and the same has been stalled for some period waiting for the outcome of the audit report and after submission of audit report, the proceeding which has been initiated vide show cause notice dated 27.01.1998 has again been started vide order dated 19.08.2002 hence according to him, it is incorrect that the departmental proceeding has not been initiated while the petitioner was in service.

9. Heard learned counsel for the parties and after hearing rival submission, it is necessary to examine the relevant provision for the purpose of adjudicating the issue i.e., the provision of Rule 7 of the Orissa Pension Rules, 1992 and the provision of Rule 9 of Central Civil Services (Pension) Rules, 1972. For ready reference it is being reproduced:-

*"**Rule. 7 of the Orissa Pension Rules, 1992 - Right to Government to withhold or withdraw pension**- (1) the Government reserve to themselves the right of withholding a pension or gratuity, or both either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if in any departmental or judicial proceedings, the pensioner found guilty of grave misconduct or negligence in duty during the period of his service including service rendered on re-employment after retirement.*

*Provided that the Orissa Public Service Commission shall be consulted before the final orders are passed:*

*Provided further that when a part of pension is withheld/withdrawn, the amount of such pension shall not be reduced below the amount of minimum limit.*

*(2)(a) Such departmental proceedings referred to in Sub-rule (1), if instituted while the Government servant was in service, whether before this retirement or during his re-employment, shall after the final retirement of the*

*Government servant, be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service.*

*Provided that when the departmental proceedings are instituted by an authority, subordinate to Government that authority shall submit a report recording its finding to the Government.*

*(b) Such departmental proceedings as referred to in Sub-rule (1) if not instituted while the Government servant, whether before his retirement or during his re-employment –*

*(i) shall not be instituted save with the sanction of Government;*

*(ii) shall not be in respect of any event which took place more than four years before such instruction; and*

*(iii) shall be conducted by such authority and in such place as the Government may, direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.*

*(c) No judicial proceedings, if not instituted while the Government servant was in service, whether before this retirement or during his re-employment, shall be instituted in respect of a cause of action which arose or in respect of an event which took place, more than four years before such institution.*

*(d) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental proceedings are continued under Clauses (a) and (b), a provisional pension as provided in Rule 66 shall be sanctioned.*

*(e) Where the Government decide not to withhold or withdraw pension but order recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant."*

***Rule. 9 of CCS (Pension) Rules 1972 - Right of President to withhold or withdraw pension*** *- (1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement:*

*Provided, that the Union Public Service Commission shall be consulted before any final orders are passed:*

*Provided, further that where a part of pension is withheld or withdrawn the amount of such pensions shall not be reduced below the amount of rupees three hundred and seventy-five per mensem.*

*(2) (a) The department proceedings referred to in Sub-rule (1), if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemd to be proceedings under this Rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service.*

*Provided, that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President.*

*(b) The departmental proceedings, is not instituted while the Government servant was in service, whether before his retirement, or during his re-employment-*

*(i) shall not be instituted save with the sanction of the President.*

*(ii) shall not be in respect of any event which took place more than four years before such institution; and*

*(iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in relation to the Government servant during his service.*

*(3) xxxx xxxx*

*(4) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against who any departmental or judicial proceedings are instituted or where departmental proceedings are continued under Sub-rule 92), a provisional pension as provided in Rule 59 shall be sanctioned.*

*(5) Where the President decides not to withhold or withdraw pension but order of recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.*

*(6) For the purpose of this rule,-*

*(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date, and*

*(b) judicial proceedings shall be deemed to be instituted-*

*(i) in the case of criminal proceedings, on the date on which the complaint or report of a police officer, of which the Magistrate takes cognisance is made, and*

*(ii) in the case of civil proceedings, on the date the plaint is presented in the Court."*

10. Provision of Rule 9 of CCS (Pension) Rules, 1972 confers power to the President and one of the provision contained therein that the departmental proceeding is not instituted while the government servant was in service, whether before his retirement or during his re-employment - (i) shall not be instituted save with the sanction of the President.
(ii) shall not be in respect of any event which took place more than four years before such institution; and (iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in relation to the Government servant during his service.

11. It further transpires from the said provision as would be evident from the Rule 9(6) of CCS (Pension) Rules 1972 that (a) departmental proceeding shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or if the Government servant has been placed under suspension from an earlier date, on such date and (b) judicial proceedings shall be deemed to be instituted - (i) in the case of criminal proceedings, on the date on which complaint or report of a police officer, of which the Magistrate takes cognizance is made, and (ii) in the case of civil proceedings, on the date the plaint is presented in the Court.

