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State of Odisha & Ors. -V- Manju Naik

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Manabodha Kisan & Ors. -V- State of Odisha & Ors
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Tirupati Panigrahi & Ors. -V- State of Orissa.
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PREVENTION OF CORRUPTION ACT, 1947 – Section 5(1)(d) read with section 5(2) – Offence under – Conviction – Allegation of illegal gratification – Ingredients required – Held, the position of law on the point is well settled that once the demand and voluntary acceptance of illegal gratification knowing it to be the bribe are proved by evidence, then conviction for commission of offence under section 5(1)(d) read with section 5(2) of the P.C. Act has to follow against the accused. Indeed these twin requirements are sine quo non for proving the offence for which the accused has been convicted.

N.C. Charian -V- State of Orissa.
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Section 5(1)(d) read with section 5(2) – Offence under – Conviction – Allegation of illegal gratification – Evidence vis-a-vis finding of the trial court – Held, having come to the conclusion that the twin requirements of demand of illegal gratification by the accused has not been proved from the side of the prosecution by leading clear, cogent and acceptable evidence beyond reasonable doubt, the judgment of conviction recorded against the accused and the consequential order of sentence impugned in this appeal, are liable to the set aside.

N.C. Charian -V- State of Orissa.

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SERVICE LAW – Departmental enquiry – Petitioner a Bank Manager –served with a memorandum of charges under Rule 50(1)(i) of the Staff Rules – Submitted his show-cause/explanation denying all the charges levelled against him –

Enquiry officer appointed, report submitted – Without serving a copy thereof on the petitioner and without affording opportunity of hearing – The authority accepted such enquiry report and also modified the finding with respect to charge no.5 by holding that the said charge was totally proved – Accordingly, vide order dated 17.08.1988, imposed punishment of "reduction of basic pay by one stage" in terms of Rule-49(e) and further directed that the period of suspension would be treated as not on duty – Appeal, Review rejected – Writ petition – Held, as under.

Arjuna Charan Mishra -V- State Bank of India & Ors.
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SERVICE LAW – Promotion – Petitioner appointed as telecommunication operator – Twenty seven years of unblemished service career – No departmental proceeding against the petitioner – Promotion denied on the ground that, the post of telecommunication operator has no promotional avenue/line – Right to promotion pleaded – Action of the authority challenged – Held, a person is joining in a post and retiring in the said post, such action violated the Articles, 14 & 16 of the Constitution of India – Hence petitioner is entitled to promotion at least upto two stages along with consequential financial benefits with 6% interest thereon.

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2020 (I) ILR - CUT-225 (S.C.)

R. BANUMATHI, J, A.S. BOPANNA, J & HRISHIKESH ROY, J.

CIVIL APPEAL NO. 9204 OF 2019
(Arising out of SLP(C) No.16283 of 2017)

STATE OF ODISHA & ORS. ………Appellant(s)

.Vs.

MANJU NAIK ……….Respondent(s)

ORISSA CIVIL SERVICES (PENSION) RULES, 1992 – Rules 39 and 47 – Provisions under – Claim of family pension and invalid pension in absence of the period of qualifying period of service – Grant of – Principles – Late Sagar Naik was appointed on 22.8.1989 under the Rehabilitation Assistance Scheme – The appointee was found to be suffering from mental incapacity and was retired from service on 6.7.1996 – During his period of service he remained absent from 1.2.1995 to 23.7.1995, thus the total period of service was 4 years 6 months and 29 days only – OA by wife claiming family pension was allowed including the grant of invalid pension – Order passed in OA confirmed by High court – Appeal by state – The question arose as to whether the minimum qualifying service prescribed under the Pension Rules can be ignored for the purpose of consideration of invalid pension under Rule 39 of the Pension Rules? – Held, No. – Reasons indicated.

"An employee becomes entitled to pension by stint of his long service for the employer and, therefore, it should be seen as a reward for toiling hard and long for the employer. The Pension Rules provide for a qualifying service of 10 years for such entitlement. When the question arises as to how certain provisions of the Pension Rules are to be understood, it would be appropriate to read the provision in its context which would mean reading the statute as a whole. In other words, a particular provision of the statute should be construed with reference to other provisions of the same statute so as to construe the enactment as a whole. It would also be necessary to avoid an interpretation which will involve conflict with two provisions of the same statute and effort should be made for harmonious construction. In other words, the provision of a Rule cannot be used to defeat another Rule unless it is impossible to effect reconciliation between them. Pension as already stated is earned by stint of continuity and longevity of service and minimum qualifying service should therefore be understood as the requirement for invalid pension as well. The Pension Rules can be harmoniously construed in this manner and in that event, there shall be no clash between different provisions in the said Rules.

The condition of qualifying service prescribed in the Pension Rules must be satisfied to become eligible for invalid pension and the arguments made to the contrary that invalid pension can be claimed under Rule 39 without satisfying the

stipulated qualifying service mentioned in the same Rules, do not appeal to us. The respondent's husband who had served for lesser years then the 10 years qualifying service, was found entitled by his employers to service gratuity only, because of his premature retirement on the ground of mental incapacitation and this is what is prescribed by the Pen sion Rules. The dues toward service gratuity was paid accordingly. The Pension Rules definitely envisaged that there could be a situation where an employee may not be eligible for pension benefits for not satisfying the prescribed qualifying service of 10 years. For those with less than 10 years' service, the Pension Rules provide for gratuity payment and therefore, it is difficult for us to conclude that for invalid pension, qualifying years of service, can be ignored."

(Paras 20 & 21)

Case Laws Relied on and Referred to :-

1. 1(2007) 6 SCC 16 : Union of India and Another .Vs. Bashirbhai R. Khiliji.

For Petitioner : Ms. Anindita Pujari

For Respondent : Mr. Kedar Nath Tripathy.

JUDGMENT Date of Judgment : 04.12.2019

HRISHIKESH ROY, J.

Leave granted.

2. This appeal arises out of the judgment and order dated 29.11.2016 in W.P. (C)No. 14413 of 2016 whereunder the High Court of Orissa has dismissed the appellants' challenge to the order dated 3.8.2015 of the Odisha Administrative Tribunal (hereinafter referred to as *"the Tribunal"*) under which the authorities were directed to consider sanction of invalid pension in favour of late Sagar Naik (husband of the respondent) and thereafter settle family pension in favour of the applicant, under the provisions of the *Orissa Civil Services (Pension) Rules- 1992* (hereafter referred to as *"the Pension Rules"*).

3. The respondent filed the OA No. 18(B)/2010 before *the Tribunal* praying for fixation of pay of late Sagar Naik and for disbursal of his accrued financial benefits with effect from 1.1.1996 until he was retired on 6.7.1996 on being mentally incapacitated. The applicant also prayed for sanction of family pension from the date of death of her husband i.e. 24.7.1996.

4. The applicant projected before *the Tribunal* that her husband on being found incapacitated was made to retire from service on 6.7.1996 and he died soon thereafter on 24.7.1996 and therefore, the widow is entitled to family pension. She also tried to make out a case for grant of invalid pension in favour of her late husband.

5. Opposing the prayers, the Government Advocate on behalf of the State contended before the Tribunal that the applicant's husband had not rendered the qualifying period of service so as to make him eligible for pension. Opposing the claim for invalid pension for the deceased husband, the appellants contended that *Rule 39* of *the Pension Rules* governing invalid pension has to be read together with *Rule 47* which specifies the qualifying service of ten years for grant of pension and accordingly it was argued that the applicant is disentitled to any relief from *the Tribunal*.

6. Notwithstanding the State's above contention, *the Tribunal* concluded that the applicant's husband is entitled to invalid pension under *Rule 39* of *the Pension Rules* and accordingly, the authorities were directed to sanction the invalid pension for the applicant's husband and after his death, to settle the family pension for the applicant, after regularizing the services of the deceased employee.

7. The above decision was challenged by the appellants through W.P.(C) No. 14413/2016 where the State projected that *Rule 39* has to be read jointly with *Rule 47* of *the Pension Rules* and if Rules are applied as it should be, conjointly, the deceased government employee is ineligible for invalid pension. However, without adverting to the specific contention raised by the appellants, the High Court observed that a reasoned order was passed by *the Tribunal* declaring entitlement for the invalid pension and accordingly the Tribunal's impugned order was left undisturbed and the writ petition came to be dismissed.

8. Representing the State of Odisha and other appellants, Ms. Anindita Pujari, learned counsel submits that the deceased government employee was unauthorizedly absent from service from 1.2.1995 to 23.7.1995 and was under suspension from 24.7.1995 to 6.7.1996 and this period cannot be counted for determining the qualifying service. Thus, in his credit, the deceased employee had net qualifying service of 4 years 6 months and 29 days until he was superannuated on 6.7.1996. The learned counsel then refers to the provisions of *Rule 47(2)(b)* and *47(5)(i)* to argue that without completing the qualifying service of ten years, the deceased employee is ineligible for pension. Due to such non-entitlement, the widow was granted the alternate benefit i.e., the service gratuity amount by computing the entitlement under *Rule 47(5)(i)*of the *Pension Rules.*

9. On account of the short duration of service rendered by the deceased employee, the State's counsel then argues that the respondent's husband

cannot be granted invalid pension under *Rule 39* as the provision has to be conjointly read with *Rule 47* and *Rule 56* of *the Pension Rules* which specify the qualifying service of ten years and also the consequences for those who do not satisfy the eligibility criterion for qualifying service.

10. Per-contra, Mr. Kedar Nath Tripathi, learned counsel for the respondent/applicant, would however argue that the government employee was allowed to retire from service on 6.7.1996 on the ground of mental incapacity and since invalid pension is envisaged under *Rule 39* of *the Pension Rules* for such prematurely retiring employees suffering permanent incapacity, *the Tribunal* and the High Court have rightly ordered for grant of invalid pension for the respondent's husband.

11. The learned counsel then submits that since the government servant died within few days of retirement, firstly he must be paid the invalid pension under *Rule 39* and after his death on 24.7.1996, the respondent as the widow, should be held entitled to family pension.

12. The issue to be considered here is whether the minimum qualifying service prescribed under *the Pension Rules* can be ignored for the purpose of consideration of invalid pension under *Rule 39* of the *Pension Rules.* As a corollary, whether *the Tribunal* or the High Court erred in directing invalid pension for a government employee who did not have the qualifying service, prescribed under *the Pension Rules*.

13. At this stage, the relevant provisions of *the PensionRules* are extracted hereinbelow for ready reference:-

> *". . . . .*
>
> *39. Invalid Pension – (1) invalid pension may be granted if a Government servant retires from the service on account of bodily or mental infirmity which permanently incapacitates him for the service.*
>
> *(2) A Government servant applying for an invalid pension shall submit a medical certificate of incapacity from the following medical authority, namely : -*
>
> *(a) Medical Board, in the case of all Gazetted and specially declared Gazetted Government servants, and*
>
> *(b) A Chief District Medical Officer or Medical Officer of equivalent status in case of other Government servants.*
>
> *47. Amount of pension (1)*

******** ******** ****

2 (a) ******** ******** ****

(b) In the case of Government servant retiring in accordance with the provisions of these rules before completing qualifying service of thirty-three years, but after completing qualifying service of ten years, the amount of pension shall be proportionate to the amount of pension admissible under clause (a) and in no case the amount of pension shall be less than the minimum amount of pension admissible.

******** ******** ****
******** ******** ****

(5)(i) In the case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of ten years, the amount of service gratuity shall be paid at a uniform rate on half month's emoluments for every completed six monthly period of service.

56. Family Pension :

**** **** **** **** **** **** ****

(2) Without prejudice to the provisions contained in Sub-rule (4) where a Government servant dies-

**** **** **** **** **** **** *****

(c) After retirement from service and was on the date of death in receipt of pension, or compassionate allowance, referred to in Chapter IV other than the pension referred to in rules 43 and 44 the family of the deceased shall be entitled to family pension, the amount of which shall be determined in accordance with the table below.

. . . . . "

14. The respondent's husband, late Sagar Naik was appointed on 22.8.1989 under the Rehabilitation Assistance Scheme as his father late Suri Naik died in harness, while serving in the M.K.C.G. Medical College and Hospital. The appointee was however found to be suffering from mental incapacity and accordingly, on the basis of the medical certificate issued by the HoD of the Psychiatric Department of the S.C.B. Medical College, Cuttack, the employee was retired from service on 6.7.1996 on the ground of mental incapacity. The case paper reveals that the service of the employee was erratic, as he remained absent from 1.2.1995 to 23.7.1995 and was under suspension from 24.7.1995 to 6.7.1996. Thus his net qualifying service for the benefits under the *Pension Rules* was taken as 4 years 6 months and 29 days only.

15. For government servants not completing ten years qualifying service prescribed in *Rule 47(5)(i)* of *the Pension Rules*, the service gratuity is to be

paid at a uniform rate of half month's emolument for every completed six months period of service. Such gratuity benefit as also the other terminal benefits like GPF, unutilized Earned Leave, Death-cum-Retirement Gratuity (DCRG), etc. were sanctioned and paid to the widow of the employee. Moreover, respondent was also appointed as a sweeper under the Rehabilitation Assistance Scheme and she is in regular government service, since 12.6.2006.

16. The gratuity and other benefits and the compassionate appointment was accepted by the respondent without raising any additional claim towards invalid pension for her deceased husband, who retired on 6.7.1996.Long after his death on 24.7.1996, the respondent approached *the Tribunal* to belatedly pray for firstly, fixation of pay for her husband in the revised scale with effect from 1.1.1996 till his superannuation and also to sanction family pension benefits for the applicant, following the death of the government employee (on 24.7.1996) along with all consequential and terminal benefits. The respondent never however prayed for invalid pension before *the Tribunal* Yet, *the Tribunal* ordered for invalid pension for the respondent's husband, under *Rule 39* of the *Pension Rules*.

17. When *the Tribunal's* decision was challenged in the High Court, the State specifically contended that *Rule 39* has to be read together with *Rule 47* of *the Pension Rules* and the specified qualifying service must be satisfied even for claiming invalid pension. But the High Court without adverting to the specific contention raised by the appellants, dismissed the writ petition with a cryptic order observing that *the Tribunal* has passed a reasoned order and that the husband of the respondent is entitled to invalid pension under *Rule 39* of *the Pension Rules*.

18. The requirement of completing the qualifying service of ten years for receipt of pension is prescribed under *Rule 47(2)(b)* and for those government employees who retire before completing the qualifying service, alternate relief is envisaged under the *Pension Rules* itself. How the service gratuity is to be computed, is also prescribed in *Rule 47(5)(1) of the Pension Rules.*

19. The respondent's husband was retired on the ground of mental infirmity and hence the service gratuity was paid and the widow had received the same, without any demur. She never raised any claim for invalid pension either at the time of retirement on 6.7.1996 or even when she approached *the Tribunal* i.e. 14 years later in the year 2010. Nevertheless, *the Tribunal* went

beyond the prayers in the O.A. No. 18(B)/2010 and ordered for invalid pension for late Sagar Naik and then following his death, ordered for family pension for the widow. In declaring such entitlement the High Court and *the Tribunal* however ignored the qualifying service of ten years as prescribed in *the Pension Rules* although the State specifically argued that the qualifying service criterion has to be satisfied not only for the regular pension but also for the invalid pension since both claims are to be considered under the very same *Pension Rules*.

20. An employee becomes entitled to pension by stint of his long service for the employer and, therefore, it should be seen as a reward for toiling hard and long for the employer. The *Pension Rules* provide for a qualifying service of 10 years for such entitlement. When the question arises as to how certain provisions of the *Pension Rules* are to be understood, it would be appropriate to read the provision in its context which would mean reading the statute as a whole. In other words, a particular provision of the statute should be construed with reference to other provisions of the same statute so as to construe the enactment as a whole. It would also be necessary to avoid an interpretation which will involve conflict with two provisions of the same statute and effort should be made for harmonious construction. In other words, the provision of a Rule cannot be used to defeat another Rule unless it is impossible to effect reconciliation between them. Pension as already stated is earned by stint of continuity and longevity of service and minimum qualifying service should therefore be understood as the requirement for invalid pension as well. The *Pension Rules* can be harmoniously construed in this manner and in that event, there shall be no clash between different provisions in the said Rules.

21. The condition of qualifying service prescribed in the *Pension Rules* must be satisfied to become eligible for invalid pension and the arguments made to the contrary that invalid pension can be claimed under *Rule 39* without satisfying the stipulated qualifying service mentioned in the same Rules, do not appeal to us. The respondent's husband who had served for lesser years then the 10 years qualifying service, was found entitled by his employers to service gratuity only, because of his premature retirement on the ground of mental incapacitation and this is what is prescribed by the *Pension Rules*. The dues toward service gratuity was paid accordingly. The *Pension Rules definitely* envisaged that there could be a situation where an employee may not be eligible for pension benefits for not satisfying the

prescribed qualifying service of 10 years. For those with less than 10 years' service, the *Pension Rules* provide for gratuity payment and therefore, it is difficult for us to conclude that for invalid pension, qualifying years of service, can be ignored.

22. The above view of ours is supported by the ratio in *Union of India and Another Vs. Bashirbhai R. Khiliji*[1], where this Court was considering claim for invalid pension for an armed constable in the CRPF who suffered from pyrogenic meningitis and neurosensory deafness (bilateral). In that case, the CRPF personnel was declared unfit for active duty, and he was invalidated from service. He applied to authorities for invalid pension but that was rejected on the ground that he had not completed the qualifying service of 10 years. Instead, he was paid service gratuity. The High Court in that case however, took the view that since the CRPF Constable's invalidity was 100 per cent, he was entitled to invalid pension and the stipulation of 10 years of qualifying service could not be invoked to deny him the invalid pension. However, Justice A.K. Mathur, speaking for a two judge Bench of this Court while interpreting similar provisions in the applicable Rules, negated the High Court's view and pronounced on the issue of qualifying service for invalid pension, in the following manner:-

> "......................
>
> 9. We are presently concerned with two provisions of the Rules i.e., Rule 38 and 49. Rule 38, as reproduced above, contemplates the invalid pension. The procedure has been mentioned therein i.e. in case an incumbent retires from service on account of bodily or mental infirmity which permanently incapacitated him for the service, then a medical certificate of incapacity shall be given by the authorities concerned and in particular Form 23 the same may be applied before the competent authority. It is true that the qualifying service is not mentioned in Rule 38 but Rule 49 which deals with the amount of pension stipulates that a government servant retiring in accordance with the provisions of these Rules before completing qualifying service of ten years, the amount of service gratuity shall be calculated at the rate of half month's emoluments for every completed six-monthly period of qualifying service. Therefore, the minimum qualifying service of ten years is mentioned in Rule 49. The word "qualifying service" has been defined in Rule 3(1)(q) of the Rules which read as under:
>
> "3. (1)(q) 'qualifying service' means service rendered while on duty or otherwise which shall be taken into account for the purpose of pensions and gratuities admissible under these Rules;"
>
> 10. <u>Therefore, the minimum qualifying service which is required for the pension as mentioned in Rule 49, is ten years</u>. The qualifying service has been explained in

various memos issued by the Government of India from time to time. But Rule 49 read with Rule 38 makes it clear that qualifying service of pension is ten years and therefore, gratuity is determined after completion of qualifying service of ten years. Therefore, for grant of any kind of pension one has to put in the minimum of ten years of qualifying service. The respondent in the present case, does not have the minimum qualifying service. Therefore, the authorities declined to grant him the invalid pension. But the amount of gratuity has been determined and the same was paid to him.

. . . ."

(Underlining added)

23. The above enunciation of the law on requirement of qualifying service for invalid pension by the bench of two judges is reiterated and approved by us.

24. In a case like this, the need for compassion and the compliance of the norms has to be balanced. As earlier noted, the allowable gratuity benefits were granted on account of the respondent's husband and after he died, the widow was appointed (on 12.6.2006) in a government job under the Rehabilitation Assistance Scheme. Thus, the needed means of sustenance was provided to the deceased's family.

25. The respondent's husband had not served for ten years and was therefore, he disentitled for regular pension. For the same reason, he cannot also be held entitled to invalid pension. The different provisions of *the Pension Rules* cannot be read in isolation and must be construed harmoniously and the requirement of qualifying service cannot be said to be irrelevant for claiming different service benefits under the same Rules. Here the employee did not satisfy the requirement of qualifying service and therefore the invalid pension could not have been ordered for him, under *Rule 39* of *the Pension Rules.*

26. In the above context, it will bear emphasis that the respondent never prayed for invalid pension for her husband in her O.A. and yet *the Tribunal* as well as the High Court granted her the unclaimed relief. Such additional munificence, in addition to the job provided to the first respondent under the Rehabilitation Assistance Scheme for the sustenance of the deceased's family, in our view, was unwarranted and the impugned order cannot be sustained.

27. In view of the foregoing, the impugned orders of *Tribunal* and the High Court are set aside and the Appeal stands allowed. The parties to bear their own cost.

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2020 (I) ILR - CUT-234 (S.C.)

UDAY UMESH LALIT, J & INDU MALHOTRA, J.

CIVIL APPEAL NO. 353 OF 2020
(Arising out of SLP (C) No. 381 of 2019)

M/S. PAWAN HANS LTD. & ORS. ……...Appellants

.Vs.

AVIATION KARMACHARI SANGHATANA & ORS. ………Respondents

EMPLOYEES PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952 read with Employees' Provident Fund Scheme, 1952 – Section 1(3) read with section 16 – Provisions under – Benefit of employees provident fund to contractual employees – Applicability – Appellant is M/s. Pawan Hans Limited, a Govt. Company claims exemption under the Act and was not granting the benefits under the Act to the contractual employees – The question arose as to whether the Appellant-Company is under the statutory obligation to provide the benefit of provident fund to its contractual employees under the PF Trust Regulation or the EPF Act? – Held, Yes – In view of the discussion, we find that the members of the Respondent-Union and all other similarly situated contractual employees are entitled to the benefit of provident fund under the PF Trust Regulation or the EPF Act. – Since the PF Trust Regulations are in force and are applicable to all employees of the Company, it would be preferable to direct that the members of the respondent Union and all other similarly situated contractual employees are granted the benefit of provident fund under the PF Trust Regulations so that there is uniformity in the service conditions of all the employees of the Company.

Case Laws Relied on and Referred to :-

1. (2007) 1 SCC 268 : (2007) 1 SCC (L&S) 167: Provident Fund Commissioner Vs. Sanatan Dharam Girls Secondary School.
2. (1972) 4 SCC 600 : Shamrao Vithal Coop. Bank Ltd. Vs. Kasargode Panduranga Maliya.
3. (2019) 8 SCC 149 : (2019) 2 SCC (L&S) 483 : SubRegional Provident Fund Office Vs. Godavari Garments Ltd.
4. (1986) 1 SCC 32 : M/s P.M. Patel & Sons and Ors. Vs. Union of India and Ors.

For Appellants : Mr. Puneet Taneja

For Respondents : M/s Anantha Narayana M.G. & Sirddharth

JUDGMENT Date of Judgment : 17.01.2020

INDU MALHOTRA, J.

Leave granted.

1. The issue which arises for consideration is whether the contractual employees of the Appellant-Company are entitled to provident fund benefits under the Pawan Hans Employees Provident Fund Trust Regulations or under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("**EPF Act**") and the Employees' Provident Fund Scheme, 1952 ("**EPF Scheme**") framed thereunder.

2. The background facts in which the present Civil Appeal has been filed are as under :

2.1 The Company was incorporated on 15.10.1985 under the Companies Act, 1956, and is registered as a Government of India company with the Registrar of Companies, Delhi. The Government of India holds 51% shareholding in the Appellant-Company and the remaining 49% is held by Oil and Natural Gas Company Ltd. (ONGC).

The Company was incorporated with the primary objective of providing helicopter support services to the oil sector for its offshore exploration operations, services in remote and hilly areas, and charter services for promotion of tourism. It is classified as a nonscheduled operator under Rule 134 of the Aircraft Rules, 1937.

2.2 On 01.04.1986, the Appellant-Company framed and notified the Pawan Hans Employees Provident Fund Trust Regulations (hereinafter referred to as "**the PF Trust Regulations**") for giving provident fund benefits to all the employees of the Appellant-Company.

Regulations 1.3 and 2.5 of the PF Trust Regulations are set out hereunder for ready reference:

> "1.3 *These Regulations shall apply to all the employees of the Corporation.*
>
> 2.5. – *"Employee" means <u>any person who is employed for wages/salary in any kind of work, monthly or otherwise, in or in connection with the work of the Corporation and who gets his wages/salary directly or indirectly from the Corporation, and excludes any person employed by or through a contractor</u> or in connection with the work of the Corporation but does not include any person employed as an apprentice or trainee."*
>
> [emphasis supplied]

2.3 On 26.03.1987, the Appellant-Company instituted the Pawan Hans Employees Provident Fund Trust ("**PF Trust**") wherein the management started depositing its share to wards the provident fund contribution with

respect to employees on the regular cadre of the Company; correspondingly, the regular employees started depositing the matching contribution with the PF Trust.

2.4 Out of a total workforce of 840 employees, the Company had engaged 570 employees on regular basis, while 270 employees were engaged on 'contractual' basis.

The Company implemented the PF Trust Regulations only with respect to the regular employees, even though the term "employee" had been defined to include "any person" employed "directly or indirectly" under the PF Trust Regulations.

2.5 The Company having framed its own PF Trust Regulations, was claiming exemption from the applicability of the EPF Act and EPF Scheme under Section 16 of the EPF Act.

2.6 On 08.01.1989, the Ministry of Labour, Government of India, issued a communication to the Central Provident Fund Commissioner, New Delhi, pertaining to the grant of exemption to departmental undertakings under the control of the Central/State Government statutory bodies. The Central Provident Fund Commissioner was directed to instruct the Regional Provident Fund Commissioners to carefully review the cases of departmental undertakings and statutory bodies falling under the categories specified in Section 16(1)(b) and 16(1)(c) of the EPF Act, and take further action as indicated in the said letter.

Clause (iv) of the said letter dated 08.01.1989 is of relevance, and is extracted hereunder for ready reference:

> "*(iv)* *There may be establishments which employ large member of casual/contingent staff, who are not entitled to the benefit of provident fund or pension. The casual/contingent staff of such establishment will continue to be covered under the Act, but their regular employees who are entitled to the benefit of provident fund or pension should be excluded from the purview of the Act .*"
>
> [emphasis supplied]

2.7 The Central Government, in exercise of the powers under S.1(3)(b) of the EPF Act, issued a Notification dated 22.03.2001, making the provisions of the EPF Act applicable to aircraft or airlines establishments employing 20 or more persons, excluding aircraft or airlines establishments owned or controlled by the Central or State Government.

The Gazette Notification No. SO 746 dated 22.03.2001 ("**Notification**") is extracted for ready reference:"

S.O. 746 – In exercise of the powers conferred by clause (b) of sub section (3) of Section 1 of the Employees Provident Fund and Miscellaneous Provisions Act 1952 (19 of 1952), the Central Government hereby specifies the following establishment employing 20 or more persons as the class of establishments to which the said Act shall apply with effect from 1st April 2001 namely:

(i) An establishment engaged in rendering courier services;

(ii) An establishment of aircraft or airlines other than the aircraft airlines owned or controlled by the Central or State Government.

(iii) An establishment engaged in rendering cleaning and sweeping services."
[emphasis supplied]

The said Notification was brought into force w.e.f 01.04.2001.

2.8 Correspondingly, amendments were made to the EPF Scheme framed under Section 5 of the EPF Act. Clause 3 (b)(ci) was inserted *vide* Notification No. S35016/ 1/1997SS II dated 22.07.2002, by which the EPF Scheme was made applicable to aircraft or airlines establishments other than the aircraft or airlines establishments owned or controlled by the Central or State Government.

2.9 The members of the Respondent-Union made several representations on 18.09.2012, 29.09.2012, 13.03.2013, 19.11.2014 to extend the benefit of the PF Trust Regulations since they were directly engaged by the Company on contractual basis, some of whom were working for almost 20 years.

The Company failed to respond to the representations.

2.10 Being aggrieved by the inaction of the Company, the Respondent-Trade Union, filed CWP No.325 of 2017 on 20.12.2016 against the Company praying for the following reliefs:

"(a) A declaration that the members of the Respondent-Trade Union and other similarly situated employees, employed on contract basis by the Appellant-Company are entitled to the benefit of Provident Fund as per the EPF Act and the EPF Scheme, and that the Appellant-Company be directed to forthwith enrol all such eligible contract employees under the EPF Scheme and deposit their contribution with the Respondent No. 3Regional Provident Fund Commissioner, Employees' Provident Fund Organisation, from the date they are eligible till remittance, and thereafter, till they are in the employment of the Appellant-Company.

(b) Alternatively, the Appellant-Company forthwith be directed to suitably amend the PF Trust Regulations to permit the enrolment of contract workers as members of the PF Trust instituted by the Appellant-Company and to make all eligible contract employees members of the PF Trust from their respective dates of entitlement and continue to contribute amounts to the PF Trust in respect of contract employees."

2.11 During the pendency of the Writ Petition, the Regional Provident Fund Commissioner, Bandra issued a letter dated 24.05.2017 to the Company wherein it was stated that even though the EPF Act would not apply to establishments owned/controlled by the Central Government as per S.16(1)(b) and (c), however social security benefits such as provident fund must be provided to all "*employees/workers who are engaged on contractual/casual/daily wages basis"* since there is no distinction between a person employed on permanent, temporary, contractual, or casual basis under S.2 (f) of the EPF Act.

2.12 The High Court *vide* the impugned Judgment & Order dated 12.09.2018 allowed the Writ Petition in terms of prayer (a), with the direction that the benefits under the EPF Act be extended to the members of the Respondent-Trade Union, and other similarly situated employees. It was held that a liberal view must be taken in extending social security benefits to the contractual employees. The High Court directed the Company to enrol all eligible contractual employees under the EPF Scheme, and deposit their contribution with Respondent No.3– Regional Provident Fund Commissioner from the date they became eligible till remittance, and thereafter till they are in employment of the Company. This was to be carried out latest by 31.12.2018.

3. Aggrieved by the impugned Judgment, the Appellant-Company filed the present Civil Appeal.

This Court *vide* Order dated 14.01.2019 issued notice and granted stay of the impugned Judgment subject to the Company depositing a sum of Rs.5,00,00,000/(Rupees Five Crores) within 3 months in this Court.

Pursuant thereto, the Company deposited the said amount on 09.04.2019, which has been invested in a Fixed Deposit.

4. We have heard the learned counsel for both the parties, and have considered the oral and written submissions made on their behalf.

4.1 Ms. Pinky Anand, learned Additional Solicitor General of India, appearing for the Appellant-Company *inter alia* submitted that:

a) The Company is excluded from the applicability of the EPF Act since it neither falls under Schedule I of the EPF Act, nor is it covered by Notification dated 22.03.2001 issued under Section 1(3)(b) of the EPF Act, since the Notification itself expressly excludes airline companies "*owned or controlled* by *the Central Government*" from the purview of the EPF Act.

b) The Notification 22.03.2001 was inapplicable to the Appellant-Company since Section 16(1)(b) of the EPF Act, excludes an establishment owned or controlled by the Central Government from the scope of the EPF Act.

c) The Central Government holds 51% of the shareholding in the Appellant-Company, and the Board of Directors of the Appellant-Company have been appointed by the Ministry of Civil Aviation. The Appellant-Company is governed by the guidelines issued by the Department of Public Enterprises, Government of India. The Appellant-Company is thus an establishment owned and controlled by the Central Government. Even after the EPF Act became applicable to the airlines industry, the Appellant-Company being an establishment owned and controlled by the Central Government, was excluded from the purview of the EPF Act.

d) The High Court committed a grave error in giving retrospective application to the provisions of the EPF Act, i.e., from the date of the members joining the Respondent-Trade Union, given that several contractual employees had superannuated, passed away, resigned, or ceased to be in the employment of the Company. The extension of benefits under the EPF Act to contractual employees irrespective of their status of employment with the Company was wholly illegal, arbitrary, and liable to be set aside.

e) The members of the Respondent-Union and other similarly situated employees have already been paid in full their monthly financial benefits/emoluments. The direction of the High Court to the Company to contribute to the provident fund of the contractual employees would amount to burdening the Company with twice the liability.

4.2 Mr. P.S. Narasimha, learned Senior Counsel appearing on behalf of the Respondent-Union *inter alia* submitted that:

a) The term “employee” defined by Clause 2.5 of the PF Trust Regulations is widely defined to cover all employees, including those engaged on contractual basis, who are in the direct or indirect employment of the Company. The members of the Respondent-Union are in direct employment of the Company, since they have not been engaged through any contractor. The contractual workers are paid directly as evidenced by the pay slips issued by the Company. The benefits under the PF Trust Regulations, or the EPF Act, are required to be provided to even contractual employees from the date of their joining till the date of remittance.

b) The Company is not controlled by the Central Government since its affairs are managed and controlled by a Board of Directors. The Company is not a company controlled by the Central Government. The Notification dated 22.03.2001, specified certain establishments including the airlines industry, other than airlines owned or controlled by the Central or State Government, to be covered under the EPF Act. Consequently, the Company was obligated to extend the benefits under the EPF Act to all its employees.

c) The EPF Act is a beneficial piece of legislation, which has to be liberally construed. The denial of statutory benefits and entitlements like provident fund to the members of the Respondent-Union is *exfacie* illegal, arbitrary, discriminatory and in violation of the provisions of the EPF Act and the Constitution of India.

5. The issue which arises for consideration in the present Civil Appeal is whether the Appellant-Company is under a statutory obligation to provide the benefit of provident fund to its contractual employees under the PF Trust Regulations or the EPF Act?

If so, the date from which the aforesaid benefit is to be extended to the contractual employees.

6. ***Discussion and Analysis***

6.1 It is first required to be seen whether the Appellant-Company is excluded from the applicability of the provisions of the EPF Act and the EPF Scheme framed thereunder as contended by them.

6.2 As per Section 1(3) of the EPF Act, the EPF Act is applicable to every establishment in which 20 or more persons are employed, which is either a factory engaged in any industry specified in Schedule I, or an establishment which the Central Government may by notification in the Official Gazette specify in that behalf. Section 1(3) of the EPF Act reads as:

> ***"Section.1(3) : <u>Subject to the provisions contained in section 16, it applies</u> —***
>
> *(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and*
>
> *(b) <u>to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf</u>:*
>
> Provided *that the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification."*
>
> [emphasis supplied]

Section 1(3) is subject to Section 16 of the EPF Act. Subsection (1) of Section 16 enlists those establishments which are excluded from the applicability of the EPF Act. As per clause (b) of subsection (1), an establishment belonging to or under the control of the Central or State Government, and whose employees are entitled to the benefit of contributory provident fund in accordance with any scheme or rules framed by the Central or State Government governing such benefits, is excluded from the purview of the EPF Act.

Subsection (1) of Section 16 reads as:

> **"Section 16. Act not to apply to certain establishment.**
> **–**
>
> *(1)This Act shall not apply*
>
> *(a) to any establishment registered under the Cooperative Societies Act, 1912 (2 of 1912), or under any other law for the time being in force in any State relating to cooperative societies employing less than fifty persons and working without the aid of power; or*
>
> *<u>(b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any Scheme</u>*

or rule framed by the Central Government or the State Government governing such benefits; or

(c) To any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits;

(2) If the Central Government is of opinion that having regard to the financial position of any class of establishment or other circumstances of the case, it is necessary or expedient so to do, it may, by notification in the Official Gazette, and subject to such conditions, as may be specified in the notification, exempt, whether prospectively or retrospectively, that class of establishments from the operation of this Act for such period as may be specified in the notification."

[emphasis supplied]

This Court in ***Regional Provident Fund Commissioner v. Sanatan Dharam Girls Secondary School*** laid down a twintest for an establishment to seek exemption from the provisions of the EPF Act, 1952. The twin conditions are:

First, the establishment must be either "*belonging to*" or "*under the control of*" the Central or the State Government. The phrase "*belonging to*" would signify "*ownership*" of the Government, whereas the phrase "*under the control of*" would imply superintendence, management or authority to direct, restrict or regulate.

Second, the employees of such an establishment should be entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits.

If both tests are satisfied, an establishment can claim exemption/exclusion under Section 16(1)(b) of the EPF Act.

Applying the first test to the instant case, the Central Government has a 51% ownership in the Appellant-Company, while the balance 49% is owned by the ONGC, a Central Government PSU.

As per Section 2(45) of the Companies Act, 2013, a "Government Company" means any company in which not less than 51 % of the paid-up share capital is held by the Central Government. Since 51% of the shares of the Appellant-Company are owned by the Central Government, the first test

is satisfied as the Appellant-Company can be termed as a Government Company under Section 2(45) of the Companies Act, 2013.

With respect to the second test, it is relevant to note that the Company had its own Scheme *viz.* the Pawan Hans Employees Provident Fund Trust Regulations in force. The Company however restricted the application of the PF Trust Regulations to only the 'regular' employees. The PF Trust Regulations of the Company were not framed by the Central or State Government, nor were they applicable to all the employees of the Company, so as to satisfy the second test.

The Regional Provident Fund Commissioner, Bandra issued letter dated 24.05.2017 addressed to the Company wherein it was stated that the benefit of contributory provident fund was not being provided to contractual/casual employees of the Company; and was directed to implement the provisions of the EPF Act.

The relevant extract from the letter is set out herein below:

> *"approximately 370400 employees have been engaged by M/s Pawan Hans Ltd. on contract basis in various cadres. But no social security benefit is being extended to them. The EPF & MP Act, 1952 under Section 2(f) lays down that any person employed for wages in any kind of work in or in connection with the work of the establishment and includes a worker engaged by or through a contractor. There is no distinction between a person employed on permanent, temporary, contractual or casual basis under Section 2(f) of the EPF & MP Act, 1952.*
>
> *You are therefore, requested to implement the provisions of the EPF & MP Act, 1952 in respect of all the contractual/causal employees engaged by M/s Pawan Hans Ltd. who are still not getting benefits of PF and Pension."*
>
> [emphasis supplied]

In our view, the Company does not satisfy the second test, since the members of the Respondent-Union and other similarly situated contractual workers were not getting the benefits of contributory provident fund under the PF Trust Regulations framed by the Company, or under any Scheme or any rule framed by the Central Government or the State Government. Consequentially, the exemption under Section 16 of EPF Act would not be applicable to the Appellant-Company.

In view of the above discussion, we hold that the Company has failed to make out a case of exclusion from the applicability of the provisions of the EPF Act.

6.3 The next issue which arises for consideration is whether the members of the Respondent-Trade Union are entitled to the benefit of Provident Fund under the PF Trust Regulations or under the EPF Act.

Clause 1.3 of the Regulations would show that the PF Trust Regulations were made applicable to "*all employees"* of the Appellant-Company.

Clause 2.5 of the Regulations, defines an "*employee*", to include *any employee* who is employed for wages/salary in any kind of work, monthly or otherwise, or in connection with the work of the Company, and who gets his wages/salary *directly or indirectly* from the Company. Clause 2.5 excludes only a person employed by or through a contractor in connection with the work of the Company, and any person employed as an apprentice or trainee.

In the present case, the Respondent-Union submitted that even though the appointment letters refer to the employees as 'contractual' employees, they were not engaged through any contractor. They were being paid directly by the Company, which is evidenced from the payslips issued to them. It was submitted that about 250 contractual employees receive wages directly from the Company, and are eligible to be included under the PF Trust Regulations framed by the Company.

6.4 We find that the members of the Respondent-Union have been in continuous employment with the Company for long periods of time. They have been receiving wages/salary directly from the Company without the involvement of any contractor since the date of their engagement. The work being of a perennial and continuous nature, the employment cannot be termed to be 'contractual' in nature. In our considered view, Clause 2.5 of the PF Trust Regulations would undoubtedly cover all contractual employees who have been engaged by the Company, and draw their wages/salary directly or indirectly from the Company.

6.5 As per Section 2(f) of the EPF Act, the definition of an 'employee' is an inclusive definition, and is widely worded to include "any person" engaged either directly or indirectly in connection with the work of an establishment, and is paid wages.

In view of the above discussion, we find that the members of the Respondent-Union and all other similarly situated contractual employees, are entitled to the benefit of provident fund under the PF Trust Regulations or the

EPF Act. Since the PF Trust Regulations are in force and are applicable to all employees of the Company, it would be preferable to direct that the members of the Respondent-Union and other similarly situated contractual employees are granted the benefit of provident fund under the PF Trust Regulations so that there is uniformity in the service conditions of all the employees of the Company.

6.6 The question which now arises is the date from which the benefit of provident fund is to be extended to the contractual employees.

This Court *vide* Order dated 24.10.2019 had passed the following Order:

> *"Provident Fund is normally managed on actuarial basis; the contributions received from employer and the employee are invested and the income by way of interest forms the substantial fund through which any payout Is made. For all these years the Fund in question was subsisting on contributions made by the other employees and, if at this stage, the benefit in terms of the judgment of the High Court is extended with retrospective effect, it may create imbalance. Those who had never contributed at any stage would now be members of the fund. The fund never had any advantage of their contributions and yet the fund would be required to bear the burden in case any payout is to be made. Even if concerned employees are directed to make good contributions with respect to previous years with equivalent matching contribution from the employer, the fund would still be deprived of the interest income for past several years in respect of such contributions.*
>
> *In order to have clear perspective in the matter and to see if there could be any solution to the problem as posed above, we call upon the petitioner to depute a person who is well versed in the matter and who has been managing the Provident Fund Scheme of Pawan Hans Limited to have a dialogue with the respondent No.3 before 15.11.2019 (a representative of the respondent(s) is also at liberty to remain present during such discussion) so that a workable solution could then be presented by such person and the representative of respondent No.3 before us on the next occasion. List the matter on 29.11.2019 at 10.30 a.m."*

6.7 The learned ASG submitted that no workable solution could be worked out at the meeting held between the representative of the Appellant-Company, Respondent No.3, and the representative of the Respondent-Union. The learned ASG however offered that the Appellant-Company was willing to extend the benefit under the PF Trust Regulations to the members of the Respondent-Union and other similarly situated employees, from the date of the impugned Judgment.

6.8 Respondent No.3– the Regional Provident Fund Commissioner submitted that since the Company had remained out of the purview of the

EPF Act, the direction to deposit contribution from the date of eligibility of the contractual employees till the date of remittance was not workable, and could not be sustained.

7. After hearing the parties at length, and in light of the peculiar facts and circumstances of this case, we affirm the Judgment & Order dated 12.09.2018 passed by the Bombay High Court in W.P.No.325/2017 holding that members of the Respondent-Union are covered by the EPF Act. However, we modify the direction of the High Court to grant the benefits under the EPF Act, and direct that the members of the Respondent-Union and other similarly situated contractual employees be enrolled under the Pawan Hans Employees Provident Fund Trust Regulations so that there is uniformity in the conditions of service of all employees of the Appellant-Company.

Furthermore, the direction of the High Court to pay the contribution from the date of their eligibility till the date of remittance is also modified in terms of the directions given in this Judgment.

8. We pass the following directions to effectuate the reliefs granted:

(i) The interests of justice would be best subserved if the benefit of Provident Fund is provided to the members of the Respondent-Union, and other similarly situated contractual employees, from January 2017 when the Writ Petition was filed before the High Court.

(ii) Respondent No.3 the Regional Provident Fund Commissioner, Regional Office, Bhavishya Nidhi Bhawan, 341 Bandra (E), Mumbai is directed to determine and compute the amount to be deposited by the Company on the one hand, and the members ofthe Respondent-Union and other similar situated employees on the other hand. The computation would be required to be made for the past period i.e. January 2017 to December 2019;

(iii) The Company shall be liable to pay Simple Interest @ 12% p.a. on the amount payable by it towards contribution of provident fund for the past period, i.e., January 2017 to December 2019, as per Section 7Q of the EPF Act,1952 ;

(iv) The statement of computation made by Respondent No.3 will be placed before this Court within a period of 12 weeks from the date of this Judgment, and thereafter the matter will be listed for issuance of

necessary directions, so that the amount can be remitted from the deposit made before this Court, directly to the PF Trust;

(v) The employees will be obligated to deposit their matching contribution for the past period i.e. January 2017 to December 2019, within a period of 12 weeks along with interest @ 6% p.a., after the contribution of the Company has been remitted to the PF Trust;

(vi) With respect to the period from January 2020onwards, the Company and the members of the Respondent-Union as also other similary situated employees, will make their respective contributions as per the PF Trust Regulations;

(vii) The benefit shall not be extended to those employees who have superannuated, expired, resigned, or ceased to be in the employment of the Company on the date of this Judgment ;

(viii) We consider it appropriate to award Costs of Rs.5,00,000 (Rupees Five Lacs) to the Respondent-Union towards litigation expenses incurred in the High Court and in this Court.

(ix) After the aforesaid amounts are disbursed, the balance amount lying deposited in this Court shall be refunded to the Appellant-Company.

The present civil appeal along with all pending applications, if any, stand disposed of. Ordered accordingly.

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2020 (I) ILR - CUT- 247

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

W.P.(C) NO. 5628 OF 2003
WITH BATCHES

O.J.C. No.10840/1999, OJC No.4850/2000, W.P.(C) No.3446/2004, W.P.(C) No.3447/2004, W.P.(C) No.6397/2007, W.P.(C) No.568/2008, W.P.(C) No.569/2008, W.P.(C) No.3958/2008, W.P.(C) No.15983/2008,W.P.(C)No.6739/2009,W.P.(C)No.1448/2011,W.P.(C) No.5732/2013, W.P.(C) No.7667/2015, W.P.(C) No.22502/2015.

M/S. UMERI DISTILLERY (P) LTD. ……….Petitioner

.Vs.

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

BOARD'S EXCISE RULES, 1965 – Rules 34(2) – Power of State to issue circulars – Circular issued with regard to recovery of cost of establishment from the concerned IMFL Manufacturing and Bottling Units – Challenge is made to the circular on the ground that Rules do not empower the authority to issue such a circular – State support the circular – Held, the circular issued being beyond the scope of the rules is liable to be quashed. (Para 9)

For Petitioners : Mr. S.P. Mishra, Sr. Adv. M/s. N. Paikray, A.N. Ray, B.P. Mohanty, R.P. Kar, M.K. Badu, K.K. Sahoo, P.K. Mishra, A.K. Mohanty, K.A. Guru & T.K. Mohanty.

For Opp. Parties: R.K. Mohapatra, Govt. Adv. M.S. Sahoo, AGA, P.K. Muduli, AGA.

JUDGMENT Heard and Decided on 04.12.2019

K.S. JHAVERI, C.J.

Heard learned counsel for the parties.

2. By way of these writ petitions, the petitioner, in the respective cases, has challenged the circular dated 3rd January, 1990 which has been issued by the State Government, particularly by the office of the I.G.R.-cum-Excise Commissioner, Odisha, Cuttack in exercise of power under Rule 34(2) of the Board's Excise Rules, 1965.

3. By the aforesaid circular, the State Government has directed as under:

> *"I am directed to draw your attention to this Office Circular No.1062 (13) dated 21.2.84 wherein instructions were conveyed for recovery of cost of establishment of the Excise Staff from the I.M.F.L. Warehouse licensees of the State. Some Bottling units of I.M.F.L. have now come into operation in the State to which the Excise staff have been posted to supervise the operations carried on by such units. In pursuance of rule 34(2) of the Board's Excise Rules, 1965, and in supersession of the instructions contained in the office Circular under reference, the Excise Commissioner has been pleased to order that steps for recovery of cost of establishment from the concerned I.M.F.L. Manufacturing and Bottling units in the matter indicated below may be taken immediately.*

(a) The actual amount disbursed as pay, dearness allowance, additional dearness allowance and house rent allowance disbursed to Excise personnel posted whole time to Warehouses and manufacturing/bottling units should be recovered.

(b) The amount paid as F.T.A./T.A. except FT.A. paid to Excise Constables, shall not be recovered,

(c) Where personnel are posted part-time, or in addition to their other duties, minimum days of attendance should be fixed by the Superintendent of Excise and so much of the amount referred to under (a) and (b) above as bears the same proportion the minimum days of attendance bear to a month shall be recovered.

(d) Where the staff have to attend to more than one I.M.F.L. Warehouse and do not have any other duties, the cost of staff calculated in pursuance of (a) and (b) above shall be pooled and equally apportioned among all Warehouses.

2. As far as the current month (January, 1990) is concerned, recovery from Warehouses should be made in accordance with the instructions contained in the Office Circular referred to above and recovery in the manner indicated above should be made with effect from 1.2.90. As regards Manufacturing/Bottling units, recovery in the current month should be limited to 50 (fifty) percent of the amount due in accordance with the present instructions; from 1.2.90, however, recovery should be made at full rates.

3. A statement showing the amount assessed and realized unit wise may be sent to the Excise Commissioner every month for information. "

4. The main contention of the petitioner is that Rule 34(2) of the Board's Excise Rules, 1965 does not empower the authority under the Board's Excise Rules to issue such a circular and the same is ultra vires of Rule 34(2) of the Board's Excise Rules, 1965. Petitioner contended that Rule 34(2) empowers the Government of Odisha to prescribe fees for maintaining a warehouse and for conducting the operations in consonance with Sub-rule (1) of Rule 34 of the said Rules. It also empowers the Commissioner to determine fees to meet with the cost of excise staff employed for the purpose of discharging functions under the said rule. However, it does not confer any power either on the State Government or Commissioner of Excise to determine fees to be paid by the licensee for maintenance of the staff employed by the Excise Department for a distillery. For ready reference, Rule 34(2) reads as under:

*"**34. Appointment of staff for supervision and payment of fees.**- (1) xx xx xx*

(2) The licensee shall pay to the State Government the fees for maintaining a warehouse and for conducting the operations referred to in Sub-rule (1) at the rates prescribed for each in Chapter VIII of these rules, at the time of obtaining the

licence and at the end of each calendar month pay such fees as may be determined from time to time by the Commissioner, which shall not exceed in amount the whole of the cost of the excise staff employed for the purpose of this rule."

5. Having heard learned counsel for the parties and considering the materials available on record, we are of the view that the Government has power to impose or recover the fees for the staff for supervision of the operation carried on in each warehouse and store room mentioned in Rule 33(3) of the Board's Excise Rules, 1965. Sub-rule (1) of Rule 34, also reads as under:

"34. Appointment of staff for supervision and payment of fees.*- (1) The Commissioner shall determine and appoint the Excise Officer and staff necessary for the proper supervision of the operations carried on in each warehouse or store-room mentioned in Sub-rule (3) of Rule 33.*

[Provided that if any Unit will function with the prior approval of the Excise Commissioner for more than one shift [i.e. 8 (eight) hours], additional staff shall be posted as would be determined by the Excise Commissioner and the cost of establishment of the officer and staff including the additional staff, as prescribed in Sub-rule (2), shall be borne by the Unit."]

6. Taking into consideration that the petitioner has no warehouse and the fees has been imposed on the distillery for which he has paid license fees, no such fees as envisaged under the impugned circular is leviable.

7. Rule 34 (2) of Board's Excise Rules, 1965 has been wrongly exercised qua distillery. In the case at hand, as circular dated 03.01.1990 runs contrary to statutory provision and there is no power conferred to impose or collect fees or charges for the staffs appointed by the Commissioner of Excise in respect of distillery pursuant to the impugned circular.

8. Learned Government Advocate for the State-opposite parties have supported the circular and contended that in view of Rule 34 (2) of the Rules, 1965, warehouse and store room being part of the distillery, the same is amenable to rigour of the said rule.

9. However, we are unable to accept such submission of learned Government Advocate. In our considered opinion, the circular issued by the Excise Department is beyond the scope of Rule 34(2) of the Board's Excise Rules, 1965. However, if the warehouse is a part of any distillery, in that event, the State Government shall issue notice to the licensee and taking into

consideration the reply to the said notice and survey report as well as taking a decision after hearing the petitioner, can pass an order in respect of warehouse or store room. However, no recovery can be made in terms of the impugned circular. Therefore, the circular dated 03.01.1990 is required to be quashed and set aside. Accordingly, the said circular is quashed and set aside.

Any recovery, if already made from the petitioner(s), will be refunded to it, within four months from today or the same will be adjusted against future dues.

10. The writ petitions are allowed to the extent indicated above. All the connected Misc. Cases/I.As, in the respective writ petitions, are also disposed of.

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2020 (I) ILR - CUT- 251

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

W.P.(C) NO. 4447 OF 2008

BOARD OF SECONDARY EDUCATION,
ODISHA, CUTTACK. ....Petitioner

.Vs.

THE CHIEF COMMISSIONER OF INCOME TAX,
ODISHA, BHUBANESWAR & ORS. ....Opp. Parties

INCOME TAX ACT, 1961 – Section 10(23C)(VI) – Order under passed by the Chief Commissioner of Income Tax – Order and the consequential notice to Board of Secondary Education, Odisha describing it to be commercial institution – Challenge by Board with pleading that the activities of the Institution is statutory in nature with the aim to perform the responsibility to promote education up to secondary standard in the State – Held, the Board is not a commercial institution – Notices issued quashed.

Taking into consideration the activities taken by the petitioner's institution, which is responsible for education up to secondary education in the State while carrying out its statutory liability and obligation, the notices issued as at Annexures-1, 2 and 3 describing it to be commercial activities, in our considered opinion, are not sustainable as the issue is covered by the decision of Rajasthan High Court in the case of ***Rajasthan Hindi Granth Academy –v- Deputy Commissioner of Income Tax****, reported in 2017 SCC Online 3547.*

Case Laws Relied on and Referred to :-

1. (1970) 3 SCC 333 : M/s. Investment Ltd. Vs. The Commissioner of Income-Tax, Calcutta.
2. (1981) 3 SCC 156 : Delhi High Court in the case of Commissioner of Income Tax, New Delhi Vs. Federation of Indian Chambers of Commerce and Industries, New Delhi.
3. 1998 SCC Online Ori 104 : High Court of Orissa in the case of Padmanav Dehury & Ors. Vs. State of Orissa & Ors.
4. 2017 SCC Online Raj 3547 :Rajasthan High Court in the case of Rajasthan Hindi Granth Academy Vs. Deputy Commissioner of Income Tax.

4. 2017 SCC Online 3547: Rajasthan Hindi Granth Academy Vs. Deputy Commissioner of Income Tax.

For Petitioner : M/s. Bibek A. Mohanti, S.K. Jena, A.R. Mohanty, N .R. Mohanty, R.C. Behera & C.R. Dash

For Opp. Parties : Mr. Radheyshyam Chimanka, Sr. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 11.12.2019

K.S. JHAVERI, C.J.

By way of this writ petition, the petitioner has challenged the order dated 18.01.2007 passed by the Chief Commissioner of Income Tax, Odisha, Bhubaneswar under Section 10(23C)(VI) of the Income Tax Act, 1961 as well as demand notices under Annexures-2 and 3.

2. Brief facts of the case is that the petitioner is a body corporate constituted under the Board of Secondary Education Act and is an instrumentality of the State for imparting secondary education. The petitioner-Board of Secondary Education, Odisha is constituted under the Board of Secondary Education Act 10 of 1953 (for short 'the Act'), inter alia, to provide secondary education in the State of Odisha by preparing course for education in secondary pre-university stage and to conduct examination for those, who have completed prescribed courses of study and to award certificates to successful candidates and also performing other statutory duties incidental thereto. Therefore, establishment of Board is only for imparting secondary education throughout the State of Odisha under Section 3 of the Act to regulate control and develop secondary education in the State of Odisha.

3. The word 'Education' has been used in Section-2(15) of the Income Tax Act in sense of systematic instruction, schooling or training and not in

wide and extended sense according to which every acquisition of further knowledge. Imparting secondary education has never been treated as trade or business and the citizen of the country have a fundamental right of secondary education. Article 21 prescribes that every child/citizen of this country has a right to free education until he completes the age of 14. At the age of 14 one may complete Secondary Education and it is also a duty cast on a State to safeguard fundamental right of citizen which includes education up to the age of 14 years. Therefore, the sole existence of Board is to impart secondary education, which safeguards the duty cast on a State.

4. Previously, a notice was issued to the petitioner-Board by the Income Tax Department for assessment, which was under challenge before this Court in OJC No.305 of 1969. Said writ petition was disposed of quashing the notices and observing that the assessing authorities under Income Tax Act have no power to assess an account in which exemption is given under the Income Tax Act. At the relevant point of time, Section 10(22) under Income Tax Act was in force to achieve the aforesaid purpose. The same reads as under:

> *"10(22) any income of a university or other educational institution, existing solely for educational purpose and not for purpose of profit" is exempted from Income Tax."*

Section 10(22) has been deleted by the Finance Act (Act 21 of 1998) with effect from 1.4.1999. Thereafter, the legislature inserted a new section 10 (23C), which came into effect from 1.4.1999. Relevant portion of the said provision is quoted as under:

> *"10(23C)(iiiab) any university or other educational institution existing solely for educational purposes not for the purpose of profit and which is wholly or substantially financed by the Government.*
>
> *10(23C) (iiiad) any university or other educational institutions existing solely for educational purposes and not for the purposes of profit if the aggregate annual receipt of such university or educational institution do not exceed the amount of annual receipts as may be prescribed."*

The amount prescribed is Rs. 1 crore vide Rule 2BC.

> *"10(23C) (Vi) any university or other educational institution existing solely for educational purposes not for the purposes of profit other than those mentioned in the Sub-clause (iiiab) and sub-clause (iiiad) and which may be approved by the prescribed authority."*

The prescribed authority for enforcement of the aforesaid provision is the 'Chief Commissioner' or the 'Director General' as provided under Rule 2CA of the Income Tax Rules.

5. In the instant case, the petitioner filed its return showing a taxable income 'nil' by claiming exemption u/s 10(23C) (iii ab) of the Income Tax Act. The reason for filing of return, as usual, for claiming refunds TDS amount arising out of some incidental income i.e. interest accrued on deposits by petitioner from which Banks have deducted tax. Soon after filing of return, the Income Tax Authorities scrutinized the case and notices under section 142(1) and 143(2) were issued for production of Books of Accounts.

6. In course of assessment proceeding, the assessing officer has also observed that the petitioner should have possessed exemption certificate from the prescribed authority i.e. the Chief Commissioner of Income Tax, but the petitioner having not possessed such certificate, failed to satisfy the requirement of the provision of Section 10(23C) (vi) of the I.T. Act. For that reason, on 28.12.2005, the petitioner without prejudice to its right in appeal applied for approval of exemption u/s 10(23C) (vi) of the Income Tax Act. The Chief Commissioner simply slept over the matter and in the meantime, the First Appeal filed by the petitioner before C.I.T. (A), Cuttack was disposed of and it filed a statutory second appeal before the Income Tax Appellate Tribunal.

7. Learned Tribunal vide order dated 05.09.2006 directed the CCIT to dispose of the application on priority basis preferably within fifteen days. In pursuance of the said order, the CCIT issued notices to the petitioner and it appeared before him through its authorized representative and filed necessary documents with books of accounts as required by the CCIT.

8. The CCIT after hearing the petitioner rejected its application with the following findings:

> *(a) There are serious irregularities in the accounts from the extracts of local funds audit which have a direct bearing on the exemption.*
>
> *(b) The decision of Hon'ble Orissa High Court in the earlier case of the petitioner is not applicable.*
>
> *(c) The petitioner running a Secondary High School and majority of activities of the petitioner was not running the school and not for solely for the purpose of running any educational institution.*

> *(d) The expenditure on the school is only around two percent of the total receipt of the petitioner for each year. Therefore, major part of the activities of the petitioner cannot support the claim of exemption.*

9. Learned counsel for the petitioner submits that the Chief Commissioner while deciding the application of the petitioner has not gone into the crux of the issue whether the exemption certificate is necessary for an institution like Board, which has been established for imparting secondary education in the State.

10. Learned counsel for the petitioner has mainly relied upon the decisions of Calcutta High Court in the case of ***M/s. Investment Ltd. –v- The Commissioner of Income-Tax, Calcutta***; reported in (1970) 3 SCC 333, Delhi High Court in the case of ***Commissioner of Income Tax, New Delhi –v- Federation of Indian Chambers of Commerce and Industries, New Delhi***, reported in (1981) 3 SCC 156, High Court of Orissa in the case of ***Padmanav Dehury and others –v-State of Orissa and others,*** reported in 1998 SCC Online Ori 104 and Rajasthan High Court in the case of ***Rajasthan Hindi Granth Academy –v- Deputy Commissioner of Income Tax***, reported in 2017 SCC Online Raj 3547.

11. Learned counsel for the opposite parties has supported the orders and contended that notices issued to the petitioner under Annexures-1 to 3 and the order passed by the authority are just and proper. No inference is called for. He has taken us to the reply filed by the opposite parties more particularly at paragraphs-3, 4, 5, 7 and 8, which read as under:

> "*3. That in reply to the averments made in para-1 of the writ petition it is respectfully submitted that save and except what appears from the record nothing is admitted. The impugned order of the CCIT is a speaking order wherein a detained review of the activities, powers and functions of the Board have been brought out in the body of the order in paragraph-6 (page-2 to 4) and paragraph-16 (page-7) of the CCIT's order. In fact after considering the actual and the authorized activities of the Board CCIT has analyzed the total receipts and expenses of concerned financial year of the Board in paragraph-19 (page-8) of his order and has given a finding that the activities of the institution do not constitute activities solely for educational purpose as per the requirement of law in Sec.10(23C)(vi). In paragraph-20 and 21 the CCIT has referred to some of the decisions of Hon'ble Supreme Court in this regard and drawn support from them in terms of the facts of this case while drawing the conclusion that the activities are not solely for educational purpose.*

The CCIT's order is elaborate and speaking wherein all the facts of the case have been considered and relying on the interpretation of the statute by the Apex Court of the land, the finding has been given.

4. That in reply to the averments made in para-1(b) of the writ petition it is respectfully submitted that save and except what appears from the record nothing is admitted. The allegation is totally false as the notice u/s.148 of the I.T. Act for reopening of the case by the Assessing Officer for Assessment Years 1990-2000 and 2000-01 was issued on 22.03.2006 and for the asst. year 2001-02 was issued on 21.03.2006 whereas the CCIT passed the order rejecting approval u/s. 10(23C)(vi) on 18.01.2007.

5. That in reply to the averments made in para-1(c) of the writ petition it is respectfully submitted that save and except what appears from the record nothing is admitted. There is no illegality in the order of the Assessing Officer while passing Assessment order u/s.147 of the I.T. Act as Assessing Officer has also relied on the findings given by the CCIT on 18.01.2007 in his impugned order.

7. That in reply to the averments made in para-8 of the writ petition it is respectfully submitted that save and except what appears from the record nothing is admitted. The petitioner had made an application u/s 10(23C)(vi) for these years, which required approval by the prescribed authority. It was bound to do so, since there is no longer any automatic exemption mandated under the Income Tax Act, which earlier existed in terms of provisions of Section 10(22) of the Income Tax Act. The impugned order of the CCIT is a speaking order wherein a detailed review of the activities, powers and functions of the Board have been brought out in the body of the order in paragraph-6 (page-2 to 4) and paragraph-16 (page-7) of the CCIT's order. In fact after considering the actual and the authorized activities of the Board the CCIT has analyzed the total receipts and expenses of concerned financial year of the Board in paragraph-19 (page-8) of his order and has given a findings that the activities of the institution do not constitute activities solely for educational purpose as per the requirement of the law in Sec. 10(23C)(vi) of the I.T. Act. The CCIT has given his findings in his order on the basis of application filed by the assessee in the prescribed form no.56D in his office on 28.12.2005 for the years 2001-02 to 2003-04.

8. That in reply to the averment s made in para-9 of the writ petition it is respectfully submitted that save and except what appears from the record nothing is admitted. The CCIT has passed the impugned order while disposing of the application in form no.56D filed in his office. Against the Assessing Officer's orders for Assessment Years 1999-2000 to 2001-02 the assessee had filed appeal before the CIT(A) who did not given any relief to the assessee vide his order in ITA No.0299/07-08/on 31.3.2008."

12. Taking into consideration the activities taken by the petitioner's institution, which is responsible for education up to secondary education in the State while carrying out its statutory liability and obligation, the notices

issued as at Annexures-1, 2 and 3 describing it to be commercial activities, in our considered opinion, are not sustainable as the issue is covered by the decision of Rajasthan High Court in the case of ***Rajasthan Hindi Granth Academy –v- Deputy Commissioner of Income Tax***, reported in 2017 SCC Online 3547, more particularly at paragraphs-16 onwards which is quoted as under:

"*16. He also relied upon the decision of Supreme Court in Assam State Text Book Production & Publication Corpn. v. CIT, Gauhati (2009) 319 ITR 317 (SC) wherein it has been held as under:—*

3. On going through the records, we find that the High Court has not taken into account the prior history of the case, particularly in the context of incorporation of the Corporation under the Companies Act, 1956, as a Government Company. Initially, as stated above, the assessee was a State-controlled Committee and Board, which were attached to the office of the Director of Public Instruction, State of Assam. It is only in the year 1972 that the Government Company got constituted under Section 617 of the Companies Act, 1956. That, prior to 1972, the entire funding for the working of the Committee/Board was done by the State of Assam and that even the ownership of the assets remained vested in the State of Assam which stood transferred to the Corporation in 1972 when it got incorporated under Companies Act, 1956. It is important to note that the assessee is a Government Company. It is controlled by the State of Assam. The aim of the said Corporation is to implement the State's policy on Education. That, Clause 21 of the Memorandum and Articles of Association provides a Return on Investment to the State of Assam. That, in the year 1975, in a similar situation, Central Board of Direct Taxes [for short, "C.B.D.T."] had granted exemption under Section 10(22) of the Act vide letter dated 19th August, 1975, to Tamil Nadu Text Books Society, which performed activities similar to those of the assessee. The letter dated 19th August, 1975, is referred to in the judgment of the Rajasthan High Court in the case of Commissioner of Income Tax v. Rajasthan State Text Book Board reported in 244 I.T.R. 667. As can be seen from the facts of that case, a similar question came up for consideration before the Rajasthan High Court, namely, whether Rajasthan State Text Book Board was entitled to exemption under Section 10(22) of the Income Tax Act, 1961? One of the arguments advanced in that case on behalf of the Revenue was that the assessee was making profit on account of publishing and sale of text books and, consequently, it was not entitled to the benefit of exemption under Section 10(22) of the Act. However, the High Court noticed the letter issued by C.B.D.T. on 19th August, 1975 in the case of Tamil Nadu Text Book Society which, as stated above, in similar circumstances had granted exemption to the Tamil Nadu Text Book Society as an Educational Institution within the meaning of Section 10(22) of the Act. The judgment of the High Court further recites that, under a similar situation, the C.B.D.T. had also extended benefit of exemption under Section 10(22) of the Act to the Orissa Secondary Board Education, as reported in Secondary Board of Education v. Income Tax Officer, 86 I.T.R. 408. Following these circulars/letters issued by C.B.D.T., the Rajasthan High Court came to the

conclusion that the assessee in that case, namely, Rajasthan State Text Book Board, was entitled to claim the benefit of exemption under Section 10(22) of the Act. The operative part of the Rajasthan High Court's judgment reads as under:

It is not disputed before us that the aims and objects of the Tamil Nadu Text Book Society and those of the respondent-assessee are almost identical. It is also not shown to us that the surplus amount, if any, of the respondent-assessee, is used for any other purpose or distributed to other members. The Commissioner of Income-tax (Appeals) as well as the Tribunal have noticed that even if some amount remains surplus, that is utilised only for the purposes of education. Thus, having regard to the concurrent findings of fact recorded by the Commissioner of Income-tax (Appeals) and the Tribunal and also taking note of the letter of the Central Board of Direct Taxes itself, it is not possible for us to say that the order of the Tribunal is erroneous in any way. In this way, no question of law arises for consideration much less a substantial question of law.

17. He also relied upon the decision of Rajasthan High Court in CIT v. Rajasthan State Text Book Board (2000) 113 Taxman 204 (Raj.) wherein it has been held as under:—

"It could be seen from the orders of the Commissioner (Appeals) as well as the tribunal that, in a similar situation, in the case of Tamil Nadu Text Book Society, the CBDT, as per the letter dt. 19.8.1975 and F. No. 184/26 of 1975, stated that the Tamil Nadu Text Book Society was an educational institution, existing solely for the purpose of education, within the meaning of Sec.10(22).

It was not disputed that the aims and objects of the Tamil Nadu Text Book Society and those of the assessee were almost identical. It was also not shown that the surplus amount, if any, of the assessee, was used for any other purpose or distributed to other members. The Commissioner (Appeals) as well as the Tribunal had noticed that even if some amount remained surplus, that was utilised only for the purposes of education. Thus, having regard to the concurrent finding of act recorded by the Commissioner(Appeals) and the tribunal has also taking note of the letter of the CBDT itself, it was not possible to say that the order of the tribunal was erroneous in any way. In this way, no question of law arose for consideration, much less a substantial question of law.

18. He also relied upon the decision of Orissa High Court in Secondary Board of Education v. ITO (1972) 86 ITR 408 (Orissa) wherein it has been held as under:—

"Under the Orissa Secondary Education Act, 1953, the Board has a fund. There were various sources of income constituting the fund. One of the sources of income was earning profits by compilation, publication, printing and sale of text books. The profits so earned entered into the Board fund. The income and expenditure of the Board was controlled and the entire expenditure was to be directed towards development and expansion of educational purposes. Even if, there was some surplus it was not appropriated by others remained as as part of the sinking fund to be devoted to the cause of education as and when necessary. Thus the object did not involve the carrying on the activity for the purpose of profit. The object was to carry

on the activity of advancement of education which incidentally resulted in profits which in their return were devoted to the cause of education. This being the objection and there being various way of control of the income and expenditure, the Board of Secondary Education could not be said to be existing for purposes of profits. It existed solely for purposes of education. The income of the Board could not, therefore, be computed in the total income of the previous year u/s 10(22). The ITO exercised his

19. He also relied upon the decision of Madhya Pradesh High Court in CIT v. Madhya Pradesh Rajya Pathya Pustak Nigam (2009) 318 ITR 497 (MP) wherein it has been held as under:—

19. From a perusal of the aforesaid decisions, it is lucid that for the entitlement for getting exemption for the assessment year, it is required to see the activities of the assessee. That is the acid test. If the income/profit is applied for non-educational purposes, it is decided only at the end of the financial year. It is to be seen whether the assessee is engaged in any kind of educational activities. The authorities which we have referred to above have laid down the criteria under what circumstances, an assessee can claim exemption being involved in educational purposes and how the income is spent. We have already referred to the memorandum of association and also stated about reasonings assigned by the CIT (Appeals) to deny the exemption and the analysis made by the Tribunal to dislodge the finding of the first appellate authority. It is worth noting that the Assessing Officer has not ascribed any reason.

20. He also relied upon the decision of Karnataka High Court in DIT v. Dhampakasha Rajakarya Prasakta B.M. Sreenivasiah Educational Trust (2015) 372 ITR 307 (Karnataka) wherein it has been held as under:—

"Section 10(23C) of the income tax act, 1961-Educational institutions (institutions substantially financed by Government) Assessment years 2003-04 and 2005-06-Assessee was running a number of educational institutions-Assessing Officer declined to grant relief claimed by assessee u/s 10(23C)(iiiab)-material on record disclosed that Government had financed assessee-institutions and its share was 25 per cent. Further, it was not existing for fake of profit making-whether when 25 per cent of finance to assessee-institutions flowed from Government, it constituted substantial finance and it satisfied all legal requirement provided u/s 10(23C)(iiiab)-whether, therefore, assessee would be entitled to benefit provided u/s 10(23C)(iiiab)."

21. However, counsel for the respondent Mr. Jain strongly contended that while considering the matter, the CIT(A) has he matter and observed as under:—

"3.3 The submission of the appellant was forwarded to the AO for his comments. The AO has stated in the remand report dt. 23.12.2013, which is as under:—

"In this connection it is submitted that the assessee "Rajasthan Hindi Granth Academy" is claiming exemption u/s 10(23C)(iiiab) of the Income Tax Act, 1961. The assessee has produced various documents and material before you in support of his claim. The same have been duly verified and considered by the office of the undersigned. However, the assessee could not produce any material in support of

his claim which may reverse the decision of the AO. The AO in his order dt. 30.12.2012 for the A.Y. 2010-11 has mentioned that the objects and activities of the assessee does not fall under the ambit of education and it is covered under general public utility as per 2(15) of the IT Act, 1961. As the objects of the assessee are not covered under the definition of education, no benefit of exemption u/s 10(23C)(iiiab) can be granted to the assessee. Section 10(23C)(iiiab) clearly says that "10. In computing the total income of a previous year of any income falling within any of the following clauses shall not be included-[(23C) any received by any person on behalf of-[iiiab) any university or other educational institution existing solely for educational purposes and not for purposes of profit and which is wholly or substantially financed by the Government; or…"

Hence in light of the above the undersigned and the opinion of the then AO rant it is reported that no exemption u/s 10(23C)(iiiab) should allowed to the assessee.

In continuation with the letter dt. 23.12.2013, it is further clarified that the assessee's submission that it should be allowed exemption u/s 10(23C)(iiiab) and 10(23C)(iv) and addition so made by the AO may also be deleted is not correct on the basis of following issues:—

1. The assessee in its return of income has no where claimed exemption u/s 10(23C)(iv) rather it has claimed exemption u/s 10(23C)(iiiab). (copy of computation enclosed). Hence, the assessee cannot be granted such exemption without claiming it.

2. The assessee is also not eligible for exemption u/s 10(23C)(iiiab) as discussed in letter dt.23.12.2013.

3. The assessee is not eligible for exemption u/s 10(23C)(iv) because for that following two requirements should not be complied with.

i. The assessee should be existing solely for education purpose.
ii. Such university and educational institution should be approved by the Hon'ble Chief Commissioner of Income Tax.

As rightly discussed in the assessment order dt. 30.12.2012, the assessee does not fulfill any of the above conditions. It cannot be allowed exemption u/s 10(23C)(iiab)(iv) r.w.s. 2(15) of the IT Act, 1961.

Hence, in view of the above discussion, it is reported that the assessee is not eligible for any exemption claimed by it u/s 10(23C)(iiiab) and 10(23C)(iv)."

22. He further contended that by no stretch of imagination, the activities carried by the appellant assessee cannot be considered as educational institutions and publication of educational books is not educational activity and, therefore, they will not be covered under the provisions of 10(23C)(iiiab)/10(23C)(iv) of the Income Tax Act.

23. Counsel for the respondent has relied upon the decision o The Supreme Court in The Sole Trustee Loka Shikshana Trust v. The Commissioner of Income Tax, Mysore reported in 1975 (101) ITR 234 wherein Supreme Court held as under:—

5. The sense in which the word "education" has been used in section 2(15) is the systematic instruction, schooling or training given to the young in preparation for the work of life. It also connotes the whole course of scholastic instruction which a person has received. The word "education" has not been used in that wide and extended sense, according to which every acquisition of further knowledge constitutes education. According to this wide and extended sense, travelling is education, because as a result of travelling you acquire fresh knowledge. Like wise, if you read newspapers and magazines, see pictures, visit art galleries, museums and zoos, you thereby add to your knowledge. Again, when you grow up and have dealings with other people, some of whom are not straight you learn by experience and thus add to your knowledge of the ways of the world. If you are not careful, your wallet is liable to be stolen or you are liable to be cheated by some unscrupulous person. The thief who removes your wallet and the swindler who cheats you teach you a lesson and in the process make you wiser though poorer. If you visit a night club, your get acquainted with and add to your knowledge about some of the not much revealed realities and mysteries of life. All this in a way is education in the great school of life. But that is not the sense in which the word "education" is used in clause (15) of section 2. What education connotes in that clause is the process of training and developing the knowledge, skill, mind and character of students by formal schooling.

24. He also relied upon the decision of Rajasthan High Court in Commissioner of Income Tax v. Maharaja Sawai Mansinghji Museum Trust reported in 1988 (169) ITR 379 wherein it has been held as under:—

7. It is amply clear from a bare reading of it that the "educational institution" must exist "solely" for educational purposes. "Solely' means exclusively and not primarily. Simply because certain persons may add something to their knowledge by visiting the museum, it cannot be said that the museum exists "solely" for educational purposes. The emphasis in Section 10(22) is on the word "solely".

25. He contended that the appeal deserves to be dismissed.

26. We have heard counsel for the parties.
27. Before proceeding with the matter, it will not be out of place to mention that Rajasthan Hindi Granth Academy is established by the State Government to see that the books are available to the students of the educational institutions at the grass root level, therefore, while considering the matter, we have considered that mainly the substantive amount out of receipts of Rs. 1,81,44,567/-, Rs. 1,24,10,000/- is received by the assessee from State Government by way of subsidy. Even if, name of the institution i.e. Rajasthan Hindi Granth Academy is considered, it is established that it is for the purpose of publication of Hindi Granth i.e. for education. In that view of the matter, in our considered opinion in view of decisions referred by Mr. Ranka, this is an educational institution activity.

28. In that view the matter, we are of the opinion that this academy is running only with a view to publish educational books and we have no hesitation in accepting the submissions of Mr. Ranka that this is only for the purpose of academy which is educational in nature.

> *29. In that view of the matter, the assessee will be entitled for the benefit u/s 10(23)(iiiab). Even from the table, looking to the turnover, the profit is negligible, therefore, it is clear that the institution has no profit motive.*
>
> *30. In view of the above, the issue is required to be answered in favour of the assessee and against the department.*
>
> *31. The appeal stands allowed."*

13. In that view of the matter, the notices issued under Annexures-1, 2 and 3 are quashed.

14. This writ petition is allowed to the aforesaid extent.

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2019 (I) ILR - CUT- 262

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

W.P.(C) NO. 20269 OF 2017 & 5634 OF 2019

M/S. ACRUX REALCON PVT. LTD. ....Petitioner

.Vs.

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

W.P.(C) NO. 5634 OF 2019

PABITRA MOHAN SAMAL ....Petitioner

.Vs.

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

ORISSA GOVERNMENT LAND SETTLEMENT ACT, 1962 – Section 7-A (3) read with OGLS RULES, 1963, 1973 and 1983 – Provisions under – Lease granted in 1973 by following the legal provisions under the OGLS Act and Rules prevalent then – Pursuant to certain direction by High Court Lease revision cases initiated in the year 2015 against the Lessee – Plea of Limitation and violation of the principles of natural justice raised – Lease cancelled on the ground of violation of lease conditions – Materials available do not support the reasoning given in the impugned order – Order set aside.

"In the case in hand, the resumption proceeding under section 3-B of the O.G.L.S. Act was initiated on 22.06.2002 in respect of the lands which were leased out in favour of Netrananda Dehury in W.L. Case No.124 of 1973 on the ground that leasehold land was used for any purpose other than that for which it was settled but

after enquiry, the Additional Tahasildar, Bhubaneswar found that the lessee Netrananda Dehury had already transferred the land and Smt. Sanjukta Padhihary, Smt. Manjulata Jena, Smt. Ranu Biswal, Sri Samarendra Nayak and Sri Gangadhar Swain are the land holders in possession of the suit land who were using it for agricultural purposes and some cashew plants and other fruit bearing trees were found on the land and accordingly as per order dated 06.10.2002, the said resumption proceeding was dropped. Though appeal is provided against any order made under section 3-B of the O.G.L.S. Act, no appeal was preferred and therefore, the order passed in the resumption proceeding attended its finality. The authority initiated suo motu revisional power forty two years after the grant of lease and thirteen years after dropping of resumption proceeding and cancelled the lease without any material relating to commission of any fraud. The findings of the Additional District Magistrate that there are material irregularities, legal deformity and procedural lapses are neither factually nor legally correct. There is an error of law apparent on the face of record in utilizing the procedure laid down in O.G.L.S. Rules, 1983 in cancelling the lease which were non-existent at the time of grant of lease in the year 1973 and even principle of natural justice has not been followed in case of the petitioner Pabitra Mohan Samal. When a statute confers any power on any statutory authority, howsoever wide the discretion may be, it cannot be used arbitrarily, mechanically but after due and proper application of mind so that it must stand the test of judicial scrutiny. Thus in view of gross error committed by the Additional District Magistrate, as per the law laid down by the Hon'ble Supreme Court in the case of ***Syed Yakoob -Vrs.- K.S. Radhakrishnan reported in A.I.R. 1964 S.C. 477****, we are of the humble view that it is a fit case to exercise our certiorari jurisdiction to correct the error in the interest of justice." (Para 8)*

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

1. 2010 (I) Orissa Law Reviews 723 : Bata Krushna Nayak Vs. State of Orissa
2. A.I.R. 2014 S.C. 3070 : Ram Karan Vs. State of Rajasthan.
3. (2010) 8 SC 4. Cases 467 : Sulochana Chandrakant Galande Vs. Pune Municipal Transport
5. 1991 (II) OLR 50 : Laxman Kanda Vs. State of Orissa.
6. 1996 (II) Orissa Law Reviews 182 : Smt. Shantilata Dei Vs. A.D.M.
7. 1995 Supp.(3) SCC 249 : State of Orissa Vs. Brundaban Sharma.
8. A.I.R. 1964 S.C. 477 : Syed Yakoob Vs. K.S. Radhakrishnan.

For Petitioners : Mr. Budhadev Routray (Sr. Adv.)
: Mr. Sourya Sundar Das (Sr. Adv.)

For Opp. Parties : Mr. Kishore Kumar Misra, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 27.11.2019 : Date of Judgment: 11.12.2019

S.K. SAHOO, J.

M/s. Acrux Realcon Pvt. Ltd. (hereafter 'the petitioner-company') in W.P.(C) No.20269 of 2017 has challenged the legality, validity and propriety

of the impugned order dated 07.07.2017 (Annexure-1) passed by the Additional District Magistrate, Bhubaneswar (opposite party no.3) in Lease Revision Case No.01 of 2015 in cancelling the lease in respect of the case land situate in Mouza Gothapatna in exercise of power conferred under section 7-A(3) of the Orissa Government Land Settlement Act, 1962 (hereafter 'O.G.L.S. Act') on the ground of material irregularities, legal deformity and procedural lapses.

The petitioner Pabitra Mohan Samal in W.P.(C) No.5634 of 2019 has also challenged the self-same order which the petitioner-company in W.P.(C) No.20269 of 2017 has challenged, inter alia, the orders dated 08.11.2017 passed in Lease Revision Case Nos.02 of 2015 to 13 of 2015 by the Additional District Magistrate, Bhubaneswar in cancelling the lease in respect of the different plots of land situate in Mouza Gothapatna in exercise of power conferred under section 7-A(3) of the O.G.L.S. Act.

Since the orders in different lease revision cases have been passed by the same authority exercising the same power on similar grounds and both the matters are connected to each other, with the consent of learned counsel for the parties, those were heard analogously and disposed of by this common judgment.

2. The case of the petitioner-company in W.P.(C) No.20269 of 2017 is that it is a private limited company under the provisions of the Companies Act, 1956 having its registered office at Patia, Bhubaneswar which is engaged in the business of construction and real estate development activities. In the daily newspaper 'Sambad' dated 12.06.2015, a public notice was published inviting public objection by 25.07.2015 against the decision to transfer the lands mentioned in the said notification to the Government Khata which was issued by the Additional District Magistrate, Bhubaneswar (opposite party no.3). Pursuant to such notice, the petitioner-company made inspection as one of the items of landed properties mentioned in the aforesaid public notice belonged to it. After inspection, the petitioner-company procured certified copies of the documents from which it came to light that the Additional District Magistrate, Bhubaneswar had initiated a proceeding under section 7-A(3) of the O.G.L.S. Act asking for show cause as to why the lease in respect different plots of land in Mouza Gothapatna should not be cancelled for alleged violation of conditions and to be more specific for allegedly transferring the leasehold property to others. It is the specific case of the petitioner-company that one Netrananda Dehury applied for lease of

Government land measuring an area Ac.1.00 decimal on 05.06.1973 and accordingly, a lease case vide W.L. Case No.124 of 1973 was instituted and the concerned R.I. was directed to submit the enquiry report along with the sketch map. Pursuant to the direction of the Tahasildar, the R.I. caused an enquiry and submitted the report stating therein that the applicant was a landless Adibasi and that he might be granted lease for an acre of land specifically mentioning the Khata, Plot, Kissam etc. Thereafter, the Tahasildar issued a public notice inviting objection from the local public. On 25.07.1973, lease was lawfully sanctioned vide W.L. Case No.124 of 1973 by following the due process of law, whereafter the said Netrananda Dehury became the lawful and absolute owner in possession of such lease property without any hindrance from any quarters. On 26.05.1988, permission of Revenue Officer in Rev. Misc. Case No.32 of 1998 in D.R. No.610 was granted to the aforesaid Netrananda Dehury under section 22(1)(b) and (4) of the Odisha Land Reforms Act, 1960 (hereafter 'O.L.R. Act') for transfer of the leasehold land. On 06.06.1988, Netrananda Dehury after obtaining valid permission from the Revenue authorities, in order to meet his urgent requirements sold away Ac.0.765 decimals of the leasehold land by way of registered sale deed no.5317 dated 06.06.1988 in favour of one Sri Aruna Mohanty who then possessed the property lawfully as the absolute owner. On 29.01.1996, this Court in O.J.C. No.9449 of 1993 passed an omnibus direction to the State Government regarding enquiry into the matter relating to lease of lands in Bhubaneswar. On 15.10.1998, this Court gave further direction in the said case to the Government to examine whether the cases are covered under section 3-B of the O.G.L.S. Act and to proceed in accordance with the said provision by following due procedure. On 17.12.1999, the Additional District Magistrate, Bhubaneswar after examining the entire case records of W.L. Case No.124 of 1973 directed the Additional Tahasildar, Bhubaneswar (opposite party no.4) vide his letter No.9905 for disposal on assessment on its own merit and in accordance with section 3-B of the O.G.L.S. Act in compliance of the order of this Court. On 19.09.2001, the aforesaid Aruna Mohanty sold away different portions of the purchased land in favour of different persons like Manjulata Jena vide registered sale deed no.4969 for an area of Ac.0.195 decimals, Sanjukta Padhiary vide registered sale deed no.4970 for an area of Ac.0.195 decimals, Gangadhar Swain vide registered sale deed no.4971 for an area of Ac.0.130 decimals, Samarendra Nayak vide registered sale deed no.4972 for an area of Ac.0.065 decimals and also in favour of Ranu Biswal vide registered sale deed no.4973 for an area of Ac.0.065 decimals. On 22.06.2002, the Additional Tahasildar,

Bhubaneswar initiated a case for resumption of the aforesaid lands which were leased out in favour of Netrananda Dehury in W.L. Case No.124 of 1973 in exercise of powers under section 3-B of the O.G.L.S. Act in terms of the direction of the Additional District Magistrate, Bhubaneswar as per order dated 17.12.1999. On 25.06.2002, notices were issued inviting objections, if any, along with paper publications by the Additional Tahasildar, Bhubaneswar in the said resumption case. On 06.09.2002, the Additional Tahasildar, Bhubaneswar also published Ishtahara in the said case. On 06.10.2002, lease resumption proceeding was dropped after following due process of law by the Additional Tahasildar, Bhubaneswar. On 21.04.2011, i.e. after about a decade of the aforesaid statutory exercise in re-examining the lease in favour of Netrananda Dehury in pursuance to the direction of this Court in O.J.C. No.9449 of 1993 and after statutorily adjudicating the same to be lawful and non-resumable as contemplated under section 3-B of the O.G.L.S. Act, transfers were effected in respect of the leasehold property by the aforesaid purchasers of Aruna Mohanty in favour of the petitioner-company. All the aforesaid transfers before the dropping of the proceeding under section 3-B of the O.G.L.S. Act and the subsequent transfers by the earlier transferees became valid under the law in terms of section 43 of the Transfer of Property Act. The petitioner-company then applied for conversion of the purchased lands from agricultural to homestead under section 8-A of the O.L.R. Act. The Tahasildar after accepting the requisite fees directed for conversion and intimated the same to the Settlement Authority as settlement operation had already begun. Thereafter the petitioner-company applied for mutation before the concerned Asst. Settlement Officer (opposite party no.5) as the Tahasildar, Bhubaneswar had no power of mutation during settlement operation. The Asst. Settlement Officer on receipt of the aforesaid motion for mutation initiated Objection Case Nos.3173 of 2012, 3176 of 2012, 3178 of 2012, 3174 of 2012 and 3177 of 2012 in respect of respective purchases of the petitioner-company and dropped the proceeding solely on the ground that the property has already been recorded in the Government Khata. Accordingly, the petitioner filed W.P.(C) No.22095 of 2014, W.P.(C) No.22096 of 2014, W.P.(C) No.22097 of 2014, W.P.(C) No.22098 of 2014 and W.P.(C) No.22099 of 2014 challenging the aforesaid undated order passed by the Asst. Settlement Officer in each case. This Court by its order dated 05.05.2016 taking cognizance of the glaring illegality quashed the aforesaid order of the Asst. Settlement Officer. On 11.08.2014, this Court in the case of **Hadu Paltasingh -Vrs.- State of Orissa** in W.P.(C) No.12641 of 2012 observed

that several other cases of fraud were committed in the grant of leases which came to light for which the Collector, Khurdha was directed to conduct a review in respect of any fraud in the grant of leases and the Additional District Magistrate, Bhubaneswar initiated the impugned proceeding under section 7-A(3) of the O.G.L.S. Act. The initiating authority initiated the impugned proceeding during subsistence of the order for maintenance of status quo passed by this Court in the aforesaid writ petitions. The petitioner-company filed W.P.(C) No.6905 of 2016 challenging the very initiation of the impugned proceeding and this Court remitted the matter back to the Additional District Magistrate, Bhubaneswar to adjudicate the matter afresh. Thereafter, the Additional District Magistrate, Bhubaneswar noticed the petitioner-company and after appearance, the petitioner-company urged that the records which were not produced before this Court should be made available for proper adjudication. The Additional District Magistrate, Bhubaneswar asked the Tahasildar, Bhubaneswar to produce the records who replied that the records were not traceable. Accordingly, the Additional District Magistrate, Bhubaneswar disposed of Lease Revision Case No.01 of 2015 vide impugned order dated 07.07.2017 under Annexure-1 in allowing the revision case and rejecting the objection of the petitioner-company relating to the maintainability of the proceeding and also cancelling the lease of the case land in favour of the lessee.

3. The case of the petitioner Pabitra Mohan Samal in W.P.(C) No.5634 of 2019 is that in pursuance to an advertisement issued by the petitioner-company, the petitioner not only verified the title of the land in question but also other certificates granted by different statutory authorities for construction of a residential project called *Acropolies* which is a multi-storied apartment located in village Gothapatana under Bhubaneswar Tahasil in the district of Khurda and having been fully satisfied about validity of the title and technical feasibility of the said apartment, applied for allotment of a 3 BHK flat and paid necessary security money and also paid the entire money phase wise and after payment of the dues, the petitioner-company executed the sale deed on 30th November 2012 in favour of the petitioner and accordingly possession of Flat No.H-112 of area 1414 sq. ft. in the 1st floor was handed over to the petitioner way back on 22.03.2014 and the petitioner came to possess the said building and residing there since 2014. The petitioner came to know that the Additional District Magistrate, Bhubaneswar in exercise of the power conferred under section 7-A(3) of the O.G.L.S. Act has settled the land over which the building was constructed in favour of the

Government in Lease Revision Case Nos.1 to 13 of 2015 without hearing the petitioner who was a necessary party to such cases. By the order of the Additional District Magistrate, the right of the petitioner over the said land was taken away behind his back by cancelling the lease and returning it to the Government khata. It is the further case of the petitioner that the petitioner was a bonafide allottee and without impleading him as a party, the Additional District Magistrate has passed the impugned orders and due to passing of such orders, the petitioner would be deprived of getting the title over the flat in question, irrespective of execution of sale deed in his favour even after making payment of entire money to the builders. It is the case of the petitioner that being an affected person pursuant to the orders passed by the Additional District Magistrate in different lease revision cases, he was a necessary party to all the revision cases but without impleading him as party, the impugned orders have been passed and thereby the right of the petitioner has been taken away in his absence which amounts to violation of principle of natural justice for which the impugned orders are liable to be set aside. It is the further case of the petitioner that the lease was granted in favour of the original lessee strictly on the basis of the O.G.L.S. Act and Rules framed thereunder and there is no infirmity in the order of the O.E.A. Collector in granting lease in favour of the original lessee and there is inordinate delay in initiating the proceeding under section 7-A(3) of the O.G.L.S. Act by the Additional District Magistrate and in view of the statutory bar coupled with 3rd party right, the impugned orders are also unwarranted in the eye of law.