12. Parimateria provision has been under the GRIDCO Officers Service Regulations as contained in Regulation 17(6) is being reproduced herein below:-

> *"17(6). Company may initiate disciplinary proceedings against officers who have retired or otherwise left the service for events occurring in the last four years of the officer's service.*

*Provided that such disciplinary proceedings shall be initiated within a period of two years from the date of the retirement or the Officer leaving the service and shall be completed within a period of three years from the date of such retirement or the Officer leaving the service."*

Thus, the provision of Regulation 17(6) stipulates that if a departmental proceeding can be initiated against an employee who have retired or left service for events occurring in the last four years of the officer's service and said proceeding shall be initiated within a period of two years from the date of retirement or the officer leaving the service and shall be completed within a period of three years from the date of such retirement or the officer leaving the service.

In the light of these provisions, now the case of the petitioner needs to be examined.

13. Undisputedly, the petitioner has been superannuated from service w.e.f. 31.12.2001, show cause notice has been issued to him on 27.01.1998 along with the draft charges and thereafter the petitioner has given its reply on 9.2.1998. The authorities have not issued any communication regarding initiation of regular departmental proceeding since according to opposite parties, GRIDCO in order to ascertain some facts regarding the financial misappropriation of money have directed to conduct an audit to verify these aspect of the matter and accordingly audit report was submitted on 17.11.2001 and thereafter the Government has issued the order as contained in letter No. 269 dated 19.08.2002 (Annexure-6) stating therein that a regular departmental proceeding has been initiated against the petitioner.

14. According to opposite party-GRIDCO, proceeding will be said to be instituted the day when the show cause notice was issued to the petitioner which was on 27.01.1998 and on that date, the petitioner was in service and the order dated 19.08.2002 will only be said to be in furtherance of the decision of the authority, it was taken on 27.01.1998 since according to the learned senior counsel appearing for GRIDCO, the reference of the draft charges has been made in the show cause notice dated 27.01.1998 which otherwise the requirement as provided under the provision of Rule 17(6) of the GRIDCO Officers Service Regulations hence the proceeding cannot be said to be without any jurisdiction.

15. This submission of the learned counsel appearing for opposite parties has strongly been opposed by the learned counsel for the petitioner who has

submitted that in the matter of initiation of departmental proceeding, first show cause issued to the employee cannot be said to be initiation of departmental proceeding because by way of first show cause notice, employee is asked to give reply and on being not satisfied with the reply, the authority cannot resort to a departmental proceeding and merely because of the reason that the word "draft charges" has been referred and the reference of the charge has been given, it cannot be misunderstood that the departmental proceeding will be said to be initiated on the date when the first show cause notice was issued to the petitioner.

16. He submits that the departmental proceeding is the right of the appointing authority/disciplinary authority and in case of the petitioner, the appointing authority/disciplinary authority is the Functional Director or the Director. Hence, it suggests that since show cause notice dated 27.01.1998 has been issued under the signature of the Superintending Engineer (Civil), it cannot said to be initiation of departmental proceeding rather the departmental proceeding will only be said to be initiated w.e.f. 19.08.2002 as because memorandum of charge has been issued with reference to the departmental proceeding initiated by the Director-in-charge as would be evident from Annexure-5.

17. Learned senior counsel representing the petitioner further submits that since the departmental proceeding has been initiated only on 19.08.2002 and the alleged date of occurrence is of the year 1995 hence it is barred by the limitation of four years which is contrary to the provision of Regulation 17(6) of GRIDCO Officers Service Regulations which provides that no departmental proceeding can be initiated after retirement of an employee if the occurrence took place beyond the period of four years from the date of retirement from service.

He further submits that the Enquiry Officer was appointed vide Office Order dated 08.10.2002 in which the departmental proceeding has been shown to be initiated vide Proceeding No.263 dated 19.08.2002 and it is on the basis of the said office order, Enquiry Officer and Presiding Officer was appointed to probe into the charges and thereafter he had participated and the finding has been given by the Enquiry Officer.

18. After appreciating the arguments advanced by the learned senior counsel appearing for the petitioner, following facts is apparent from which it can be adjudicated regarding the issue involved in this case.