4. The Additional District Magistrate, Bhubaneswar in the impugned order dated 07.07.2017 under Annexure-1 in W.P.(C) No.20269 of 2017 has been pleased to formulate two points i.e. **(i)** whether Lease Revision Case No.01 of 2015 is maintainable? **(ii)** if so, then, is there any mistake of fact, fraud, violation of procedure in the process of the lease?

Taking into account the orders of this Court passed in **Hadu Paltasingh** (supra) and in O.J.C. No.9449 of 1993, it was held by the Additional District Magistrate that there is no illegality or impropriety in the initiation of the revision proceeding in respect of the case land. It was further held that the case record reveals that the eligibility aspects of the lessee for availing of Government land on lease was examined and verified by the Tahasildar, Bhubaneswar before settlement of one acre of land in the vicinity of Bhubaneswar Municipal Corporation area and no enquiry was conducted either by R.I. or anything has been mentioned by the Tahasildar in the case

record in that regard and therefore, the settlement of lease without examination of the above aspects was not proper and also not in conformity with the provision of law. It was further held that nothing has been mentioned in the case record as regards the extent of land possessed by the lessee or whether the lessee was a landless or not and therefore, the eligibility of the lessee to avail the land on lease still remains as a question. It was further held that the procedure on proclamation of notice as laid down under O.G.L.S. Rules was not properly adhered to while deciding the lease of the case land in favour of the lessee and that the lease of the case land involves certain material irregularities, legal deformity and procedural lapses and accordingly, the revision case was allowed and the lease of the case land settled in favour of the lessee was cancelled.

Similar points for adjudication were formulated and similar reasons were assigned in the Lease Revision Case Nos. 02 to 13 of 2015 in cancelling lease of the case lands which are challenged in W.P.(C) No.5634 of 2019.

5. Mr. Budhadev Routray, learned Senior Advocate appearing for the petitioner-company in W.P.(C) No.20269 of 2017 contended that the resumption proceeding under section 3-B of the 1962 Act was initiated in respect of the land leased in favour of Netrananda Dehury and as per order dated 06.10.2002, the said resumption proceeding was dropped. It is further contended that the lease was granted way back in 1973 in W.L. Case No.124/73 but the proceeding under 7-A(3) of the O.G.L.S. Act was initiated on 10.04.2015 which was after forty two years, which is not permissible in law particularly when third party right had accrued and several orders were passed by different statutory authorities in different proceedings. He argued that the original lessee who was a Scheduled Tribe person, after obtaining permission under section 22(4) of the O.L.R. Act transferred the land by way of sale deed on 06.06.1998. Subsequently by virtue of the sale deed, the transferees made an application under section 8-A read with Rule 12-A of the Odisha Land Reforms (General) Rules, 1965 for conversion of the land in OLR case no.10779 of 2011 and accordingly, the land was recorded as Stitiban status by the competent authority and the Record of Rights (R.O.R.) were corrected. According to Mr. Routray, the impugned order was passed by the A.D.M. relying upon the direction made in the case of **Hadu Palta Singh** (supra) which was a case of fraud whereas in the case in hand, there is no whisper of fraud. He emphasized that before initiation of proceeding under section 7-A(3), the authority must satisfy itself about the existence of

circumstances necessary for exercising such jurisdiction but a bare perusal of order dated 10.04.2015 in Lease Revision Case No.01 of 2015 under Annexure-9 indicates that through the proposal was for initiation of resumption proceeding under section 3-B of the O.G.L.S. Act but in the operative portion of the said order, notice was issued requiring the lessee to explain why lease would not be cancelled for violation of the conditions. Under section 7-A(3) of the O.G.L.S. Act which was amended by Orissa Act No. 38 of 1976, no proceeding under that sub-section can be initiated after the expiry of fourteen years from the date of the order which period was lifted vide Odisha Act No.26 of 2013 which came into force on 13.11.2013. He argued that in the instant case, such a power under section 7-A(3) of the O.G.L.S. Act was not available to the Additional District Magistrate since lease was granted in 1973 on the basis of pre-amended Act. While concluding his argument, Mr. Routray contended that when the records in W.L. Case No.565 of 1972 which was the basis of the order passed in W.L. Case No.124 of 1973 was not available, the conclusion arrived at by the Additional District Magistrate in the impugned order under Annexure-1 that the lease of the case land involves certain material irregularities, legal deformity and procedural lapses is totally misconceived. Reliance was placed in the cases of **Bata Krushna Nayak -Vrs.- State of Orissa reported in 2010 (I) Orissa Law Reviews 723**, **Ram Karan -Vrs.- State of Rajasthan reported in A.I.R. 2014 S.C. 3070**, **Sulochana Chandrakant Galande -Vrs.- Pune Municipal Transport reported in (2010) 8 Supreme Court Cases 467**, **Laxman Kanda -Vrs.- State of Orissa reported in 1991 (II) Orissa Law Reviews 50** and **Smt. Shantilata Dei -Vrs.- A.D.M. reported in 1996 (II) Orissa Law Reviews 182**..

Mr. Sourya Sundar Das, learned Senior Advocate appearing for the petitioner Pabitra Mohan Samal in W.P.(C) No.5634 of 2019 emphatically contended that the petitioner is residing in the apartment since 2014 and he was a bonafide allottee and therefore, without impleading him as a party in the proceeding and without giving him an opportunity of hearing, the Additional District Magistrate, Bhubaneswar should not have passed the impugned orders in the lease revision cases which amounts to violation of principle of natural justice.

Mr. Kishore Kumar Misra, learned Addl. Govt. Advocate on the other hand supported the impugned orders and submitted that the Tahasildar had taken recourse to settlement of a big patch of valuable land which situates in the periphery of Bhubaneswar Municipal area in favour of a private

individual without examining his eligibility criteria and without even thinking a little on reservation of land for the purpose of expansion of city and future development. It is further argued that since by virtue of Odisha Act 26 of 2013, the period of limitation in exercising the suo moto revisional power under section 7-A(3) of the O.G.L.S. Act has been taken away, no fault can be found in the initiation of the proceeding in the year 2015 particularly in view of the orders of this Court passed in **Hadu Paltasingh** (supra). He placed reliance in the case of **State of Orissa -Vrs.- Brundaban Sharma reported in 1995 Supp.(3) Supreme Court Cases 249** and submitted that length of time cannot be a factor to refrain from exercising the revisional power and since there is no illegality or infirmity in the impugned orders, this Court in a writ of certiorari should not interfere with the same.

6. Adverting to the contentions raised by the learned counsel for the respective parties and after carefully going through the impugned orders and case records, it appears that in W.L. Case No.124 of 1973, the land in question was leased out in favour of one Netrananda Dehury, son of Sukadeb Dehury of village Gothapatana under Chandaka police station in the district of Puri on 25.07.1973 under the provisions of O.G.L.S. Act, 1962 and O.G.L.S. Rules, 1963. Before grant of lease, proclamation was issued, report was called for from the Revenue Inspector who submitted his enquiry report along with the case map indicating therein that the applicant is a member of Scheduled Tribe and a landless person and also recommended the case of the applicant for grant of lease. The relevant documents in that respect have been annexed as Annexure-3 and Annexure-4 to W.P.(C) No.20269 of 2017. The learned counsel for the State also produced the records of W.L. Case No.124 of 1973 during hearing of the case. The learned counsel for the petitioner placed different provisions of O.G.L.S. Act, 1962 as well as O.G.L.S. Rules, 1963 which indicate that at the relevant point of time no specific procedure was there relating to grant of lease or the manner of settlement of Government land. It is mentioned in the impugned orders that the lease of case land involves certain material irregularities, legal deformity and procedural lapses. When a pertinent question was put to the learned State Counsel as to which procedure laid down in the aforesaid Act and Rules or any standing orders issued by the Government were violated at the time of grant of lease, no satisfactory reply was given. As it seems, even though there was no specific procedure laid down for grant of lease of Government land then in O.G.L.S. Act, 1962 as well as O.G.L.S. Rules, 1963 but all the same the authorities issued proclamation, called for report from th e Revenue

Inspector and after submission of enquiry report along with the case map, lease was granted in favour of Netrananda Dehury.

The Orissa Government Land Settlement Rules, 1974 (hereafter 'O.G.L.S. Rules, 1974') came into force on 11.12.1974 which is obviously after grant of lease in the case in hand and in the said Rules, for the first time some procedure were laid down for grant of lease in Rule 3. By virtue of Rule 8 of the said Rules, O.G.L.S. Rules, 1963 was repealed but in view of sub-rule (2) of Rule 8, in spite of such repeal, anything done or any action taken under O.G.L.S. Rules, 1963 was saved. Then the Orissa Government Land Settlement Rules, 1983 (hereafter 'O.G.L.S. Rules, 1983') came into force on 06.03.1984 repealing O.G.L.S. Rules, 1974 and in Rule 5 of O.G.L.S. Rules, 1983, a detailed procedure was laid down relating to manner of settlement of Government land. Since in the instant case, the lease was granted prior to the coming into force of O.G.L.S. Rules of 1974 and 1983, no fault can be found with the Tahasildar in granting lease in favour of Sri Netrananda Dehury following certain procedures. The Additional District Magistrate, Bhubaneswar appears to have overlooked the provisions of O.G.L.S. Act, 1962 and O.G.L.S. Rules, 1963 and referring to Rule 5 of O.G.L.S. Rules, 1983 held that the procedure laid down therein have not been followed. When O.G.L.S. Rules, 1983 was not there at the relevant point of time, where is the question of following any procedure laid down therein? It reflects total non-application of mind on the part of the Additional District Magistrate while cancelling the lease.

In the impugned orders, it is mentioned that the case record reveals that the eligibility aspect of the lessee for availing of Government land on lease was not examined and verified by the Tahasildar, Bhubaneswar, however it is mentioned that by virtue of a joint order recorded in W.L. Case No.565 of 1972, lease was sanctioned. The learned Addl. Govt. Advocate submitted that the record of W.L. Case No.565 of 1972 is not available. When the records of W.L. Case No.124 of 1973 produced before us do not indicate any irregularity or illegality in the grant of lease and the other W.L. Case record is not available and the learned Additional Government Advocate has not produced anything to show what was the eligibility criteria prevailing then at the time of grant of lease and how it was flouted, we are not able to accept the view taken by the Additional District Magistrate that the eligibility aspect of the lessee has not been examined.

The Additional District Magistrate further held that no enquiry was conducted by the R.I. which is contrary to the records inasmuch as the enquiry report of the R.I. is very much available in the records of W.L. Case No.124 of 1973. Similarly it is mentioned in the impugned orders that nothing is mentioned in the case record as regards the extent of land possessed by the lessee or whether the lessee was a landless person or not. Such an observation is clearly an error of record inasmuch as it is mentioned therein that the applicant was a landless person apart from the fact that he was a member of Scheduled Tribe.

It is not in dispute that the lease was granted way back in 1973 but the proceeding under 7-A(3) of the O.G.L.S. Act was initiated in the year 2015 i.e. after forty two years. The suo moto power of revision was conferred under section 7-A(3) with the Board of Revenue for the first time in the O.G.L.S. Act, 1962 by way of amendment in the form of the Orissa Government Land Settlement (Amendment and Validation) Act, 1974 which prescribed period of one year for exercise of such power in calling for and examining the records of any proceeding in which any authority subordinate to him has passed an order under the Act for the purpose of satisfying himself as to whether such order was not passed under a mistake of fact or owing to fraud or misrepresentation. The period was enhanced to fourteen years in the year 1976 by virtue of Orissa Act, 38 of 1976 and in the year 1981, by virtue of Act 18 of 1981, in place of Board of Revenue, the Collector was conferred with suo moto revision power. No such power was exercised in the case in hand by the prescribed authorities within the time stipulated. In the meantime, third party rights were accrued by virtue of several orders passed by different statutory authorities in different proceedings.

In the case of **Bata Krushna Nayak** (supra), it is held as follows:-

> "......Further, we find that the original lease was granted long back in 1974 whereas the order of the revisional authority was passed in 1998, i.e., about 24 years after the grant of lease. Under the second proviso to Section 7A (3) referred to above, no proceeding can be initiated after expiry of fourteen years from the date of order granting lease. Since in the instant case, the proceeding under Section 7-A(3) of the OGLS Act was initiated by the revisional authority after 24 years of grant of lease, i.e., beyond the statutory period of limitation prescribed, on that ground also the present writ petition succeeds."

In the case of **Ram Karan** (supra), it is held as follows:

> "36. In the present case, no action was taken either by the Vendor or by the State for more than 31 years. The sale deed was executed on 12.01.1962 and the land was mutated in the name of the Appellants' predecessor in interest on 10.09.1963. It was after about 31 years, on 06.07.1993 the suit was filed by the Tehsildar, Viratnagar being Case No. 1681 of 1993. In the said suit for the first time an application was filed for appointment of receiver. The said application was rejected by the Assistant Collector, Shahpura vide order dated 1.1.1994 holding that the vendee has been in possession and cultivating the suit land for 32 years.
>
> 37. In view of the position of law, as noticed above, it is not necessary to see whether the petition for cancellation of mutation was filed on time or not. The decision of this Court in **Nathu Ram -Vrs.- State of Rajasthan:(2004) 13 Supreme Court Cases 585** relates to Section 42 of the Act and the transaction made in contravention with the provisions of the said Act. In the said case, similar plea were taken by the parties, having noticed Sub-Section 4(A) of Section 175 and Section 214 of the Act, this Court held that as the transaction was made much beyond the period of 12 years, the proceeding was beyond the period of limitation and, therefore, barred by limitation.
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> 38. In **State of Punjab and Ors. -Vrs.- Bhatinda District Cooperative Milk Union Ltd.: (2007) 11 Supreme Court Cases 363**, this Court held that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. However, what shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors. In the present case, neither any objection was raised nor was any application filed by vendors for restoration of land in their favour. The suit was filed by the Tehsildar, Viratnagar after more than 31 years. No ground is shown to file such petition after long delay nor it was mentioned as to whether the vendors i.e. original landholders made any application for restoration of land in their favour.
>
> 39. In view of the matter, we hold that the suit being filed beyond the reasonable period was fit to be dismissed. The Additional Collector rightly dismissed the suit being barred by limitation."

In the case of **Sulochana Chandrakant Galande** (supra), the Hon'ble Supreme Court considering section 34 of the Urban Land (Ceiling and Regulation) Act, 1976 which deals with revisional power of the State Government, held as follows:-

> "28. The legislature in its wisdom did not fix a time-limit for exercising the revisional power nor inserted the words "at any time" in Section 34 of 1976 Act. It does not mean that the legislature intended to leave the orders passed under the Act open to variation for an indefinite period inasmuch as it would have the effect of rendering title of the holders/allottee(s) permanently precarious and in a state of perpetual uncertainty. In case, it is assumed that the legislature has conferred an everlasting and interminable power in point of time, the title over the declared surplus land, in the hands of the State/allottee, would forever remain virtually

insecure. The Court has to construe the statutory provision in a way which makes the provisions workable, advancing the purpose and object of enactment of the statute.

29. In view of the above, we reach the inescapable conclusion that the Revisional powers cannot be used arbitrarily at belated stage for the reason that the order passed in Revision under Section 34 of the 1976 Act, is a judicial order. What should be reasonable time, would depend upon the facts and circumstances of each case."

In the case of **Laxman Kanda** (supra), this Court considering section 12 of the Odisha Prevention of Land Encroachment Act, 1972 which deals, inter alia, suo motu revisional power of the Revenue Divisional Commissioner, held as follows:-

"5.....In view of such overwhelming authorities, we cannot but repel the submission of the learned Additional Government Advocate that because of the wording of Section 12 the power was available to be exercised by the Commissioner at any time. But the question is as to what is reasonable time within which the power should be exercised. Though there is no intrinsic evidence in the Act itself as to what would be the reasonable time for exercise of suo motu power of revision, yet without going into that question it can be held on the authorities of the decisions (supra) that such reasonableness is dependent upon facts and circumstances of each case, including analysis of relevant provisions of the statute concerned. Section 38-A of the Orissa Estates Abolition Act is a pari materia statute as regards the vesting of the estates in the State and the settlement thereof, with the intermediaries or recognising the continuance of the tenants under the State. The provision empowers the respective authorities to review any order in a suo motu proceeding within one year from the date of the decision or the order. Even though we do not propose to hold a general view that the power of suo motu revision is to be exercised by the Commissioner under the Act within a year of the date of the order, yet so far as the present case is concerned, we feel that the order of the Tahasildar on 18-1-1978 was not available to be varied after lapse of nearly five year and as a matter of fact no move for a reference should have been made by the Collector after expiry of such period. Here is a case where the petitioner, a tribal was in possession of the land since 1945 and even if it is his admission that since 1965 his sons are in possession of the land, it does not alter the position that it is either the petitioner or his sons who are in possession. Ordinarily a person who has continued in possession for such length of time is not to 'be disturbed even if he is not a tribal and that more weightage is to be as attached when the person concerned is one such. We would thus hold that the initiation of the proceeding against the petitioner was erroneous in law and hence cannot be sustained."

It is no doubt true that in the case of **Brundaban Sharma** (supra), the Hon'ble Supreme Court held as follows:-

> "16. It is, therefore, settled law that when the revisional power was conferred to effectuate a purpose, it is to be exercised in a reasonable manner which inheres the concept of its exercise within a reasonable time. Absence of limitation is an assurance to exercise the power with caution or circumspection to effectuate the purpose of the Act, or to prevent miscarriage of justice or violation of the provisions of the Act or misuse or abuse of the power by the lower authorities or fraud or suppression. Length of time depends on the factual scenario in a given case. Take a case that patta was obtained fraudulently in collusion with the officers and it comes to the notice of the authorities after a long lapse of time. Does it lie in the mouth of the party to the fraud to plead limitation to get away with the order? Does lapse of time an excuse to refrain from exercising the revisional power to unravel fraud and to set it right? The answers would be no."

However, **Brundaban Sharma** (supra) case relates to commission of fraud in acquiring the Government land by a person in collusion with the officers.

It is not in dispute that by virtue of amendment to the O.G.L.S. Act by Odisha Act No.26 of 2013 which came into force on 13.11.2013, the period of limitation of fourteen years prescribed in the Orissa Act No.38 of 1976 for exercising suo motu revisional power by the authority under section 7-A(3) has been lifted. Therefore, as the law stands now, in case of proof of fraud in the grant of lease, length of time cannot be a factor not to exercise the suo motu revision power. Similarly, if the authority is satisfied that there is mistake of fact or misrepresentation or any kind of material irregularity of procedure in the grant of lease, then also length of time would not be a bar in exercising such suo motu revisional power. A 'mistake of fact' occurs when some fact which really exists is unknown or some fact is supposed to exist which really does not exist. 'Misrepresentation' is an act of making a false or misleading statement about something with the intent to deceive or it is an assertion that does not accord with the facts. 'Material irregularity' is omission to mention a certain thing required by the statute. (Advanced Law Lexicon, 3rd Edition by P. Ramanatha Aiyar). However, in the case in hand, there is absolutely no material relating to commission of fraud in the grant of lease. Even though the impugned order indicates regarding material irregularities, legal deformity and procedural lapses, we have already discussed that such vague observation of the Additional District Magistrate is based on no material and it also suffers from non-application of mind by applying a procedural law to cancel the grant of lease which was not in force at the relevant point of time when the original lessee Netrananda Dehury was granted lease. This Court in the case of **Hadu Paltasingh** specifically took

note of the fraud committed in several cases in the grant of lease and accordingly directed Collector, Khurda to conduct a review to find out those cases where lease has been granted fraudulently and to initiate appropriate action against such person. Most peculiarly, the Additional District Magistrate without any finding of commission of fraud in the case in hand, cancelled the lease on some other grounds for which there is no clinching material in the lease case records.

The initiation of the proceeding under section 7-A(3) of the O.G.L.S. Act has also no definite basis. A bare perusal of the order indicates that though the proposal was for initiation of resumption proceeding under section 3-B of the O.G.L.S. Act but in the operative portion of the order, notice was issued requiring the lessee to explain why lease would not be cancelled for violation of the conditions. Therefore, we are of the view that the proceeding has been initiated arbitrarily and illegally. In the case of **Smt. Shantilata Dei** (supra), it is held as follows:-

> "10. It is well-settled that before exercising a power or jurisdiction vested in an authority, he is to satisfy himself about the existence of circumstance necessitating exercise of said jurisdiction and to record prima face reasons for the same. Mechanical reproduction of the language of the statute in the order or notice is no substitute for recording reasons upon application of mind to the facts of the case. No fishing or roving enquiry without arriving at the required satisfaction is permissible.
>
> 11. In the present case, the notice and also the order of initiation clearly indicate that the revisional authority merely reproduced the language of the section without any application of mind or without disclosing any definite basis for exercise of the suo motu power. In the circumstance, the initiation of the impugned proceeding is illegal, arbitrary and incompetent."

7. So far as the petitioner Pabitra Mohan Samal in W.P.(C) No.5634 of 2019 is concerned, he was a bonafide allottee, but the Additional District Magistrate, Bhubaneswar without impleading him as a party and without giving him an opportunity of hearing passed the impugned orders in the lease revision cases affecting his valuable rights over the properties. The proviso to sub-section (3) of section 7-A of the O.G.L.S. Act clearly indicates that no order in the suo motu revision shall be passed unless the person affected by the proposed order has been given a reasonable opportunity of being heard in the matter. The learned Additional Government Advocate fairly submitted that no notices were issued by the A.D.M. to the petitioner. In the case of **Bata Krushna Nayak** (supra), it is held as follows:-

> "On perusal of the impugned order, it reveals that the Additional District Magistrate, Bhubaneswar has not made any attempt to comply with the requirement of first proviso to Section 7-A(3) of the Act quoted above, by calling for information from the office of the Sub-Registrar as to whether in the meantime the leasehold property or any portion thereof has been alienated by the original lessee to any other party. Had such report been called for, the revisional authority could have ascertained at the petitioner has purchased in the interregnum a portion of the leasehold land from the original lessee and thereupon the Additional District Magistrate, Bhubaneswar should have issued notice to the petitioner, who is the real affected party, in order to comply with the first proviso to Section 7-A(3) of the Act. No such step has been taken by the Additional' District Magistrate before passing the impugned order.
>
> The legal position which has arisen in this proceeding came up for consideration by this Court in the case of Rama Chandra Pandav v. State of Orissa and Ors. (W.P.(C) No. 14364 of 2006 decided on 9.11.2006) and in the said case this Court held that since the petitioner had purchased a portion of the leasehold land from the original lessee, the order of the Additional District Magistrate was not sustainable as the same was contrary to the provisions of the Orissa Government Land Settlement Act and accordingly, quashed the same.

Therefore, we are of the view that the impugned orders have been passed without complying the statutory provisions and it is also against principle of natural justice.

8. In the case in hand, the resumption proceeding under section 3-B of the O.G.L.S. Act was initiated on 22.06.2002 in respect of the lands which were leased out in favour of Netrananda Dehury in W.L. Case No.124 of 1973 on the ground that leasehold land was used for any purpose other than that for which it was settled but after enquiry, the Additional Tahasildar, Bhubaneswar found that the lessee Netrananda Dehury had already transferred the land and Smt. Sanjukta Padhihary, Smt. Manjulata Jena, Smt. Ranu Biswal, Sri Samarendra Nayak and Sri Gangadhar Swain are the land holders in possession of the suit land who were using it for agricultural purposes and some cashew plants and other fruit bearing trees were found on the land and accordingly as per order dated 06.10.2002, the said resumption proceeding was dropped. Though appeal is provided against any order made under section 3-B of the O.G.L.S. Act, no appeal was preferred and therefore, the order passed in the resumption proceeding attended its finality. The authority initiated suo motu revisional power forty two years after the grant of lease and thirteen years after dropping of resumption proceeding and cancelled the lease without any material relating to commission of any fraud. The findings of the Additional District Magistrate that there are material

irregularities, legal deformity and procedural lapses are neither factually nor legally correct. There is an error of law apparent on the face of record in utilizing the procedure laid down in O.G.L.S. Rules, 1983 in cancelling the lease which were non-existent at the time of grant of lease in the year 1973 and even principle of natural justice has not been followed in case of the petitioner Pabitra Mohan Samal. When a statute confers any power on any statutory authority, howsoever wide the discretion may be, it cannot be used arbitrarily, mechanically but after due and proper application of mind so that it must stand the test of judicial scrutiny. Thus in view of gross error committed by the Additional District Magistrate, as per the law laid down by the Hon'ble Supreme Court in the case of **Syed Yakoob -Vrs.- K.S. Radhakrishnan reported in A.I.R. 1964 S.C. 477**, we are of the humble view that it is a fit case to exercise our certiorari jurisdiction to correct the error in the interest of justice.

9. In view of the foregoing discussions, the impugned orders passed by the Additional District Magistrate, Bhubaneswar in Lease Revision Case Nos.1 to 13 of 2015 in cancelling the lease are not sustainable in the eye of law and accordingly, the same is hereby set aside. In the result, both the writ applications are allowed, however, the parties shall bear their own costs.

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2020 (I) ILR - CUT- 279

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

W.A. NO. 604 OF 2019

MAMINA OJHA ....Appellant

.Vs.

C.D.P.O., JAGATSINGHPUR & ORS. ....Respondents

LETTERS PATENT APPEAL – Principles to be followed – Indicated.

"A writ appeal is an appeal on principle where the legality and validity of the judgment and/or order of the Single Judge is tested and it can be set aside only when there is a patent error on the face of the record or the judgment is against established or settled principle of law. If two views are possible and a view, which is reasonable and logical, has been adopted by a Single Judge, the other view, howsoever appealing may be to the Division Bench; it is the view adopted by the

Single Judge, which would, normally be allowed to prevail. If the discretion has been exercised by the Single Judge in good faith and after giving due weight to relevant matters and without being swayed away by irrelevant matters and if two views are possible on the question, then also the Division Bench in writ appeal should not interfere, even though it would have exercised its discretion in a different manner, were the case come initially before it. The exercise of discretion by the Single Judge should manifestly be wrong which would then give scope of interference to the Division Bench." *(Para 7)*

Case Laws Relied on and Referred to :-

1. (2008) 10 SCC 687 : Diptimayee Parida Vs. State of Orissa & Ors.

For Appellant : Mr. Kali Prasanna Mishra, P. Das, S. Das, A.K. Sahoo

For Respondents : Addl. Govt. Adv. (No.1 to 3)
Mr. V. Narasingh, J. Samantaray & S.G. Das (No.4)

JUDGMENT Date of Hearing & Judgment: 19.12.2019

BY THE BENCH

Heard Mr. Kali Prasanna Mishra, learned Counsel for the appellant and Mr. V. Narasingh, learned counsel for the respondent no.4.

In this writ appeal, the appellant Mamina Ojha (opposite party no.3 to the writ petition) seeks to set aside the impugned judgment and order dated 04.11.2019 passed by the learned Single Judge in W.P.(C) No.6787 of 2013 in quashing order dated 13.03.2013 passed by the Child Development Project Officer, Jagatsinghpur (respondent no.1) vide Annexure-7 to the writ petition whereby the C.D.P.O. allowed the appellant to continue as Anganwadi Worker. The learned Single Judge further directed the respondent no.1 to give fresh appointment order in favour of the respondent no.4 Rashmiprava Moharana (writ petitioner).

2. The case of the appellant Mamina Ojha is that an advertisement dated 08.09.2009 was issued by the C.D.P.O., Jagatsinghpur inviting applications from the eligible women candidates for engagement of Anganwadi Workers in various Anganwadi Centers including Odiso (Kha)(i) Anganwadi Centre under Jagatsinghpur Block. The appellant along with the respondent no.4 Rashmiprava Moharana and other candidates applied for the said post. The respondent no.4 in her application had mentioned that she is physically handicapped and has secured 50.93% of marks in matriculation, whereas the appellant had mentioned her qualification as matriculation and she has

secured 54.01% of marks. At the time of submission of application form or verification of documents, the appellant had neither mentioned nor submitted any document with regard to her higher qualification but only during the period of objection, i.e. from 12.10.2009 to 19.10.2009, she produced the documents with regard to her qualification i.e. +2 Arts pass. During the process of selection, the selection committee awarded 55.93% marks to the respondent no.4, including 5% extra marks on the basis of physical handicapped certificate, whereas the appellant was awarded 59.13% marks, including 5% extra marks given on the basis of her higher qualification and was selected for the post of Anganwadi Worker. Challenging the selection of the appellant, the respondent no.4 filed an appeal before the respondent no.2. The appellate authority, vide order dated 24.05.2012 disposed of the appeal observing therein that illegality was committed during the selection process and the appellant was illegally appointed, for which her selection was cancelled and the respondent no.2 Sub-Collector, Jagatsinghpur was directed to prepare a merit list ignoring the higher qualification of the appellant and also the physical handicapped certificate of the respondent no.4 on the ground that the respondent no.4 is physically handicapped to the extent of 15% on the basis of the report of the H.O.D., Department of Orthopedics, S.C.B. Medical College and Hospital, Cuttack. Challenging the order dated 24.05.2012 passed by the appellate authority, the respondent no.4 filed W.P.(C) No.12322 of 2012 and the appellant filed W.P.(C) No.10472 of 2012. This Court heard both the cases analogously and passed a common order on 12.02.2013 observing therein that if a candidate is physically handicapped, she is entitled to get 5% extra mark as per the revised guidelines and the selection committee has to follow the guidelines. The order passed by the appellate authority was set aside and the selection committee was directed to issue engagement order in favour of the candidate having possessed higher percentage of marks. In pursuance of the order dated 12.02.2013, the selection committee selected the appellant as Anganwadi Worker by awarding her 5% marks for her higher qualification and issued appointment order in her favour.

3. The case of the respondent no.4 Rashmiprava Moharana is that pursuant to advertisement dated 08.09.2009 issued by the Child Development Project Officer (CDPO), Jagatsinghpur, she along with the appellant and other candidates applied for the post of Anganwadi Worker in Odiso (Kha)(i) [Odiso B(i)] Anganwadi Centre under Jagatsinghpur Block. She comes under physically handicapped category and is entitled 5% extra mark, whereas the

appellant had produced the certificate for acquisition of her higher qualification only at the time of scrutiny and thus she is not entitled to get 5% extra mark, as she has not produced such certificate at the time of submission of her application. Therefore, the higher qualification acquired by the appellant and the certificate produced thereof at the time of scrutiny could not have been taken into consideration, as the last date of submission of application was over and at the time of scrutiny, the authority could not have entertained such documents. If the certificate of the appellant with regard to acquisition of her higher qualification is not taken into consideration, then the respondent no.4 is the only eligible candidate, who is to get the appointment as Anganwadi Worker. Reliance was placed on the judgment of the Hon'ble Supreme Court in the case of **Diptimayee Parida vrs. State of Orissa and others, (2008) 10 SCC 687.**

4. The learned Single Judge in the impugned judgment and order has been placed to hold that the appellant produced her certificate of acquisition of higher qualification at the time of scrutiny but not at the time of submission of application and therefore, the same should not have been taken into consideration by the authority. If the extra 5% marks is taken into consideration so far as the physical handicapped category is concerned then the respondent no.4 having secured 55.93% of marks, would be selected and given an appointment order as Anganwadi Worker instead of the appellant, inasmuch as if the extra 5% marks given to the appellant for acquisition of higher qualification gets deducted/excluded, she cannot be eligible for such appointment. Accordingly, the impugned order dated 13.03.2013 vide Annexure-7 passed by C.D.P.O., Jagatsinghpur to the said writ petition in allowing the appellant to continue as Anganwadi Worker was held to be not sustainable in the eye of law and accordingly, quashed. Since on the basis of such calculation, the respondent no.4 secured higher percentage of marks than the appellant, she was held to be entitled for appointment as Anganwadi Worker and the learned Single Judge directed the Sub-Collector, Jagatsinghpur (respondent no.2) to give fresh appointment order in favour of the respondent no.4 within a period of one month from the date of communication of the order.

5. Mr. Kali Prasanna Mishra, learned counsel appearing for the appellant contended that even though the respondent no.4 produced the disability certificate issued by the District Medical Board, Jagatsinghpur dated 16.09.2009 in which it is mentioned that she has locomotor disability to the

extent of 40% but when the genuineness of such certificate was verified at a later stage on the basis of Letter no.3079/21.05.2010 of the C.D.M.O., Jagatsinghpur by the Professor and H.O.D., Department of Orthopaedics, S.C.B. Medical College and Hospital, Cuttack, it was found that she was having an old injury in the left hip joint and post traumatic pain and stiffness of hip joint and the percentage of disability is 15%. Basing on such report of the Professor and H.O.D. dated 28.06.2010, the C.D.M.O. treated the disability certificate issued by the Board on 16.09.2009 as cancelled. It is contended that the respondent no.4 basing on such disability certificate dated 16.09.2009 was awarded 5% extra marks and if such extra mark is deducted in view of the order dated 03.07.2010 passed by the C.D.M.O., Jagatsinghpur under Annexure-1, then respondent no.4 would secure less mark than the appellant, in the event of which the appellant would be selected for the post. He placed the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereafter '1995 Act') and contended that since the learned Single Judge has committed patent error in not considering the definition of 'person with disability' and 'disability' as occurred in section 2 of the 1995 Act and passed the impugned order, the same is liable to be set aside.

6. Mr. V. Narasingh, learned counsel for the respondent no.4, on the other hand, contended that while issuing revised guidelines for the selection of Anganwadi Workers by the Commissioner -cum- Secretary to Government, Women and Child Development Department, Govt. of Odisha, it was stipulated that a preferential additional percentage of 5% would be given to physically handicapped woman and as on the date of submission of application, a certificate issued by a competent Board which is dated 16.09.2009 was produced in which it is mentioned that the locomotor disability is 40% and merely because at a subsequent stage i.e. after nine months of issuance of such certificate, the percentage of disability was reduced from 40% to 15%, it cannot be said that the respondent no.4 is not coming within the physically handicapped woman and therefore, the learned Single Judge has rightly held the respondent no.4 to have secured higher percentage of mark than the appellant basing on such 5% extra marks and therefore, entitled to be appointed as Anganwadi Worker.

7. A writ appeal is an appeal on principle where the legality and validity of the judgment and/or order of the Single Judge is tested and it can be set aside only when there is a patent error on the face of the record or the judgment is against established or settled principle of law. If two views are

possible and a view, which is reasonable and logical, has been adopted by a Single Judge, the other view, howsoever appealing may be to the Division Bench; it is the view adopted by the Single Judge, which would, normally be allowed to prevail. If the discretion has been exercised by the Single Judge in good faith and after giving due weight to relevant matters and without being swayed away by irrelevant matters and if two views are possible on the question, then also the Division Bench in writ appeal should not interfere, even though it would have exercised its discretion in a different manner, were the case come initially before it. The exercise of discretion by the Single Judge should manifestly be wrong which would then give scope of interference to the Division Bench.

Adverting to the contentions raised by the learned counsel for both the parties, it appears that advertisement was issued by the C.D.P.O., Jagatsinghpur on 08.09.2009 inviting applications from the eligible candidates for filing up of the post of Anganwadi Worker in Odiso (Kha)(i) [Odiso B(i)] of Jagatsinghpur Block and the respondent no.4 submitted her application indicating therein that she is a physically handicapped person on the basis of the certificate issued by the District Medical Board, Jagatsinghpur dated 16.09.2009 and therefore, the authority calculated the marks of respondent no.4 to be 55.93% which includes 5% of mark on the basis of such disability certificate. So far as the appellant is concerned, she was awarded 59.13% of mark including 5% of mark on the basis of higher qualification acquired by her. The learned Single Judge held that since the higher qualification certificate was produced at the time of scrutiny but not filed at the time of submission of application, therefore, the same should not have been taken into consideration by the authority. We find no illegality or infirmity with such finding.

So far as the case of the respondent no.4 is concerned, it is not in dispute that at the time of filing of the application, she had filed the disability certificate issued by the District Medical Board, Jagatsinghpur which is dated 16.09.2009 in which her locomotor disability percentage was reflected to be 40% and therefore, as per the revised guidelines issued by the Commissioner -cum- Secretary, she is entitled to get the preferential additional percentage of 5% which is available for physically handicapped woman. In 1995 Act, the definition of ‘disability’ has been mentioned in section 2(i) which includes locomotor disability and section 2(t) defines “person with disability” which means a person suffering from not less than 40% of any disability as certified

by a medical authority. It is also not dispute that the District Medical Board, Jagatsinghpur issued the disability certificate under rule 4(2) of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1995. It is also not dispute that nine months after issuance of such certificate, the Professor and H.O.D. of Department of Orthopaedics has assessed the percentage of disability to be 15% and accordingly, the C.D.M.O. held that the disability certificate issued by the Board stands cancelled but the fact remains that in the revised guidelines for selection of Anganwadi Workers, it is not mentioned that what would be the percentage of disability for a physically handicapped woman to get preferential additional percentage of 5%. Since it is simply mentioned that a physically handicapped woman is entitled to get preferential additional percentage of 5% marks and nowhere it is mentioned that the definition of 'disability' and 'person with disability' as per 1995 Act are to be adopted for verifying whether a woman is physically handicapped or not, we are of the humble view that even though the respondent no.4 is assessed to be having disability percentage of 15% by the Professor and H.O.D. of Department of Orthopedics at a later stage, she is entitled to get the preferential additional percentage of 5% as per the revised guidelines for selection of Anganwadi Workers. Once the respondent no.4 gets the preferential additional percentage of 5%, she scores more marks than the appellant and therefore, the learned Single Judge has rightly held the respondent no.4 to have secured higher percentage of marks than the appellant and also holding her entitled to be appointed as Anganwadi Worker.

After careful analysis of the impugned order, the case records, the related Act and the guidelines of the Government, we find that view taken by the learned Single Judge is reasonable and logical and there is no illegality or infirmity in the impugned judgment and order of the learned Single Judge. Accordingly, the writ appeal being devoid of merits, stands dismissed.

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2020 (I) ILR - CUT- 285

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

W.P.(C) NO. 6996 OF 2006

BAURI BANDHU MOHAPATRA & ORS. ....Petitioners

.*Vs.*

THE COLLECTOR, PURI & ORS. ....Opp. Parties

ORISSA GOVERNMENT LAND SETTLEMENT ACT, 1962 – Sections 2, 3 read with rules 4 and 5 of the OGLS RULES – Provisions under – Settlement of Govt. land in favour of land less persons – Petitioners being Govt. servants encroached upon Govt. land – Application for settlement of the said land on the ground that they being land less persons are in possession over the same for more than forty years – Rejected by all subordinate revenue authorities – Writ petition – Challenge is made to the orders passed by the revenue authorities – Held, High Court cannot correct some errors of fact by examining the evidence and re-appreciating it in writ jurisdiction.

"Undisputed facts not averred but found in the impugned orders are summed up being relevant for consideration of this case. The petitioners along with others were encroachers and encroachment cases were initiated in which they were removed on 5.3.1999. Thereafter, the suit land was handed over to the Telecom Department. All the three authorities found that the claimed land was objectionable for settlement as the same had been either reserved for construction of revenue staff quarters or has been leased out to Telecom Department. All the authorities also found that the land in question situated in central location. As reflected by the Revisional authority, seven petitioners 6 were public servants working in the Government office and their annual income was more than the prescribed limit. The names of those seven petitioners have been mentioned in the revision order. The Revisional authority also found that plotting for providing house sites in Puri, Urban area had not been done as required under Clause(a) of subsec.(1) of Section 3 of the O.G.L.S. Act. 10. Having heard learned counsel for the petitioners and having carefully perused the impugned orders, we feel it apposite to reiterate the principle governing jurisdiction invoked under Article 227 of the Constitution of India. In the decision reported in 2015 (Supp.-II) OLR 78, Debesh Das Vrs. State of Orissa & others, it has been held that the power of Superintendence of High Court is limited to see that the subordinate Courts or tribunals function within the limits of their authorities but it cannot correct some errors of fact by examining the evidence and re-appreciating it." *(Para 9)*

Case Laws Relied on and Referred to :-

1. 78 (1994) CLT 643 : Chandrakala Garbadu Vs. State of Orissa & Ors.
2. Supp.-II) OLR 78 : Debesh Das Vs. State of Orissa & Ors,
3. 59 (1985) C.L.T. 407 : Satyapriya Mohapatra Vs. Ashok Pandit & Ors.
4. 78 (1994) C.L.T. 643 : Smt. Chandrakala Garabadu Vs. State of Orissa, their

For Petitioners : M/s. Alekh Chandra Mohanty, G.N.Rout, B.Pradhan & S.Bhagat.

For Opp. Parties : Mr. B.P.Pradhan. Addl. Govt. Adv.

JUDGMENT Date of Hearing: 17.07.2019 : Date of Judgment: 25.07.2019

DR. A.K.MISHRA, J.

Prayer is made to quash Annexures- 1 to 3, i.e., order of the Tahasildar, Puri, dated 31.12.2001 in Urban Lease Case No. 21 of 2001, appeal judgment of the Sub-Collector, Puri, dated 18.09.2002 in O.G.L.S. Appeal No. 1 of 2002 and Revisional judgment dated 31.03.2006 of the Addl. District Magistrate, Puri, in O.G.L.S. Revision No. 4 of 2002. All the above three authorities under Orissa Government Land Settlement Act, 1962(hereinafter referred to as the O.G.L.S.Act) refused to settle any land recorded as "Anabadi" appertaining to Plot No. 207 under Khata No. 89 of Puri Town in favour of the petitioners.

2. With the consent of the parties, the writ petition is takenup for final disposal at the stage of admission.

3. The petitioners claim to be the landless persons. They earn their livelihood in selling "Bhoga" in "Badadanda". Petitioner No.11 Smt. Dali Pradhan D/o. Bauri Bewa is a Green card holder. Father of petitioner No.16, namely, Braja Sundar Mallick died during pendency of revision. They applied for settlement of land in their favour. It was refused. They preferred writ petition in OJC Nos. 3254 of 1999, 7728 of 2000 to 7739 of 2000, 7741 of 2002 and 7752 of 2002. All the writ petitions were disposed of vide judgment dated 13.04.2001 and it was ordered therein:-

> "xxx xxx.Therefore, I think interest of justice would be served by giving a further opportunity to the petitioners to file fresh application regarding settlement of the dispute land. If it is found that the encroachment is unobjectionable and the applicant is otherwise eligible, the question of settlement of land may be considered in accordance with law by the prescribed authority. Such application should be filed on or before 7th May, 2001 and the same should be considered and disposed of within four months in accordance with law after giving opportunity of hearing and until the matter is disposed of by the appropriate authority, the concerned applicant may not be evicted from the disputed land."

4. The petitioners then filed their applications for grant of lease and it was registered as Urban Lease Case No. 21 of 2001, The Tahasildar, Puri invited objections issuing proclamation. No objection was filed. The Tahasildar found that the site was earmarked as per the Selection Committee Meeting held during the year 1972 for the purpose of revenue staff quarters. The Collector, Puri had registered Alienation Case No. 3 of 1999 and land measuring Ac.0.296 decimals of land has been transferred in favour of the Telecom Department on deposit of Rs.12,50,000/- towards premium and

Ac.0.180 decimals of land out of Sabik Plot No. 566(P) under Sabik Khata No. 306 at Balukhand Khasmal-108 was leased out in favour of Smt. Uma Mishra for a period of 90 years w.e.f. 18.12.1984.The Tahasildar also found that the petitioners affidavit filed as per Rule-8(4) of the Orissa Government Land Settlement Rules, 1983 (hereinafter referred to as the O.G.L.S. Rules) was discrepant to their applications as required under G.O. No. 56/66 R.G.E.(GL) 29/72 dated 30.9.1972. Resultantly he rejected their claim of settlement vide order dated 31.12.2001(Annexure-1)

The petitioners preferred appeal before the Sub-Collector, Puri. The appellate authority added to the ground of Tahasildar that settlement would violate the principle of town planning and hygienic requirements of the city and the land claimed was objectionable. The appeal was dismissed on 18.9.2002 vide Annexure-2.

The petitioners preferred revision before the Additional District Magistrate, Puri, who found that the petitioners were not eligible for sanction of lease for having more than prescribed annual income and land was objectionable in nature. The revision was dismissed vide Annexure-3, dated 31.03.2006.

5. This writ petition was filed on 15.05.2006 with above averments, but on the following grounds:-

> (i) As the petitioners were landless and in possession of land in question for last 40 years, the rejection for settlement by the Tahasildar on finding discrepancy between the petitioners statement and the affidavit was an error apparent on record.
>
> (ii) Appellate authority had not applied judicial mind because the petitioners were discriminated against granting of lease in respect of part of the suit land to a private individual.
>
> (iii) The Revisional authority was confused by overlooking the provisions enumerated under Section 3 of the O.G.L.S. Act.
>
> (iv) Petitioner No.4-Laxmidhar Mohapatra and petitioner No.8- Brundabann Pradhan have filed civil suits in the court of learned Civil Judge (Jr. Division), Puri, bearing T.S. No. 164 of 2002 & 166 of 2002 and injunction in the form of status-quo has been granted in respect of the suit land.