(i) There is no dispute about the fact that a departmental proceeding will be said to be initiated by the authority who is the disciplinary authority,

under the GRIDCO the Functional Director or the Director is the competent authority of the petitioner, meaning thereby the departmental proceeding has to be initiated by the Functional Director or the Director. From perusal of the show cause notice dated 27.01.1998, it is evident that the show cause notice has been issued against the petitioner under the signature of Superintending Engineer (Civil) who is not the competent authority to initiate a departmental proceeding against the petitioner, hence it cannot be said to be initiation of departmental proceeding.

(ii) Specific stand of the opposite party-GRIDCO is that a show cause notice was issued on 27.01.1998 by making reference of draft charges but the same was stalled awaiting for the audit report which was submitted on 17.11.2001 and thereafter the office order was issued on 19.08.2002 which also clarifies the position that the departmental proceeding cannot be said to be initiated from 27.01.1998 as because the GRIDCO was awaiting the evidence regarding show cause notice by calling upon the audit team and to conduct an audit in this regard and when the material has been collected and submitted before the competent authority, then the competent authority has passed the order on 19.08.2002, hence the departmental proceeding will be said to be initiated on or after 19.08.2002.

(iii) Similarly by making reference of draft charges in the first show cause notice, it cannot be said to be initiation of departmental proceeding because the process of imposing a punishment is by way of initiation of departmental proceeding and prior to that the authority after conducting preliminary enquiry and if anything comes against a delinquent employee, he will issue show cause notice which is said to be first show cause notice for providing an opportunity regarding show cause notice and after submission of reply in this regard, the disciplinary authority if not being satisfied with the reply will take decision for initiation of regular departmental proceeding and then only it could be said to be initiation of departmental proceeding.

19. Thus, this is the process for initiation of departmental proceeding, but from the facts of this case, the show cause notice dated 27.01.1998 will be said to be a first show cause notice since it was issued by the Superintending Engineer (Civil) but when the authorities have found not themselves satisfied regarding the material available for issuing a definite charge, they have called upon the audit team to submit a report in this regard as such the report from 27.01.1998 till the issuance of the order dated 19.08.2002 will be said to be the period of fact finding and when the irregularities which was leveled against the petitioner was found to be substantiated in the audit

report then the authorities have taken decision while issuing the order dated 19.08.2002 for initiation of departmental proceeding.

20. Here, the reference of Rule 15 of the Orissa Civil Services (C.C.A.) Rules, 1962 needs to be referred wherein as per the provision as contained in Rule 15 which is the procedure for imposing penalties is being reproduced:-

> ***"15.*** *Procedure for imposing penalties – (1) Without prejudice to the provisions of the Public Servant (Inquiry) Act, 1950, no order imposing on a Government servant any of the penalties specified in Clauses (vi) to (ix) of Rule 13 shall be passed except after an inquiry held as far as may be in the manner hereinafter provided.*
>
> *(2) The disciplinary authority shall frame definite charges on the basis of the allegations on which the inquiry is to be held. Such charges, together with a statement of the allegations on which they are based, shall be communicated in writing to the Government servant and he shall be required to submit, within such time as may be specified by the disciplinary authority, not ordinarily exceeding one month a written statement of his defence and also to state whether he desires to be heard in person."*

From perusal of Rule 15 (2), the disciplinary authority shall impose definite charges on the basis of allegation on which the enquiry is to be held and such charges with a statement of the allegation shall be communicated in writing to the Government servant and who will be required to submit a defence reply, which means that before initiation of departmental proceeding, a definite charge has to be served upon the delinquent employee and in this case from perusal of show cause notice dated 27.01.1998, it is evident that there is reference of draft charges without any statement of allegation, hence on this pretext also it can be said that the departmental proceeding has not been initiated as on 27.01.1998.

21. On 19.08.2002 a definite charge has been supplied to the petitioner which is the requirement of the procedure laid down in the Rule 15(2) of **framing of definite charge**, hence the departmental proceeding will be said to be initiated from 19.08.2002.

22. This is being substantiated from the content of the audit report wherein even Director (Engineer) has expressed that draft charges could not have been served to the officers including the petitioner, relevant part is being quoted herein below:-

***"Draft charges were framed against the following persons;***

1. *Sri Mohadev Senapati, J.E. (Civil)*
2. *Sri B.D. Chatterjee, JE (C) retired on 31.12.2001 A.N.*
3. *Sri Gopinath Jota, JE(C)*
4. *Sri Shyam Sundar Jena, Divisional Accountant*
5. *Sri Dungei Mallia, LDC*

***Draft charges could not be served to the officers in Sl.1 to 4 as Director (Engineering) refused to serve the charge sheet before the detailed inquiry. But charge sheet was served to Sri D. Mallia, LDC and the inquiry is continuing and awaited for final report."***

Thus, from its perusal, it is evident from this note of the Director that the fact finding enquiry was going on in between the period 31.12.2001 to 17.11.2001 i.e., the date of submission of audit report.