6. No rejoinder is filed.

7. It is submitted by Mr. Mohanty, learned counsel for the petitioners that all the authorities empowered to settle the land under O.G.L.S. Act

having failed to exercise their jurisdiction in compliance with this Court's order and the sanctity of the civil court in granting status-quo order being not considered, this Court should set aside the impugned order under Annexures-1 to 3 and direct for settlement of the land in favour of the landless petitioners.

8. Mr. Pradhan, Learned Addl. Government Advocate countered the above submission stating that all the three authorities having exercised their jurisdiction in conformity with law, no more interference is warranted to set aside the impugned orders. Further it is submitted that the petitioners having encroached upon Government land, this Writ Court should be loathful to hear from them on the principle based on equity. For this contention he relied upon a decision of this Court in the case of **Chandrakala Garbadu Vs. State of Orissa and Others, reported in 78 (1994) CLT 643.**

9. Undisputed facts not averred but found in the impugned orders are summed up being relevant for consideration of this case. The petitioners along with others were encroachers and encroachment cases were initiated in which they were removed on 5.3.1999. Thereafter, the suit land was handed over to the Telecom Department. All the three authorities found that the claimed land was objectionable for settlement as the same had been either reserved for construction of revenue staff quarters or has been leased out to Telecom Department. All the authorities also found that the land in question situated in central location. As reflected by the Revisional authority, seven petitioners were public servants working in the Government office and their annual income was more than the prescribed limit. The names of those seven petitioners have been mentioned in the revision order. The Revisional authority also found that plotting for providing house sites in Puri, Urban area had not been done as required under Clause(a) of subsec.(1) of Section 3 of the O.G.L.S. Act.

10. Having heard learned counsel for the petitioners and having carefully perused the impugned orders, we feel it apposite to reiterate the principle governing jurisdiction invoked under Article 227 of the Constitution of India. In the decision reported in 2015 (Supp.-II) OLR 78, **Debesh Das Vrs. State of Orissa & others**, it has been held that the power of Superintendence of High Court is limited to see that the subordinate Courts or tribunals function within the limits of their authorities but it cannot correct some errors of fact by examining the evidence and re-appreciating it. The Division Bench has

relied upon a earlier decision of this Court in the case of **Satyapriya Mohapatra v. Ashok Pandit and others, 59 (1985) C.L.T. 407.**

11. In the decision reported in **78 (1994) C.L.T. 643, Smt**. **Chandrakala Garabadu Vs. State of Orissa, their** Lordships have reiterated the following words in para-7, which is quoted hereinbelow:-

> "7. xxx xxx. It is specific case of the petitioner that she has encroached upon Government land in the municipal area of Bhubaneswar for which eviction case has been initiated and she now wants 8 decimals of Government land in the encroached area so that the 7 illegal act committed by her can be legalized. It said that no one shall profit from his own wrong. As the petitioner is admittedly a law-breaker a writ court should be loathful to hear from her on the principle based on equity."

12. In case at hand, some of the petitioners were encroachers and in the encroachment cases they were removed. Seven petitioners were Government servants. All the three authorities have found that the land was objectionable in nature.

In order to make any settlement under Orissa Government Land Settlement Act, 1962, the Government shall not be deemed to be debarred from exercising amongst others "to reserve such proportion of the lands as they deem proper for the purpose of being used as house sites or for any communal or industrial purpose or any other purpose whatsoever" under Sec. 3(1)(a) of the O.G.L.S. Act. A person is defined under Sec.2(b-2) for the purpose of eligibility whose total income of all the members of his family living with him in common mess, does not exceed rupees three thousand and six hundred. Rule-5 of the O.G.L.S. Rules, 1983 provides the manner of settlement of Government land. Form of application has been prescribed. Sub-rule 3 of Rule-5 provides that Tahasildar on receipt of the application shall cause verification to ascertain if the land applied for is free from encroachment of encumbrance or not, and whether the lease can be granted. The Tahasildar can reject the application if in his opinion the settlement land cannot be granted because of non-availability of land in question or non-eligibility of the person applying for the land or the like. Under Rule-3 plotting of urban lands reserved for house-sites is required to be done in consultation and subject to approval of the Revenue Divisional Commission. Those plots in urban area are to be divided in to five categories. Rule-3(3)(ii) of the O.G.L.S. Rules, 1983 stipulates one such category for middle class people and those plots are to be settled by the Collector under Rule-8 Sub-rule (4) of the O.G.L.S. Rules,1983. The settlement is to be done in the order

prescribed in priority basis and application is to be accompanied by an affidavit.

13. In the light of above provisions of the O.G.L.S. Act and Rules, if the impugned orders of the Tahasildar, appellate authority and revisional authority are given a glance, it is found that factual finding that land was not available for settlement has been clearly stated. Such factual finding cannot be interfered with in the writ. No contravention of procedural requirement is shown. The supervisory authority of this Court cannot be invoked to find errors in the finding as to whether lease can be granted in respect of the land applied for. The petitioners were removed from their encroachment and seven of them are Government servants. As observed in Chandrakala Garabadu decision (supra), law breakers are not entitled to equitable relief.

14. For the reasons stated above, no interference is called for in this writ petition in respect of Annexures-1, 2 and 3 and the writ petition deserves to be dismissed.

15. Accordingly, the W.P. (C) is dismissed.

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2020 (I) ILR - CUT- 291

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

CRLA NO. 569 OF 2010

RAMA SINGH & ANR. ……....Appellants

.Vs.

STATE OF ORISSA ……..…Respondent

CRIMINAL TRIAL – Appreciation of evidence – Accused persons faced trial for the charge U/s. 376(2)(g) IPC, 302/34 IPC and 201/34 IPC – Convicted on the basis of circumstantial evidence and extra judicial confession – The Doctor evidence clearly proves that the death of deceased was homicidal in nature – Chain of circumstances like last seen theory, extra judicial confession, discovery of stone piece with blood stain and deceased found dead while in the company of accused persons established – Appeal – Conviction under section 302 confirmed – However, the conviction under section 376(2)(g) was set aside as the doctor has not disclosed anything about commission of sexual assault on the victim. (Para 12)

"The Doctor (P.W. 22) has not disclosed anything about commission of sexual assault on the victim. His report (Exhibit-24) is silent. Learned Trial Court has stated in his judgment Para 21 that Medical Officer negligently did not examine the private part of the victim to ascertain about the sexual assault and in his opinion the fact of sexual assault on the deceased had been proved by the extra judicial confession made by the accused Kaira Jarka. In a criminal trial the court cannot substitute his conjecture upon the Medical evidence legally brought on record. Appreciation of medical evidence cannot be done by adding something by conjecture or guess work which is not be done during examination by Doctor. Chemical examination report found no semen on the wearing apparels of the deceased and also on the vaginal swab. Though injury on the body is not always must to prove the charge of rape, in the circumstance projected alleging gang rape by three accused persons, the silence of medical opinion in the postmortem report cannot be lost sight of.

Case Laws Relied on and Referred to :-

1. 2014(1) OLR (F.B) 672 : Gurua Naik .Vs. State of Orissa
2. 1984 4 SCC 116 : Sharad Birvdhichand Sarda .Vs. State of Maharashatra.
3. AIR 2000 SC 1608 : Joseph S/O. Kooveli Poulo .Vs. State of Kerla

For Appellants : M/s. Sk. Zafarulla, P.S.Nayak.
For Respondent : Addl. Govt. Adv.

JUDGMENT Date of Hearing : 21.08.2019 : Date of Judgment :17.10.2019

DR. A. K. MISHRA, J.

Both the appellants have assailed their conviction and sentence in the judgment dated 13.9.2010 passed by Adhoc Addl. Sessions Judge (F.T.C.-II), Balasore in Sessions Trial No.107/50 of 2009/07. The learned Sessions Judge, has convicted them U/s.376(2)(g) of the I.P.C. and passed sentence R.I. for 10 (Ten) years and also U/s.302/34 of the I.P.C. sentencing life imprisonment and U/s.201/34 of the I.P.C. sentencing R.I. for 5(Five) years.

Both the appellants were convicted and sentenced with another accused-Kaira Jarka who has not preferred appeal.

2. The prosecution case in narrow compass may be stated thus:-

Accused persons and deceased belong to Village-Pindabasa. On 7.6.2006 deceased with Smt. Minjari Mahakuda (P.W.4) and girl child-Kumari Minjhar Singh (P.W.5) had been to Padampur Weekly Market from their Village-Pindabasa of Oupada P.S. While returning from the market evening approached near Village-Badacua. All of them went to the house of

Dhaneswar Manik (P.W.19) for a night halt. After sometime all the accused persons, namely, Kaira Jarka, Jujhar Hoo and Rama Singh came to the house of Dhaneswar and consumed 'Handia' (Formented Rice). The three accused persons when stared to return their village, deceased also accompanied them. On their way near Manichua forest all the accused persons committed rape and to silence the disclosure they committed her murder dashing stone on her head. They concealed the stone inside the bush leaving the dead body there. The matter came into fore when on the next day morning accused Kaira Jarka (non-appellant) confessed his guilty before (P.W.1) Grama Rakhi while he was returning with his father (P.W.2) and Gautam Sahu (P.W.3). Babaji Biwwal (P.W.1) brought the accused Kaira Jarka to Oupada Police Station and orally reported the matter. The OIC (P.W.20) reduced the oral report into writing and registered Oupada P.S. Case No.28 of 2006.

3. Investigation ensued. The Investigating Officer made inquest over the dead body. At his instance the scientific team collected blood stained earth and stone from the spot. All the accused persons were arrested. Accused Jujhar Hoo gave confessional statement and led to discovery of a blood stained stone concealed in a bush near the spot. The accused persons were medically examined and their semen and blood sample were collected. The vaginal swab of deceased was collected by Doctor (P.W.22). All those articles were sent for chemical examination to S.F.S.L., Rasulgarh. The Chemical Examination report was also obtained vide Exhibit-23. Postmortem was conducted, the death was found to be due to the injuries to the brain. The Doctor also gave his opinion on the blood stained stone that injury might have been caused by such stones vide Exhibit-24. After completion of investigation charge-sheet was submitted.

3.a Accused persons faced trial for the charge U/s. 376(2)(g) IPC, 302/34 IPC and 201/34 IPC. The plea of defence was denial of simplicitor.

3.b Prosecution examined 22 witnesses, defence examined none. Exhibits-1 to 24 were exhibited. Photographs, seized stones and wearing apparels of the deceased and accused persons were marked as M.O-I to M.O-XXI. P.W.8 is the mother of deceased who stated that deceased was sixteen years of age and had identified the dead body at the spot. P.W.1 is the informant. His father is P.W.2. P.W.3 and 9 are witnesses to the extra judicial confession of accused Kaira. P.W.19 is the person from whose house deceased accompanied accused persons lastly. Along with P.W.4 and 5 they are witness to the last seen. P.W.10 stated that while returning he first saw the

dead body at Manichua after hearing from Balia Padhan. P.W.6 is the witness to the inquest. P.Ws.7,11,14,16,17 and 18 are witness to the seizure. P.W.12 is a witness to the leading to discovery of blood stained stone by accused Jujhara Hoo. P.W.14 is the Photographer who proved photographs M.O-I to Mo.V. P.W.13 is the Medical Officer who examined all the three accused persons and collected sample of semen vide Exhibits.6, 7 and 8. He found injury on the glance penis of accused Jujhar Hoo. P.W.21 is the Scientific Officer who examined the seized stones and found in one which was detected being led by accused Jujhar Hoo to have contained blood stain. P.W.22 is the Doctor who conducted Postmortem. P.W.20 is the Investigating Officer.

3.c Learned Sessions Judge, relying upon the Doctor evidence (P.W.22) and Postmortem Report(Exhibit-24) found that the death of the deceased was homicidal in nature. He believed four circumstances, i.e., (a) last seen of deceased in the company of accused persons, (b) extra judicial confession of Kaira Jarka, (c) leading to discovery of blood stained stone as weapon of offence at the disclosure of accused Jujhar Hoo and (d) false denial plea of accused persons, and found that accused persons were authors of the murder and guilty of causing disappearance of evidence. The act of all the accused persons were found to have been committed in furtherance of common intention. He also found that Medical Officer negligently did not examine the private part of the victim to ascertain about the sexual assault. But believing upon the extra judicial confession, he found the accused persons guilty of gang rape. Accordingly, he convicted accused persons and passed sentence as stated above.

4. Learned counsel for the appellants, Mr. Jafarulla would submit that:-

(i) The extra judicial confession made by accused-Kaira before P.W.1 is not admissible because, P.W.1 is a Grama Rakhi and thereby a Police Officer U/s. 25 of the Evidence Act.

(ii) Deceased and accused persons were in the state of intoxication in the house of P.W.19 and for that the last seen theory should not be believed.

(iii) The signature of appellant no.2-Jujhar Hoo is not taken in the confessional statement for which it is inadmissible U/s.27 of the Evidence Act.

(iv) As the blood stain found in the seized stone is not matched with the blood group of the accused or deceased, the connecting link between the accused persons and the death of the deceased is missing.

(v) Doctor (P.W.22) and his report (Exhibit-24) having not disclosed anything about sexual assault, the learned Sessions Judge has recorded a perverse finding that Medical Officer negligently did not examine the private part of the victim and such conjecture is not permissible in a criminal trial. As the connecting links of all the circumstances are not established conclusively, he urged, the conviction and sentence should be set aside.

5. Learned Addl. Government Advocate repelled the above submission on the ground stated in the judgment. Further it is stated that Grama Rakhi (P.W.1) is not a Police Officer as per decision reported by the full Bench of our Court reported in 2014(1) OLR (F.B) 672 ***Gurua Naik v. State of Orissa***, and for that extra judicial confession made before P.W.1 is admissible. Secondly, the evidence of the owner of the house (P.W.19), P.W.4 and P.W.5 are so cogent that last seen theory is established beyond reasonable doubt. Exhibit-4 the discovery statement of accused, Jujhar Hoo having contained the L.T.I, it is admissible U/s.27 of the Evidence Act. Lastly, the evidence of Doctor having not ruled out the sexual assault on the deceased, the confession of accused persons is sufficient to hold them guilty for gang rape which was acted upon in furtherance of their common intention.

6. This is a case based upon circumstantial evidence as to the actual occurrence leading to the death of deceased. Seminal features are required to be depicted to delve deep into the circumstances projected on record.

6.a The mother of the deceased (P.W.8) has stated that deceased was 16 years old by the time and she had gone to Padmapur market along with Minjari Mahakuda (P.W.4) and had not returned. She has also stated that Grama Rakhi, Babaji Biswal had informed her that accused persons had murdered her daughter and she on next day morning went to the spot with her husband and identified the dead body lying naked.

6.b Grama Rakhi (P.W.1) had orally reported the matter to the police at Police Station which was reduced into writing and he proved FIR (Exhibit-1). He had taken accused, Kaira Jarka with him to police. As per decision reported in 2014(1) OLR (F.B) 672 ***Gurua Naik v. State of Orissa*** the confession made by an accused before a Grama Rakhi is admissible as he is not a police officer within the meaning of that expression in section 25 of the Evidence Act.

6.c The postmortem report is (Exhibit-24). It is proved by Doctor (P.W.22). She has stated that the cause of death was due to injuries to the

brain and the murder might have been caused by three stones produced before her. She found laceration of whole left ear and laceration of the skin of left temporal bone. She also found fracture of left temporal bone with irregular margin and brain matters were drained out through the fracture. On internal dissection of the dead body, she found the brain membrane macerated and cranial cavity was empty. All the chambers of the heart were found empty and other vital organs were found pale. The Doctor evidence clearly proves that the death of deceased was homicidal in nature.

6.d The circumstances advanced to prove the guilty of the accused persons are:-

(i) Deceased was lastly seen in the company of all the accused persons when they left the house of P.W.19,

(ii) Accused Kira Jarka made extra judicial confession before P.Ws.1,2 and 3 having committed rape and murder of deceased,

(iii) Accused Jujhar Hoo led to the discovery of a stone piece having contained blood stain,

(iv) The fact that the stone was concealed under a bush near the spot is admissible U/s.27 of the Evidence Act.

(v) The deceased had not returned to their house as stated by P.W.8 and found dead while in the company of accused persons, for which instead of giving explanation, few persons have taken plea of denial U/s.313 Cr.P.C.

7. Legality and reliability of the evidence are the step forward to find the contour of the circumstances.

7.a P.W.19 stated that on the date of incident at 7 P.M. when he returned from the weekly market found the deceased, one old lady, namely, Minjari and one girl of 10 years having taken shelter in his house. As it was night they could not proceed to their village Pindabasa. At about 9 P.M to 10 P.M all the three accused persons came and took Handia and when they started to proceed to their village, the deceased told him to go with them. He advised her not to go with them. The deceased insisted and left believing them as co-villagers. On next day morning he came to know that dead body of deceased was lying at Monichua forest. In cross-examination nothing material has been elicitated to disbelieve him. But he has stated that deceased had also

consumed Handia with accused persons. P.Ws.4 and 5 both of them had gone to weekly market with deceased and have categorically corroborated the testimony of P.W.19. P.W.4 is the Grand Mother of P.W.5. On the aspect of human traits, their relationship leave no scope to suspect their evidence. Rather it persuaded us to believe P.Ws.4, 5 and 19. Their evidence is cogent and clear. This direct and positive evidence proves beyond doubt that deceased was lastly seen in the company of accused persons on the occurrence night when they left after consuming Handia from the house of P.W.19.

7.b On next day early morning accused Kaira Jarka, as per P.W.19, had come to his house and talked with Minjari from where P.W.19 came to know that deceased was lying inside Manichua forest and he immediately proceeded and found the dead body. The conduct of accused Kaira that he had visited the house of P.W.19 on the next day morning is admissible as one of the incriminating circumstances.

7.c P.W.1 stated that while he was coming with his father (P.W.2) and brother Purna Biswal, accused Kaira Jarka came and touched his feet. On being asked he disclosed that he along with two accused persons had murdered the deceased after committing rape at Manichua Chatara. He further confessed that when deceased had told them that she would disclose the matter before others they out of fear committed her murder by means of a stone, P.W.1 also testified that thereafter he took accused Kaira to Oupada P.S. and orally reported the matter which was reduced into writing vide Exhibit-1. FIR (Exhibit-1) corroborates the same. It was lodged on the next day at 8 P.M. P.W.2 and 3 have corroborated the evidence of P.W.1. P.W.3 categorically stated that it was at about 5 P.M. accused Kaira disclosed that he along other two accused persons committed rape and murder of the deceased and P.W.1 took Kaira to Oupada P.S. and he was present when such discloser was made. In cross-examination he has categorically stated that he heard the confession made by accused Kaira before P.W.1 where P.W.2 was present. Nothing material is elicidated in the cross-examination to disbelieve P.Ws. 1, 2 and 3 as stated earlier. In view of ***Gurua Naik judgment*** (supra), the extra judicial confession of accused Kaira that he along two others had murdered the deceased on the previous night when after committing rape, she threatened to disclose, is admissible. The contention of learned counsel for appellant in this regard to discard the same on the ground that P.W.1 was the Grama Rakhi is not acceptable under law.

7.d The fourth circumstance is leading to discovery by accused-Jujhar Hoo. P.W.20, Investigating Officer has stated that he arrested the accused at 2 P.M. and while in custody accused-Jujhar Hoo gave confessional statement which he had recorded vide-Exhibit-4(1). We perused the disclosure statement Exhibit.4/1, keeping the law in view that so much of such information whether it amounts to confession or not, as relates distinctly to the fact thereby discovered may be proved. The statement was challenged on the ground that accused has not given any endorsement but we have already stated that it contain the LTI of the accused and signature of independent witnesses. The admissible part of that statement as per law is that he had concealed the stone under the bush and would show that. Thereafter, P.W.20 stated, that accused led them and showed a stone stained with blood and he seized the same preparing seizure list Exhibit-5 and the seized stone is identified as M.O.-VI. P.W.20 is the Investigating Officer. There is no animosity with accused persons. P.W.12, is the uncle of accused, Jujhar Hoo. Admitting his signature in Exhibit-4, has categorically stated that accused Jujhar Hoo gave recovery of a stone which was kept under bush and proved his signature in the seizure list (Exhibit.5). This part of such evidence that accused Jujhar Hoo gave a statement which is confirmed by recovery of stone piece stained with blood and the fact that it was concealed under a bush is admissible incriminating the accused Jujhar Hoo and it is proved to the hilt.

8. Scientific Officer (P.W.21) examined the stone and collected saline extraction of blood stain from that stone and instructed to send the same for SFSL, Rasulgarh for further confirmation. He proved his report (Exhibit.22). The chemical examination report (Exhibit-23) reveals that the blood stain collected from that stone was found to be human blood.

9. All the above four circumstances are conclusive in nature and they exclude every other hypothesis except the one that accused persons were the authors of committing homicidal death of the deceased. The chain of evidence proving the above circumstances is complete so as to not leave any reasonable ground for a conclusion of innocence of the accused persons. The law in this regard has been elucidated in the decision reported in 1984 4 SCC 116 ***Sharad Birvdhichand Sarda v. State of Maharashatra.***

10. For the circumstance relating to the last seen evidence proved beyond reasonable doubt, the accused persons have given no explanation in their statement recorded U/s.313 Cr.P.C. No evidence is adduced by the defence. The false plea would provide an additional link in the chain of circumstances. The evidence should be given a rational, realistic and genuine approach.

11. All the above circumstances unmistakably and inevitably lead to the guilty of the accused persons that they have caused murder of deceased and had caused disappearance of evidence for screening themselves. All of them are participants at spot. Their common intention is also proved. Resultantly, the offence U/s.302 and 201 read with 34 IPC against all the accused persons are proved beyond reasonable doubt.

12. With regard to offence of gang rape, on careful consideration of evidence on record we entertain a reasonable doubt. The Doctor (P.W. 22) has not disclosed anything about commission of sexual assault on the victim. His report (Exhibit-24) is silent. Learned Trial Court has stated in his judgment Para 21 that Medical Officer negligently did not examine the private part of the victim to ascertain about the sexual assault and in his opinion the fact of sexual assault on the deceased had been proved by the extra judicial confession made by the accused Kaira Jarka. In a criminal trial the court cannot substitute his conjecture upon the Medical evidence legally brought on record. Appreciation of medical evidence cannot be done by adding something by conjecture or guess work which is not be done during examination by Doctor. Chemical examination report found no semen on the wearing apparels of the deceased and also on the vaginal swab. Though injury on the body is not always must to prove the charge of rape, in the circumstance projected alleging gang rape by three accused persons, the silence of medical opinion in the postmortem report cannot be lost sight of.

12.a On this score, we are unable to accept the appreciation made by the learned Trial Court because suspicion in this regard however grave may be cannot take the place of proof. Our view is supported by the decision reported in AIR 2000 ***SC 1608 Joseph S/O. Kooveli Poulo v. State of Kerla***, wherein it is stated that "anything possibly might have happened and the facts found proved do not inevitably lead to the only conviction of the guilty of the appellant in respect of an offence U/s.376 IPC."

12.b Because of this, we feel it reasonable to gave benefit of doubt to the accused persons and for that, conviction of accused persons U/s.376 (2)(g) IPC is to be set aside along with sentence passed thereon.

13. On the conspectus of above analysis, we affirm the conviction of appellants-accused persons U/s.302/34 IPC and U/s.201/34 IPC and sentence passed thereon. The conviction of accused persons U/s. 376(2)(g) of IPC and sentence passed thereon are set aside.

14. The appeal is allowed in part.

15. L.C.R. be returned to the lower Court.

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2020 (I) ILR - CUT- 300

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

CRIMINAL APPEAL NO. 232 OF 1997

BHAGABAN GOUDA ……….Appellant

.Vs.

STATE OF ODISHA ……….Respondent

CRIMINAL TRIAL – Appreciation of evidence – Offence under sections 302 of IPC – Conviction on the basis of circumstantial evidence and extra judicial confession – Chain of circumstances not complete – Relationship between the deceased and the accused persons were not good as a civil suit was pending for the property – Enmity is a double edged weapon, it can be the motive for commission of crime and can be the basis for false implication – Conviction set aside.

"It is difficult to bring harmony in truth from the complexity of incompatibility found in the evidence regarding time, place and arrival of police and proximity of time between the extra judicial confession and statement of accused in the custody leading to discovery of M.O.I. Recovery of M.O.I does not appear natural in the chain of events. On anatomical survey of evidence on record, the prosecution is found to have failed to prove the circumstances from which the conclusion of guilt of accused could be drawn. The chain is incomplete for which the accused is to be given benefit of doubt. The judgment assailed is not sustainable in the eye of law."

(Paras 11-13)

Case Laws Relied on and Referred to :-

1. AIR 1984 SC 1622 : Sharad Birdhichand Sarda .Vs. State of Maharashtra.
2. 1981) 1 SCC 511 : Rama Nand & Ors Vs. State of Himanchal Pradesh.
3. 2019 (9) SCALE 514 : Sanjay Rajak Vs. The State of Biha.
4. 2002 (8) SCC 45 : Bodh Raj @ Bodha & Ors. Vs. State of Jammu & Kashmir.
5/ AIR 1963 SC 1094 : Pyare Lal Bhargava Vs. The State of Rajasthan.

For Appellant : Mr. Debasis Sarangi

For Respondent : Mrs. S. Pattnaik, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 18.09.2019 : Date of Judgment : 05.11.2019

DR. A.K.MISHRA, J.

The sole appellant has assailed his conviction U/s.302 of the Indian Penal Code (in short 'the I.P.C.') and sentence of imprisonment for life, passed by the learned Additional Sessions Judge, Berhampur on 22.8.1997 in Sessions Case No.3 of 1997.

2. A synoptical view of the prosecution case reveals that deceased Padma Gouda is the mother of informant Urmila Gouda. After death of her husband, while Urmila was one and half years old, deceased married Panu Gouda of village Barakolia. Informant was given marriage in village Solandi 14 years prior to the incident, i.e. in the year 1982. Accused Bhagaban Gouda is the son of Naba Gouda. Panu and Naba are agnatic brothers. Panu and deceased Padma had no son. They adopted Bhagaban. Panu had landed properties having yield of 20 varans paddy. Panu had executed a Will in favour of Bhagaban, having condition that Bhagaban would look after them. As Bhagaban defaulted to honour the said condition, the Will was cancelled by Panu. Panu expired in the year 1991, i.e. 5 years preceding the incident. Thereafter the deceased and accused persons locked horns over a proceeding U/s.145 Cr.P.C. in the Court at Bhanjanagar. It was terminated in favour of deceased. Later a civil suit was filed in the court at Bhanjanagar and by the time of the incident in the year 1996, the proceeding was pending.

Deceased Padma Gouda used to stay in her daughter's house at Solandi. She often gave visit to her husband's village at Barakolia. Two or three months prior to her death she had returned to village Barakolia. She was maintaining a wandering life.

On 7.5.1996, P.W.13, the Grama Rakhi of village Barakolia informed at Jagannathprasad Out Post that a dead body was lying at Kumuti Banjar beyond Hadisahi. The S.I. of Police (P.W.14) of Jagannathprasad Out Post registered U.D. Case No.4 of 1996 and conducted enquiry. He visited the spot. There he found some human hair stained with blood, 8 nos. of teeth, one blood stained saree and one Karata (small container). He seized the same under seizure list (Ext.1) in presence of witnesses including P.Ws.1 and 2. He made inquest over all the human body parts vide inquest report Ext.7) and sent to F.M.T., Berhampur under challan (Ext.5).

On 11.5.1996 informant Urmila (P.W.3) lodged an F.I.R. (Ext.8) at Jagannathprasad Out Post at 3 P.M., scribed by one P. Narasingh Rao. It was reported therein that Chandramani Gouda (P.W.2) and Ladu Jena had come to her village in the morning and informed that accused Bhagaban had murdered her mother on 30.4.1996 at 9 A.M. near Landei Pahada Kumuti Banjar. Hearing this, she accompanied by her blind elder mother (P.W.9), proceeded to village Barakolia. She ascertained from Judhistir Gouda (P.W.5), Jaya Gouda, Dhoba Gouda and Udayanath Gouda (P.W.8) that prior to two days of her mother's death, Bhagaban had proposed to settle up all the

disputes and on 30.4.1996 (Tuesday), Bhagaban asked her mother to proceed forest to bring some wooden beams to thatch the roof and they proceeded along with Nila Gouda, the younger brother of Bhagaban towards the forest. Bhagaban was then armed with a 'Katuri'. Ramahari Sethi (P.W.6) had seen it. She also ascertained that accused, on the pretext of the same had murdered her mother. She has also mentioned in the F.I.R. that she went to the Out Post and identified her mother's blood stained saree and hair and the Karata on being shown by police. The report was registered at Buguda Police Station by O.I.C. as P.S. Case No.58 dtd.11.5.1996 on that day at 7 P.M. and P.W.14 continued investigation.

In course of investigation, the investigating officer examined the witnesses and recorded their statement U/s.161 Cr.P.C. P.Ws.1, 4, 5 and 8 have stated about extra judicial confession of accused Bhagaban Gouda. P.W.6 Ramahari Sethi stated to have seen deceased with accused and his brother. Accused Bhagaban gave recovery of weapon of offence Kati (M.O.I). The I.O sent the Kati to the doctor (P.w.15) who examined the same on 6.6.1996. He gave his report Ext.12 and Ext.9 that the bones and hairs found, were of one lady and for the fracture found on the scalp, the death was homicidal and was possible by blunt side impact of Kati (M.O.I). On the basis of police report, learned S.D.J.M. took cognizance and committed the case to the court of Session. One of the accused namely, Nila Gouda faced enquiry before Juvenile Justice Board. Two accused persons namely, Bhagaban Gouda, the present appellant and his father Naba Gound faced trial for the offence U/s.302 and 201 read with Sec.34 of the I.P.C.

3. The plea of defence was denial simplicitor and false implication.

4. Prosecution examined 15 witnesses in all. Defence examined none. Seizure list, inquest report, chemical examination report, spot map, etc. were marked as Ext.1 to Ext.11. On behalf of defence the Willnama and the rent receipts were marked as Ext.A and Ext.B series. The seized articles including blood stained Kati were marked as M.O.I. to M.O.VII. The informant is P.W.3. The doctor who gave report on the bodily parts and also on the weapon of offence is P.W.15. The I.O., both in U.D. Case and in this case, is examined as P.W.14. P.W.12 is a witness to seizure but declared hostile. P.W.13 is the Grama Rakhi who informed the matter resulting registration of U.D. Case No.4 of 1996 before whom the seizure was made at the spot. P.W.10 and 11 are Constable and Grama Rakhi. Both of them, on being directed, took the body parts for test to the doctor P.W.15 vide Ext.4, 5 and 6.

P.W.9 is the elder sister of the deceased. She is blind but has identified the seized Karata (M.O.II) seized from the spot being shown by police. P.W.2 is the elder brother of accused Naba. P.W.7 is the brother of P.W.2. P.Ws.1, 2, 4, 7 and 8 are witnesses to extra judicial confession and leading to discovery of M.O.I. P.W.6 is a witness to the last seen theory.

5. Learned Addl. Sessions Judge, on analyzing the evidence on record, found that previous property dispute was the strong motive behind the murder of deceased Padma. He believed the extra judicial confession, though retracted, of accused Bhagaban and recovery of Kati (M.O.I). He also believed that deceased was lastly found in the company of the appellant. He did not believe the monologue confession of accused Naba. Learned Addl. Sessions Judge found that the bodily parts found were of deceased Padma and the death was homicidal in nature. As a necessary corollary, he acquitted accused Naba of all the charges. He also acquitted the accused - appellant Bhagaban of the charge U/s.201 of I.P.C. but held him guilty of the offence U/s.302 of I.P.C. and sentenced him to undergo imprisonment for life.

6. Learned counsel for the appellant Mr. Debasis Sarangi buttressed the following submissions:-

(i) That the bodily parts found from the spot on 7.5.1996 and the report of P.W.15, the doctor that homicidal death may be possible is not a proof of the fact that deceased Padma was done to death by infliction of injury on 30.4.1996;

(ii) that the lodging of F.I.R. by P.w.3 by putting L.T.I. describing the facts found during enquiry in the U.D. case is indicative of the fact that accused persons are framed for previous litigating terms and for that the scribe of the F.I.R. (Ext.8) is neither cited as a witness in the charge sheet nor examined as a witness;

(iii) that P.W.6 Ramahari Sethi having disclosed after 10 to 12 days of occurrence that he had seen deceased in the company of the accused persons, he cannot be believed to be reliable enough for last seen together theory;

(iv) that P.W.8 having disclosed the presence of police at the time of extra judicial confession, the same cannot be a circumstance to complete the chain;

(v) that the seizure of Kati (M.O.) on 11.5.1996 from the spot from where on 7.5.1996 the Karata and the remnants of dead body was found cannot be believed because two persons were alleged to have gone to spot with deceased; and

(vi) that the circumstances advanced, being not clinching, the prosecution cannot be said to have proved the charge beyond reasonable doubt and for that accused is to be given benefit of doubt.

7. Learned Addl. Government Advocate Smt. S. Pattnaik supported the conviction and sentence on the grounds stated in the judgment and further submitted that corpus delicti is not required to be proved when death is homicidal in nature and learned Lower Court has described the same in the sentence hearing part of the judgment.

8. We carefully perused the evidence on record keeping in view the contentious issues raised before us. This is a case based upon circumstantial evidence. The projected circumstances are;

(i) Motive;
(ii) Extra Judicial Confession;
(iii) Discovery of facts on the recovery of weapon of offence; and
(iv) Last seen together theory.

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

1. The circumstances from which the conclusion of guild is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;

2. the facts so established should be consistent only with the hypothesis of the guild of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

3. the circumstances should be of a conclusive nature and tendency;

4. they should exclude every possible hypothesis except the one to be proved; and

5. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

The prosecution is obliged to prove that the death of deceased Padma was homicidal in nature. This aspect assumes importance because the full dead body was not found.

The I.O. (P.W.14) has testified that on 7.5.1996, on getting information from the Grama Rakhi (P.W.13), he registered U.D. Case No.4 of 1996 and proceeded to the spot near Londei hill, Rama Naik Banjar and seized some hairs of human being, 8 nos. of teeth, blood stained saree and a Karata under seizure list (Ext.1) and made inquest vide Ext.7. The inquest report reveals that a skull was found with 3 pieces of ribs. The evidence of P.W.15, the Doctor and his report Ext.12 and Ext.9 reveal that those body parts were of human origin, female sex and of a deceased about 40 to 50 years old and death might be due to head injury with fracture of the skull bone and such injury could be possible by the blunt side of the Kati which was examined by him. From the spot where the body parts were found, one Karata (M.O.II) and blood stained saree (M.O.V) were seized. P.W.3 the informant had identified the Saree to be of her mother while P.w.9 the elder sister, though blind, had identified the Karata by touch.

In our considered opinion, a specific identifying feature can be the peculiar identifying character of a person sans vision. Identification of an article by touch is not illegal. The detection of saree and Karata was made on 7.5.1996 and identification was made on 11.5.1996. The materials on record do not show that the deceased was alive thereafter. In the decision reported in **(1981) 1 SCC 511, Rama Nand and others Vrs. State of Himanchal Pradesh** referred to in the decision reported in **2019 (9) SCALE 514, Sanjay Rajak Vrs. The State of Bihar** the Hon'ble Apex Court has observed as follows:-

"*28...... But where the fact of corpus delicti i.e. "homicidal death" is sought to be established by circumstantial evidence alone, the circumstances must be of clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Even so, this principle of caution cannot be pushed too far as requiring absolute proof. Perfect proof is seldom to be had in this imperfect world, and absolute certainty is a myth. That is why under Section 3 of the Evidence Act, a fact is said to be "proved", if the court consider ing the matters*

> *before it, considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The corpus delicti or the fact of homicidal death, therefore, can be proved by telling and inculpating circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned….*"

9-A. In the case at hand, for the identification made by daughter and elder sister to the belongings of deceased and the death of deceased being not ruled out, we are of the considered view that the finding of the learned trial court that the death of deceased Padma was homicidal in nature is correct. Hence the same is affirmed.

10. The evidence of P.W.2 and 3 proves the relationship of deceased Padma Gouda with informant and the accused persons. It is not disputed that a civil suit was pending in the court at Bhanjanagar for the property of Panu, husband of deceased Padma between both parties. Enmity is a double edged weapon, it can be the motive for commission of crime and can be the basis for false implication.

11. Deceased was staying alone. The informant has stated that she was not looking after her mother. The fact that the missing of deceased Padma was not noticed by anybody even after Grama Rakhi lodged report about availability of body parts on 7.5.1996 at Out Post till filing of F.I.R. on 11.5.1996, is a pointer that deceased was a wanderer. Availability of an unidentified dead body was reported by the Grama Rakhi (P.W.13) who had not disclosed from whom he came to know, but fact remains proved that U.D. Case No.4 of 1996 was registered on 7.5.1996 and at the spot bones and body parts were detected along with Karata and blood stained saree. F.I.R. was lodged by the daughter – informant on 11.5.1996 on which date P.W.2 and one Ladu Jena went to her village and informed about the incident implicating present appellant.

In the above back backdrop, the last seen together circumstance is required to be scanned. P.W.6 testified that he had seen accused Nila and Bhagaban and deceased Padma going towards Banjar while accused Bhagaban was holding rice in a Tiffin and a Kati. On being asked by him deceased told him that she was going to collect some branches of trees and by then she was put on an orange colour saree. He has categorically admitted that after 10 to 12 days of said fact he disclosed the same at the time of enquiry. Death of deceased was found to have been informed when her wearing saree and Karata were identified on the date of lodging of F.I.R. on

11.5.1996 at the Out Post. If a person being a co-villager is not found for 10 to 12 days and the witness who had seen her with the person having enmity had not disclosed the same, it cannot be accepted that the witness is trustworthy. The time gap is sufficient to create doubt on the last seen together circumstance.

In the decision reported in **2002 (8) SCC 45, Bodh Raj @ Bodha and Ors. Vrs. State of Jammu and Kashmir** the Hon'ble Apex Court has held on the principle that "the last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

Learned trial court has failed to consider this aspect of time while drawing conclusion on last seen together theory. On careful scrutiny, we have no hesitation to conclude that this circumstance on last seen together as stated by P.W.6 is not clinching enough to be relied upon.

12. On the point of extra judicial confession, P.W.1 has testified that due to litigating terms he enquired from accused Bhagaban while he was coming at about 8.30 A.M. and Bhagaban told him that he had committed a mistake by murdering the deceased on 30.4.1996 by means of a Kati. P.W.1 also stated that he found police officer coming towards that side and told against accused Bhagaban whereafter police officer called accused Bhagaban and accused Bhagaban wanted to give recovery and in their presence he gave recovery of Kati (M.O.I) which was seized under Ext.2 and the statement of accused is Ext.3.

In cross-examination this witness was duly contradicted with his earlier statement U/s.161 Cr.P.C. which was proved by I.O. (P.W.14) regarding this part of extra judicial confession. He is a witness to the seizure Ext.1 made on 7.5.1996.

P.W.4 has testified that 10 to 12 days after the incident, P.W.1 called accused Bhagaban who admitted his guilty before him and then police and

Grama Rakhi reached there and he was present when accused Bhagaban confessed his guilt and P.W.1 told the same to police. This part of evidence was duly contradicted with his earlier statement before police and is proved through I.O. (P.w.14).

P.W.8 has deposed that after 4 days of murder when he was near P.W.1, accused Bhagaban appeared there and being asked by P.W.1 he admitted his guilt and at that time police arrived P.W.1 stated about accused Bhagaban and police arrested him and was taken to the spot in a vehicle.

In cross-examination he has categorically asserted that P.W.1 asked Bhagaban about the occurrence and police arrived there.

P.W.14, the I.O. has stated that on 11.5.1996 at 3 P.M. on receipt of F.I.R. (Ext.8) from P.W.3, he sent the F.I.R. to Buguda police station for registration and thereafter he visited the spot and searched for the accused. On 12.5.1996 he found accused Bhagaban going away and arrested him and he gave confessional statement and led to the discovery of Kati (M.O.I). At this point it is noteworthy that informant P.W.3 was informed on 11.5.1996 by P.W.2 and one Ladu Jena that accused Bhagaban had killed her mother. If that is so, the evidence of P.W.2 and others including the I.O. (P.W.14) that when accused Bhagaban confessed before villagers to have killed Padma, police arrived there, cannot be believed being inconsistent. It is true that time is not the essence of life of villagers but P.W.14 is the I.O. who first registered U.D. case at the Out Post on 7.5.1996 and received F.I.R. on 11.5.1996 and arrested accused on 12.5.1996. The statement of accused was recorded on 12.5.1996. The sequence of events regarding the time of extrajudicial confession at 8.30 A.M. morning whereafter police reached there and took P.Ws.1, 4, 5 and 8 to spot for seizure of M.O.I Kati runs contrary to the fact that I.O. arrested the accused on 12.5.1996 and F.I.R. naming culprit was lodged on 11.5.1996.

P.W.2 was a witness to the seizure of body parts on 7.5.1996. He had informed P.W.3 – informant on 11.5.1996 implicating accused Bhagaban behind murder of Padma. The deceased was his brother’s wife. For four days, he had not reported the missing of Padma either to informant or to police though he witnessed the seizure of body parts of an unidentified person. This conduct does not appear normal to the ordinary human being. His reliability is wholly doubtful.

It is difficult to bring harmony in truth from the complexity of incompatibility found in the evidence regarding time, place and arrival of police and proximity of time between the extra judicial confession and statement of accused in the custody leading to discovery of M.O.I. Recovery of M.O.I does not appear natural in the chain of events.

In the aforesaid **Bodh Raj @ Bodha** case (supra) it is stated by Hon'ble Apex Court that "it would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under section 27 if the information did come from a person not in the custody of a police officer or did come from a person not in the custody of a police officer."

When falsehood is not ruled out in either one of the circumstances advanced by the prosecution, the hypothesis required to be tested cannot be said to have been established beyond reasonable doubt.

In the decision reported in **AIR 1963 Supreme Court 1094, Pyare Lal Bhargava Vrs. The State of Rajasthan** Hon'ble Apex Court has held as follows:-

> "A *retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only a rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars.* "

13. On anatomical survey of evidence on record, the prosecution is found to have failed to prove the circumstances from which the conclusion of guilt of accused could be drawn. The chain is incomplete for which the accused is to be given benefit of doubt. The judgment assailed is not sustainable in the eye of law.

In the result, the appeal is allowed. The conviction and sentence of appellant in the judgment dtd.22.08.1997 in S.C. No.3 of 1997 (S.C. No.60/97 G.D.C.) is hereby set aside. The appellant is held not guilty of the offence U/s.302 of I.P.C. and is acquitted thereform.

14. The appellant was granted bail on 16.5.2001 in Misc. Case No.234 of 2001. But from the communication of Addl. Sessions Judge, Berhampur dtd.30.8.2019 it is reported that the appellant is in custody since 30.8.2019.

He be set at liberty if his detention is not required in any other case.

The appeal is allowed.

L.C.Rs. be returned immediately.

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2020 (I) ILR - CUT- 310

S. K. MISHRA, J & B.P. ROUTRAY, J.

JCRLA NO. 69 OF 2004

BIDYA MEHER ……….Appellant

.Vs.

STATE OF ORISSA ……….Respondent

INDIAN PENAL CODE, 1860 – Section 302 – Conviction under – Appeal – Appellant was confronted in his house regarding the sale of illicit liquor – Charaneswar Bag (P.W.3) assaulted the appellant first and in retaliation, the appellant assaulted the Grama Rakhi, the deceased – So, this case comes within the 4th exception to Section 300 of the I.P.C., as the occurrence took place without any pre-meditation, on a sudden fight, in a hit of passion, upon a sudden quarrel and the offender has not taken undue advantage or acted in a cruel or unusual manner – Held, this is not a case of culpable homicide amounting to murder,

rather, it is a case of culpable homicide not amounting to murder and the same is punishable under Section 304, Part-I of the I.P.C.

(Para 9)

For Appellant : Mr. Prasanna Kumar Mishra
For Respondent : Mr. J. Katikia, Addl. Govt. Adv.

JUDGMENT Date of Hearing and Judgment : 21.11.2019

S. K. MISHRA, J.

In this JCRLA, the convict/appellant (Bidya Meher) assails the judgment of conviction and order of sentence dated 23.03.2004 passed by the learned Additional District and Sessions Judge-Cum-Special Judge, Nuapada in S.A. No.61/63 of 2001 (Sessions), wherein he has been found guilty of the offence under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "the I.P.C." for brevity) and has been convicted and sentenced to undergo imprisonment for life without imposition of any fine.

2. The case of the prosecution is that on 07.04.2001 at about 8.00 P.M. the appellant- Bidya Meher sold country liquor to one person of Mahakhanda village. The members of Bharati Club of Bhuliasikuan detected the liquor and informed the matter to the deceased. The deceased-Sudhir Bag who was the Gram Rakhi at the relevant point of time kept the seized liquor near the Charchhak crossing of the village and went to ascertain the matter to the house of the appellant Bidya Meher. At that time, all the accused persons, namely, Bidya Meher (appellant), Nara Meher, Tikchan Meher and Subash Meher being armed with tangia and tabal, abused the deceased in vulgar language and the appellant Bidya Meher gave one blow on the head of the deceased by means of a tangia, as a result of which, the deceased fell down. Hearing halla, one Binduka Bag (P.W.12) came to the spot and seeing the condition of the deceased, she raised halla. Hearing hue and cry, the mother and wife of the deceased came and wrapped the head of the deceased by means of cloth. Accused Nara Meher gave a blow on the right hand of Santosh Bag (P.W.7) by means of tabal and accused Tikchan Meher assaulted Charaneswar Bag (P.W.3) by means of lathi on his head and accused Subash Meher armed with tabal chased Bhishma Bag (P.W.6) to assault, but could not succeed. F.I.R. was lodged at the Police Station and the P.W.16 registered Khariar P.S. Case No.37 of 2001 for the offence under Section 302/34 of the I.P.C. read with Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "the S.C. & S.T. (P.A.) Act" for brevity). He took up the investigation. After

completion of investigation by taking necessary steps, he submitted charge-sheet against four accused persons including the appellant under Section 302/34 of the I.P.C.