23. From perusal of the office order dated 8.10.2002, it is evident that Enquiry Officer was appointed for conclusion of the enquiry wherein also reference of the proceeding No.263 dated 19.08.2002 has been made in Annexure-D to the counter affidavit which also suggests that it is after the decision having been taken by the disciplinary authority on 19.08.2002.

24. In view of foregoing reasons as stated hereinabove, it is evident that the departmental proceeding against the petitioner will be said to be initiated from 19.08.2002 which is after retirement of the petitioner i.e., 31.12.2001 and the same was issued for the charges which was alleged to have been committed in the year 1995 which is beyond the period of four years from the date of institution of the departmental proceeding i.e., 19.08.2002 or from the date of superannuation of the petitioner i.e., 31.12.2001.

25. It is settled that imposing punishment by disciplinary authority depends upon the provision of discipline and appeal rule, the petitioner being an employee of GRIDCO as such the GRIDCO Officers Service Regulations is applicable wherein there is provision of Rule 17(6) which provides that the Company may initiate a departmental proceeding against Officers who retired otherwise left the service for events occurring in the last four years of the officer's service and in this case since the petitioner ceased to be an employee of GRIDCO on 1.1.2002, hence four years period will cover up to 1.1.1998 and from the date of institution of the departmental proceeding, the four year period will come up to 19.08.1998 hence in both cases the departmental proceeding will be said to be without any jurisdiction because

the allegation levelled against the petitioner was of the year 1995 as would be evident from the audit report and show cause notice dated 27.01.1998.

26. Hence, it is now admitted position that the allegation levelled against the petitioner is beyond the period of four years either from the date of retirement or from the institution of the departmental proceeding i.e., 31.12.2001 or 19.08.2002.

27. Now the second question which fell for consideration is that regarding the date of occurrence of the offence.

28. From perusal of the show cause notice dated 27.1.1998, it is evident that the petitioner while posted as Sectional Officer Major Building, Secion-2, Bhubaneswar on 18.08.1995 and while functioning as Junior Engineer (Civil) has committed some irregularities, thus the date of occurrence will be said to be of the year 1995.

29. Thus, further being corroborated from the audit report as contained in Annexure-C to the counter affidavit which pertains to the period from 1987 to 1991, it is further being gathered from the audit report that the occurrence took place beyond the period of 4 years from the date of institution of the departmental proceeding i.e., 19.08.2002 so if the occurrence took place in between 19.08.2002 and 19.08.1998, then the jurisdiction regarding initiation of departmental proceeding is exist but if it is beyond the period i.e., before 19.08.1998 then certainly it can be said that proceeding is barred by period of limitation as provided under the Regulation 17(6) of the GRIDCO Officers Service Regulations.

30. From perusal of the audit report and the show cause notice dated 27.01.1998 and also from the enquiry report, it is evident that the occurrence took place beyond 18.08.1995 hence the proceeding will be said to be barred by limitation, hence the proviso to Regulation 17(6) of GRIDCO Officers Service Regulations will have no application also.

31. In the light of foregoing reasons and explanation, the departmental proceeding will be held to be without jurisdiction and accordingly the departmental proceeding is hereby quashed and in the result thereof, the writ petition is allowed with a direction to release all consequential benefit to the petitioner for which he is legally entitled to get within reasonable period preferably within ten weeks from the date of communication/receipt of this order.

Writ petition allowed.

**2016 (I) ILR - CUT-1044**

**K.R. MOHAPATRA , J.**

F.A.O. NO. 55 OF 2002

**MADHUSUDAN SAHU** …….Appellant

*.Vrs.*

**SMT. JHUNUMANI BEHERA & ANR.** …….Respondents

**CIVIL PROCEDURE CODE,1908 – O.23, R-3 & O-43, R-1A(2)**

**Compromise decree – Fraud Practiced in recording the compromise – Decree challenged in appeal U/s. 96(1) C.P.C. – Objection raised that appeal is barred U/s. 96(3) of the code – Remedy under law – Held, a party to the compromise can call in question its validity either by filing an application under the proviso to Rule 3 of Order 23 C.P.C. before the Court which has recorded the compromise or by filing an appeal U/s. 96(1) C.P.C., in view of the provision under Rule 1-A of Order 43 of the Code.** (Para 5)

**Case Laws Referred to** :-

1. AIR 2015 SC 706 : R.Rajanna Vs. S.R.Venkataswamy & Ors.
2. AIR 2006 SC 2628 : Pushpa Devi Bhagat (D) by LR Vs. Rajinder Singh & Ors.
3. AIR 1993 SC 1139 : Banwarilal Vs. Smt. Chando Devi (through L.R.) & Anr.

For Appellant : Miss D. Priyanka
For Respondents : M/s. B.Baug, B.R.Das & S.S.Ghosh
M/s. K.Rath, G.K.Nanda & H.S.Deo

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Date of hearing : 06.11.2015
Date of judgment: 06.11.2015

**ORDER**

***K.R. MOHAPATRA , J.***

Heard Miss D.Priyanka, learned counsel for the appellant and learned counsel for the respondents.

2. This appeal has been filed assailing the order dated 14.10.1998 passed by the learned Civil Judge (Senior Division), Balasore in T.S. No.411 of 1998 recording a compromise between the parties to the suit. This appeal is filed mainly on the ground that the compromise recorded was an outcome of fraud. Hence, learned counsel for the appellant prays for setting aside the impugned compromise decree and for issuance of a direction for disposal of the suit on merit.

3. Learned counsel for the respondents raises objection to the above submissions on the ground that the appellant, who was defendant No.2 in the Court below is a signatory to the compromise petition and in view of the provision under Order 23 Rule 3, CPC, he could not have filed this appeal against decree of compromise and any grievance with regard to such compromise can only be raised before the Court, which recorded such compromise. Learned counsel for the respondents also submits that the in view of provision of Section 96(3) CPC, an appeal is barred as against the said decree recorded on compromise.

4. Miss Priyanka, learned counsel for the appellant, on the other hand, submits that in view of Order 43 Rule 1-A (2), CPC, this appeal is maintainable and the Court can entertain and pass necessary orders thereon. She relies upon a decision of the Hon'ble Supreme Court in the case of ***Banwarilal Vs. Smt. Chando Devi (through L.R.) and another***, reported in AIR 1993 SC 1139, wherein, the Hon'ble Supreme Court at paragraphs 9 and 13 held as under:

> "9. Section 96(3) of the Code says that no appeal shall lie from a decree passed by the Court with the consent of the parties. Rule 1A(2) has been introduced saying that against a decree passed in a suit after recording a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should not have been recorded. When Section 96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties. One such remedy available was by filing the appeal under Order 43, Rule 1(m). If the order recording the compromise was set aside, there was no necessity or occasion to file an appeal against the decree. Similarly a suit used to be filed for setting aside such decree on the ground that the decree is based on an invalid and illegal compromise not binding on the plaintiff of the second suit. But after the amendments which have been introduced, neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3A of Order 23. <u>As such a right has been given under Rule 1A(2) of Order 43 to a party, who challenges the recording of the compromise, to question the validity thereof while prefering an appeal against the decree. Section 96(3) of the Code shall not be a bar to such an appeal</u>

because Section 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute.

10. xx xx xx

11. xx xx xx

12. xx xx xx

13. When the amending Act introduced a proviso along with an explanation to Rule 3 of Order 23 saying that where it is alleged by one party and denied by other that an adjustment or satisfaction has been arrived at, "the Court shall decide the question", the Court before which a petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the explanation to the proviso says that an agreement or compromise "which is void or voidable under the Indian Contract Act..." shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the explanation, a Court which had entertained the petition of Compromise has to examine whether the compromise was void or voidable under the Indian Contract Act. Even Rule 1(m) of Order 43 has been deleted under which an appeal was maintainable against an order recording a compromise. As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal under Section 96(1) of the Code, in which he can now question the validity of the compromise in view of Rule 1A of Order 43 of the Code." (*emphasis supplied*)

Hon'ble Supreme Court in *Banwarilal (supra)* had the occasion to examine the question with regard to the remedy available to a party to the suit being aggrieved by a decree of compromise. In the light of the elaborate discussion of the scope of provision under Section 96(3). Rule 3 and 3-A of Order 23 as well as Rule1-A of Order 43 of the Code and findings thereon it leaves no scope of doubt that the remedy open to a party to the suit to call in question a compromise is either to file a petition under the proviso to Rule-3 of Order-23, CPC or to file an appeal under Section 96(1) of the Code, in view of Rule 1-A of Order 43 of the Code.