3. The defence took the plea of complete denial.

During course of accused statement, the appellant-Bidya Meher has stated that about three years back from the date of his statement he was present in his house and at about 8.30 P.M. Bhisma Bag (P.W.6) called him to his house, but he protested. So, Charaneswar Bag (P.W.3) gave two blows by tangia on his back and he lost his sense. He has further stated that the informant has foisted a false case against him.

4. The prosecution in order to substantiate the charges against the accused persons examined 17 witnesses. Out of them, P.W.3 is the informant-injured. P.Ws.1, 3, 6 and 11 are eye-witnesses to the occurrence. Other witnesses are formal in nature. P.W.13 has conducted post-mortem examination over the dead body of the deceased. P.W.14 is the Police Constable who escorted the dead body of the deceased for post-mortem examination. P.Ws.15, 16 and 17 are the Investigating Officers of this case. In addition to examination of witnesses, prosecution led into evidence 17 exhibits and 5 material objects.

5. No witness has been examined on behalf of the defence. So also, no document has been led into evidence by the defence.

6. Taking into consideration of the entire evidence available on records, learned Additional District and Sessions Judge-Cum-Special Judge, Nuapada came to the conclusion that the prosecution has proved its case beyond all reasonable doubt that the present appellant has committed murder of the deceased-Grama Rakhi- Sudhir Bag and proceeded to convict him under Section 302 of the I.P.C. and sentence him as stated above. He has also recorded the conviction against the accused Nara Meher under Section 324 of the I.P.C. and the accused Tikchan Meher under Section 323 of the I.P.C. Nara Meher and Tikchan Meher are not before us and none of the learned Advocate appearing for the parties is able to point out as to what happened of that conviction. Since the appeal is of the year 2004, without waiting any further instruction, we have heard the learned counsel for the present parties and proceeded to dispose of the appeal.

7. While arguing the case, Mr. Prasanna Kumar Mishra, learned counsel for the appellant has submitted that he does not dispute the homicide nature of death of the deceased, but it is argued on behalf of the appellant that this is not a case under Section 302 of the I.P.C. He further submits that at best, a case under Section 304, Part-II of the I.P.C. is made out against the appellant, as there was aggression from the side of the informant at the time of occurrence.

8. To examine the same, let us examine evidence of the eye witnesses.

8.1. It is apparent from the record that the star witnesses of the prosecution are P.Ws.1, 3, 6 and 11. P.W.1 has not supported the prosecution case and has been cross-examined by the prosecution.

8.2. P.W.3-Charaneswar Bag has stated on oath that the occurrence took place on 07.04.2001 at about 8.00 P.M. night near the house of accused Bidya Meher. In that night, accused Bidya Meher was selling country liquor and it was detected by the club members of Bharati Club and it was kept at the Char Chhak of the village and they called the Grama Rakhi, Sudhir Bag, deceased who is the brother of P.W.3. The deceased went to the spot and asked the appellant Bidya Meher regarding the illegal possession and sale of illicit liquor. At that time, other accused persons were also present there and the appellant Bidya Meher assaulted by means of Tabala on his head causing bleeding injury. On hearing halla, he went to the spot along with his wife and his brother Santosh Bag (P.W.7) and found the deceased lying in a pool of blood. Accused Tikchan Meher also assaulted on his head by means of lathi. This is not relevant for this case. Accused Nara Meher assaulted by means of tangia over the left shoulder of his brother Santosh Bag (P.W.7) causing bleeding injury. This is also not relevant for this case. He identified the weapon of offence (tangia) marked as M.O.II, lathi marked as Ext.III and the Tabal marked as Ext.IV. The F.I.R. was scribed by his son Laiban Bag (P.W.4). Ext.7 is the said F.I.R. In cross-examination he has stated that he was an accused in G.R. Case No.92 of 2001 initiated by accused Bidya Meher which was pending in the court of the learned J.M.F.C., Khariar. He denied the defence suggestion that on the night of occurrence, he himself along with his brother and son went to the house of the appellant Bidya Meher and assaulted him, his brother and his son and during chasing between the appellant and his brother, the Tabal of Biswa Bag hit on the head of the deceased and he died thereof.

8.3. P.W.6 has similarly supported the case of the prosecution. In the cross-examination, he has denied the suggestion of the defence that the assault was started by the informant.

8.4. P.W.11 has also supported the case of the prosecution. In his cross-examination he has stated that he knew the accused Bidya Meher had filed G.R. Case No.92 of 2001 against Charaneswar Bag and the brother of the deceased. He was examined by the police and he had stated that in G.R. Case No.92 of 2001 that Charaneswar Bag brought a tangia from his house and assaulted accused Bidya Meher by means of tangia and that he gave two blows by tangia on Bidya Meher causing bleeding injuries. He has further stated that he had not stated the police that one Bhojraj had taken liquor from the house of accused Bidya Meher and that they informed the matter to their Secretary and that they were opposing accused Bidya Meher for his illicit liquor selling and that accused Bidya Meher assaulted by a lathi on the right leg of the deceased and that Sarpanch and President went to the house of the accused Bidya Meher.

09. From the aforesaid materials available on record, it is apparent that the appellant was confronted in his house regarding the sale of illicit liquor. Charaneswar Bag (P.W.3) assaulted the appellant first and in retaliation, the appellant had assaulted the Grama Rakhi, the deceased. So, this case comes within the 4th exception to Section 300 of the I.P.C., as the occurrence took place without any pre-meditation, on a sudden fight, in a hit of passion, upon a sudden quarrel and the offender has not taken undue advantage or acted a cruel or unusual manner. So, we are of the opinion that this is not a case of culpable homicide amounting to murder, rather, it is a case of culpable homicide not amounting to murder and the same is punishable under Section 304, Part-I of the I.P.C.

10. Accordingly, we allow the appeal in part. The impugned judgment of conviction and order of sentence dated 23.03.2004 passed by the learned Additional District and Sessions Judge-Cum-Special Judge, Nuapada in S.A. No.61/63 of 2001 (Sessions) convicting the appellant under Section 302 of the I.P.C. and sentencing him as stated supra are set aside and the conviction recorded by the learned Additional District and Sessions Judge-Cum-Special Judge, Nuapada in the aforesaid case under Section 302 of the I.P.C. is hereby converted to one under Section 304, Part I of I.P.C. sentencing the appellant to undergo R.I. for ten years. The period already undergone during the course of investigation, trial and upon appeal shall be set off against the

substantive sentence under Section 428 of the Cr.P.C. There shall be no fine, as the learned Additional District and Sessions Judge-Cum-Special Judge, Nuapada in the aforesaid case has not imposed any fine on the appellant. The L.C.R. be returned back forthwith.

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2020 (I) ILR - CUT- 315

DR. B.R.SARANGI, J.

W.P.(C) NO. 17736 OF 2012

BHASKAR KUMAR MOHANTY ……..Petitioner

.Vs .

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

INTERPRETATION OF STATUTES – Petitioner was appointed as the Chairman, Orissa Staff Selection Commission and retired after rendering service for a period of 2 years 8 months and 26 days – Claim of pension as per Orissa Staff Selection Commission (Method of Recruitment and Conditions of Service of the Chairman and Members) Rules, 1995 and the amendment made to the Rules thereafter – Conflicting views on Rule 7(1) and 7(2) of the Amendment Rules, 1998 – Interpretation – Held, the cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the Legislature their ordinary, natural and grammatical meaning.

"*In view of the law laid down by the apex Court, as discussed above, there is no iota of doubts that the words used in the rules must be given a plain grammatical meaning and the elementary duty of the Court is to give effect of the intention of the words used as expressed and no outside consideration can be called in aid to find that out in different meaning. Therefore, the spirit of law may well be an elusive and unsafe guide and the supported spirit can certainly not be given effect to in opposition to the plain language of the section of the Act and Rules made thereunder. As such, this statutory provision has to be construed according to the ordinary, grammatical and natural meaning of their language. Therefore, the cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the Legislature their ordinary, natural and grammatical meaning.* Applying the above principle to the present context, since the petitioner was retired from government service on the date of his appointment as Chairperson of the Commission, he is entitled to get pension as per Rule 7(1) of the Amendment Rules, 1998. Therefore, the claim made that the benefit should be extended as per the Rule 7(2) of the Amendment Rules, 1998 has no justification." (Paras 17 & 18)

Case Laws Relied on and Referred to :-

1. AIR 1962 SC 1543 : Madan Lal Vs. Changdeo Sugar Mills.
2. AIR 1962 481 : Workmen of Bombay Port Trust Vs. Trustees.
3. AIR 1921 PC 240 : Corporation of the City of Victoria Vs. Bishop of Vancouver Island.
4. AIR 1950 SC 165 : New Piece Goods Bazar Co Ltd. Vs. Commissioner of Income-tax, Bombay.
5. AIR 1954 SC 749 : Rananjaya Singh Vs. Baijnath Singh.
6. AIR 1989 SC 1024 : Commr. of Wealth-tax Vs. Hashmalunnisa Begum.
7. (1955) 1 SCR 829 : Navin Chandra Vs.Commissioner of Income-tax.
8. AIR 1986 SC 1682 : Raghunandan Saran Ashok Saran Vs. Pearey Lal Workship Pvt. Ltd.
9. AIR 1955 SC 376 : Jugal Kishore Vs. Raw Cotton Co. Ltd.
10. (1990) 3 SCC 682 : Punjab Land Development and Reclamation Corpn. Ltd. Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh.

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

For Opp. Parties : Mr. D.K. Pani, Addl. Standing Counsel
M/s. S.K. Das, S. Swain and S. Mohanty.

JUDGMENT Date of Hearing: 02.08.2019 : Date of Judgment : 06.08.2019

DR. B.R. SARANGI,J.

The petitioner, who after his retirement from Indian Postal Service, was appointed as the Chairman, Orissa Staff Selection Commission, has filed this writ application seeking following reliefs;

> *"In view of the facts states above the petitioner humbly prays that the Hon'ble Court may graciously be pleased to issue a writ in the nature of writ of mandamus or any other appropriate writ/writs, order/orders, direction/directions in directing the OP No.1 and OP No.3 to calculate the pension of the petitioner for the period of service he rendered as Chairman of the Orissa Staff Selection Commission in light of Rule 7(2) of the ORISSA STAFF SELECTION (METHOD OF RECRUITMENT AND CONDITION OF SERVICE OF CHAIRMAN AND MEMBERS) Rules, 1995:*
>
> *And further be pleased to direct the Opposite Parties to pay the petitioner the pension @ 333/- per month for the period of service he rendered as Chairman of the Orissa Staff Selection Commission;*
>
> *And further be pleased to direct the Opposite Parties to pay the petitioner all arrears arising out of such fixation of his pension;*
>
> *And for this act of kindness the petitioner as in duty bound shall ever pray."*

2. The fact of the case, in a nutshell, is that the petitioner, after being duly selected in a competitive civil service examination conducted by Union Public Service Commission (UPSC), was selected and appointed to the Indian Postal Service and after successful completion of his tenure, he retired from the said service on attaining the age of superannuation on 30.09.1997. After his retirement, he was appointed as Chairman, Orissa Staff Selection Commission, vide order of the Government dated 28.12.1998, and pursuant to which he joined on 01.01.1999 and continued up to 26.09.2001 on attaining the age of 62 years. Thus he served the commission for a period of 2 years 8 months and 26 days. In exercise of power conferred under Article 309 of the Constitution of India, the Governor of Orissa was pleased to make the Orissa Staff Selection Commission (Method of Recruitment and Conditions of Service of the Chairman and Members) Rules, 1995 (in short "Rules 1995") for regulating the method of recruitment and conditions of service of the Chairman and Members of the Orissa Staff Selection Commission. The Rules, 1995 have undergone amendment vide notification dated 8th September, 1998 i.e. Orissa Staff Selection Commission (Method of Recruitment and Conditions of Service of the Chairman and Members) Amendment Rules, 1998 (in short "Amendment Rules, 1998") and as per the amended provision, Rule 7 has been changed. Before his retirement from the office of the Chairman, Orissa Staff Selection Commission, the petitioner applied for payment of his pension as well as the gratuity and the same was forwarded by the opposite party no.1 to the Principal, Accountant General (A & E), opposite party no.3 for calculating the pensionary benefit, as per Rule 7(2) of the Amendment Rules, 1998. But the pension paper was returned by opposite party no.3 to opposite party no.1 with a request to send the same after calculating the pension entitlement as per Rule 7(1) of the Amendment Rules, 1998. The claim of the petitioner is that the pensionary benefit should be calculated as per Rule 7(2) of the Amendment Rules, 1998. Since calculation was not done following the said rules, he submitted a representation to opposite party no.1 with request to look into the matter and settle his pension, but after 10 years of his retirement, the opposite party no.1 passed an order directing that the pay of the petitioner has been re-fixed at Rs.11,200/- only per month (i.e. pay of Rs.22,400 last drawn while in Government Service minus gross amount of pension Rs.11,200) w.e.f. 01.01.1999 plus Dearness Allowance granted by the Government from time to time. But nothing has been specified with regard to sanction of pension to the petitioner by the opposite party no.1. Therefore, he further prays for reconsideration of his pensions as per Rule 7(2) of the Amendment Rules,

1998, in view of the fact that the petitioner was not in service, while he was issued with order of appointment as the Chairman of the Commission. As such, Rule 7(1) of the Rules, 1995 has no application to the present case of the petitioner, since at the time of his appointment he was neither in service nor he retired to take up the job of the Chairman of the Commission. Rather, he had retired on 30.09.1997 and got the appointment as the Chairman of the Commission on 28.12.1998, almost after one year three months of his retirement. Therefore, the entitlement of the petitioner should be calculated as per Rule 7(2) of the Amendment Rules, 1998, instead of Rule 7(1) of the Amendment Rules 1998. Since the prayer of the petitioner has not been acceded to, he has filed this application.

3. Mr. A.K. Mishra, learned Senior Counsel appearing along with Mr. G. Sinha, learned counsel for the petitioner contended that in view of the provisions of Rule 7(1), on the date of appointment if the person was in service in the Government then only his pension can be fixed under the said provision. But fact remains since the petitioner was not in service on the date of his appointment, the benefit is admissible only under Rule 7(2) of the Amendment Rules, 1998. It is contended emphatically that the petitioner is entitled to get pension as per Rule 7(2) of the Amendment Rules, 1998. It is further contended that on plain reading of the provisions contained under Rules 7(1) and 7(2) of the Amendment Rules, 1998, it would be amply clear that the petitioner's claim is covered under Rule 7(2), but not under Rule 7(1). As such, the opposite parties has erroneously calculated the pensionary benefit admissible to the petitioner under Rule 7(1) of the Amendment Rules, 1998, therefore seeks for a direction to reconsider the matter keeping in view the provision of Rule 7(2) of the Amendment Rules, 1998.

4. Per contra, Mr. D.K. Pani, learned Addl. Standing counsel justifies the order passed by the authority stating that the petitioner is entitled to get the benefit only under Rule 7(1) of the Amendment Rules, 1998 because on the date of appointment the petitioner had retired from the government service. Therefore, he is not entitled to get the pensionary benefit as per Rule 7(2) of the Amendment Rules, 1998, as claimed by him, rather, the authorities have taken into consideration the provisions of Rules 7(1) of Amendment Rules, 1998 and extended the benefit to the petitioner. Thereby, no illegality or irregularity has been committed by the authority concerned.

5. Mr. S. Mohanty, learned counsel appearing for opposite party no.2 also subscribed the arguments advanced by the learned counsel for the State

and contended that the petitioner's pension has been calculated as per Section 7(1) of the Amendment Rules, 1998, thereby, no illegality or irregularity has been committed by the authority concerned so as to cause interference of this court at this stage.

6. This Court heard Mr. A.K. Mishra, learned Senior Counsel appearing along with Mr. G. Sinha, learned counsel for the petitioner; Mr. D.K. Pani, learned Addl. Standing Counsel for the State; and Mr. S. Mohanty, learned counsel for opposite party no.2 and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. There is no dispute with regard to factual matrix delineated above. Only question is to be considered here whether the petitioner is entitled to get the pensionary benefit as per Rule 7(1) or Rule 7(2) of the Amendment Rules, 1998 and as such, the benefit under Rule-7(1) of the Amendment Rules already extended to the petitioner. For better appreciation, Rule 7 of the Rules, 1995, which regulates the method of recruitment and conditions of service of the Chairman and Members of the Orissa Staff Selection Commission, reads as follows:

> *"No pension/gratuity shall be admissible to the Chairman and the Member for the serviced rendered in the Commission."*

The aforesaid Rule-7 was amended by the Government vide notification dated 8th September, 1998, to the following effect:-

> *"(1) The Chairman and Member of the Commission who <u>on the date of appointment in service in the Government and retired from the said service are entitled to get pension not exceeding Rs.3,500/-</u> per annum, for life, if they have completed not less than 2 years of service as Chairman or Members, as the case maybe, in the Commission. No pension shall be payable to Chairman or Member service. If Chairman or Members who have completed two years of service or more resigns from his office and such resignation is accepted by the Government, he shall be entitled to pension as admissible under these rules. If Chairman or Member has completed two years, three years, four years of service, he shall be entitled for 1/5th 3/5th or 4/5th respectively of the full pension which is payable to him.*
>
> *(2) Where the Chairman or the Member, who <u>on the date of appointment was not in service of the Union or in any State</u>, he is entitled to get pension of Rs.10,000/- and Rs.7,000/- per annum respectively for life is he has completed five years of service in the commission and subject to other provisions as contained in sub rule (1) above.*

(3) The Chairman and the Member shall be entitled to the benefit of gratuity at the rate of 15 days pay for each completed year of service, if they have completed not less than two years of service in the commission." *(Emphasis supplied)*

8. Admittedly, the petitioner was appointed as the Chairman, Orissa Staff Selection Commission vide order of the Government dated 28.12.1998. Consequence thereof, he joined on 01.01.1999 and retired from service on attaining the age of 62 years on 22.09.2001 by rendering service for a period of 2 years 8 months and 26 days. After retirement, the benefit as per Rule 7(1) of Amendment Rules, 1998 has been granted to him, but his claim is that his pension should be calculated as per Rule 7(2) mentioned above. On close reading of the aforementioned rule, it is made clear that so far as Rule 7(1) is concerned, the Chairman and Member of the Commission, **who on the date of appointment was in service in the Government and retired from the said service, are entitled to get pension not exceeding Rs.3,50,000/-** per annum, if they have completed not less than 2 years of service as Chairman or Member, as the case may be, in the Commission. So far as Rule 7(2) is concerned, it is provided where the Chairman or the Member, **who on the date of appointment was not in service of the Union or in any State**, he is entitled to get pension of Rs.10,000/- and Rs.7,000/- per annum respectively for life if he has completed five years of service in the commission and subject to other provisions as contained in sub-rule (1) of Rule 7.

9. Mr. A.K. Mishra, learned Senior Counsel appearing for the petitioner emphatically submitted that the petitioner, on the date of appointment of Chairman, Orissa Staff Selection Commission, was not in service of the Union or any State. Therefore, he is entitled to get the benefit as per Rule 7(2) of the Amendment Rules, 1998. But the Rule 7(1) contemplates the Chairman or Member of the Commission who on the date of appointment in service in the Government and retired from the said service are entitled to get pension. Admittedly, on the date of appointment, the petitioner had retired from the Government service on 30.09.1997. Therefore, the determination of benefit has been made in accordance with Rule 7 (1) of the Amendment Rules, 1998.

10. Mr. A.K. Mishra, learned Senior Counsel appearing for the petitioner further contended that as per the provisions contained under Rule 7(2), since the petitioner was not in service of the Union or any State, he is entitled to get pension under the said Rules. That cannot sustain because of the fact that the petitioner is admittedly retired from Government service and as a consequence thereof Rule 7(1) has got application to the present context.

Therefore, it is only question of interpretation of Rule 7(1) vis-à-vis Rule 7(2) to fix the entitlement of the petitioner concerned. On perusal of the aforesaid Rules, there is no ambiguity of the Rules itself.

11. In ***Madan Lal v. Changdeo Sugar Mills,*** AIR 1962 SC 1543, the apex Court held that the elementary rule is that words used in a section must be given their plain grammatical meaning.

This view has also been reiterated in ***Workmen of Bombay Port Trust v. Trustees***, AIR 1962 481. The above interpretation is considered as golden rule of interpretation.

12. In ***Corporation of the City of Victoria v. Bishop of Vancouver Island,*** AIR 1921 PC 240, the Privy Council, speaking through ***Lord Atkinson*** observed as follows:

> *"In the construction of statutes, their words must be interpreted in their ordinary grammatical sense, unless there be something in their context, or in the objection of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense. Exigencies of business, for instance, cannot deflect the Court from adopting the only interpretation with the language of the enactment bears."*

13. In ***New Piece Goods Bazar Co Ltd. v. Commissioner of Income-tax, Bombay,*** AIR 1950 SC 165, the Supreme Court held as follows:

> *"it is an elementary duty of a Court to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find that intention."*

14. In ***Rananjaya Singh v. Baijnath Singh,*** AIR 1954 SC 749, the apex Court observed as follows:

> *"The spirit of the law may well be an elusive and unsafe guide and the supposed spirit can certainly not be given effect to in opposition to the plain language of the section of the Act and the rules made thereunder. If all that can be said of these statutory provisions is that construed according to the ordinary grammatical and natural meaning of their language they work injustice by placing the poorer candidates at a disadvantage, the appeal must be to Parliament and not to this Court."*

Similar view has also been taken by the apex Court in ***Commr. Of Wealth-tax v. Hashmalunnisa Begum,*** AIR 1989 SC 1024.

15. In ***Navin Chandra v. Commissioner of Income-tax,*** (1955) 1 SCR 829, the apex Court held as follows:

> *"The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude."*

Similar view has also been taken ***Raghunandan Saran Ashok Saran v. Pearey Lal Workship Pvt. Ltd.,*** AIR 1986 SC 1682.

16. In ***Jugal Kishore v. Raw Cotton Co. Ltd.,*** AIR 1955 SC 376, the apex Court observed as follows:

> *"The cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the Legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning, the court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation."*

Similar view has also been taken by the apex Court in ***Punjab Land Development and Reclamation Corpn. Ltd. Chandigarh v. Presiding Officer, Labour Court, Chandigarh*** (1990) 3 SCC 682**.**

17. In view of the law laid down by the apex Court, as discussed above, there is no iota of doubts that the words used in the rules must be given a plain grammatical meaning and the elementary duty of the Court is to give effect of the intention of the words used as expressed and no outside consideration can be called in aid to find that out in different meaning. Therefore, the spirit of law may well be an elusive and unsafe guide and the supported spirit can certainly not be given effect to in opposition to the plain language of the section of the Act and Rules made thereunder. As such, this statutory provision has to be construed according to the ordinary, grammatical and natural meaning of their language. Therefore, the cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the Legislature their ordinary, natural and grammatical meaning.

18. Applying the above principle to the present context, since the petitioner was retired from government service on the date of his appointment as Chairperson of the Commission, he is entitled to get pension as per Rule

7(1) of the Amendment Rules, 1998. Therefore, the claim made that the benefit should be extended as per the Rule 7(2) of the Amendment Rules, 1998 has no justification.

19. In view of the aforesaid facts and circumstances as well as the law discussed above, this Court is of the considered view that the determination of pensionary benefits as per Rule 7(1) of the Amendment Rules, 1998 is wholly and fully justified, as such the claim made by the petitioner to determine the pensionary benefit in accordance with Rule 7(2) of the Amended Rules, 1998 cannot sustain in the eye of law. Therefore, the writ petition is devoid of any merit and the same is accordingly dismissed. No order to costs.

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2020 (I) ILR - CUT- 323

DR. B.R. SARANGI, J.

O.J.C. NO. 2181 OF 2002

ARJUNA CHARAN MISHRA ……..Petitioner

.Vs.

STATE BANK OF INDIA & ORS. ……..Opp. Parties

SERVICE LAW – Departmental enquiry – Petitioner a Bank Manager – served with a memorandum of charges under Rule 50(1)(i) of the Staff Rules – Submitted his show-cause/explanation denying all the charges levelled against him – Enquiry officer appointed, report submitted – Without serving a copy thereof on the petitioner and without affording opportunity of hearing – The authority accepted such enquiry report and also modified the finding with respect to charge no.5 by holding that the said charge was totally proved – Accordingly, vide order dated 17.08.1988, imposed punishment of "reduction of basic pay by one stage" in terms of Rule-49(e) and further directed that the period of suspension would be treated as not on duty – Appeal, Review rejected – Writ petition – Held, as under.

"In view of provisions contained in Rule 49, as mentioned above, reduction to a lower grade or post, or to a lower stage in a time scale, which has been provided under sub-rule (e), comes under the category of major penalties. For

imposition of major penalty, procedure has been prescribed under Rule-50, as indicated above. Sub-clause (b)(II) of sub-rule (x) of Rule-50 clearly prescribes that the inquiring officer has to supply the list of documents and witnesses so as to enable the petitioner to give written statement of defence. But in the present case, though the petitioner requested the inquiring officer, vide letter dated 30.09.1986, for supply of the relevant documents and also for verification of documents, the same was not done. Again on 29.05.1987, when the petitioner requested for verification of documents, the inquiring officer, without allowing the said application, directed the concerned authority to produce the available documents only. Accordingly, the documents, which were called for by the petitioner, were not supplied to him, thereby the authorities have acted in gross violation of the Staff Rules and non-compliance of the principle of natural justice." (Para 6)

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

1. AIR 1998 SC 3038 : State of U.P. Vs. Shatrughan Lal.
2. AIR 2002 SC 1241 : State of U.P. Vs. Ramesh Chandra Mangalik.
3. AIR 1998 SC 2713 : Punjab National Bank Vs. Kunj Behari Misra.
4. AIR 2001 SC 2398 : S.B.I. and others Vs. Arvind K. Shukla.
5. (1979) 2 SCC 286 : Union of India Vs. J. Ahmed.
6. AIR 1999 SC 677 : Kuldeep Singh Vs. The Commissioner of Police.
7. AIR 2013 SC 151 : Nirmal J. Jhala Vs. State of Gujarat.
8. W.P.(C) No.7848 of 2009 : Abhiram Samal Vs. Indian Bank.

For Petitioner : M/s. R. Mahapatra & A.K. Das.

For Opp. Parties : Mr. P.K. Mohanty, Sr. Adv.
M/s S.P. Das, P.K. Nayak, P.K. Passayat
& P. Mohanty

JUDGMENT Date of Hearing: 28.08.2019 : Date of Judgment: 05.09.2019

DR. B.R. SARANGI, J.

The petitioner, who was working as Branch Manager of State Bank of India, Satkosia Branch in the district of Mayurbhanj, by way of this writ application, seek to quash the orders dated 17.08.1988 passed by opposite party no.1-Chief General Manager, State Bank of India (disciplinary authority) in Annexue-7; dated 11.06.1990 passed by the appellate authority-opposite party no.5 in Annexure-9; and dated 20.08.2001 passed by opposite party no.6-reviewing authority in Annexure-13 imposing and confirming the punishment inflicted on him in a departmental proceeding by violating the norms and procedures prescribed in the State Bank of India (Supervising Staff) Service Rules, (for short 'Staff Rules') and without affording reasonable opportunity of being heard, i.e., non-compliance of the principle of natural justice.

2. The factual matrix of the case, in hand, is that the petitioner, while working as Branch Manager of State Bank of India, Satkosia Branch in the district of Mayurbhanj, was served with a memorandum of charges under Rule 50(1)(i) of the Staff Rules on 28.05.1986 to the following effect:

> "*(i) During 1982-83 while the petitioner was working as Branch Manager, he conducted himself in a manner detrimental to the interest of the Bank by sanctioning loans under the Integrated Rural Development Programme (IRDP) and Economic Rehabilitation of the Rural Poor (ERRP) schemes and while disbursing the loans he had retained amounts ranging from 10% to 20% as illegal gratification in sanctioning the loans and recommending them for subsidy.*
>
> *(ii) In many cases loans were sanctioned for purchase of goatary units/bullocks, whereas no assets were purchased. The disbursements were made in cash contravening the laid down instructions.*
>
> *(iii)The Petitioner accepted illegal gratification from number of borrowers and committed irregularities mentioned.*
>
> *(iv)The Petitioner debited the toral project cost to the loan accounts without receiving permissible subsidy from the concerned Government body. Therefore, he has deviated from the laid down procedure to collect the subsidy amount in advance as a result, interest burden on the borrower increased.*
>
> *(v) Some loan accounts credits were made few weeks after raising the debits. It was therefore concluded that the Petitioner had with him duly signed forms and deposit vouchers, which he had been putting to use as and when required."*

In response thereto, the petitioner submitted his show-cause/explanation denying all the charges levelled against him, on receipt of which, inquiring officer was appointed. During course of enquiry, the petitioner, vide letter dated 30.09.1986, requested the inquiring officer to supply him relevant documents to prepare his written statement of defence. In the said letter, the petitioner also indicated that he had not verified certain documents produced by the presenting officer and requested to allow him five days time for the said purpose, and also for supply of the documents requisitioned therein. But the inquiring officer did not supply the requisitioned documents to him. The petitioner again, vide letter dated 29.05.1987, requested the inquiring officer for supply of some documents, on which reliance was placed, and the inquiring officer, without allowing the said application, directed the concerned authorities to produce the available documents only, and accordingly the documents, which were called for by the petitioner, were not supplied to him. The inquiring officer proceeded with the enquiry proceeding without supplying the documents, as requested by the

petitioner, and without affording opportunity of adequate hearing to defend his case properly, submitted his report on 30.11.1987 as follows:

> "i) *Charge No.1 was not proved.*
>
> *ii) Charge No.2 was partially proved holding that disbursements were made by cash contravening the laid down norms.*
>
> *iii) Charge No.3 was not proved.*
>
> *iv) Charge NO.4 was fully proved.*
>
> *v) Charge No.5 was partially proved regarding liquidation of loans in short period."*

2.1. On receipt of such enquiry report, the disciplinary authority-opposite party no.1, without serving a copy thereof on the petitioner and without affording opportunity of hearing, accepted such enquiry report and also modified the finding with respect to charge no.5 by holding that the said charge was totally proved. Accordingly, vide order dated 17.08.1988, he imposed punishment of "reduction of basic pay by one stage" in terms of Rule-49(e) ibid w.e.f. the date this order is served on him and further directed that the period of suspension of the petitioner would be treated as not on duty. Against the said order of the disciplinary authority-opposite party no.1, the petitioner preferred an appeal before the appellate authority-opposite party no.1, who dismissed the same, vide order dated 11.06.1990, directing the period of suspension to be treated as on duty and the petitioner should be paid the emoluments for the suspension period less the subsistence allowance already paid to him, but did not modify the order of reduction of basic pay by one stage. Against the said order of the appellate authority, the petitioner preferred review, as provided under the Staff Rules before the reviewing authority who dismissed the same vide order dated 30.10.1991. Challenging the same, the petitioner approached this Court by filing OJC No.7996 of 1992. This Court, after hearing the parties, allowed the said writ petition and quashed the order dated 30.10.1991 and remitted the matter to the reviewing committee with a direction that the officers who are unconnected with the disciplinary proceeding may re-hear the review afresh, vide judgment dated 23.01.2001, which was reported in 91(2001) CLT 418. In compliance thereof, the review committee rejected the application, vide order dated 20.08.2001, confirming the order passed by the appellate authority-opposite party no.1. Hence this application.

3. Mr. A.K. Das, learned counsel for the petitioner contended that the orders of the disciplinary authority, appellate authority and reviewing

authority, as referred to above, cannot sustain in the eye of law, as the same have been passed in gross violation of principles of natural justice. It is contended that during process of enquiry, when the petitioner asked for supply of certain documents, the same were not supplied to him and the inquiring officer submitted his report with the finding that on the basis of the materials placed before him he found the petitioner guilty of charges, as mentioned hereinbefore, and thereby adequate opportunity of hearing has not been given to him. It is further contended, when the inquiring officer found that charge no.5 was partially proved, the disciplinary authority held that the charge no.5 was fully proved, but, however, without endorsing any ground for such disagreement with the finding of the inquiring officer, thereby, the order so passed cannot sustain in the eye of law.

It is further contended that the reviewing authority, without considering the AGL circular No.16 of 1979, has passed the order, which amounts to non-application of mind, and as such, preponderance of probabilities is enough for the authority to punish only when there is legal and reasonable evidence. The documents relied upon by the prosecution were not exhibited/produced in the enquiry. No witness was produced by the bank to prove the charge nor on cross-examination was any legal or reasonable evidence brought out to substantiate the charge. Therefore, the orders so passed by the disciplinary authority, appellate authority, as well as the reviewing authority in Annexures-7, 9 and 13 cannot sustain and the same are liable to be quashed.

To substantiate his contentions, he has relied upon ***State of U.P. v. Shatrughan Lal***, AIR 1998 SC 3038; ***State of U.P. v. Ramesh Chandra Mangalik***, AIR 2002 SC 1241; ***Punjab National Bank v. Kunj Behari Misra***, AIR 1998 SC 2713; ***S.B.I. and others v. Arvind K. Shukla***, AIR 2001 SC 2398; ***Union of India v. J. Ahmed***, (1979) 2 SCC 286; and ***Kuldeep Singh v. The Commissioner of Police***, AIR 1999 SC 677.

4. Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr. S.P. Das, learned counsel for the opposite party Bank, justifying the action taken by the authorities, contended that the same has been done in consonance with the provisions of law and interference of this Court at this stage may not be called for. To substantiate his contention, he has relied upon the judgments of the apex Court in ***Nirmal J. Jhala v. State of Gujarat,*** AIR 2013 SC 151**;** and of this Court in ***Abhiram Samal v. Indian Bank*** [W.P.(C) No.7848 of 2009 disposed of on 16.04.2015].

5. This Court heard Mr. A.K. Das, learned counsel for the petitioner and Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr.S.P. Das, learned counsel for the opposite party Bank. Since no counter affidavit has been filed by the opposite party-Bank, and it is a matter of 2002 and in the meantime 17 years have passed, this Court is not inclined to grant further adjournment and proceeded to decide the matter on the basis of the pleadings available on record, as it is a certiorari proceeding, with the consent of learned counsel for the parties.

6. For just and proper adjudication of the case in hand, the relevant provisions of the State Bank of India (Supervising Staff) Service Rules are quoted below:-

"***Section 2-DISCIPLINE AND APPEAL***

49. Without prejudice to any other provisions contained in these rules, any one or more of the following penalties may be imposed on an employee, for an act of misconduct or for any other good and sufficient reason:-

Minor Penalties

(a) censure;
(b) withholding of increments of pay with or without cumulative effect;
(c) withholding of promotion;
(d) recovery from pay or such other amount as may be due to him of the whole or part of any pecuniary loss caused to the Bank by negligence or breach of orders.

Major Penalties

(e) reduction to a lower grade or post, or to a lower stage in a time scale;
(f) compulsory retirement;
(g) removal from service;
(h) dismissal.

Explanation: *The following shall not amount to a penalty within the meaning of this rule:*

(i) withholding of one or more increments of an employee on account of his failure to pass a prescribed department test or examination in accordance with the terms of appointment to the post which he holds;

(ii) stoppage of increments of an employee at the efficiency bar in a time scale, on the grounds of his unfitness to cross the bar;

(iii) non-promotion, whether in an officiating capacity or otherwise of an employee to a higher grade or post for which he

may be eligible for consideration but for which he is found unsuitable after consideration of his case;

(iv) reserving or postponing the promotion of an employee for reasons like completion of certain requirements for promotion or pendency of disciplinary proceedings;

(v) reversion to a lower grade or post, of an employee officiating in a higher grade or post, on the ground that he is considered, after trial, to be unsuitable for such higher grade or post, or on administrative grounds unconnected with his conduct;

(vi) reversion to the previous grade or post, of an employee appointed on probation to another grade or post during or at the end of the period of probation, in accordance with the terms of his appointment or rules or orders governing such probation;

(vii) reversion of an employee to his parent organization in case he had come to deputation;

(viii) termination of service of an employee:

(a) appointed on probation in terms of sub-rule(1) of rule 13;

(b) appointed in a temporary capacity otherwise than under a contract or agreement on the expiration of the period for which he was appointed, or earlier in accordance with the terms of his appointment;

(c) appointed under a contract or agreement, in accordance with the terms of such contract or agreement; and

(d) as part of retrenchment.

(ix) termination of service of an employee in terms of rule 18;

(x) termination of service of an employee in terms of clause (b) of rule 19.

(xi) retirement of an employee in terms of rule 20.

50.(1)(i)The Disciplinary Authority may itself, or shall when so directed by its superior authority disciplinary proceedings against an employee.

(ii) The Disciplinary Authority or any authority higher than it may impose any of the penalties in rule 49 on an employee.

Provided that where the Disciplinary Authority is lower in rank than the Appointing Authority in respect of the category of employees to which the employee belongs no order imposing any of the manor penalties specified in clauses (e)(f)(g) and (h) of rule 49 shall be made except by the Appointing Authority or any authority higher than it on the recommendations of the Disciplinary Authority.

(2) (i)No order imposing any of the major penalties specified in clause(e)(f)(g) and (h) of rule 49 shall be made except after an inquiry is held in accordance with this sub-rule.

(ii) Whenever the Disciplinary Authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct against an employee, it may itself enquire into, or appoint any other employees or a public service (hereinafter referred to as the Inquiring Authority) to inquire into the truth thereof.

Explanation: *When the Disciplinary Authority itself holds the enquiry, any reference in clauses (viii) to (xxi) to the Inquiring Authority shall be construed as the reference to Disciplinary Authority.*

(iii) Where it I proposed to hold an inquiry, the Disciplinary Authority shall frame indefinite and distinct charges on the basis of the allegations against the employee. The articles of charge, together with a statement of the allegations on which they are based, shall be communicated in writing to the employees, who shall be required to submit within such time as may be specified by the Disciplinary Authority not exceeding 15 days or within such extended time as may be granted by the said Authority, a written statement of his defence.

(iv) On receipt of a written statement of the employee, or if no such statement is received within the time specified, an enquiry may be held by the Disciplinary Authority itself, or if it considers it necessary to do so appoint under clause (ii) an Inquiring Authority for the purpose.

Provided that it may not be necessary to hold an enquiry in respect of the articles of charge admitted by the employee in his written statement but it shall be necessary to record its findings on each such charge.

(v) The Disciplinary Authority shall, where it is not the Inquiring Authority, forward to the Inquiring Authority:-

(a) a copy of the article of charge and statements of imputations of misconduct;

(b) a copy of the written statement of defence, if any, submitted by the employee;

(c) a list of documents by which and list of witnesses by whom the articles of charge are proposed to be substantiated;

(d) a copy of statements of witnesses, if any;

(e) evidence proving the delivery of the articles of charge under clause (iii);

(f) a copy of the order appointing the "Presiding Officer"in terms of clause (iv).

Note*: The forwarding of the documents referred to in this clause need not necessarily be done simultaneously.*

(vi) Where the Disciplinary Authority itself enquires or appoints an Inquiring Authority for holding an enquiry, the Bank, may, be an order, appoint an employee

or a public servant to be known as the "Presiding Officer" to present on its behalf the case in support of the articles of charge.

(vii) The employee may take the assistance of an employ as defined in clause (u) of Rule 3 (hereinafter referred to as employee's representative) but shall not engage a legal practitioner for the purpose.

Provided that where the Presiding Officer is a public servant other than an employee of the Bank, the employee may take the assistance of any public servant.

(viii) (a)The Inquiring Authority shall by notice in writing specify the date on which the employee shall appear in person before the Inquiring Authority.

(b) On the date fixed by the Inquiring Authority, the employee shall appear before the Inquiring Authority at the time, place and date specified in the notice.

(c) The Inquiring Authority shall ask the employee whether he pleads guilty or has any defence to make and if he pleads guilty to all or any of the articles of charge, the Inquiring Authority shall record the plea, sign the record and obtain the signature of the employee thereon.

(d) The Inquiring Authority shall return a finding of guilt in respect of those articles of charge to which the employee concerned pleads guilty.

(ix) If the employee does not plead guilty, the Inquiring Authority may, if considered necessary, adjourn the case to a later date not exceeding 30 days or within such extended time as may be granted by it.

(x)(a) The Inquiring Authority shall where the employee does not admit all or any of the articles of charge furnish to such employee a list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be proved.

(b) The Inquiring Authority shall also record an order that the employee may be for the purpose of preparing his defence:

I- inspect and take notes of the documents listed within five days of the order or within such further time not exceeding five days as Inquiring Authority may allow;

II- submit a list of documents and witnesses that he wants for inquiry;

III- be supplied with copies of statements of witnesses, if any, recorded earlier and the Inquiring Authority shall furnish such copies not later than three days before the commencement of the examination of the witnesses by the Inquiring Authority;

IV- give a notice within ten days of the order or within such further time not exceeding ten days as the Inquiring Authority may allow for the discovery or production of the documents referred to at (II) above.

***Note**: The relevancy of the documents and the examination of the witnesses referred to at (II) above shall be given by the employee concerned.*

(xi) The Inquiring Authority shall, on receipt of the notice for the discovery or production of the documents, forward the same or copies thereof to the authority in whose custody or possession the documents are kept, with a requisition for the production of the documents on such date as may be specified.

(xii) on receipt of the requisition under clause (ix), the authority having custody or possession of the requisitioned documents shall arrange to produce the same before the Inquiring Authority on the date, place and time specified in the requisition.

Provided that the authority having custody or possession of the requisitioned documents may claim privilege of the production of such documents will be against the public interest or the interest of the Bank. In that event, it shall inform the Inquiring Authority accordingly.

(xiii) On the date fixed for the inquiry, the oral an documentary evidence by which the articles of charge are proposed to be proved shall be produced by or on behalf of the Bank. The witnesses produced by the Presenting Officer shall be examined by the Presenting Officer and may be cross-examined by or on behalf of the employee. The Presiding Officer shall be entitled to re-examine his witnesses on any points on which they have been cross-examined, but not on a new matter without the leave of the Inquiring Authority. The Inquiring Authority may also put such questions to the witnesses as it thinks fit.

(xiv) Before the close of the case in support of the charges, the Inquiring Authority may, in its discretion, allow the Presenting Officer to produce evidence not included in the charge-sheet or may itself call for new evidence or recall or re-examine any witness. In such case the employee shall be given opportunity to inspect the documentary evidence before it is taken on record, or to cross-examine a witness who has been so summoned. The Inquiring Authority may also allow the employee to produce new evidence, if it is of the opinion that the production of such evidence is necessary in the interest of justice.

(xv) When the case in support of the charges is close, the employee may be required to state his defence, orally or in writing, as he may prefer. If the defence is made orally, it shall be recorded and the employee shall be required to sign the record. In either case a copy of the statement of defence shall be given to the Presenting Officer.

(xvi) The evidence on behalf of the employee may then be produced. The employee may examine himself as a witness in his own behalf, if he so prefers. The witnesses, if any, produced by the employee shall then be examined employee shall be entitled to re-examine any of his witnesses on any points on which he have been cross-examined, but not on any new matter without the leave of the Inquiring Authority.

(xvii) The Inquiring Authority may, after the employee closes his evidence, and shall if the employee has not got himself examined, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the employee to explain any circumstances appearing in the evidence against him.

(xviii) After the completion of the production of the evidence, the employee and the Presenting Officer may file written briefs of their respective cases within a reasonable time but not exceeding 15 days of the date of completion of the production of evidence.

(xix) If the employee does not submit the written statement of defence referred to in clause (iii) on or before the date specified for the purpose or does not appear in person, or through the employee's representative or otherwise fails or refuses to comply with any of the provisions of these rules which require the presence of the employee or his representative, the Inquiring Authority may hold the enquiry ex-party.

(xx) Whenever any Inquiring Authority, after having heard and recorded the whole or part of the evidence in an inquiry, ceases to exercise jurisdiction therein and is succeeded by another Inquiring Authority which has, and which exercises, such jurisdiction, the Inquiring Authority so succeeding may act on the evidence so recorded by itself.

Provided that if the succeeding Inquiring Authority is of the opinion that further examine of any of the witnesses whose evidence has already been recorded is necessary in the interest of justice, it may recall and cause them to be examined, cross-examined and re-examined as hereinbefore provided.

(xxi) On the conclusion of the inquiry, the Inquiring Authority shall appear a report which shall contain the following:-

(1) a gist of the articles of charge and the statement of the imputations of misconduct;

(2) a gist of the defence of the employee in respect of each article of charge;

(3) an assessment of the evidence in respect of each article of charge;

(4) the findings on each article of charge and the reason therefor.

Explanation: *If, in the opinion of the Inquiring Authority, the proceedings of the inquiry establish any article of charge different from the original article of charge, it may record its findings on such article of charge.*

Provided that the findings on such article of charge shall not be recorded unless the employee has either admitted specifically and not by inference the facts on which such article of charge is based or has had a reasonable opportunity of defending himself against such article of charge.

(b) The Inquiring Authority, where it is not itself the Disciplinary Authority, shall forward to the Disciplinary Authority the records of inquiry which shall include:-

(1) the report of the inquiry prepared by it under(a) above;

(2) the written statement of defence, it any, submitted by the employee referred to in clause(xv);

(3) the oral and documentary evidence produced in the course of the inquiry;

(4) written briefs referred to in clause (xviii), if any, and

(5) the orders, if any, made by the Disciplinary Authority and the Inquiring Authority in regard to the inquiry.