The Hon'ble Supreme Court in the case of ***Pushpa Devi Bhagat (D) by LR Vs. Rajinder Singh & Ors.***, reported in AIR 2006 SC 2628, at paragraph 12 held as under:-

"12. The position that emerges from the amended provisions of Order 23, can be summed up thus :

(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in section 96(3) CPC.

(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) Rule 1 Order 43.

(iv) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made….." (*emphasis supplied*)

In the decision of *Pushpa Devi Bhagat (supra),* however, the Hon'ble Supreme Court had no occasion to examine the applicability of Section 96(3) and Rule 1-A of Order 43 of the Code.

Placing reliance upon the aforesaid two decisions, the Hon'ble Supreme Court in the case of ***R.Rajanna Vs. S.R.Venkataswamy and others***, reported in AIR 2015 SC 706, at paragraph 10 held as under:-

"10. It is manifest from a plain reading of the above that in terms of the proviso to Order XXIII Rule 3 where one party alleges and the other denies adjustment or satisfaction of any suit by a lawful agreement or compromise in writing and signed by the parties, the Court before whom such question is raised, shall decide the same. What is important is that in terms of Explanation to Order XXIII Rule 3, the agreement or compromise shall not be deemed to be lawful within meaning of the said rule if the same is void or voidable under

Indian Contract Act, 1872. It follows that in every case where the question arises whether or not there has been a lawful agreement or compromise in writing and signed by the parties, the question whether the agreement or compromise is lawful has to be determined by the Court concerned. What is lawful will in turn depend upon whether the allegations suggest any infirmity in the compromise and the decree that would make the same void or voidable under the Contract Act. More importantly, Order XXIII Rule 3A clearly bars a suit to set aside a decree on the ground that the compromise on which the decree is based was not 7 Page 8 lawful. This implies that no sooner a question relating to lawfulness of the agreement or compromise is raised before the Court that passed the decree on the basis of any such agreement or compromise, it is that Court and that Court alone who can examine and determine that question. The Court cannot direct the parties to file a separate suit on the subject for no such suit will lie in view of the provisions of Order XXIII Rule 3A of CPC. That is precisely what has happened in the case at hand. When the appellant filed OS No.5326 of 2005 to challenge validity of the compromise decree, the Court before whom the suit came up rejected the plaint under Order VII Rule 11 CPC on the application made by the respondents holding that such a suit was barred by the provisions of Order XXIII Rule 3A of the CPC. Having thus got the plaint rejected, the defendants (respondents herein) could hardly be heard to argue that the plaintiff (appellant herein) ought to pursue his remedy against the compromise decree in pursuance of OS No.5326 of 2005 and if the plaint in the suit has been rejected to pursue his remedy against such rejection before a higher Court."

11. xx xx xx

12. We may also refer to the decision of this Court in Banwari Lal v. Chando Devi (1993) 1 SCC 581 where also this Court had observed:"As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order XXIII, or an appeal under S. 96(1) of the Code, in which he can now question the validity of the compromise in view of Rule 1-A of Order 13 of the Code."

5. On a conjoint reading of the aforesaid decisions, it is manifest that party to the compromise can call in question its validity either by filing an application under proviso to Rule-3 of Order 23 before the Court which has recorded the compromise or by filing an appeal under Section 96(1) of the

Code, in view of the provision under Rule 1-A of Order 43 of the Code depending upon the facts and circumstances of each case.

In the instant case, the appellant alleges that fraud has been practised in recording the compromise by the learned Trial Court. Hence, essentially evidence has to be led to substantiate the allegation made. Hence, it will be appropriate for the appellant to file an application under the proviso to Rule 3 of Order 23 of the Code before learned Trial Court questioning the compromise, which recorded the compromise. As it appears, the appellant has not filed any application questioning the validity of the compromise before the Court which recorded it.

6. In that view of the matter, this Court while setting aside the impugned order remits the same to the learned Trial Court granting liberty to the appellant to file appropriate application along with documents before the Trial Court for adjudication, if so advised, which shall be decided on its own merit.

6. With the aforesaid observations and direction, the appeal is allowed, but in the circumstances, there is no order as to costs.

Appeal allowed.