(3)(i) The Disciplinary Authority, if it is not itself the Inquiring Authority, may, for reasons to be recorded by it in writing, remit the case to the Inquiring Authority-whether the Inquiring Authority is the same or different-for fresh or further inquiry and report, and the Inquiring Authority shall thereupon proceed to hold further inquiry according to the provisions of sub-rule(2) as far as may be.

(ii) The Disciplinary Authority shall, if it is disagrees with the findings of the Inquiring Authority on any article of charge, record its reasons for such disagreement and record its own findings on such charge, if the evidence on record is sufficient for the purpose.

(iii) if the Disciplinary Authority, having regard to its findings on all or any of the articles of charge, is of the opinion that any of the penalties specified in rule 49 should be imposed on the employee, it shall, notwithstanding anything contained in sub-rule(4), make an order imposing such penalty.

Provided that where the Disciplinary Authority is of the opinion that the penalty to be imposed is any of the manor penalties specified in clauses (e), (f), (g) and (h) of rule 49 and if it is lower in rank to the Appointing Authority in respect of the category of employees to which the employee belongs, it shall submit to the Appointing Authority the records of the enquiry specified in clause (xxi) (b) of sub-rule (2), together with its recommendations regarding the penalty that may be imposed and the Appointing Authority shall make an order imposing such penalty as it considers in its opinion appropriate.

(iv) If the Disciplinary Authority or the Appointing Authority, as the case may be, having regard to its findings on all or any of the articles of charge, is of the opinion that no penalty is called for, it may pass on order exonerating the employee concerned.

4 (i) Where it is proposed to impose any of the minor penalties specified in clauses (a) to (d) of rule 49 the employee shall be informed in writing of the imputations of lapses against him and be given an opportunity to submit his written statement of defence within a specified period not exceeding 15 days or such extended periods

may be granted by the Disciplinary Authority. The defene statement, if any, submitted by the employee shall be taken into consideration by the Disciplinary Authority before passing orders.

(ii) Where, however, the Disciplinary Authority is satisfied that an enquiry is necessary, it shall follow the procedure for imposing a major penalty as laid down in sub-rule(2).

(iii) The record of proceedings in such cases shall include:

(a) a copy of the statement of imputations of lapses furnished to the employee;

(b) the defence statement, if any, of the employee; and

(c) the orders of the Disciplinary Authority together with the reasons therefor.

(5) Orders made by the Disciplinary Authority or the Appointing Authority as the case may be under sub-rules (3) and (4) shall be communicated to the employee concerned, who shall also be supplied with a copy of the report of inquiry, if any.

(6) Where two or more employees are concerned in a case, the authority competent to impose a major penalty on all such employees may make an order directing that disciplinary proceedings against all of them may be taken in a common proceeding.

(7) (i) Notwithstanding anything contained in sub-rules (2), (3) and 4, where an employee is at any time or has been adjudicated insolvent or has suspended payments or has compounded with his creditors or is or has been convicted by a criminal court of an offence involving moral turpitude, the Appointing Authority may discharge the employee from the Bank's service without any notice whatsoever, any no appeal shall lie against such discharge.

(ii) Without prejudice to what is stated in clause(i) above and not withstanding anything contained in sub-rules (2), (3) and 4, the Disciplinary Authority or the Appointing Authority, as the case may be, may impose any of the penalties specified in rule 49, if the employee has been convicted of a criminal charge or on the strength of facts or conclusions arrived at by a judicial trial."

In view of provisions contained in Rule 49, as mentioned above, reduction to a lower grade or post, or to a lower stage in a time scale, which has been provided under sub-rule (e), comes under the category of major penalties. For imposition of major penalty, procedure has been prescribed under Rule-50, as indicated above. Sub-clause (b)(II) of sub-rule (x) of Rule-50 clearly prescribes that the inquiring officer has to supply the list of documents and witnesses so as to enable the petitioner to give written statement of defence. But in the present case, though the petitioner requested

the inquiring officer, vide letter dated 30.09.1986, for supply of the relevant documents and also for verification of documents, the same was not done. Again on 29.05.1987, when the petitioner requested for verification of documents, the inquiring officer, without allowing the said application, directed the concerned authority to produce the available documents only. Accordingly, the documents, which were called for by the petitioner, were not supplied to him, thereby the authorities have acted in gross violation of the Staff Rules and non-compliance of the principle of natural justice.

7. The inquiring officer submitted his report on 30.11.1987 by holding that charge no.5 was partially proved regarding liquidation of loans in short period, but the disciplinary authority, in disagreement with finding given by the inquiring officer, held that the said charge is proved, but, however, without assigning any cogent reason which is in gross violation of the provisions contained in sub-rule (xxi) (3)(ii) of Rule-50 of the Staff Rules and also violates the principle of natural justice. The inquiring officer has also committed gross error, which is apparent on the face of the record, in recording the finding in respect of charge no.2 that it is partially proved, when neither the charge-sheet nor the statement of article of charges specify any particular instruction which was violated during disbursement of loan and, as such, the allegation, that disbursement of loan was made in cash contravening the laid down instruction, is vague and baseless. Besides, the inquiring officer during course of inquiry has also not referred to any particular instruction, which has been allegedly violated by the petitioner at the time of disbursement of loan. Had there been any particular instruction clearly violated by the petitioner, then it would have been reflected in the enquiry report submitted by the inquiring officer. In the instant case, the enquiry report does not refer any particular instruction to that effect.

8. At this stage, it is worthwhile to refer clause (iv) of the AGL Circular No.10 of 1980, which reads as follows:

> *"(iv) Where the branch is situated at a manageable distance from the fair/Market, (where the official is not compelled to camp at the fair overnight), the Bank's officials need carry from the branch in a day only that much of cash which is required for payment on deals already concluded. This would avoid the keeping of cash on his person overnight."*

The finding of the inquiring officer in respect of charge no.4, which was fully proved, is that the petitioner during his tenure at Satkosia Branch sanctioned loans under different Government sponsored schemes like IRDP

(Integrated Rural Development Programme), I.T.D.P. (Integrated Tribal Development Programme), M.A.D.A.(Modified Area Development Agency), E.R.R.P. (Economic Rehabilitation of the Rural Poor) which did not have the same laid down procedure towards administration of subsidy. The I.R.D.P. Schemes was introduced in the year 1979-80 in certain selected Blocks in the country, which was extended to all the Blocks of the country w.e.f. 2.10.80. At the time of inception of the said scheme, Bank Authority issued AGL Circular No.16 of 1979 prescribing the procedure of administration of subsidy and the said procedure does not clearly prohibit the bank to disburse the beneficiary with the full project cost, by debiting the entire project cost to his loan account for which the sanction has been made by obtaining the pronote/loan bond for the full unit cost from the borrower. The petitioner followed the procedure prescribed in the AGL Circular No.16 of 1979 is not unique event but it is adopted by all the branches throughout the country. The prevailing practice in disbursement of the IRDP Scheme was that the entire project cost was disposed of by the bank and that the subsidy received, which was duly reflected in the borrower's account. In fact, the LB Circular No.5 of 1986 dated. 5.3.1986, which was introduced after Circular No.4 of 83, not only noticed the said prevailing practice but also indicated that in all the cases where interest was liable to be paid by the borrower for the short period, only the subsidy was received, the Bank was advised not to charge interest for that period. The scheme, as such, being beneficial one if the total project amount was not disbursed, asset could not be even purchased, which would result in the scheme becoming totally redundant. No loss was caused to the bank and after 86 Circular, no interest burden was passed on to the borrower. In any event, the borrower having duly executed loan documents, it is clarified that practice of sanction and disbursement of all the entire loan, including subsidies, was only made in the case of the IRDP scheme, as has been noticed in the 86 Circular. In view of that, the finding arrived at by the inquiring officer cannot have any justification.

9. While dealing with charge no.5, the inquiring officer came to a finding that the same is partially proved but as it appears, getting no evidence in respect of pre-signed vouchers to liquidate the loan account the inquiring officer held that the accounts were liquidated in quick interval and, as such, the charge is partly proved. In support of his conclusion, he has taken note of the evidence adduced by the petitioner, but, for the reasons best known to him, he did not rely fully upon the witnesses who categorically stated before him that they have liquidated their loan account on their will. There is no iota

of evidence in record even to suggest that it was the petitioner who had been benefited from the entire transaction and that the alleged pre-signed vouchers were fabricated. To the contrary, the borrowers have categorically stated that they had availed the loan and made good the same from their own sources of income. There is evidence that agreements were duly signed between the bank and the borrowers, along with the creation of assents through the instrumentality of the bank, who made payment to the suppliers. Therefore, the finding of the inquiring officer in respect of charge no.5 cannot have any justification.

10. As provided in sub-rule (5) of Rule-50 of the Staff Rules, copy of the enquiry report should be supplied to the employee, but in the present case, before the order passed by the disciplinary authority, copy of the enquiry report was not supplied to the petitioner, which contravenes the said provision. On the other hand, the disciplinary authority, without serving a copy of the enquiry report on the petitioner and without affording opportunity of hearing, not only accepted the enquiry report but also modified the finding in respect of charge no.5 holding that the said charge was fully proved and accordingly, vide his order dated 17.08.1988, imposed major punishment of 'reduction of basic pay by one stage' in terms of Rule-49 (e) w.e.f. the date of service of the order, and further directed the period of suspension of the petitioner may be treated as not on duty. But the appellate authority, vide order dated 11.06.1990, modified the order of the disciplinary authority holding that the period of suspension of the petitioner may be treated as on duty and be paid the emoluments for the suspension period less the subsistence allowance already paid to him, without interfering with the penalty of "reduction of basic pay by one stage" imposed by the disciplinary authority. Though a specific plea was taken before the appellate authority with regard to the irregularities committed in course of enquiry as well as by the disciplinary authority, but the same was not taken into consideration in an arbitrary and unreasonable manner. Against the order passed by the appellate authority, the petitioner preferred review but the reviewing committee, vide order dated 20.08.2001, affirmed the order passed by the appellate authority. Challenging the order of the reviewing committee, the petitioner approached this Court in OJC No. 7996 of 1992, in which the order dated 30.10.1991 passed by the reviewing committee was set aside, on the ground that the disciplinary authority was one of the members of the reviewing committee, it was directed that the officers who are unconnected with the disciplinary proceeding may re-hear the review afresh.

11. As it appears, the article of charges, which were served on the petitioner, do not indicate any particular instructions prohibiting him from cash disbursement and prescribing the procedure of administration of subsidy which are violated or deviated by him in sanction of different loans for different schemes. Thereby, the allegation is definite or specific. But the inquiring officer during enquiry proceeding relied upon one circular deterring the bank to other circulars, thereby, the charges so framed against the petitioner cannot sustain in the eye of law.

12. In ***Punjab National Bank*** (supra), the apex Court while considering the provisions contained in the Industrial Disputes Act held that in a disciplinary enquiry natural justice is the rule. Inquiry Officer's report in favour of delinquent should be supplied and he must give opportunity of hearing to the delinquent before recording its conclusion and natural justice rule has to read in Regulation 7(2) of Punjab National Bank Officer Employees (Discipline and Appeal) Regulations (1977).

13. In ***State Bank of India*** (supra), the apex Court, while considering Section 49 of the State Bank of India Act read with Regulation 49 (g), 68(3), held that in a disciplinary enquiry if the disciplinary authority disagreed with conclusions and findings arrived at by inquiring officer, he is required to record its tentative reasons for disagreement and reasons should be given to delinquent officer to represent before ultimate finding is recorded. Non-furnishing of reasons to delinquent officer is fatal and vitiates ultimate order of dismissal.

14. In view of aforesaid law laid down by the apex Court and applying the same to the present context, it is clearly proved that there is gross violation of principle of natural justice and the Staff Rules governing the field. The reliance placed by the opposite party-Bank on the cases of ***Nirmal J. Jhala*** and ***Abhiram Samal*** (supra) have no application to the present case, as the same has been decided in different context altogether.

15. Considering the factual and legal aspects, as discussed above, this Court is of the considered view that the orders passed by the disciplinary authority-opposite party no.1, the appellate authority-opposite party no.5 and the reviewing authority-opposite party no.6 in Annexures-7, 9 and 13 dated 17.08.1988, 11.06.1990 and 20.08.2001 respectively cannot sustain in the eye of law. The same are liable to quashed and are hereby quashed, as the same are violative of principle of natural justice and the Staff Rules governing the field.

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

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2020 (I) ILR - CUT- 340

DR. B.R.SARANGI, J.

W.P.(C) NO. 1186 OF 2012

STATE OF ORISSA & ANR. ……… Petitioners

.Vs.

SUNIL KUMAR BARAL ……….Opp. Parties

ORISSA FOREST ACT, 1972 – Section 56 read with Rule 4 of Orissa Forest (Detection, Enquiry and Disposal of Forest Offence) Rules, 1980 – Provisions under – Vehicle carrying timber seized and after preliminary inquiry confiscation proceeding initiated – Order of Confiscation passed – Appeal – District judge allowed the appeal by holding that since the inquiry, as contemplated under Rule-4 of Orissa Forest (Detection, Enquiry and Disposal of Forest Offence) Rules, 1980 was not carried out, the confiscation proceeding is vitiated and directed release of the vehicle – Writ petition by State challenging the order passed in appeal – The question thus arose as to whether non-conduct of independent inquiry as envisaged under sub-rule (2) of Rule-4 of Rules, 1980 vitiates the initiation of proceeding under Section 56 of the Forest Act – Held, No.

"The learned District Judge has, in support of the conclusion arrived in the order impugned, placed reliance on the judgments rendered in the case of Rabinarayan Sahu v. Forest Range Officer of Sorada Range, 2008 (II) OLR 592 and Ashok Kumar Sahoo v. Forest Range Officer, Nayagarh, 2011 (II) CLR 422. But, it would not be out of place to mention, since there was conflict of decision, the law laid down by the this Court in Rabiranayan Sahu (supra) was referred to the Full Bench and their Lordships of the Full Bench in Anatha Bandhu Mandal (supra) have categorically held that Rule-4 of Rules, 1980 is not applicable to the confiscation proceeding initiated under Section 56 of the Act, 1972 before the Authorized Officer. Therefore, in view of the law laid down by the Full Bench of this Court, the findings arrived at by the learned District Judge is contrary to the provisions of law to the extent applicable under Rule-4 of Rules, 1980 to a confiscation proceeding. Thereby, there is apparent error on the face of record committed by the learned District Judge in passing the order impugned." (Para 7)

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

1. 2015 (II) OLR (FB) 1 : Anatha Bandhu Mandal Vs. State of Orissa.
2. 2005 (Supp.) OLR 921 : Guru Charan Singh Vs. State of Orissa.
3. 2002(II) OLR 216 : Gurudev Singh Rai Vs. Authorized Officer.
4. 1992 (I) OLR 305 : Malatilata Samal Vs. State of Orissa.
4. 2008 (II) OLR 592 : Rabinarayan Sahu Vs. Forest Range Officer of Sorada Range
5. 2011 (II) CLR 422 : Ashok Kumar Sahoo Vs. Forest Range Officer, Nayagarh.

For Petitioners : Mr. D.K. Pani, Addl. Standing Counsel.
For Opp. Party : M/s. S.K. Dash, S.P. Das & A. Tripathy.

JUDGMENT Date of Hearing: 29.11.2019 : Date of Judgment: 10.12.2019

DR. B.R. SARANGI, J.

The State of Orissa and its functionaries, being the petitioners, have filed this application seeking to quash judgment dated 12.12.2011 passed in FAO No.07 of 2011 by the learned District Judge, Dhenkanal vide Annexure-2 reversing the order dated 18.03.2011 passed by the Authorized Officer-cum-DFO, Dhenkanal Forest Division, Dhenkanal in OR Case No.80 KE of 2009-10 and directing release of the seized truck bearing registration no.OR/04/D-6551 in favour of its owner forthwith.

2. The factual matrix of the case, in hand, is that on 11.02.2010 at about 9.00 P.M., while the Range Officer, Kamakhyanagar East Range, along with his staff, on getting a confidential information regarding illegal transportation of timbers from Kankadahad forest to Sukinda, was waiting for detection of the same at Batagaon chhaka, at about 3.30 A.M. night one vehicle came from Kankahad side. When the Range Officer signaled to stop the vehicle, the driver stopped it before 50 ft. ahead. Thereafter, when the staff rushed towards the vehicle, some occupants and the driver of the vehicle went away from the spot and due to night, they could not catch hold them. During checking by the staff, it was found that the said vehicle (truck bearing registration no. OR/04/D-6551, having duplicate number plate bearing registration No. OR 19-D-7482) was loaded with 28 nos. of teak logs measuring about 3.1945 cum. On demand/interrogation, the persons sitting inside the vehicle could not be able to produce any valid document or authority in support of transportation of the timbers and confessed their guilty and admitted that the owner and driver of the seized vehicle fled away from the spot before arrival of the forest staff. On the spot, forest guard seized the vehicle, along with the timbers loaded, and prepared a seizure list. After preliminary inquiry by the forest guard, report was submitted before the Range Officer, who submitted necessary papers before the A.O.-cum-DFO, Dhenkanal Division for initiation of a confiscation proceeding under Section 56 of the Orissa Forest Act, 1972 (hereinafter referred to "Act, 1972") in respect of the offending vehicle, as it was found to be involved in commission of a forest offence.

2.1 The A.O.-cum-Asst. Conservator of Forests, Dhenkanal conducted hearing and finally the vehicle bearing registration no. OR/04/D-6551 and the

seized forest produce were confiscated to the Government vide order dated 18.03.2011. Against the said order, the opposite party preferred appeal bearing FAO No.07/2011 before the learned District Judge, Dhenkanal, who, after hearing the parties, came to hold that since the inquiry, as contemplated under Rule-4 of Orissa Forest (Detection, Enquiry and Disposal of Forest Offence) Rules, 1980 (hereinafter referred to "Rules, 1980") was not carried out, resulting in depriving the opposite party herein of his asset, i.e., a truck and it was incumbent upon the authority to comply with the requirements of law and failure to do so, is fatal to the prosecution, and thus directed to release the vehicle bearing registration no. OR/04/D-6551 in favour of the owner of the vehicle forthwith. Hence this application.

3. Mr. D.K. Pani, learned Addl. Standing Counsel for the petitioners strenuously urged that the inquiry as contemplated under Rule-4 of Rules, 1980 has no application to the confiscation proceeding under Section 56 of the Act, 1972. Therefore, the findings arrived at by the learned District Judge to the extent that the provisions contained under Rule-4 of Rules, 1980, having not been carried out, the order of confiscation suffers from jurisdictional error, is absolutely an error apparent on the face of record. It is further contended that even if there is no evidence that the timbers were cut and removed from Kankadahad Forest, the same is not fatal to the prosecution case. It is contended that seizure of timber does not require to be made in presence of the independent witnesses, thereby, the strict rule of evidence is not applicable to the confiscation proceeding. As such, in a proceeding under Section 56 of the Act, 1972, the department has to simply show prima facie material indicating involvement of concerned vehicle in the forest offence. Thereby, the learned District Judge committed error apparent on the face of record in interfering with the findings of the Authorized Officer and also reversing the same in the order impugned.

To substantiate his contention, he has relied upon the judgments of this Court rendered in the cases of ***Anatha Bandhu Mandal v. State of Orissa***, 2015 (II) OLR (FB) 1; ***Guru Charan Singh v. State of Orissa***, 2005 (Supp.) OLR 921; ***Gurudev Singh Rai v. Authorized Officer***, 1992 (I) OLR 305; and ***Malatilata Samal v. State of Orissa***, 2002(II) OLR 216.

4. Pursuant to notice dated 07.08.2014, M/s Saroj Kumar Dash, S.P. Dash and A. Tripathy, Advocates had entered appearance on behalf of the opposite party by filing vakalatnama on 06.11.2019. Though their names have been indicated in the cause list as well as in the brief, at the time

hearing, none has entered appearance on behalf of the opposite party. Since it is an old case of the year 2012, this Court did not feel inclined to grant any further adjournment, rather proceeded to decide the writ petition, being a certiorari proceeding, on the basis of the materials available on record,.

5. This Court heard Mr. D.K. Pani, learned Addl. Standing Counsel appearing for the petitioners-State and perused the record. Considering the arguments advanced by learned Addl. Standing Counsel for the petitioners and looking at the impugned order dated 12.12.2011, it appears that the learned District Judge has come to a definite finding that due to non-conduct of independent inquiry by the Range Officer, Kankadahad, East Range Division, after the preliminary inquiry was conducted by the forest guard, initiation of proceeding under Section 56 of the Forest Act vitiates the mandatory provisions as envisaged under sub-rule (2) of Rule-4 of Rules, 1980. Therefore, for just and proper adjudication of the case, the relevant provisions of Orissa Forest Act, which has been amended from time to time, are extracted below:

> ***"RELEVANT PROVISIONS OF "THE ACT"*** *as it stood prior to Orissa Act 9 of 1983 also known as the Orissa Forest (Amendment) Act, 1982.*
>
> *"56. Seizure of property liable to confiscation- (1) When there is reason to believe that a forest offence has been committed in respect of any forest produce, such produce, together with all tools, ropes, chains, boats, vehicles or cattle used in committing any such offence may be seized by any Forest Officer or Police Officer.*
> *(2) Every officer seizing any property under this Section shall place, on such property a mark indicating that the same has been so seized and shall as soon as may be, except where the offender agrees in writing to get the offence compounded, make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made:*
>
> *Provided that, when the forest produce with respect to which such offence is believed to have been committed is the property of Government, and the offender is unknown, it shall be sufficient if the officer makes, as soon as may be, a report of the circumstances to his official superior and the Divisional Forest Officer.*
>
> *(3) The property seized under this section shall be kept in the custody of a Forest Officer or with any third party, until the compensation for compounding the offence, is paid or until an order of the Magistrate directing its disposal is received.*
>
> *Explanation:- For the purposes of this section and Section 59, cattle shall not include buffaloes, bulls, cows, calves and oxen.*
>
> *58. Action after seizure:- Upon the receipt of any such report the Magistrate shall, except where the offence has been compounded, with all convenient dispatch, take*

such measures as may be necessary for the arrest and trial of the offender and the disposal of the property according to law.

59. Forest produce, tools, etc. liable to confiscation: (1) All timber or forest produce, which is not the property of Government and in respect of which a forest offence has been committed, and all tools, ropes, chains, boats, vehicles and cattle used in committing any forest offence, shall be liable to confiscation.

(2) Such confiscation may be in addition to any other punishment provided for such offence.

60. Disposal on conclusion of trial for forest offence of produce in respect of which it was committed: - When the trial of any forest offence is concluded, any forest produce in respect of which such offence has been committed shall, if it is the property of Government or has been confiscated, be taken charge of by or under the authority of the Divisional Forest Officer, and in any other case, may be disposed of in such manner as the Court may direct.

64. Property when to vest in Government:- When an order for the confiscation of any property has been passed under Section 59 or Section 61, as the case may be, and the period limited by Section 63 for filing an appeal from such order has elapsed, and no such appeal has been preferred or when, on such an appeal being preferred, the appellate Court confirms such order in respect of the whole or a portion of such property, such property or such portion thereof, as the case may be, shall vest in the State Government free from all encumbrances.

71. Power to try offence summarily- Any Management of the First Class specially empowered in this behalf by the State Government may try summarily under the Code of Criminal Procedure, 1898, any forest offence punishable with imprisonment for a term not exceeding one year, or with fine not exceeding one thousand rupees, or with both.

72. Power to compound of offences- (1) Any Forest Officer specially empowered in this behalf by the State Government may accept as compensation from any person who committed or in respect of whom it can be reasonably inferred that he has committed, any forest offence other than an offence under Section 66 or Section 67

(i) a sum of money not exceeding fifty rupees where such offences is of a trivial nature and involves forest produce the market value of which does not exceed twenty –five rupees;

(ii) a sum of money which shall not in any case be less than the market value of the forest produce, or more than four times such value as estimated by such Forest Officer, in addition to the market value of the forest produce, where such offence involves any forest produce which in the opinion of the Forest Officer may be released;

(iii) a sum of money which shall not in any case be less than the market value of the forest produce, or more than four times such value as estimated by such Forest Officer, where such offence involves forest produce which in the opinion of the Forest Officer should be retained by the Government:

(2) On receipt of the sum of money referred to in Subsection (1) by such officer –

(i) the accused person, if in custody, shall be discharged;

(ii) the property seized shall, if it is not to be so retained, be released; and

(iii) no further proceedings shall be taken against such person or property;

82. Additional powers to make rules- (1) The State Government may make rules - (a) to prescribe and limit the powers and duties of any Forest Officer under this Act:

(b) to regulate the rewards to be paid to officers and informants out of the proceeds of fines and confiscations under this act;
(c) for the preservation, reproduction and disposal of trees and timber belonging to Government, but grown on lands belonging to or in the occupation of private persons; and

(d) generally, to carry out the provisions of this Act.

(2) All rules made under this Act shall, as soon as may be after, they are made, be laid before the State legislature for a total period of fourteen days which may be comprised in one session or in two or more successive sessions and if during the said period, the State legislature makes modifications, if any, therein, the rules shall thereafter have effect only in such modified form so, however, that such modifications shall be without prejudice to the validity of anything previously done under the rules."

RELEVANT PROVISIONS OF THE ORISSA FOREST (AMENDMENT) ACT, 1982*, which is also known as Orissa Act 9 of 1983, for short "the 1983 Act".*

"8. Amendment of section 56 - In section 56 of the Principal Act,- (a) in sub-section (2), after the words and comma "to get the offence compounded", the following words and brackets shall be inserted, namely:- "either produce the property seized before an officer not below the 7 rank of an Assistant Conservator of Forest authorized by the State government in this behalf by notification (hereinafter referred to as the 'authorised officer') or";

(b) after sub-section (2), the following new sub-sections shall be inserted, namely:-

"(2-a) Where an authorized officer seizes any forest produce under sub-section (1) or where any such forest produce is produced before him under sub-section (2) and he is satisfied that a forest offence has been committed in respect thereof, he may order confiscation of the forest produce so seized or produced together with all tools, ropes, chains, boats, vehicles or cattle used in committing such offence.

(2-b) No order confiscating any property shall be made under sub-section (2-a) unless the person from whom the property is seized is given-

(a) a notice in writing informing him of the grounds on which it is proposed to confiscate such property;

(b) an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation; and

(c) a reasonable opportunity of being heard in the matter.

(2-c) Without prejudice to the provisions of sub-section (2- b), no order of confiscation under sub-section (2-a) of any tool, rope, chain, boat, vehicle or cattle shall be made if the owner thereof proves to the satisfaction of the authorized officer that it was used without his knowledge or connivance or the knowledge or connivance of his agent, if any, or the person in charge of the tool, rope, chain, boat, vehicle or cattle, in committing the offence and that each of them had taken all reasonable and necessary precautions against such use.

(2-d) Any forest officer below the rank of a Conservator of Forests empowered by the Government in this behalf by notification, may within thirty days from the date of the order of confiscation by the authorized officer under subsection (2-a), either suo motu or on application, call for and examine the records of the case and may make such inquiry or such inquiry to be made and pass such orders as he may think fit.:

Provided that no order prejudicial to any person shall be passed without giving him an opportunity of being heard.

(2-e). Any person aggrieved by an order passed under subsection (2-a) or sub-section (2-d) may, within thirty days from the date of communication to him of such order, appeal to the District Judge having jurisdiction over the area in which the property has been seized, and the District Judge shall after giving an opportunity to the parties to be heard, pass such order as he may think fit 8 and the order of the District Judge so passed shall be final.".

10. Amendment of section 59 - In section 59 of the Principal Act, in sub-section (1), the words and figure "unless an order of confiscation has already been passed in respect thereof under section 56" shall be added at the end.

11. Amendment of section 64 – In Section 64 of the Principal Act, shall be re-numbered as sub-section (1) thereof and after sub-section (1) as so re-numbered, the following new sub-section shall be added, namely;- "When an order of confiscation of any property passed under section 56 has been become final under that section in respect of the whole or any portion of the property, such property or the portion thereof as the case may be, shall vest in the State Government free from all encumbrances."

12. Insertion of new section 64-A - After section 64 of the principal Act, the following new section shall be inserted, namely:-

"64-A. Confiscation to be no bar to imposition of other penalty - An order of confiscation made under section 56 shall not act as a bar to the imposition of any other penalty to which the offender is liable under this Act or the rules made thereunder".

14. Amendment of section 72 - In section 72 of the Principal Act, in sub-section (1),-

(a) for the words and figures "any forest offence other than an offence under section 66 or section 67", the words, figures and brackets "any forest offence (other than an offence under section 66 or section 67 or an offence in committing which a vehicle has been used)," shall be substituted;

(b) the following proviso shall be added at the end, namely:- "Provided that no such offence as is referred to in clause (ii) or clause (iii) shall be compounded if the market value of the forest produce involved exceeds one hundred rupees."

RELEVANT PROVISIONS OF THE ORISSA FOREST (AMENDMENT) ACT, 2000*, which is also known as Orissa Act 12 of 2003, for short "the 2003 Act".*

"8 – Amendment of Section 56: In Section 56 of the principal Act:

(a) In Sub-section (2), after the words, "offence compounded", the words and figure "under Section 72" shall be inserted;

(b) In Sub-section (2-a), for the words "he may" the words "he shall" shall be substituted; and

(c) To Sub-section (3), the following proviso shall be added, namely:

"Provided that the seized property shall not be released during pendency of the confiscation proceeding or trial even on the application of the owner of the property for such release."

13 – Amendment of Sections 71 & 77 : In Section 71 and in clause (c) of Sub-section (1) of Section 7 of the principal Act:

(a) for the figure "1898", the figure "1973" shall be substituted; and

(b) for the marginal references "5 of 1898" and "45 of 1898" the marginal references "2 of 1974" shall be substituted."

RELEVANT PROVISIONS OF THE ORISSA FOREST (AMENDMENT) ACT, 2010*, which is also known as Orissa Act 9 of 2011, for short "the 2011 Act". "*

"2. Amendment of Section 72 – In Section 72 of the Orissa Forest Act, 1972, in the proviso to Sub-section (1), for the words "one hundred rupees", the words "five thousand rupees" shall be substituted."

RELEVANT PROVISIONS OF "THE ACT" AS THOSE STAND TODAY.

"56. Seizure of property liable to confiscation — (1) When there is reason to believe that a forest offence has been committed in respect of any forest produce, such produce, together with all tools, ropes, chains, boats, vehicles or cattle used in committing any such offence may be seized by any Forest Officer or Police Officer.

(2) Every officer seizing any property under this section shall place on such property a mark indicating that the same has been so seized and shall, as soon as may be, except where the offender agrees in writing to get the offence compounded, under Section 72 either produce the property seized before an officer not below the rank of an Assistant Conservator of Forests authorised by the State Government in this behalf by notification (hereinafter referred to as the authorised officer) or make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made:

Provided that, when the forest produce with respect to which such offence is believed to have been committed is the property of Government, and the offender is unknown, it shall be sufficient if the officer makes, as soon as may be, a 10 report of the circumstances to his official superior and the Divisional Forest Officer.

(2-a) When an authorised officer seizes any forest produce under sub-section (1) or where any such forest-produce is produced before him under sub-section (2) and he is satisfied that a forest offence has been committed in respect thereof, he shall order confiscation of the forest produce so seized or produced together with all tools, ropes, chains, boats, vehicles or cattle used in committing such offence.

(2-b) No order confiscating any property shall be made under sub-section (2-a) unless the person from whom the property is seized is given—

(a) a notice in writing informing him of the grounds, on which it is proposed to confiscate such property;

(b) an opportunity of making a representation in writing within such reasonable times as may be specified in the notice against the grounds for confiscation; and

(c) a reasonable opportunity of being heard in the manner.

(2-c) Without prejudice to the provisions of sub-section (2- b), no order of confiscation under sub-section (2-a) of any tool, rope, chain, boat, vehicle or cattle shall be made if the owner thereof proves to the satisfaction of the authorised officer that it was used without his knowledge or connivance or the knowledge or connivance of his agent, if any, or the person in charge of the tool, rope, chain, boat, vehicle or cattle, in committing the offences and that each of them had taken all reasonable and necessary precautions against such use.

(2-d) Any Forest Officer not below the rank of a Conservator of Forests empowered by the Government in this behalf by notification, may, within thirty days from the date of the order of confiscation by the authorised officer under sub-section (2-a), either suo motu or on application, call for and examine the records of the case and may make such inquiry or cause such enquiry to be made and pass such order as he may think fit:

Provided, that no order prejudicial to any person shall be passed without giving him an opportunity of being heard.

(2-e) Any person aggrieved by an order passed under subsection (2-a) or sub-section (2-d) may, within thirty days from the date of communication to him of such order, appeal to the District Judge having jurisdiction over the area in which the property has been seized, and the District Judge shall after giving an opportunity to the parties to be heard, pass such order as he may think fit and the order of the District Judge so passed shall be final.

(3) The property seized under this section shall be kept in the custody of a Forest Officer or with any third party, until the compensation for compounding the offence is paid or until an order of the Magistrate directing its disposal is received.

Provided that the seized property shall not be released during pendency of the confiscation proceeding or trial even on the application of the owner of the property for such release.

Explanation.—For the purposes of this section and Section 59, cattle shall not include buffaloes, bulls, cows, calves and oxen.

58. Action after seizure— Upon the receipt of any such report the Magistrate shall, except where the offence has been compounded, with all convenient despatch, take such measures as may be necessary for the arrest and trial of the offender and the disposal of the property according to law.

59. Forest produce, tools, etc., liable to confiscation — (1) All timber or forest produce which is not the property of Government and in respect of which a forest offence has been committed, and all tools, ropes, chains, boats, vehicles and cattle used in committing any forest offence, shall be liable to confiscation unless an order of confiscation has already been passed in respect thereof under Section 56,

(2) Such confiscation may be in addition to any other punishment provided for such offence.

60. Disposal on conclusion of trial for forest offence of produce in respect of which it was committed — When the trial of any forest offence is concluded, any forest produce in respect of which such offence has been committed shall, if it is the property of Government or has been confiscated be taken charge of by or under the authority of the Divisional Forest Officer, and in any other case, may be disposed of in such manner as the Court may direct.

64. Property when to vest in Government— (1) When an order for the confiscation of any property has been passed under Section 59 or Section 61, as the case may be, and the period limited by Section 63 for filing an appeal from such order has elapsed, and no such appeal has been preferred or when, on such an appeal being preferred, the Appellate Court confirms such order in respect of the whole or a portion of such property, such property or such portion thereof, as the case may be, shall vest in the State Government free from all encumbrances.

(2) When an order of confiscation of any property passed under Section 56 has become final under that section in respect of the whole or any portion of the

property, such property or the portion thereof, as the case may be, shall vest in the State Government free from encumbrances.

64-A. Confiscation to be no bar to imposition of other penalty—An order of confiscation made under Section 56 shall not act as a bar to the imposition of any 12 other penalty to which the offender is liable under this Act or the rules made thereunder.

71. Power to try offences summarily - Any Magistrate of the First Class specially empowered to this behalf by the State Government may try summarily under the Code of Criminal Procedure, 1973, (2 of 1974) any forest offence punishable with imprisonment for a term not exceeding one year, or with fine not exceeding one thousand rupees, or with both.

72. Power to compound of offences - (1) Any Forest Officer specially empowered in this behalf by the State Government may accept as compensation from any person who committed or in respect of whom it can be reasonably inferred that he has committed any forest offence (other than an offence under Section 66 or Section 67 or an offence in committing which a vehicle has been used)-

(i) a sum of money not exceeding fifty rupees where such offence is of a trivial nature and involves forest produce the market value of which does not exceed twenty-five rupees;

(ii) a sum of money which shall not in any case be less than the market value of the forest produce, or more than four times such value as estimated by such Forest Officer, in addition to the market value of the forest produce, where such offence involves any forest produce which in the opinion of the Forest Officer may be released;

(iii) a sum of money which shall not in any case be less than the market value of the forest produce, or more than four times such value as estimated by such Forest Officer, where such offence involves forest produce which in the opinion of the Forest Officer should be retained by the Government:

Provided that no such offence as is referred to in Clause (ii) or Clause (iii) shall be compounded if the market value of the forest produce involved exceeds five thousand rupees.

(2) On receipt of the sum of money referred to in subsection (1) by such officer-

(i) the accused person, if in custody, shall be discharged;

(ii) the property seized shall, if it is not to be so retained, be released; and

(iii) no further proceedings shall be taken against such person or property.

82. Additional powers to make rules — (1) The State Government may make rules—

(a) to prescribe and limit the powers and duties of any Forest Officer under this Act;

(b) to regulate the reward to be paid to officers and informants out of the proceeds of fines and confiscations under this Act;

(c) for the preservation, reproduction and disposal of trees and timber belonging to Government, but grown on lands belonging to or in the occupation of private persons; and

(d) generally, to carry out the provisions of this Act.

(2) All rules made under this Act shall, as soon as may be after, they are made, be laid before the State Legislature for a total period of fourteen days which may be comprised in one session or in two or more successive sessions and if during the said period, the State Legislature makes modifications, if any, therein, the rules shall thereafter have effect only in such modified form, or, however, that such modifications shall be without prejudice to the validity of anything previously done under the rules.

THE RELEVANT PROVISIONS OF "THE 1980 RULES"

"S.R.O. No.56/80-In exercise of the powers conferred by clause (d) of sub-section (1) of Section 82 of the Orissa Forest Act, 1972 (Orissa Act 14 of 1972), the State Government do hereby make the following rules, namely:-

1. (1) These rules may be called the Orissa Forest (Detection, Enquiry and Disposal of Forest offence) Rules, 1980.

(2) They shall come into force on the date of their publication in the Official Gazette

2.(1) In these rules, unless the context otherwise requires,-

(i) "Act" means the Orissa Forest Act, 1972;

(ii) "Accused" means any person who committed or in respect of whom it may be reasonably inferred that he has committed or abetted the commission of a forest offence;

(iii) "Case record" means the records of a case relating to any forest offence maintained by a Forest Officer under these Rules;

(iv) "Form" means a form appended to these rules.

(2) All words and expressions used but not defined in these rules shall have the meanings, respectively assigned to them in the Act.

3 (1) When a forest offence is detected and booked it shall be dealt with in the manner hereinafter provided.

(2) The forest officer who detects any forest offence under any of the provisions of the Act, shall draw a report in Form No.1 which shall form a part of the case record.

(3) A list in duplicate of articles seized shall be prepared by the officer detecting the offence, in Form No.II, and a copy of the seizure list shall be made over to the accused person, where the accused is known and his signature shall be obtained in the duplicate copy of the said seizure list. The duplicate copy of the seizure list shall form a part of the case record.

(4) The report of seizure required to be made to the Magistrate under sub-section (2) of Section 56 of the Act shall be in Form No.III, and a copy of the report shall be retained in the case record when the report is so made.

4.(1) When a forest offence is detected, a preliminary enquiry may be held by a Forester in charge of the Section, who shall forward his enquiry report along with the Report in Form No.1 to the Range Officer concerned, soon after his preliminary enquiry is completed :

Provided that no enquiry may be held by any such Officer, if the accused who has committed a forest offence, other than an offence under Sections 66 and 67 of the Act agrees, and files a petition to that effect in Form No.4 to get the offence compounded under Section 72 of the Act and to pay compensation therefore. Such application in Form No.IV shall also form a part of the case record.

(2) An enquiry into the forest offence shall thereafter be held by an officer not below the rank of a Range Officer.

(3) The enquiry report together with the case record shall be submitted to the Divisional Forest Officer by the Range Officer in all cases in which the Divisional Forest Officer is not competent to compound under Rule 7 and where the accused persons do not opt to compound the offence.

5. Every accused who agrees under Rule 4 to get the offence compounded shall immediately deposit in advance an amount as determined by the Forest Officer not below the rank of a Forester towards the probable compensation within the meaning of Section 72 of the Act. On receipt of such amount the forest officer concerned shall issue a receipt in Form No.V duly signed by him.

Provided that the acceptance of any amount as aforesaid by the Forest Officer shall be without prejudice to any decision that may be taken by the Forest Officer specially empower under Section 72 of the Act having regard to the quantum of compensation in conformity with the clauses (i) to (iii) of sub-section (1) of the said Section.

6. Any forest produce seized from an accused shall not immediately be released on receipt of the amount of advance towards probable compensation under Rule 5 but shall be retained with the Forest Officer concerned until an order in 15 this behalf is issued by the competent authority under Section 72 of the Act.

7. Where the accused files the petition under Rule 4, the Forest Officer specially empowered under Section 72 of the Act may compound the case by passing an order in this behalf in Form No.VI. The order shall in all such cases be communicated to the accused immediately by or through the Range Officer, as the case may be.

8. When the Forest Officer empowered under Section 72 refused to compound an offence, the amount that was received as advance towards probable compensation from the accused under Rule 5 shall be refunded to him by the Range Officer on receipt of the order in that behalf from such Forest Officer.

9. The compounding order once passed shall be final and no appeal shall lie against such order.

10. (1) In the event where the amount of compensation ordered under Rule 7 becomes higher than the amount deposited under Rule5, the differential amount shall be paid by the accused to the concerned Range Officer within thirty days from the date of issue of the compounding order.

(2) In case of default in such payment under sub-rule (1), the Divisional Forest Officer shall take action to recover the balance amount as provided under Section 87 of the Act.

11. Where the accused does not opt to compounded the offence or the Forest Officer empowered refused to compound the offence and for all cases under Sections 66 and 67 of the Act, the Divisional Forest Officer may forward the offence report in Form No.VII along with the report in Form No.1 to the Magistrate having jurisdiction for prosecution of the offender.

12. All rules corresponding to these rules and in force prior to the commencement of these rules are hereby repealed.

Provided that orders made, notices issues, compensation levied, imposed or assessed, proceeding instituted and sent for prosecution and all actions taken and things done under any of the provisions of the rules so repealed shall be deemed to have been respectively made, issued, levied, imposed or assessed, instituted, taken or done under these rules."

6. On perusal of the aforementioned provisions, it appears that enquiry into forest offence under Rule-4 is a prelude to launching of prosecution and Rule-4 should be read along with Rule-11 in a harmonious manner to get a complete picture. The word "enquiry" is given an independent interpretation; it no way helps the case of the opposite party. Therefore, such an enquiry cannot be *sine qua non* prior to initiation of confiscation proceeding as the enquiry proceeds on the assumption of existence of forest offence. Once existence of forest offence is not disputed, the Authorized Officer can proceed for confiscation of forest produce with all tools, chains, vehicles, etc. Besides, since Sections (2-a), (2-b) & (2-c) of Section 56 of Act, 1972 came much later, on this ground also, Rules, 1980 cannot be made applicable to confiscation proceeding before the authorized officer.

7. The learned District Judge has, in support of the conclusion arrived in the order impugned, placed reliance on the judgments rendered in the case of ***Rabinarayan Sahu v. Forest Range Officer of Sorada Range***, 2008 (II) OLR 592 and ***Ashok Kumar Sahoo v. Forest Range Officer, Nayagarh***, 2011 (II) CLR 422. But, it would not be out of place to mention, since there was conflict of decision, the law laid down by the this Court in ***Rabiranayan Sahu*** (supra) was referred to the Full Bench and their Lordships of the Full Bench in ***Anatha Bandhu Mandal*** (supra) have categorically held that Rule-4 of Rules, 1980 is not applicable to the confiscation proceeding initiated under Section 56 of the Act, 1972 before the Authorized Officer. Therefore, in view of the law laid down by the Full Bench of this Court, the findings arrived at by the learned District Judge is contrary to the provisions of law to the extent applicable under Rule-4 of Rules, 1980 to a confiscation proceeding. Thereby, there is apparent error on the face of record committed by the learned District Judge in passing the order impugned.

8. For better appreciation, Section 2 (g) of The Orissa Forest Act, 1972 is quoted below:-

> *"**forest produce"** includes-*
>
> *(i) the following whether found in, or brought from a forest or not, that is to say-*
>
> *(a) timber, charcoal, caoutchouc catechu, wood-oil, resign, natural varnish, bark, tussay cocoon, lac, gums, roots of Patal garuda, mohua flowers, mohua seeds, myrabolans, kendu leaves, sandalwood, tamarind, hill-broom, siali leaves, siali fibres, sal seeds;*
>
> *(b) wild animals and wild birds, skins, tusks, horns, bones and all other part or produce of wild life; and*
>
> *(c) such other produce as may be notified by the State Government; and*
>
> *(ii) the following when found in or brought from a forest that is to say-*
>
> *(a) trees and leaves, flowers and fruuits and all other parts or produce of trees not hereinbefore mentioned;*
>
> *(b) plants not being trees (including grass, creepers, reeds, and moss) and all parts or produce of such plants;*
>
> *(c) honey, wax and arrowroot;*
>
> *(d) peat, surface oil, rock, sand and minerals (including limestone, laterite, mineral oils and all products of mines of quarries)."*

9. Sub-section (1) of Section 56 which provides that when there is reason to believe that a forest offence has been committed in respect of any

forest produce, such produce, together with all tools, ropes, chains, boats, vehicles or cattle used in committing any such offence may be seized by any Forest Officer or Police Officer. The timbers have been included within the definition of forest produce and admittedly the same has been seized from the vehicle of which opposite party is the owner. If the forest produce, which has been seized, is liable to be confiscated under Section 56 of the Forest Act, 1972, therefore, the findings arrived at by the learned District Judge, that no evidence has been adduced on behalf of the prosecution that the timbers were cut and removed from Kankadahad forest, have no justification in view of the fact that the timbers, being the forest produce, have been seized and for that purpose the provisions contained in Section 56 of Act, 1972 is applicable, irrespective of the fact that any evidence was led or not by the prosecution that the timbers were cut and removed from Kankadahad forest. Therefore, non-adducing of evidence by the prosecution that seized forest produce were cut and removed from Kankadahad forest, cannot be said to be fatal to the prosecution.

10. In ***Gurucharan Singh*** (supra), this Court held that in initiation of proceeding under Section 56 of the Orissa Forest Act, the department has to simply show prima facie materials indicating involvement of the concerned vehicle in a forest offence. If such onus is discharged by the Department, then the burden shifts on the owner of the vehicle to establish that he had no knowledge or connivance in commission of the forest offence and that he had taken all reasonable and necessary precaution against misuse of the vehicle by the driver or his agent. Once this was established and once the opposite party offered no evidence to show that he had taken reasonable and necessary precaution against use of the vehicle in any illegal work, the protection provided under sub-section (2-c) of Section 56 of the Act is not available. In view of such position, the plea advanced by the learned District Judge in the order impugned that the prosecution has failed to adduce evidence that the timbers were cut and removed from Kankadahad forest, is not a requirement, rather it is established that the department has shown prima facie materials indicating involvement of the vehicle in question in commission of forest offence. Therefore, the reasons given by the learned District Judge cannot sustain in the eye of law.

11. In ***Gurudev Singh Rai*** (supra), this Court held that if a forest offence is committed even with knowledge or connivance of driver, the vehicle would be liable for confiscation even though owner might not have any knowledge or connivance. To escape from order of confiscation, it must be

proved that all necessary and reasonable precautions were taken to prevent the offence. Therefore, in absence of such materials, the learned District Judge could not have come to such a conclusion for releasing the confiscated vehicle in favour of the opposite party.

Similar view has also been taken in ***Malatilata Samal*** (supra), wherein this Court held that for the wrong committed by the driver, the owner is also liable.

12. The findings arrived at by the learned District Judge that prosecution has failed to substantiate the actual timbers and the seizure, is based on surmises and conjectures, inasmuch as there is no dispute that the timbers were seized from the offending vehicle and the seizure list was produced by the seizure officer and, as such, Section 56 of the Forest Act does not require seizure of forest produce to be made before any independent witness and the strict rule of evidence is not applicable to the confiscation proceeding. Rather, the Department has to simply show the prima facie materials indicating involvement of concerned vehicle in the forest offence. Thereby, the authorized officer is justified in confiscating the vehicle, while considering the materials available on record.

13. Considering the factual and legal aspects of the matter, this Court arrives at a conclusion that the order impugned has been passed by the learned District Judge, Dhenkanal without appreciating the materials available on record and law laid down by this Court, as discussed above, in their proper perspective. Therefore, the order dated 12.12.2011 in Annexure-2 passed by the learned District Judge cannot sustain in the eye of law and the same is liable to be quashed and hereby quashed. Consequentially, the order passed by the Authorized Officer on 18.03.2011, which was communicated on 22.03.2011, is upheld. The opposite party is directed to produce the vehicle in question before the Authorized Officer-cum-DFO, Dhenkanal Forest Division, Dhenkanal forthwith for compliance of the order dated 18.03.2011.

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

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2020 (I) ILR - CUT- 357

DR. B.R.SARANGI, J.

W.P.(C) NO. 17928 OF 2019

MANAS KUMAR SWAIN ....Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Petitioner a Multi Purpose Assistant, i.e., Gram Rozgar Sevak – Challenge is made to the order passed by the Block Development Officer relieving him from his duty and directed to hand over the detail charges – Question raised as to whether BDO can pass such order when the petitioner has been selected and engaged by the Committee headed by the Collector? – Held, No, Keeping the above law in view, this Court is of the considered opinion that if power has been vested with a particular authority and the very same authority has to exercise the same and the same cannot be delegated or exercised by any other person – If that is so, the order impugned cannot sustain in the eye of law. (Para 12)

Case Laws Relied on and Referred to :-

1. (1875) 1 Ch D 426 : Taylor Vs. Taylor.
2. (1954) SCR 1098 = (AIR 1954 SC 322 = 1954 Cri L.J 910) : Shiv Bahadur Singh Vs. State of V.P.
3. (1962) SCR 662 = (AIR 1961 SC 1527 = 1961 (2) Cri L.J 705) : Deep Chand Vs. State of Rajasthan.
4. AIR 1970 SC 7 : Municipal Corporation of Delhi, Vs. Jagdish Lal & Anr.
5. AIR 1975 SC 915: Ramchandra Keshav Adke (Dead) by Lrs. V. Govind Joti Chavare & Ors.

For Petitioner : Mr. S.K. Dalai, R.K. Mahanta and N.Hota.
For Opp.Parties : Mr. S.P. Panda, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 11.12.2019 : Date of Judgment: 17.12.2019

DR. B.R. SARANGI, J.

The petitioner, who was engaged as a Multi Purpose Assistant, i.e., Gram Rozgar Sevak (GRS), by way of this writ petition, seeks to quash the order dated 05.09.2019 passed by the Block Development Officer, Tangi-Choudwar in Annexure-4, by which he has been relieved from his duty and directed to hand over the detail charges of his section to his successor immediately.

2. The factual matrix of the case, in hand, is that in the year 2005 the Government of India, with the objective for enhancing livelihood security in rural areas by providing at least 100 days of guaranteed wage employment in a financial year to every household whose adult members volunteer to do unskilled manual work, enacted National Rural Employment Guarantee Act, 2005 (in short "NREG Act, 2005"). In connection with implementation of NREG Act, 2005 and strengthening of infrastructure at Gram Panchayat level, Government of Odisha, after careful consideration, laid down certain principles for engagement of personnel at Gram Panchayat/Panchayat Samiti level for smooth execution of NREGA works and maintenance of records thereof. Accordingly, it was intimated to all the Collectors of 19 NREGA districts, vide letter dated 25.08.2006, for engagement of staff at Gram Panchayat/Block level for smooth execution of NREGA works. Pursuant to such letter, the Project Director, DRDA-opposite party no.3 floated an advertisement for engagement of Multi Purpose Assistant (Gram Rozgar Sevak) for all the G.P./P.S. of Tangi-Choudwar Block in the district of Cuttack stipulating therein that selection would be made strictly on the basis of the marks secured in 10+2 examination and preference would be given to the candidates belonging to the concerned G.P. area under the same panchayat samiti and then the district concerned in case suitable candidates are not available in the same gram panchayat or block.

2.1 Pursuant to such advertisement, the petitioner, having requisite qualification and satisfied the requirement, applied for. On consideration of his application, he was selected for the post of GRS and accordingly executed an agreement with the Sarpanch Uchapada Gram Panchayat and consequentially submitted his joining report before the BDO, Tangi-Choudwar and as per the job chart he discharged his duty. But all on a sudden, the Collector, Cuttack-opposite party no.2 vide order dated 05.09.2019, that was received by the petitioner through his mobile whatsapp, directed the BDO, Tangi-Choudwar to relieve all other functionaries working as GRS, whose names are not included in the order, on or before 07.09.2019. As the petitioner's was not found place in the said order, on the same day, he received relieve order through his mobile Whatsapp from the BDO, Tangi-Choudwar, vide Annexure-4, directing him to handover the charge of his section to his successor immediately. Hence, this application.

3. Mr. S.K. Dalai, learned counsel for the petitioner contended that the relieve order so passed in Annexure-4 dated 05.09.2019 is not in consonance with the provisions as contained in NREG Act, 2005. It is contended that

even though such relieve order was passed on 05.09.2019, but the petitioner was allowed to discharge his duty and, as such, he was instructed on 07.09.2019 to assess the damage to the houses due to cyclone FANI and not only that the petitioner also received the amount from the authority for distribution of old age pension on 11.09.2019 as per office order dated 28.08.2019. It is further contended that there was no such administrative exigency to relieve the petitioner from his duty without complying the provisions of law. Thereby, he seeks for quashing of Annexure-4 with a direction to the opposite parties to allow the petitioner to discharge his duty as before.

4. Mr. S.P. Panda, learned Addl. Government Advocate contended that as per instructions of the Collector, Cuttack, the BDO, Tangi-Choudwar acted upon and the GRSs, whose contracts were not renewed during year 2019-20, were relieved and the GRSs, whose contracts were renewed during 2019-20, were kept in additional charges of GPs remained vacant after relieve of 03 GRSs (including the petitioner) of the block. It is contended that the petitioner, having been appointed on contract basis, there is no vested right to continuance in the post or of automatic renewal of contract. It is further contended that since action has already been taken, pursuant to direction issued by the Collector, and the petitioner has been already relieved from duty and, as such, there being no agreement executed between the parties, the petitioner cannot claim to be continued with engagement as before. Accordingly, he prays for dismissal of the writ petition.

5. This Court heard Mr. S.K. Dalai, learned counsel for the petitioner and Mr. S.P. Panda, learned Addl. Government Advocate, and perused the record. Since pleadings have been exchanged, with the consent of learned counsel for the parties, the matter is disposed of finally at the stage of admission.

6. In the factual backdrop of the case, as discussed above, it is worthwhile to recapitulate here that productive absorption of under-employed and surplus labour force in the rural sector has been a major focus of planning for rural development. In order to provide direct supplementary wage-employment to the rural poor through public works, many programmes were initiated by the Government of India with an objective to provide supplementary wage employment in rural areas, create durable rural infrastructure and to ensure food security. Recognizing the urgent need to ensure a certain minimum days of wage employment for the poor, it was felt

necessary to empower the poor in the rural areas by appropriate enactment so that they can demand work on the strength of this legal entitlement. Consequentially, the National Rural Employment Guarantee Act 2005 was enacted, which provides for enhancement of livelihood security of the households in rural areas of the country by providing at least one hundred days of guaranteed wage employment in every financial year to every household whose adult members volunteer to do unskilled manual work. By providing employment to those who seek it, this Act has emerged as one of the largest social safety net providing employment to 4.51 crore rural households in 2008-09 and providing employment to more than 3 crore households in the current financial year.

7. The name of Mahatma Gandhi was associated with the Act subsequently to reinforce the Act's thrust towards equity and inclusiveness, specially of the deprived groups and socio-economically marginalized communities. Thereafter, the National Rural Employment Guarantee Act, after being amended, was called "Mahatma Gandhi National Rural Employment Guarantee Act, 2005". To achieve the objectives of the Act itself, rules were also framed. To give effect to the said Act, the Government of Odisha in Panchayati Raj Department, on 25.08.2006, issued necessary instructions for engagement of staff at Gram Panchayat/Block level for smooth execution of NREGA works. Clause-2 and 3 of the instructions dated 25.08.2006 in Annexure-1, read thus:

> *"2. The engagements will be effected by the PRI Bodies. Government will have no role or linkage to the engagement of these personnel, deployment and other related matters.*
>
> *3. The selection for all the contractual appointments will be done in a fair and transparent manner at the district level under over all direction, control and supervision of Collector-cum-District Programme Coordinator in the capacity of CEO, Zilla Parishad.*
>
> *A. **Engagement of Multi Purpose Assistants (Gram Rozgar Sevak).***
>
> *(i) One Multi Purpose Assistant (Gram Rozgar Sevak) will be engaged on contractual basis only in that Gram panchayat which does not have a Gram Panchayat Secretary. The GP which will have a Secretary will also perform the works of Gram Rozgar Sevak and will be responsible for proper maintenance of accounts, database in the computer and to discharge the duties and responsibilities under NREGA. The minimum qualification of the candidate should be 10 +2 pass, and preference should be given to Commerce stream having computer proficiency of 'O' level with use of Oriya language in Computer.*

(ii) Selection will be strictly on the basis of marks obtained in the 10 +2 examination and shall be made at the district level by the Committee headed by the Collector-cum-CEO, Zilla Parishad, other members of the Committee being nominated by the Collector-cum-CEO, likewise Collector-cum-CEO, Zilla Parishad is also competent to take disciplinary action for removal for unsatisfactory performance, indiscipline or otherwise after getting approval from the concerned gram panchayat through Programme Officer.

xxx xxx xxx"

8. On perusal of the aforementioned provisions, it is made clear that Government will have no role or linkage to the engagement of the personnel, deployment and other related matters and, as such, the engagement will be effected by PRI Bodies and the selection will be made on contractual basis with fair and transparent manner at the district level under the over all direction, control and supervision of Collector-cum-District Programme Coordinator in the capacity of CEO, Zilla Parishad. More particularly, the selection will be done strictly on the basis of the marks obtained in 10+2 and shall be made at the district level by a committee headed by the Collector-cum-CEO, Zilla Parishad, other members of the committee being nominated by Collector-cum-CEO likewise Collector-cum-CEO, Zilla Parishad is also competent to take disciplinary action for removal for unsatisfactory performance, indiscipline or otherwise after getting intimation from concerned gram panchayat through programme officer.

9. With strict adherence to the instructions contained in letter dated 25.08.2006, the petitioner was selected and engaged as GRS in Uchapada gram panchayat and continued to discharge his duty as per the job chart under Annexure-2. While the petitioner was discharging his duty as GRS, all on a sudden on 05.09.2019, an office order was issued by the Collector-cum-DPC, NREGA, Cuttack by posting some GRSs to different G.Ps, after renewal of their contract, till 31.03.2020. In the said office order dated 05.09.2019, it was mentioned that the GRSs posted were to take up charge immediately and the respective BDOs were directed to relieve all other functionaries working as GRS, whose names were not included in the said order before 07.09.2019. The petitioner name was not found place in the office order dated 05.09.2019, but consequentially vide order dated 05.09.2019 in Annexure-4 the BDO, Tangi-Choudwar, while implementing the office order dated 05.09.2019 of the Collector, Cuttack, made arrangement afresh in distribution of Gram Panchayats among GRSs of Tangi-Choudwar Panchayat Samiti for effective implementation of Government sponsored developmental projects in supersession of all

previous order, relieved the petitioner from his duty and directed to hand over the detail charges to the section and to his successor immediately.

10. As it reveals from the record, even though the direction was given to relieve the petitioner from his duty, pursuant to order dated 05.09.2019 in Annexure-4, but he has been subsequently allowed to discharge the duty, which is apparent from the order passed by the BDO-opposite party no.3 vide orders dated 17.09.2019 and 28.08.2019 in Annexure-5 series. Challenging the said order dated 05.09.2019 in Annexure-4, the petitioner has approached this Court by filing the present writ petition on 24.09.2019 and this Court, while entertaining the writ petition, passed interim order on 26.09.2019 to the extent that if the petitioner has not been relieved pursuant to Annexure-4 dated 05.09.2019, he should not be relieved till 23.09.2019, and thereafter the said interim order is continuing till date.

11. Pursuant to notice issued by this Court, opposite parties have filed counter affidavit, paragraph-4 whereof reads as follows:-

> *"That in reply to the averments made in paragraph-1 of the writ application, it is humbly submitted that the petitioner Sri Manas Kumar Swain who was working as Gram Rozgar Sevak (GRS) was not appointed according to service condition and statutory provisions of Odisha Gram Panchayat Act, 1964. The GRSs were engaged in contractual basis by the District Level Committee headed by the Collector-cum-CEO, Zilla Parishad for implementation of NREGA and strengthening of infrastructure at GP level as per Panchayati Raj Department letter no.17146/PR dated 25.08.2006 vide Annexure-1 to the writ petition. Like wise Collector-cum-CEO, Zilla Parishad is also competent authority to take disciplinary action, removal for unsatisfactory performance, indiscipline etc. Hence, the opposite party no.2, i.e., Collector, Cuttack is competent to issue order no.3028/DRDA, dated 05.09.2019 and opposite party no.4, i.e., Block Development Officer, Tangi-Choudwar carried out such order as Programme Officer of the scheme by issuing relieve order dated 05.09.2019 is not violating the any Act."*

On perusal of the aforementioned pleadings, it would be evident that the opposite parties have categorically admitted that the petitioner was engaged on contractual basis by the district level committee headed by the Collector-cum-CEO for implementation of NREGA and strengthening of infrastructure, as per the Panchayati Raj Department letter dated 25.08.2006 in Annexure-1, and that it is the Collector, who is competent to take disciplinary action for removal for unsatisfactory performance, indiscipline etc. The contention was raised that even though the Collector is the competent authority, who issued the order on 05.09.2019, the same has been

carried out by the BDO, Tangi-Choudwar by passing the order impugned on 05.09.2019, which is not tenable in the eye of law.

12. It is well settled law laid down by the apex Court that if power has been vested with an authority, the same authority can only exercise power not by other.

In ***Taylor v. Taylor***, (1875) 1 Ch D 426, Jessel M.R. adopted the rule that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden.

In ***Nazir Ahmad v. King Emperor***, 63 Ind App 372 at p.381=(AIR 1936 PC 253 (2) at p.257) the Privy Council held that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. It was, therefore, held that if a legal proceeding was instituted under the relevant Act, it must be done in accordance with the provisions of the Act and not otherwise.

The apex Court has also followed the aforementioned principle in ***Shiv Bahadur Singh v. State of V.P.***, (1954) SCR 1098 = (AIR 1954 SC 322 = 1954 Cri L.J 910), ***Deep Chand v. State of Rajasthan***, (1962) SCR 662 = (AIR 1961 SC 1527 = 1961 (2) Cri L.J 705) to a Magistrate making a record under Sections 164 and 364 of the Code of Criminal Procedure, 1898. This rule squarely applies "where, indeed, the whole aim and object of the legislatue would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other. Maxwell's Interpretation of Statutes, 11th Edn., pp. 362-363." The rule will be attracted with full force in the present case, because non-verification of the surrender in the requisite manner would frustrate the very purpose of this provision. Intention of the legislature to prohibit the verification of the surrender in a manner other than the one prescribed, is implied in these provisions. Failure to comply with these mandatory provisions, therefore, had vitiated the surrender and rendered it non est for the purpose of S.5(3) (b).

Similar view has also been taken in ***Municipal Corporation of Delhi, v. Jagdish Lal and another***, AIR 1970 SC 7 and also in ***Ramchandra Keshav Adke (Dead) by Lrs. V. Govind Joti Chavare and others***, AIR 1975 SC 915.

Keeping the above law in view, this Court is of the considered opinion that if power has been vested with a particular authority and the very same authority has to exercise the same and the same cannot be delegated or exercised by any other person. If that is so, the order impugned cannot sustain in the eye of law.

13. It is of relevance to note here, in paragraphs-8 and 9 of the counter affidavit, the opposite parties have stated as follows:

> *"8. That in reply to the averments made in paragraph-10 of the writ application, it is humbly submitted that the petitioner's agreement was not renewed during current financial year 2019-20.*
>
> *9. That in reply to the averments made in paragraph-11 of the writ application, it is humbly stated and reiterated that the performance of the petitioner was not upto the mark. Therefore, his assertion to the contrary is incorrect."*

Mr. S.K. Dalai, learned counsel for the petitioner contended that the above averments made by the opposite parties in the counter affidavit are absolutely wrong and, as such, by giving such wrong facts the opposite parties are trying to mislead the Court.

14. In the context, he draws attention of this Court to the rejoinder affidavit filed by the petitioner wherein he has appended Annexure-6, the agreement dated 30.03.2019 executed between the petitioner and the Sarpanch of the GP, which is valid for the period from 30.03.2019 to 29.03.2020 as per clause-1 of the said agreement. Thereby, the contention raised by learned counsel for the State, that there was no renewal of the agreement in respect of the petitioner, is absolutely misconceived, in view of such document available on record.

15. Furthermore, the contention of the learned State counsel, that the petitioner's performance was not up to mark, is also not correct in view of the documents available on record, wherein the very same BDO on 06.09.2019 submitted the performance appraisal report of the petitioner for consideration of his case for annual agreement for continuation of his service. Therefore, on one hand, the opposite parties state that the performance of the petitioner is not up to mark and, on other hand, it appears that recommendation was made for renewal of the agreement, which itself indicates that performance of the petitioner was up to the mark and, thereby, recommendation has been made. To substantiate the same, reliance has been placed on the performance report for the year 2018-19, which has been enclosed with the recommendation letter wherein it has been indicated that the petitioner was in charge of two G.Ps., i.e.,

Uchapada and Kanehipur and incurred expenditure of 14.18 lakhs and those two panchayats are ranked at serial no.6 in the list of Tangi Choudwar Block Rank in Persondays. Thereby, the impugned action of the authorities is discriminatory one.

16. The operational guidelines, 2013, 4th Edition of MGNREGA, 2005, which has been filed by the petitioner as Annexure-7 to the rejoinder affidavit, under clause-2 of Chapter-18, which deals with Strengthening of panchayats, it has been stated that the staff provided to panchayats under MGNREGS would work under the superintendence and control of the Panchayat concerned, including disciplinary powers. Therefore, it is contended that the action taken by opposite party no.4 in Annexure-4 is in gross violation of the operational guidelines and, more so, the petitioner having appointed under the gram panchayat and the panchayat has got power of superintendence and control over the action done by the GRS, including the disciplinary powers, at the behest of the Collector, the opposite party no.4 could not have issued relieve order, while there is continuance of agreement with the gram panchayat and, as such, the said relieve order has been passed under misconception of fact that the agreement was not renewed, which is contrary to the records.

17. By 73rd amendment of the Constitution 1992, Part-IX has been inserted to the Constitution by inserting Article 243 to 243(o). To achieve the objective of such amendment of provisions of the Constitution and strengthening the peoples participation in panchayat administration, if the benefit has been extended to the petitioner in consonance with the constitutional mandate read with MGNREG Act, 2005 and operational guidelines issued under the provisions of the Act itself and basing upon which the petitioner was engaged and allowed to continue by virtue of the agreement executed between the parties, during subsistence of such agreement, the authority cannot curtail the same without any rhyme or reason by relieving him forthwith. Thereby, the entire action of opposite party no.4 by issuing order in Annexure-4 relieving the petitioner from the post of GRS cannot sustain in the eye of law and accordingly the same is liable to be quashed and is hereby quashed. The opposite parties are directed to allow the petitioner to continue in his post as GRS, as before, till subsistence of the agreement between the parties and allow him to discharge the duty allotted to him, in consonance with the provisions of law.

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

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2020 (I) ILR - CUT- 366

DR. B.R.SARANGI, J.

W.P.(C) NO. 806 OF 2017

MANABODHA KISAN & ORS. ……….Petitioners

.Vs .

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

(A) WORDS AND PHRASES – Natural justice, meaning of.

In R. v. Secy. Of State for Home Affairs, ex p. Hosenball, Geoffrey Lane, LJ, 1977 3 All ER 452 (DC & CA), preferred the homely phrase 'common fairness' in defining natural justice.

Natural justice, another name of which is common sense justice, is the name of those principles which constitute the minimum requirement of justice and without adherence to which justice would be a travesty. Natural justice accordingly stands for that "fundamental quality of fairness which being adopted, justice not only be done but also appears to be done".

(B) ORISSA GRAMA PANCHAYAT ACT, 1964 – Section 3, 4 and 149 – Provisions under – Constitution of Grama, Constitution and incorporation of Grama Sasan and matters ancillary to abolition or reconstitution of Gramas – Power of State Govt. – Held, the discretionary power has to be exercised on relevant considerations and cannot be permitted to be exercised on extraneous consideration.

"There is no iota of doubt that power to constitute a Grama and to assign a name to such Grama is derived from Section 3 of the Orissa Grama Panchayats Act, 1964. But no guideline has been fixed under Section 3 for the purpose of assigning any name to a group of contagious villages. Therefore, it is the discretion of the State Government to constitute a group of contiguous villages as a Grama and to assign to such Grama a name, which shall be of one of the villages comprised within the Grama. But, there is a rider to exercise such discretionary power to the extent that such discretionary power has to be exercised on relevant considerations and cannot be permitted to be exercised on extraneous consideration. Therefore, the Court is not entitled to interfere with the discretion exercised by the State Government as long as the said discretion is exercised bona fide, but it would be fully entitled to interfere when it comes to the conclusion that the discretion has been exercised on extraneous consideration or has been exercised ignoring the relevant materials or the Court comes to the conclusion that the power has been exercised colourably." *(Para 17)*

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

1. 73 (1992) C.L.T. 692 : Pramod Kumar Bohidar Vs. State of Orissa.
2. 96 (2003) CLT 454 : Harihar Swain Vs. State of Orissa.

3. 2001 (1) OLR 168 : Bijay Kumar Behera Vs. State of Orissa.
4. 2014 (Supp.-I) OLR-635 : Krushna Chandra Swain Vs. State of Orissa.
5. 1976 2 All ER 865 (HL) : Fairmount Investments Ltd. Vs. Secy of State for Environment.
6. 1977 3 All ER 452 : R. Vs. Secy. Of State for Home Affairs, ex p. Hosenball, Geoffrey Lane, LJ.
7. AIR 1981 SC 818 : Swadeshi Cotton Mills Vs. Union of India.
8. AIR 1965 SC 1767 : Bhagwan Vs. Ramchand.
9. AIR 1990 SC 307 : Shridhar Vs. Nagar Palika, Jaunpur.
10. (2008) 11 SCC 90: Rajendra Vs. State of Maharastra.
11. 2019 (I) OLR-5 : Purna Chanda Hota Vs. Sambalpur University.
12. 2019(II) OLR 771 : Biswanath Behera Vs. State Bank of India.

For Petitioners : M/s. Nityananda Behuria, Nibedita Behuria and P.K. Rout.

For Opp. Parties : Mr. B. Senapati, Addl. Govt. Adv.
M/s. S.K. Samantaray, N. Sahoo and M. Das.

JUDGMENT Date of Hearing: 09.12.2019 : Date of Judgment: 20.12.2019

DR. B.R. SARANGI, J.

The petitioners, who are the villagers of Jharmunda, by way of this writ petition, seek to quash the order dated 22.12.2016 passed by the Commissioner-cum-Secretary, Government of Odisha, Panchayati Raj Department in Annexure-1, pursuant to order dated 17.10.2016 passed in W.P.(C) No. 17483 of 2016 filed by opposite party no.6- Sri Bhadra Charan Kisan of village Kadadihi challenging the decision of the Commissioner-cum-Secretary for fixation of newly created Gram Panchayat Jharmunda at Jharmunda under Tileibani Block of Deogarh district, and issue direction to the opposite parties to dispose of representations dated 31.12.2016 and 05.01.2017 by giving adequate opportunity to all the parties and declare the headquarters of newly created Gram Panchayat at Jharmunda in place of Gambharipasi.

2. The factual matrix of the case, in hand, is that in exercise of power conferred under Section 3 read with sub-section (3) of Section 4 and Section 149 of Orissa Grama Panchayats Act, 1964, the State Government declared that groups of contiguous villages of Deogarh district, as specified in column (4) of the Schedule in Annexure-2 relating to the Sub-division and Block specified in column (1) and (2) respectively to be a Grama by the name specified in column (3) thereof and constitute a Grama Sasan for each of the said Grama and accordingly all previous notifications issued on the subject

stand modified so far it relates to the villages specified in column (4) of the said Schedule. Initially, six villages, namely, Jharmunda, Kadodihi, Kadalimunda, Chandiposi, Dengrujore, Gambharipasi were in the Parposi Grama Panchayat in the district of Deogrh and the residents of the said villages are all schedule tribe. Due to creation of new villages as well as increase in the number of population, the State Government decided to create new Grama Panchayats in the State of Orissa by invoking the power conferred under Section 3 read with sub-section (3) of Section 4 and Section 149 of Orissa Grama Panchayats Act, 1964. Accordingly, direction was given to the Collector-cum- District Magistrates to make enquiry in their respective districts to create new Gram Sasan (Panchayat) bifurcating from other Gram Sasan. The Collector, District Panchayat Officer and Block Development Officer (BDO) were competent to make enquiry and to submit proposal for consideration of new Gram Sasan in the village.

2.1 On the basis of enquiry, the competent authority submitted a proposal to the State Government recommending creation of new Jharmunda Gram Panchayat with its headquarters at Jharmunda, having highest population and well connected to all constituent villages. Considering such recommendation, the Government of Odisha in Panchayati Raj Department issued a notification on 02.07.2016 declaring a new Gram Panchayat called, Jharmunda Gram Panchayat with contiguous villages namely, Jharmunda, Kadodihi, Kadalimunda, Chandiposi, Dengrujore, Gambhariposi with population of 2433 having headquarers at Jharmunda. Pursuant to such notification, new Jharmudna Gram Panchyat was inaugurated/ established with effect from the date of issuance of notification dated 02.07.2016 having headquarters at Jharmunda without any objection.

2.2 The opposite party no.6, who is a villager of Kadadihi, approached this Court by filing W.P.(C) No. 17483 of 2016 seeking direction to opposite party no.1, Commissioner-cum-Secretary Panchayati Raj Department to dispose of the representation dated 12.10.2015 forwarded by the M.L.A., vide letter dated 14.01.2016. This Court, vide order dated 17.10.2016, disposed of the writ petition directing the Commissioner-cum-Secretary- opposite party no.1 to consider the grievance of the petitioner within four weeks from the date of receipt of the certified copy of that order. It was also further directed that the petitioner and other concerned parties would be given opportunity of hearing in the matter and a reasoned order in consonance with the guidelines of the Government be passed. Pursuant to such order, opposite

party no.1, without giving any notice and opportunity of hearing to all affected parties and ignoring the enquiry report submitted by the Block Level Committee and District Level Committee, disposed of the said representation and passed the order impugned on 22.12.2016 that creation of new Jharmunda Gram Panchayat out of the existing Paraposi Gram Panchayat shall remain unchanged, but the headquarters of the newly created Jharmunda Gram Panchayat is to be fixed at Gambharipasi for better administrative convenience and in the larger public interest. Hence this application.

3. Mr. N. Behuria, learned counsel for the petitioner strenuously urged that there is no dispute with regard to power of authority to pass an order with regard to fixation of headquarters of the Gram Panchayat, but contended that such power has not been exercised bonafidely and such discretion has been exercised on extraneous consideration and has also been passed ignoring the relevant materials. Therefore, the order impugned should be interfered with by this Court. It is further contended that the representation dated 12.10.2015 filed by opposite party no.6 with regard to fixation of headquarters was much prior to the notification dated 02.07.2016 and after such notification, the representation had become infructuous.

It is further contended that regarding creation of new Gram Panchayat and its headquarters at Jharamunda, basing on the report of the Block Level Committee and District Level Committee, none of the villagers of the contiguous villages had filed any representation protesting/objecting about the fixation of headquarters of Jharmunda Grama Panchayat at Jharmunda and further the direction issued by this Court vide order dated 17.10.2016 in W.P.(C) No. 17483 of 2016 has not been complied with in its letter and spirit, to mean that this Court directed the opposite party no.1 to consider the representation filed opposite party no.6 by giving opportunity to the petitioner and other concerned parties, but the order in Annexure-1 clearly reveals that though the opposite party no.1 has given opportunity to opposite party no.6 but the other concerned parties have not been given any opportunity. Thereby, the order passed by opposite party no.1 is in gross violation of the direction issued by this Court and, therefore, the same has to be quashed. It is further contended that the opposite party no.1 has passed the order impugned without application of mind and more particularly, had not taken into consideration the report submitted by the Block Level Committee and District Level Committee, who have submitted their reports after going to the spot and after making field enquiry. Reliance has been

placed on the village map, in which village Jharamunda situates in the center place and village Gambharipasi situates extreme end and adjacent to Sundargarh. More particularly, when the Government of Orissa, having taking into consideration all materials aspects, issued notification on 02.07.2016 for creation of new Gram Panchayat at Jharamunda with highest population, the said notification having not suffered from any illegality and having issued in consonance with the provisions contained under Section 4(3) of the Orissa Grama Panchayts Act, the same should not have been interfered with lightly because of interference of the local M.L.A. at whose instance direction has been issued for shifting of headquarters from Jharmunda to Gambharipasi. Therefore, the order impugned cannot sustain in the eye of law.

To substantiate his contention he has relied upon the judgments of this Court in ***Pramod Kumar Bohidar v. State of Orissa,*** 73 (1992) C.L.T. 692; ***Harihar Swain v. State of Orissa,*** 96 (2003) CLT 454; and ***Bijay Kumar Behera v. State of Orissa,*** 2001 (1) OLR 168.

4. Mr. B. Senapati, learned Addl. Government Advocate, with reference to the counter affidavit, contended that opposite party no.1 took up the hearing for fixation of headquarters of Jharmunda Grama Panchayat on 23.11.2016 at 11.00 a.m., in pursuance of order no.2 dated 17.10.2016 passed by this Court in W.P.(C) No.17483 of 2016 filed by opposite party no.6, and passed a reasoned order on 22.12.2016 considering the representation of the opposite party no.6, keeping in view all the factual aspects, that creation of new Grama Panchayat Jharmunda out of existing Parposi Grama Panchayat shall remain unchanged, but the headquarters of newly created Jharmunda Gram Panchayat is fixed at Gambhariposi for better administrative convenience and in the larger public interest, thereby, no illegality or illegality has been committed by passing the order impugned so as to cause interference of this Court.

5. Mr. S.K. Smanataray, learned counsel for opposite party no.6 supported the arguments advanced by Mr. B. Senapati, learned Addl. Government Advocate and contended that pursuant to order dated 22.12.2016 passed by the Commissioner-cum-Secretary, opposite party no.1, the headquarters of newly created Grama Panchayat has already been established at Gambharipasi in an existing constructed house and the same was inaugurated on 01.01.2017 in presence of all without any objection. Since

Gambharipasi is centrally located, having administrative convenience, the office work of the said Grama Panchayat has been smoothly functioning in affording services to the villagers of all constituent villages. Therefore, the prayer made in the writ application to change the headquarters from Gambharipasi to Jharmunda once again, cannot sustain in the eye of law and prayed for dismissal of the writ application.

To substantiate his contention he has relied upon the judgment of this Court in ***Krushna Chandra Swain v. State of Orissa,*** 2014 (Supp.-I) OLR-635.

6. This Court heard Mr. N. Behuria, learned counsel for the petitioner; Mr. B. Senapati, learned Addl. Government Advocate appearing for the State; and Mr. S.K. Samantaray, learned counsel for opposite party no.6, and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. The record reveals that pursuant to notification no. 10729 dated 01.07.2015 in the matter of reorganization and delimitation of Gramas and constitution of Grama Panchayats, District Level Committee and Block Level Committee, Tileibani had been constituted vide order no. 304/GP dated 03.07.2015 by the Collector, Deogarh with an instruction to Block Development Officer, Tileibani, being the Chairman of the team, to prepare data sheet and take up the exercise of reorganization of Grama Panchayats under his jurisdiction in the prescribed format-I, II, III, & IV and submit the proposals thereof to the Collector, Deogarh in order to publish proposals inviting objections and suggestions, if any, from the general public. In compliance thereof, the B.D.O., Tileibani submitted proposals for creation of new Grama Panchayats, namely, Gandam out of Dimirikuda Grama Panchayat, Biriam out of Kansar Grama Panchayat, Kalanda out of Suguda Grama Panchayat, Jharamunda out of Parposi Grama Panchayat, Palkudar out of Kendeijuri Grama Panchayat, Gunduriposi out of Suguda Grama Panchayat and Chhepilipali Grama Panchayat. The proposals so received from the B.D.O., Tileibani were brought to public notice, vide Notice dated 07.08.2015 of District Office, Deogarh, inviting objections and suggestions latest by 17.08.2015, as scheduled by the government, fixing the date of public hearing to 26.08.2015 with a copy to all concerned. Besides, it was also put to public domain in www.deogarh.nic.in. In response to the district

office notice, the suggestions and proposals relating to the above proposed new Grama Panchayats were put to public hearing in the presence of P.D., DRDA, Deogarh; B.D.O., Tileibani; Tahasildar, Deogarh; GPEO, Tileibani; and DPO, Deogarh on 28.08.2015 and all the stakeholders were informed. After threadbare discussion, keeping in view the population criteria and cardinal principle of administrative convenience and better service delivery to the citizens, the District Level Committee resolved on 14.09.2015 to send the proposals of creation of Gandam Gram Panchayat out of Dimirikuda Grama Panchayat, Palkudar Grama Panchayat out of Kendeijuri GP, Kalanda Grama Panchayat out of Suguda Grama Panchayat and Jharamudna Grama Panchayat out of Parposi Grama Panchayat under Tileibani Block rejecting the rest, as those were not viable in any manner. The proposal for creation of new Grama Panchayat-Jharamunda out of existing Parposi Gram Panchayat had been transmitted to the Government in Panchayati Raj Department, Odisha vide letter no. 742/GP dated 19.10.2015 with all the supportive documents. Accordingly, the Government was pleased to notify the newly created Jharamunda Grama Panchayat out of Parposi Grama Panchayat, vide notification no. 11280 dated 02.07.2016 of Panchayati Raj Department, Odisha.

8. At this juncture, it is worthwhile to quote some of the relevant provisions of the Orissa Grama Panchayats Act, 1964:

> *"**3. Constitution of Grama.** - (1) The State Government may for the purposes of this Act by declaration notified in the Gazette constitute any village or group of contiguous villages as a Grama and assign to such Grama, a name which shall be of one of the villages comprised within the Grama.*
>
> ***Explanation** - Village intervened only by forest areas, hills, streams, rivers and such other natural barriers, and lands not forming part of any village may be treated as contiguous villages :*
>
> *[Provided that in the Scheduled Areas, a Grama shall ordinarily consist of a habitation or group of habitations, a hamlet or a group of hamlets comprising a community or communities and managing its affairs in accordance with traditions and customs.]*
>
> *(2) Wherever the State Government deem it fit so to do they may cancel any notification in respect of a Grama under Sub-section (1) or may alter the area comprised in a Grama by reducing or adding to the number of villages comprised within such Grama and by declaration notified in the Gazette constitute such altered area or areas as a Grama or Gramas, as the case may be, for the purposes of the said sub-section.*

(3) No Grama shall, so far as may be reasonably practicable, be constituted with a population of less than two thousand and more than ten thousand but in no event shall a village be divided and a part thereof included within a Grama.

4. Constitution and incorporation of Grama Sasan. *- (1) For every Grama there shall be a Grama Sasan which shall be composed of all persons registered by virtue of the Representation of the People Act, 1950 (43 of 1950) in so much of the electoral roll for any Assembly Constituency for the time being in force as relates to the Grama [and unless the Election Commission directs otherwise, the said portion] of the roll shall be deemed to be the electoral roll in respect of the Grama.*
(2) The Grama Sasan shall be a body corporate by the name of the Grama to which it relates, having perpetual succession and common seal, with power, subject to the provisions of this Act and the rules made thereunder, to acquire, hold and dispose of property and to contract and may by the said name sue and be sued.

(3) The office and headquarters of the Grama Sasan shall be situated within the limits of the Grama and unless otherwise ordered by the State Government in the village bearing the name of the Grama.

149. Matters ancillary to abolition or reconstitution of Gramas. –

(1) (a) Whenever the State Government, decide upon a general re-organisation of the Gramas within the State they may for the said purpose by order direct all steps to be taken in accordance with this Act and the rules made thereunder in the matters of redelimitation of Gramas division thereof into wards and for the constitution of Grama Panchayats for such Gramas.

(b) The redelimitation, division and constitution made in pursuance of an order under Clause (a) shall not affect the constitution of the existing Grama and Grama Panchayats but shall have effect only on the date following the date of expiry of the term, or, as the case may be, extended term of office of the existing Grama Panchayats and the new Grama Panchayats shall enter office on the date earlier mentioned.

(2) The State Government may, as in their opinion the expediency of the circumstances requires, by general or special order in that behalf provide for all or any of the following matters, arising out of or in relation to the abolition or reconstitution of Gramas, namely :

(a) amalgamation, allegation, utilisation or apportionment of assets and liabilities and procedure for enforcement of rights and obligations in relation thereto;

(b) continuance or termination of or alterations in the conditions of service of officers and servants of such local authorities immediately before such abolition or reconstitution and the allocation of such persons to the different bodies thereafter;

(c) reorganisation and constitution of the Committees, their functions, or term of office of the members thereof as were there prior to the abolition or reconstitution ; and

(d) any matter necessary, ancillary or incidental to such abolition or reconstitution for which this Act makes no provision or makes insufficient provision and provision in the opinion of the State Government is necessary.

(3) The provisions of Section 148 and of this section shall have effect notwithstanding anything to the contrary in any of the other provisions of this Act or the rules made thereunder.

9 In view of such provisions of Orissa Grama Panchayats Act, 1964, since notification was issued on 02.07.2016 by the Panchayati Raj Department creating Jharamunda Grama Panchayat out of Parposi Grama Panchayat, having the headquarters at Jharamunda, the representation, which was filed by opposite party no.6 on 12.10.2015, much prior to notification dated 02.07.2016, had become infructuous. But opposite party no.6, who is the villager of Kadadihi village, which is a contagious village of newly created Jharmunda Grama Panchayat, filed W.P.(C) No. 17483 of 2016 before this Court challenging the decision of the opposite party no.1 for fixation of headquarters of newly created Jharmunda Grama Panchayat at Jharmunda in Tileibani Block in the district of Deogarh. But this Court did not interfere with such notification dated 02.07.2016 and disposed of the above writ petition on 17.10.2016 with the following direction.

" Learned Commissioner-cum-Secretary, P.R. Department is directed to consider the grievance of the petitioner within four weeks from the date of receipt of a certified copy of this order. If necessary, the petitioner and other concerned parties may be given opportunity of hearing in the matter and a reasoned order in consonance with the guidelines of the Govt. be passed by Commissioner-cum-Secretary, Panchayati Raj Department."

10. On perusal of the aforesaid order, it would be evident that this Court, while disposing of the writ petition, passed order to the extent that if necessary, the petitioner and other concerned parties may be given opportunity of hearing in the matter and a reasoned order in consonance with the guidelines of the government be passed by opposite party no.1. The order impugned in Annexure-1 dated 22.12.2016 reveals that the opposite party no.6 appeared on 23.11.2016 before opposite party no.1 for personal hearing and the DPO, Deogarh was also present in the hearing and opposite party no.1 only heard them without giving opportunity to other concerned parties and without giving any notice to the villagers of contiguous villages and

passed the order impugned. Thereby, the said order has been passed without compliance of principle of natural justice.

11. The soul of natural justice is '*fair play in action'*

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

In ***Fairmount Investments Ltd. v. Secy of State for Environment***, 1976 2 All ER 865 (HL), Lord Russel of Killowen somewhat picturesquely described natural justice as '*a fair crack of the whip'*

In ***R. v. Secy. Of State for Home Affairs, ex p. Hosenball, Geoffrey Lane, LJ***, 1977 3 All ER 452 (DC & CA), preferred the homely phrase '*common fairness'* in defining natural justice.

Natural justice, another name of which is common sense justice, is the name of those principles which constitute the minimum requirement of justice and without adherence to which justice would be a travesty. Natural justice accordingly stands for that "*fundamental quality of fairness which being adopted, justice not only be done but also appears to be done*".

12. In ***Swadeshi Cotton Mills v. Union of India***, AIR 1981 SC 818, the meaning of natural justice came up for consideration and the apex Court held as follows:-

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

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

14. In ***Shridhar v. Nagar Palika, Jaunpur***, AIR 1990 SC 307, the appellant was appointed to the post of Tax Inspector. His appointment was

cancelled by the authorities on the representation made by a departmental candidate who contended that a Tax Inspector's post should have been exclusively filled by promotion. The authority as well as the High Court proceeded on the assumption that the extant Government orders provided for filling up the post of Tax Inspector exclusively by promotion and therefore the appellant's appointment was illegal. The Supreme Court did not agree with the interpretation of the Government order made by the High Court. But, the Court proceeded to observe that since the order of appointment had conferred a vested right in the appellant to hold the post of Tax Inspector, that right could not be taken away without affording an opportunity of hearing to him. The Court observed as follows:

> *"It is an elementary principle of natural justice that no person should be condemned without hearing. The order of appointment conferred a vested right in the appellant to hold the post of Tax Inspector, that right could not be taken away without affording opportunity of hearing to him. Any order passed in violation of principles of natural justice is rendered void. There is no dispute that the Commissioner's Order had been passed without affording any opportunity of hearing to the appellant therefore the order was illegal and void."*

In view of law laid down by the apex Court, it cannot, however, be doubted that cancellation of appointment has adverse civil consequences and therefore before making the order of cancellation the employee concerned must be given an opportunity of making a representation and the elementary of principles of natural justice has to be complied with.

15. In ***Rajendra v. State of Maharastra***, (2008) 11 SCC 90, the apex Court held that even if the appointment is by mistake, the abrupt withdrawal of the same after the employee has worked for 17months amounts to violation of natural justice.

This above view has also been taken by this Court in ***Purna Chanda Hota v. Sambalpur University,*** 2019 (I) OLR-5 and ***Biswanath Behera v. State Bank of India,*** 2019(II) OLR 771.

16. In view of the propositions of law, as discussed above, this Court is of the considered view that the order so passed on 22.12.2016 by the opposite party no.1 was without complying the principle of natural justice and without giving any opportunity of hearing, that too the same was not in consonance with the order dated 17.10.2016 passed by this Court in W.P.(C) No. 17483 of 2016, meaning thereby, the other concerned parties, including the petitioner, have not been given any opportunity of hearing in the matter.

17. There is no iota of doubt that power to constitute a Grama and to assign a name to such Grama is derived from Section 3 of the Orissa Grama Panchayats Act, 1964. But no guideline has been fixed under Section 3 for the purpose of assigning any name to a group of contagious villages. Therefore, it is the discretion of the State Government to constitute a group of contiguous villages as a Grama and to assign to such Grama a name, which shall be of one of the villages comprised within the Grama. But, there is a rider to exercise such discretionary power to the extent that such discretionary power has to be exercised on relevant considerations and cannot be permitted to be exercised on extraneous consideration. Therefore, the Court is not entitled to interfere with the discretion exercised by the State Government as long as the said discretion is exercised bona fide, but it would be fully entitled to interfere when it comes to the conclusion that the discretion has been exercised on extraneous consideration or has been exercised ignoring the relevant materials or the Court comes to the conclusion that the power has been exercised colourably. In view of the materials available on record, on the basis of the notification dated 01.07.2015 in the matter of reorganization and delimitation of Grams and constitution of Grama Panchayat, District Level Committee and Block Level Committee, Tileibani were constituted, and direction was given to the Block Level Committee to prepare data sheet and take up the exercise of reorganization of Gram Panchayats. Accordingly, the Block Level Committee submitted a report for constitution of Jharmunda Grama Panchayat out of Parposi Grama Panchayat and also fixed the headquarters at Jharmunda. In pursuance thereto, it was duly recommended by the District Level Committee and on consideration of the same, the State Government, vide notification dated 02.07.2016, in its Panchayati Raj Department created Jharmunda Grama Panchayat out of Parposi Grama Panchayat and fixed headquarters at Jharmunda taking into consideration the maximum number of population at centrally located place. Therefore, the same should not have been lightly interfered with by opposite party no.1 in the name of consideration of representation, pursuant to order dated 17.10.2016 passed by this Court in W.P.(C) No. 17483 of 2016, and he should not have substituted own views ignoring the reports of the Block Level committee and District Level Committee, who have made the field enquiry and submitted a report. That apart, it is apparent from the record that the representation filed by the opposite party no.6 was forwarded by local M.L.A. That clearly indicates, there was interference of local politician and, as such, it cannot be disbelieved that at the behest of such political interference, the order

impugned in Annexure-1 has been passed without affording opportunity of hearing to the petitioner. Besides, after the Block Level Committee and District Level Committee recommended and suggested for creation of Jharmunda Grama Panchayat with the headquarters at Jharamunda, the objections from the public were invited and as no objection was received from any quarter, vide notification dated 02.07.2016 in Annexure-1, the Grama Panchayat was established with headquarters at Jharmunda. Consequentially, the opposite party no.1 cannot and could not have modified the headquarters of the Grama Panchayat on an extraneous consideration ignoring the relevant materials available on record.

18. Though in the order impugned the opposite party no.1 admitted that Jharamunda is the highest population village, but viewed that population is not the sole factor for which fixation of headquarters can be taken up and relying upon a map, whose authenticity has not been placed on record, come to a conclusion that the Gambharipasi village is centrally located place and, therefore, the headquarters of the Grama Panchayat should be at Gambharipasi instead of Jharmunda. In the considered opinion of this Court, the said map should not have relied upon, as its authenticity was not proved. Therefore, it can be safely viewed, opposite party no.1 has exercised his jurisdiction with an extraneous consideration and ignoring the relevant materials, and more so since the representation of the opposite party no.6 was recommended by the local M.L.A., the power has been exercised colourably. Needless to mention, the said representation was filed on 12.10.2015 and recommendation was made by local M.L.A. on 14.01.2016, which has been annexed as Annexure-6 to the writ application, and on consideration of the same, the notification under Annexure-2 was issued on 02.07.2016. Therefore, this clearly indicates that the opposite party no.1, while passing the order impugned, has not applied its mind and directed for change of headquarters of the Jharmunda Grama Panchayat from Jharmunda to Gambharipasi in the name of administrative convenience and larger public interest. In view of the discussions made above and also the ratio decided in ***Pramod Kumar Boidhar*** (supra), this Court has no hesitation to quash the order dated 22.12.2016 passed by opposite party no.1 and declare the notification dated 02.07.2016 in Annexure-2 as valid and operative.

19. In ***Harihar Swain*** mentioned supra, this Court held that the fixation of headquarters of the Grama Panchayat in any particular village is essentially an administrative matter and so long as relevant considerations

have weighed with the Government in fixing the headquarters in a particular village, the High Court cannot interfere with the decision of the Government like an appellate authority and quash the decision of the Government. While exercising power under judicial review, the High Court under Article 226 of the Constitution has only to see whether the administrative power has been exercised within the limits of law and taking into account the relevant considerations and so long as the High Court is satisfied that the power has been exercised within the limits of law after taking into account the relevant considerations, the High Court will not interfere with the same on the ground that it should have been located at a different place. In exercise of power under Article 226 of the constitution of India, this Court is of the considered view that when notification dated 02.07.2016 was issued, on the relevant materials available with the Government, to fix the headquarters of Jharmunda Gram Panchayat at Jharmunda, but subsequently, without affording any opportunity of hearing in consonance with the direction of this Court dated 17.10.2016 passed in W.P.(C) No. 17483 of 2016, the order impugned has been passed in Annexure-1. Thereby, in exercise of power of judicial review, this Court is of the considered view that the opposite party no.1 has not acted in consonance with the provisions of law, rather, exercised the power colorably to deprive the benefits to the petitioners. Therefore, the order so passed has to be interfered with by this Court.

20. Examining from all angles, this Court is of the considered view that as the notification was issued on 02.07.2016 by creating Jharmunda Grama Panchayat from Parposi Grama Panchayat fixing headquarters at Jharmunda, taking into consideration the relevant factors and documents available on record, the same should not have been changed by opposite party no.1 by order dated 22.12.2016. Thereby, this Court held that notification dated 02.07.2016 will remain valid and that cannot be interfered with by passing the order impugned in Annexure-1 dated 22.12.2016 by the opposite party no.1.

21. The case of ***Krushna Chandra Swain*** (supra) on which reliance has been placed by opposite party no.6, has been decided on its own facts and circumstances and, as such, has no application to the present context. Thereby, the said judgment is distinguishable.

22. In view of the foregoing discussions, both on facts and law, this Court is of the considered view that the order passed on 22.12.2016, pursuant to

order dated 17.10.2016 passed by this Court in W.P.(C) No. 17483 of 2016, for change of headquarters of Jharmunda Grama Panchayat from Jharmunda to Gambharipasi cannot sustain in the eye of law, as the same suffers from gross violation of the principle of natural justice, exercise of extraneous consideration by ignorance of relevant materials and colourable exercise of power. Accordingly, the order dated 22.12.2016 in Annexure-1 is liable to be quashed and is hereby quashed. The notification issued on 02.07.2016 in Annexure-2, so far it relates to constitution of Jharmunda Grama Panchayat with headquarters at Jharmunda, remains valid and operative.

23. The writ petition is thus allowed. No order to costs.

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2020 (I) ILR - CUT- 380

D.DASH, J.

CRA NO.167 OF 1992

N.C. CHARIAN ....Appellant

.Vs.

STATE OF ORISSA ....Respondent

(A) PREVENTION OF CORRUPTION ACT, 1947 – Section 5(1)(d) read with section 5(2) – Offence under – Conviction – Allegation of illegal gratification – Ingredients required – Held, the position of law on the point is well settled that once the demand and voluntary acceptance of illegal gratification knowing it to be the bribe are proved by evidence, then conviction for commission of offence under section 5(1)(d) read with section 5(2) of the P.C. Act has to follow against the accused. Indeed these twin requirements are sine quo non for proving the offence for which the accused has been convicted. (Para 7)

(B) PREVENTION OF CORRUPTION ACT, 1947 – Section 5(1)(d) read with section 5(2) – Offence under – Conviction – Allegation of illegal gratification – Evidence vis-a-vis finding of the trial court – Held, having come to the conclusion that the twin requirements of demand of illegal gratification by the accused has not been proved from the side of the prosecution by leading clear, cogent and acceptable evidence beyond reasonable doubt, the judgment of conviction recorded against the accused and the consequential order of sentence impugned in this appeal, are liable to the set aside. (Para 7)

For Appellant : Mr.N.C.Panigrahi & S.C.Dash
For Respondent : Mr.Sanjay Kumar Das, Standing Counsel (Vigilance)

JUDGMENT Date of Hearing : 25.06.2019 : Date of Judgment : 09.07.2019

D.DASH, J.

This appeal has been directed against the judgment of conviction and order of sentence dated 29.04.1992 passed by the learned Special Judge (Vigilance), Sabmalpur in T.R. Case No.44 of 1987 corresponding to Sambalpur Vigilance P.S. Case No.5 of 1987. By the said judgment, the appellant having been convicted for the offence under section 5(1)(d) read with section 5(2) of the Prevention of Corruption Act, 1947 (in short, 'the P.C.Act') and under section 161 of the Indian Penal Code (for short, 'the IPC'), order has been passed that he would undergo rigorous imprisonment for one year and pay fine of Rs.500/- in default to undergo rigorous imprisonment for three months on each count of the offence under which he has been convicted with the stipulation that substantive sentences would run concurrently.

2. The prosecution case, in short, is that complainant (P.W.1) was a petty contractor undertaking different works under the Executive Engineer, Command Area Development Agency (CADA), Sambalpur in the year 1987-88. He having been paid with the amount for the work executed by him as against the bills raised; in March, 1987, it was ascertained that 2% of the bill amount had been deducted towards the income tax and that in so far as the complainant's bills are concerned, the deducted sum was Rs.661/-. In view of the fact that for the income of the complainant in that year, he being not liable to pay the income tax, he contacted the officials of the income tax to get refund of said sum of Rs.661/-. Coming to know from them that the reports of deduction of the income tax against his bills had not been received from the Office of the Executive Engineer, CADA, Sambalpur Division in the income tax office so as to advance the prayer for refund of the said deducted amount towards income tax, he came to the office of the Executive Engineer, CADA, Sambalpur and met the accused who was then the clerk-in-charge of checking of the bills. He requested the accused to send the detail report as to the deduction of income tax against his bills in order to advance the claim of refund of the said amount. It is alleged that the accused for that purpose demanded bribe of Rs.100/- from the complainant in order to send the report showing the detail deduction of income tax from the billed amount of the complainant towards the work executed by him. It is stated that

although expressing inability to meet the demand, the complainant approached the accused to send the same, yet the accused remained adamant and insisted upon his demand of illegal gratification. So, being frustrated, the complainant went to the Vigilance Office at Sambalpur and lodged the written report (Ext.11), before the Superintendent of Police, Sambalpur Vigilance Division, which was treated as FIR and that led to the registration of Sambalpur Vigilance P.S. Case No.5 of 1987.

Subsequent to the lodging of the FIR by the complainant, independent witnesses were brought on requisition from the office of the Additional C.T.O, Sambalpur in whose presence the complainant narrated the factum of illegal demand of gratification of a sum of Rs.100/- by the accused in order to give the report of deduction of amount towards the income tax from the billed amount. The complainant produced two G.C. notes of rupees fifty denomination. Their numbers were noted on a paper for future comparison by the Additional C.T.O., Sambalpur-I (P.W.3). Demonstration was made in the presence of the complainant and all other official and independent witnesses in the Vigilance Office. The complainant was then showed as to how colourless solution of sodium carbonate turns pink on addition of phenolphthalein powder. Those two currency notes being rubbed with phenolphthalein powder were given to the complainant for being kept in the shirt pocket to be delivered to the accused on his demand.

Pursuant to the arrangement, as above, on 3.3.1997, the official members of the trap laying party along with the complainant and one Pramod Nath (P.W.5) being set up as the accompanying witness to see the giving of the bribe to the accused and its receipt by him and then to signal; proceeded to the office of the Executive Engineer, CADA, Sambalpur Division. The trap was laid successfully in the sense that the complainant and Sri Nath went to the office, the complainant after some time paid the bribe money on demand by the accused at the verandah of the office and the accused receiving the same kept in his right side pant pocket. Signal being given by that Promod Nath, Vigilance Officials and others went there and finally, the two fifty rupees G.C. notes were recovered. The vigilance officers seized all the incriminating materials including the currency notes.

The hands of the accused being washed with sodium carbonate solution, the same turned pink and so also the wash of the pant pocket. The wash was preserved and sent for examination. It has been ascertained that the

solution contain phenolphthalein. The relevant file was also seized. On completion of investigation, charge-sheet being filed, the accused faced the trial.

3. The accused has denied the factum of demand of bribe and to have received those two currency notes of fifty denomination towards illegal gratification pursuant to the demand for doing that work of dispatching the detail statement as to deduction of amount from the bills of the complainant towards income tax to the concerned office.

His specific plea is that one day his colleague Mr. Mistri (D.W.1) had given two torn fifty rupees currency notes to the complainant for getting those exchanged in the Bank and on 03.03.1987 complainant had returned those two notes to be given to Mr. Mistri as he was then absent in the office and the accused having received the same in good faith fell prey to the mischievous plot laid by the complainant coining a story to harass him.

4. Learned counsel for the appellant (accused) submitted that the evidence on record being scanned would clearly go to show that the finding of the trial court as to the demand of bribe is erroneous. He submitted that the evidence of P.W.4 who is the decoy does not receive corroboration on material particulars especially on the score of demand of bribe by the accused and thus the same also do not go to establish said factum of demand of bribe by the accused beyond reasonable doubt. It was submitted that the presumption as available under section 20 of the P.C. Act cannot be drawn as the factum of demand of bribe by the accused has not been proved beyond reasonable doubt. It was also submitted that in so far as recovery of those two currency notes are concerned the defence evidence clearly go to explain as to how those came to be recovered from him by preponderance of probability and thus when the explanation cannot be discarded, the trial court erred both in fact and law in holding the accused guilty of commission of offences as noted above. He thus submitted that the finding of guilt under section 5(1)(d)/5(2) of the P.C. Act as also under section 161 of the IPC is liable to be set aside.

Learned Standing Counsel (Vigilance) submitted that the evidence on record wholly support the finding that the accused had demanded bribe of Rs. 100/- from P.W.4 and in view of that the trial court finding that the prosecution has well proved the factum of recovery of the tainted money from the accused which is also not so denied by the accused, having gone to

hold the accused guilty for above offences is unassailable and the present appeal bears no merit. It was his submission that the defence case, as projected, being wholly unacceptable when it clearly appears to be a created one and the prosecution evidence being wholly reliable on the point of demand and acceptance of bribe, the judgment of conviction and order of sentence cannot be found fault with.

On the above rival submissions, the evidence on record has to be examined to ascertain whether the demand of illegal gratification which is the sine qua non to constitute the offence under the P.C. Act has been proved beyond reasonable doubt or not and that the accused had voluntarily accepted the money knowing it to be bribe.

5. Prosecution in order to establish its case against the accused has examined six witnesses besides providing the F.I.R.(Ext.11) and other documents prepared in course of investigation. The A.S.I., Vigilance as the member of the trap laying party has been examined as P.W.1, P.W.2 is the sanctioning authority. The ACTO has been examined P.W. 3. P.W. 4 is none other than the complainant and P.W.5 is the peon of the Office of A.C.T.O. who was also the member of that party. The Inspector, Vigilance (I.O.) has come to depose as P.W.6.

The defence has examined one, namely, Indrajit Mistri (D.W.1) and proved the certificates said to have been already prepared to be given to P.W.4.

6. The position of law on the point is well settled that once the demand and voluntary acceptance of illegal gratification knowing it to be the bribe are proved by evidence, then conviction for commission of offence under section 5(1)(d) read with section 5(2) of the P.C. Act has to follow against the accused. Indeed these twin requirements are sine quo non for proving the offence for which the accused has been convicted.

Thus, in the light of the above and keeping in view the rival contention touching the evidence, reappraisal of evidence stands as the need to adjudge the sustainability of the finding returned by the trial court in the above scores.

7. First coming to the FIR (Ext.11), it is seen that P.W.4 has not indicted therein as to when he had gone to the Income Tax Office and thereafter when

to the Office of the Executive Engineer, CADA, Sambalpur Division and particularly when he met the accused in the said office and ventilated his grievance for redressal when in turn, the demand of bribe was advanced from the side of the accused. It has been stated that the fact as regards non-receipt of the detail statement as to the deduction of the income tax in the Income Tax Office had been ascertained through a lawyer, namely Mr.Pandia, whom the prosecution has of course not chosen to examine. The evidence of P.W.4 is to the effect that he was not liable to pay the income tax and, therefore, it was to be refunded to him. He has specifically stated that his advocate Mr.Pandia used to move the office of the Authority for return of the money, Next stating about the then assignment of the accused, he jumps to say that the accused did not return the money to him, which had been kept back and, therefore, he made an application through Mr.Pandia for refund of the money but it was not paid any heed to and he repeatedly approached the accused for return of money, but he did not pay any attention to it.

When the very prosecution case is that the money having been deducted from the bill of P.W.4 towards the income tax, it was to be refunded by order from the office of Income Tax and it is said that the refund order could have only been passed on receipt of detail deduction report from the office where the accused was the head clerk and thus no money was to be paid back to this P.W.4 in the office of the Executive Engineer; so, there was no reason for the P.W.4 to ask the accused to pay him the money back. In fact, the position is admitted by defence as can be seen from office order, Ext.A to G (Except Ext.B). This important part of the evidence of P.W.4 goes to create grave doubt on the foundation of the prosecution case and rather it is shaken which has been ignored by the trial court. It gives a blow to the very foundation and in fact cuts at its root when admittedly this accused was not to refund the money and his job to be done was to send the statement to the Income Tax Department for onward action which is evident from the prepared statements proved by defence. This provides all such inference that the P.W.4, without understanding the procedure, had approached the accused for refund of the money and he having not been paid back, which was not within his power, P.W.4 might have nurtured the grudge and went to grind the axe as his expectation that the accused would do the job by refunding the money was not fulfilled by the accused and for that he had to run through another channel by engaging an advocate etc. This witness when admittedly had engaged Mr.Pandia to do the needful, no where it is stated that whether he at all had intimated Mr.Pandia about this illegal act of the accused in

advancing demand of illegal gratification. In his evidence, he has insisted that he repeatedly approached the accused for payment of the money, which is not the prosecution case. At the risk of repetition it be stated that it is the case of the prosecution that the accused demanded illegal gratification for sending the statement as to the deduction of money towards the income tax from the bills of P.W.4 to the Income Tax Office in initiating the process of refund and not to refund the amount deducted towards income tax.

When this P.W.4 is not stating either in the FIR or in evidence that prior to the date of laying of the trap when the accused had demanded illegal gratification, he has said regarding the demand and payment on the date of laying of the trap, i.e, 3.3.1987. He says that when he entered into the office leaving the Vigilance Office, other members of the trap party were outside and he went only being accompanied by the witness, namely, Pramod Chandra Nath (P.W.5). The accused was not present in the office and, therefore, he went to the nearby hotel. While going, he saw the accused coming from the hotel side and then followed him. The witness appears to have shown the conduct being of very much impatient to handover the money to the accused at the earliest as if to take care that in case upon passing of the day, everything would turn futile. Admittedly, when it was during the office hour, there arises no reason for this P.W.4 to rush to the hotel instead of waiting for some minutes even in the place where the accused was to come to join his work. Next, he says that on the verandah, the accused demanded the money and then he paid. The accompanying witness, i.e, P.W.5 has also said that the accused, on their arrival, was not present in the office, but he is not saying that P.W.4 had gone towards the hotel and on the way, he found the accused coming and so came back following him in reaching the verandah of the office. He does not say to have followed P.W.4. It is his evidence that they met the accused in front of the office where P.W.4 and the accused had a talk. His categorical statement is that no money was paid on the verandah and then the accused and P.W.4 went inside the office and he followed them but they went out of his range of visibility. He is not stating to have heard the conversation between the accused and P.W.4, more specifically demand by accused or to have even seen the handing over to two fifty rupees currency notes by P.W.4 to the accused and his keeping the same in pant pocket. On being examined from the side of the prosecution with the permission of the court, he has said to have stated nothing on the score before the investigating officer in course of the investigation. During cross-examination, P.W.4 has stated, which has to be taken note of that at this stage, that on 3.3.1987 at

9.00 am, he had gone to the very office and then it had not been opened. The reason for the same has not been deposed to by him. He then has further stated that the staff of the office came around 10.30 to 11.00 am. His next statement is that he came to the Vigilance Office straight from home at 9.00 am. The FIR has been registered by the Inspector of Vigilance on 3.3.1987, but noting as to its presentation before the Superintendent of Police or receipt by Vigilance Inspector is absent. P.W.6, the Inspector of Vigilance, who is the I.O. is totally silent on the score. P.W.4, the complainant has also not deposed about the time when he met the Superintendent of Police and then came to the Inspector of Vigilance on being so directed. The trap has been laid on 3.3.1987 whereas the A.S.I. of Vigilance, examined as P.W.1, has not stated as to the time when they left office for laying the trap. The A.C.T.O, (P.W.3) stated about his arrival in the Vigilance at 3.00 pm and he states to have left the Vigilance Office around 3.40 to 3.45 pm and they reaching the office where the accused was working at 3.50 pm and at 4.15 pm, the signal was received. This witness has also stated that the complainant while narrating the post trap incident, if had at all stated as to the date and time of advancement of the demand by the accused on being requested to send the detail statement as to deduction of income tax. This witness has then stated to have not remembered in which language the accused was interrogated or he replied.

All the above features being noticed in the evidence, in my considered view, the trial court by simply noting in a general manner that P.W.3 and 6 have corroborated the evidence of P.W.4 in all material particulars without any sort of critical analysis, when has rendered the finding that the prosecution evidence is reliable in so far as the demand of illegal gratification from the side of the accused, does not stand to judicial scrutiny. That apart, on the face of the evidence led in by the defence by examining D.W.1 that he had given to the complainant (P.W.4) for exchanging two fifty rupees currency notes in the bank which had been received by the accused being handed over by P.W.4 coupled with the evidence that D.W.1 was then not present in the office which is not unusual in view of the fact that it was almost during the end of the office hour, the finding of trial court that the prosecution has establish its case beyond reasonable doubt is not sustainable. Thus, having come to the conclusion that the twin requirements of demand of illegal gratification by the accused has not been proved from the side of the prosecution by leading clear, cogent and acceptable evidence beyond reasonable doubt, the judgment of conviction recorded against the accused

for commission of offence under section 5(1)(d) punishable under section 5(2) of the P.C. Act read with section 161 of the IPC and the consequential order of sentence impugned in this appeal, are liable to the set aside.

8. In the wake of aforesaid, the appeal is allowed and the judgment of conviction and order of sentence dated 29.04.1992 passed by the learned Special Judge (Vigilance), Sabmalpur in T.R. Case No.44 of 1987 corresponding to Sambalpur Vigilance P.S. Case No.5 of 1987 are hereby set aside.

9. The CRLA is disposed of accordingly.

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2020 (I) ILR - CUT- 388

D. DASH, J.

SAO NO. 9 OF 2019

SECRETARY, SARASWATI SISHU VIDYA MANDIR THROUGH SRI PRAMOD KUMAR BEHERA & ANR. ……....Appellants

.Vs.

SARASWATI SISHU VIDYA MANDIR TRUST, DHENKANAL & ORS. ……….Respondents

CODE OF CIVIL PROCEDURE, 1908 – Order 7 Rule 11 read with Section 92 – Suit by Saraswati Sishu Vidya Mandir Trust and Others with a prayer for declaration of the Trust to be valid to run the school with all its assets and Management and other prayers – Defendants filed petition under Order 7 Rule 11 seeking rejection of plaint on the ground that no leave has been obtained from the Principal Civil Court of original jurisdiction as provided under section 92 of the Code – Senior Civil Judge accepting the objection rejected the plaint for non-compliance of the provision of section 92 of the Code – First Appeal by Plaintiff allowed – Second appeal by defendants – Principles to be followed – Held, the real test for the applicability of the section 92 is to see whether the suit is fundamentally on behalf of the public for vindication of a public right.

"The principles of law set out in the cited decisions are that the main purpose of section 92 of the Code is to give protection to the public trust of a

charitable or religious nature from being subjected to harassment by suits being filed against the trust and to prevent an indefinite number of reckless and harassing suits being brought against the trustees by different persons interested in the trust. The real test for the applicability of the section is to see whether the suit is fundamentally on behalf of the public for vindication of a public right. This suit is not on behalf of the public for vindication any public right but to protect the so called interest of the trust and its property from the hands of those who are now alleged to be intruders. The plaint case has nothing to do with a breach of trust in a trust created for public purpose or a direction of the court as deemed necessary for administration of the trust is claimed therein. In view of all the aforesaid, the submission of the learned counsel for the appellants that substantial questions of law as placed at paragraph 5, are arising for being answered in this appeal meriting its admission stands repelled." (Paras 6 & 7)

For Appellants : Mr. Bibekananda Bhuyan & S.Sahoo

For Respondents :M/s. D.N.Rath, P.K.Rout & A.K.Saa
Mr. P.K.Lenka & D.P.Pattnaik

JUDGMENT Date of Hearing : 09.01.2020: Date of Judgment : 20.01.2020

D. DASH, J.

The appellants, in this appeal, have called in question the judgment dated 12.4.2019 passed by the learned District Judge, Dhenkanal in R.F.A. No.19 of 2019.

2. The appellants being the defendant nos.2 and 3 in C.S. No.160 of 2018, upon their appearance therein, filed an application under Order 7, Rule 11(d) of the Code of Civil Procedure (for short, 'the Code') for rejection of the plaint filled by the present respondent nos.1 and 2 being the plaintiffs. The plaint had been filed claiming the following reliefs:-

> "(1) Let the plaintiff trust be declared as valid to run the school with all its assets and Management;
>
> (2) let the newly constituted Managing Committee dated 24.4.2018 be declared as illegal;
>
> (3) let the decision to drive out the trust and members from the school affairs and Managing Committee be declared as illegal;
> (4) let it be decided that the defendant one has no locus-standi to hold the meeting in the manner it was held and the trust was ousted and the Managing Committee was constituted;
>
> (5) let it be declared only action and Management activity in the school other than the trust be declared as in operative; and

> (6) any other order as deemed proper in the facts and circumstances of the case be passed in the ends of justice."

The ground on which the plaint sought to be rejected is that the suit in the present form for the reliefs as aforesaid ought to have been filed seeking leave of the Principal Civil Court of original jurisdiction or the court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust is situate as provided under section 92 of the Code. The learned Senior Civil Judge, by order dated 2.3.2019 accepting the objection filed by the defendant nos.2 and 3, rejected the plaint for non-compliance of the provision of section 92 of the Code.

3. The plaintiffs aggrieved by the said order having filed the appeal, the same has been allowed taking a view that as in the instant suit, there arises the question of management of the school, the same does not fall within the ambit of section 92 of the Code for being filed by taking the leave as required thereunder. Accordingly, the trial court has been directed to proceed with the suit for its disposal in accordance with law.

4. Learned counsel for the appellants (defendant nos.2 and 3) as well as the respondent nos.1 and 2 (plaintiffs) have been heard at length as to if there stands the substantial question/s of law meriting admission of the appeal.

5(a). Learned counsel for the defendant nos.2 and 3 (appellants) submitted that the lower appellate court has erred in taking a view that the plaint is not liable to be rejected since the provisions of section 92 of the code are not attracted in so far as the suit in the present form as has been laid for the reliefs claimed.

Referring to the provisions of section 92 of the Code and placing the averments taken in the plaint as also the reliefs claimed as stated in the aforesaid paragraphs, he contended that the following substantial question of law arises for being answered in this appeal.

> "(I) Whether the learned District Judge is justified in holding that since the suit relates to the management of the school which has nothing to do with the management of Trust and as such Section 92 of the C.P. Code is not attracted?;
>
> (i) Whether for the purpose of section 92 of C.P. Code, the entirety of the plaint averments is required to be looked into or only relief portion?; and

> (ii) Whether a suit relating to public and charitable trust and for protection of its management and property when instituted before the Civil Court of ordinary jurisdiction is required to be returned for presentation before the appropriate court or the plaint can be rejected under Order 7, Rule 11 (d) of C.P.Code?"
>
> He relied upon the decisions in case of *Joginder Singh and others –V- Dy. Custodian-General of Evacuee Property and others*; AIR 1967 SC 145 and *Harendra Nath Bhattacharya and others –V- Kaliram Das (dead) by LRs and others*; AIR 1972 SC 246.

5(b). Learned counsels for the respondent nos.1 and 2 (plaintiffs), refuting the submission, as above, contended that the lower appellate court, upon detail examination of the plaint averments as also the prayer made therein, in the touch stone of the provisions of section 92 of the Code, has rightly held the plaint to be entertainable. According to him, on going through the case as projected in the plaint and keeping in view the reliefs sought for, the order of the lower appellate court which has been impugned herein is unassailable. According to them, none of the questions of law as placed by the learned counsel for the appellants come to surface in the case when the cause of action giving rise to the institution of the suits for the reliefs claimed are examined and viewed in their proper perspectives and tested in the touchstone of the settled position of law governing the field. They placed reliance upon the principles of law as stated in the decisions as under:-

> (i) *Swami Parmatmanand Saraswati and another –V- Ramji Tripathy and another*; AIR 1974 SC 2141;
>
> (ii) *R. Venugopala Naidu and others –V- Venkatarayulu Naidu Charities and other*; AIR 1990 SC 444;
>
> (iii) *Thayarammal (Dead) by LR –V- Kankammal & others*; AIR 2005 SC 1588;
>
> (iv) *A. A. Gopalakrishnan –V- Cochin Devaswom Board and others*; AIR 2007 SC 3162; and
>
> (v) *Vidyodaya Trust –V- Mohan Prasad R. and others*; AIR 2008 SC 1633.

6. Keeping in view the rival submissions, I have perused the judgments of the appellate court as well as the order of the trial court which had been impugned in that appeal and has been set aside.

The decisions cited by the learned counsels for the parties have been carefully gone through.

The principles of law set out in the cited decisions are that the main purpose of section 92 of the Code is to give protection to the public trust of a

charitable or religious nature from being subjected to harassment by suits being filed against the trust and to prevent an indefinite number of reckless and harassing suits being brought against the trustees by different persons interested in the trust. The real test for the applicability of the section is to see whether the suit is fundamentally on behalf of the public for vindication of a public right.

7. Adverting to the case in hand, the plaint averments in support of the claim of the reliefs claimed therein, being gone through, it is seen that Saraswati Shisu Vidya Mandir, Dhenkanal is a registered trust. The trust through its Managing Trustee applied for affiliation of Bharatiya Sikhya Vikash Sansthan (defendant no.1) for opening new school Saraswati Sishu Vidya Mandir at Dhenkanal and that being granted, the trust started running the school forming a Managing Committee. As pleaded, the trust having the paramount authority not only appointed the members to that Managing Committee but also the teachers and staffs. The role/function of the Managing Committee is to assist the trust in properly running the school. It is stated that by resolution dated 29.12.2017, Managing Committee was formed nominating Pramod Kumar Behera, defendant nos.2 as Secretary and others as office bearers.

On 30.3.2018, Managing Committee meeting was called to discuss the important affairs of the school where the members of the Managing Committee created disturbance and the purpose of the meeting was frustrated. So, the Managing Committee was dissolved and new Managing Committee was constituted. It is stated that on 2.4.2018, the ousted members made resolution levelling false allegations against the trustees and they declared themselves as the members of the Managing Committee it is next stated that said Pramod Kumar Behera is not eligible to be the Secretary as he is neither a parent nor guardian of any student, furthermore, he being a teacher in an aided school, has even no eligibility to be the member of Managing Committee.

The allegation is that such formation of Managing Committee of the school is without the authority and against the interest of the trust which is thus illegal. The resolution of said Managing Committee that no trustee can be member of the Managing Committee and to the effect of transfer of account of the trust and usurping the power to deal with the funds lying in the Bank are said to be illegal. The school being of the trust and as such affiliated; it is said that all said resolutions to the contrary are nonest.

Placing all these above, the plaintiffs have sought for a declaration that the plaintiff-trust is valid and has the authority over the management of the school with the other ancillary declarations as to the actions of the Managing Committee as illegal.

The core dispute raised is the plaint is as to the management of the school. The question posed here is as to if the Managing Committee as has been constituted have the right to manage the school which is said to be the creation of the trust from out of its funds to the exclusion of the trust by way of its alienation from the trust in all respect.

This suit is not on behalf of the public for vindication any public right but to protect the so called interest of the trust and its property from the hands of those who are now alleged to be intruders. The plaint case has nothing to do with a breach of trust in a trust created for public purpose or a direction of the court as deemed necessary for administration of the trust is claimed therein.

In view of all the aforesaid, the submission of the learned counsel for the appellants that substantial questions of law as placed at paragraph 5, are arising for being answered in this appeal meriting its admission stands repelled.

8. In the result, the appeal stands dismissed. No order as to cost.

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2020 (I) ILR - CUT- 393

S. PUJAHARI, J.

CRLA NO(s). 348, 349, 350, 351 & 352 OF 2018

TIRUPATI PANIGRAHI & ORS. ………Appellants

.Vs.

STATE OF ORISSA ………Respondent

ODISHA PROTECTION OF INTERESTS OF DEPOSITORS (In FINANCIAL ESTABLISHMENTS) ACT, 2011 – Sections 6 and 8 – Offences under– Initially G.R case registered under different offences of the Penal Code – Enforcement of OPID Act – Subsequently Charge sheet filed under section 6 of the Act along with offences under the Penal Code –

Case transferred to the Designated Court as per section 8(3) of the Act – Retrospective Operation the Act questioned – Order of cognizance challenged – Held, if there is failure to render services, for which the deposit had been made or when there is default or failure in return of the deposit or payment of the interests on the deposit, until the said failure or default continues, the offences under section 6 of Act is to be treated as continuing, notwithstanding the fact that the deposit was received or contract was made prior to the date of coming into force of the OPID Act.

For Appellants : M/s. Amitav Bagchi, D. Nanda & M. Dash.

For Respondents : Mr. Bibekananda Bhuyan, Special Counsel.

JUDGMENT Date of Judgment : 15.11.2019

S. PUJAHARI, J.

The appellants being common to all these five Criminal Appeals and the questions raised also being common, for sake of convenience, all these appeals have been heard together and the common judgment to follow shall dispose of all of them.

2. All these five criminal appeals correspond to five separate C.T. cases in which the learned Designated Court, Cuttack has taken cognizance of the offence under Section 6 of the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 (for short "the OPID Act") against the accused-appellants as per separate orders passed in those C.T. Cases on 04.11.2015. The common accused-appellants now challenge the legality and propriety of the orders of cognizance in so far as the same relate to the offence under Section 6 of the OPID Act on the ground that the corresponding G.R. Cases of those C.T. Cases had been registered before the learned S.D.J.M., Bhubaneswar in the year 2012, i.e., before the OPID Act came into force having no retrospective effect. The continuance of the proceedings before the Designated Court is also challenged by the accused-appellants on the ground that in compliance with the order of the Apex Court they having already deposited an amount of Rs.63,55,49,227/- towards the total money collected from the depositors, to be refunded to them, the same has the effect of compounding of the offence under Section 6 of the OPID Act in view of Section 7 of the OPID Act (as it stood before the amendment brought into force with effect from 13.11.2016), and hence, the order of taking cognizance under Section 6 of the OPID Act is bad in law. The

appellants seek for an order to quash the order of cognizance under Section 6 of the OPID Act with a direction to the designated Court to send back the cases to the common Criminal Court, i.e., SDJM, Bhubaneswar for their trial for the offences under the Indian Penal Code only.

3. As it appears, the G.R. Cases were registered by the police in the year 2012 for different offences under the Indian Penal Code, but after coming into force of the OPID Act, charge-sheets were filed under Section 6 of the said Act besides other offences under the I.P.C. against the accused-appellants. Thereafter, keeping in view the provision under Section 8(3) of the OPID Act, the learned S.D.J.M., Bhubaneswar transferred all those G.R. cases to the Designated Court who took cognizance of the offence under Section 6 of the OPID Act and other offences under the I.P.C. against the accused-appellants vide the order dated 04.11.2015.

4. During hearing of the criminal appeals before this Court, Mr. Bagchi, the learned counsel appearing for the common appellants while reiterating the grounds indicated hereinbefore, submitted that since the OPID Act has no retrospective effect and the erstwhile G.R. Cases having been registered before the S.D.J.M., Bhubaneswar prior to coming into force of the OPID Act, the orders passed by the learned Designated Court taking cognizance of offence under Section 6 of the OPID Act is not sustainable in law. Referring to the orders dated 21.02.2014 and 25.07.2017 passed by the Supreme Court of India in S.L.P. (Criminal) Nos.6749-6751, 6961-6963, 6942-6944, 6983-6985 and 6986-6988 of 2013, the learned counsel further submits that the amount of money which the appellants had received from the depositors having been deposited by them and on the prayer of the State the said amount having already been directed to be appropriated under the provisions of the OPID Act, the offence under Section 6 of the OPID act is deemed to have been compounded with effect from 22.04.2016, on which date the phase-wise deposit of the amount by the accused-appellants was completed. According to the learned counsel, in view of Section 7 of the OPID Act, (as it stood before being omitted, as per the Notification dated 13.11.2016), the learned Designated Court became functus officio to try the appellants under Section 6 of the OPID Act.

5. Mr. Bhuyan, learned Special Counsel appearing for the respondent-State, on the other hand, submitted that the grounds taken by the appellants are not only misconceived in fact and law, but also are conflicting inter se.

According to him, by necessary implication, the OPID Act has retrospective effect. His further submission is that the amount deposited by the appellants being in compliance with the bail condition imposed by the Apex Court and the same being not to the tune of discharging the total liability towards the depositors and there having been no move from the side of the aggrieved depositors to seek compounding of offence, Section 7 as it stood before the amendment never came to the rescue of the appellants.

6. The aim and object of the OPID Act is primarily to protect the deposits made by the public in the financial establishments, with provision for punishment for the defaulters. There can be no gainsay that a statute unless by specific provision or by necessary implication is made effective retrospectively shall be treated as being effective prospectively. The intention of the Legislature to make the OPID Act retrospective in application is implicit in its provisions, inter-alia, under Section 6 and sub-section (3) of Section 8 of the OPID Act. Both these sections are re-produced here below for the sake of ready reference;

> "6. **Default in Repayment of deposits and interests honouring the commitment** – Notwithstanding anything contained in section 3, where any Financial Establishment defaults the return of the deposit or defaults the payment of interest on the deposit or fails to return in any kind or fails to render service for which the deposit have been made, every person responsible for the management of the affairs of the Financial Establishment shall be punished with imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees and such Financial Establishment is also liable for a fine which may extend to two lakh rupees.
>
> 8. **Designated Court –** (1) xxxxxxx
>
> (2) xxxxxxxx
>
> (3) Any pending case in any other court to which the provisions of this Act apply shall stand transferred to the Designated Court.
>
> (4) xxxxxxx"

7. If there is failure to render service, for which the deposit had been made or when there is default or failure in return of the deposit or payment of the interests on the deposit, until the said failure or default continues, the offence under Section 6 of the OPID act is to be treated as continuing, notwithstanding the fact that the deposit was received or contract was made prior to the date of coming into force of the OPID Act. In that view of the underlying object of the penal provision under Section 6 of the OPID Act,

with constitution of Designated Courts, provision has been made under Section 8 of the OPID Act for transfer of the cases pending before the common Criminal Courts to the Special Designated Court for trial. This Court, therefore, is unable to agree with the learned counsel for the appellants that the OPID Act has no retrospective effect or that the impugned orders of cognizance passed by the learned Designated Court under Section 6 of the OPID act suffer from any impropriety or illegality.

8. Now, adverting to the alternative plea of the appellants with reference to Section 7 of the OPID Act, as it stood before the amendment, a reference may be made to the orders dated 21.02.2014 and 25.07.2017 passed by the Apex Court in Cr.M.P. Nos.3982-3984, 4775-47777, 4961-4963, 4964-4966 and 4969-4971 of 2017 in SLP (Crl.) Nos.6749-6751/2013. As one of the conditions of bail, the accused-appellants were directed by the Apex Court to deposit the aforesaid sum, and after such deposit was made on installments, subsequently on the prayer of the State Government, the said amount was directed to be appropriated by the State under the provisions of the OPID Act. Needless to mention that while depositing the aforesaid amount the accused-appellants did not seek to appropriate the said amount for compounding of the offence under Section 6 of the OPID Act, although Section 7 of the OPID Act was in vogue by then. It may also be mentioned here that compounding of offence is always a bilateral move, and here neither there is any report that any of the depositors has in fact received money to his satisfaction, nor is there any conclusive information on record that the amount deposited by the appellants is capable of discharging their whole liability towards all the depositors. In the facts and circumstances indicated above, the contention of the appellants regarding compounding of the offence under Section 6 of the OPID Act is found to be misconceived.

9. Resultantly, all these criminal appeals being devoid of merit are hereby dismissed.

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2020 (I) ILR - CUT- 397

S. PUJAHARI, J.

CRLA NO. 70 OF 2019

NIRANJAN GUIN ……..Appellant

.Vs.

STATE OF ORISSA(OPID) ………Respondent

CRIMINAL TRIAL – Initiation of criminal proceeding – Whether availability of civil forum is a bar to launch criminal proceeding? – Held, No, law is well settled that availability of a civil forum will not be a bar for launching criminal prosecution, if the element of mens rea is there, and the ingredients of the offences are manifestly present.

For appellant : M/s. S.C. Mohapatra, R.K. Mallick, R.R. Chhottaray, S.S. Das.

For Respondent : Mr. Bibekananda Bhuyan, Special Counsel, OPID.

JUDGMENT Date of Judgment: 24.12.2019

S.PUJAHARI, J.

The order dated 20.12.2018 passed by the learned Designated Court under the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 (for short "the OPID Act"), Cuttack in C.T. No.22 of 2017 framing charge under Section 420/34 of I.P.C. and Section 6 of the OPID Act against the appellant and one co-accused is sought to be quashed qua the appellant.

2. On 11.11.2017 the Chauliaganj Police registered the case on receiving a written report from the Informant, namely, Smt. Snehalata Sukla to the effect that one Basudev Behera, the co-accused of the present appellant who was involved in Real Estate business, took an amount of Rs.7,73,000/- with an assurance of providing a piece of land, and cheated her by not providing the land and not refunding her money either. Police took up investigation and on completion of investigation, submitted charge-sheet against the aforesaid Basudev Behera and the present appellant suggesting their trial under Section 420/34 of IPC and under Section 6 of the OPID Act. According to the prosecution, both the accused were running the Partnership Firm, namely, M/s. Satyam Sai Infratech having their office at Mahanadi Vihar, Cuttack for carrying on their Real Estate business, and in furtherance of such business, they collected money from the Informant and others with assurance of registering land in their favour, and ultimately, they cheated the depositors by not providing the assured service and not returning their deposited money, for which not only the present case, but also some other criminal cases have been registered against them.

3. The appellant named above has sought for quashing of the charge framed against him by the learned Designated Court on the grounds that the

Informant has not brought any allegation against him inasmuch as he never approached the Informant much less with demand of any money or deposit, or giving any assurance of registering any land in her favour. It is his further contention that the transaction allegedly entered into by the Informant and the co-accused – Basudev Behera had no reference to the Partnership Firm named above. He has further contended that the charge has been framed by the learned Court below without affording him any opportunity of hearing and no reason has been assigned in the impugned order as to why charge under Section 6 of the OPID Act was framed against the appellant when the Investigating Officer had not added the said offence against him in the charge-sheet. In course of hearing, the learned counsel for the appellant has made a reference to certain case laws to buttress his argument that the impugned order is liable to be quashed when the charge is found to be groundless.

4. Shri Bhuyan, learned Special Counsel appearing for the opposite party-State, supports the impugned order by advancing rival submission that at the time of framing of charge there is no legal requirement of searching for evidence beyond reasonable doubt inasmuch as strong suspicion is sufficient to frame charge. Referring to the statements of some of the witnesses recorded by the Investigating Officer under Section 161 of Cr.P.C. and some other materials on record, he submits that since the appellant was a business partner of Basudev Behera and their registered Partnership Firm was engaged in the Real Estate business at the relevant period of time, the charge brought against the appellant along with the co-accused – Basudev Behera cannot be said to be groundless.

5. Perusal of the impugned order would reveal that the learned Court below on hearing both the sides and perusing the materials on record has come to presume both the accused persons to have committed the offence under Section 420/34 of IPC and Section 6 of the OPID Act. Needless to mention that while taking up the question of framing of charge the Court is in need of materials which if remained un-rebuttal, will be sufficient to hold the accused guilty of the offence alleged. To put in other words, at this stage of the proceeding, no evidence beyond reasonable doubt, but materials sufficient to draw a presumption are required to be placed by the prosecution. A perusal of the police papers would show that by the time the co-accused – Basudev Behera took the money from the Informant, the registered Firm, namely, M/s. Satyam Sai Infratech was in operation, and the appellant along with the said

Basudev Behera happened to be the Directors of the said Firm. Although the F.I.R. does not name the appellant, it is there that Basudev Behera was doing Real Estate business, and some of the witnesses examined by the Investigating Officer, have stated about involvement of both the Partners, and that Basudev Behera and the present appellant cheated the Informant and some other persons in course of their Real Estate business. It is also not correct to say that the Investigating Officer has not added the charge under Section 6 of the OPID Act against the appellant in the charge-sheet. The Investigating Officer has clearly mentioned in the charge-sheet that as per the investigation, both the accused persons have committed the offence under Section 420/34 of IPC and Section 6 of the OPID Act.

6. The appellant in an attempt to show that the transaction of Basudev Behera with the Informant was in his individual capacity, but not on behalf of the Partnership Firm, produced copy of one notice issued by him through his lawyer on 07.01.2017 to the co-accused – Basudev Behera and a copy of one affidavit purportedly sworn by Basudev Behera on the same date, i.e., 07.01.2017. Those papers being post F.I.R. creation are of no assistance to the appellant, particularly at the stage of charge.

7. Law is well settled that availability of a Civil Forum will not be a bar for launching a criminal prosecution, if the element of *mens rea* is there, and the ingredients of the offence(s) are manifestly present.

8. For the discussion made hereinbefore, this Court does not find any illegality in the impugned order.

9. Accordingly, this Criminal Appeal being devoid of merit stands dismissed.

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2020 (I) ILR - CUT- 400

BISWANATH RATH, J.

W.P.(C) NO.166 OF 2008

AKSHAYA KUMAR TRIPATHY ……….Petitioner

.Vs.

ORISSA POWER TRANSMISSION CORPORATION LTD. (OPTCL), BHUBANESWAR, & ORS. ………Opp. Parties

SERVICE LAW – Promotion – Petitioner appointed as telecommunication operator – Twenty seven years of unblemished service career – No departmental proceeding against the petitioner – Promotion denied on the ground that, the post of telecommunication operator has no promotional avenue/line – Right to promotion pleaded – Action of the authority challenged – Held, a person is joining in a post and retiring in the said post, such action violated the Articles, 14 & 16 of the Constitution of India – Hence petitioner is entitled to promotion at least upto two stages along with consequential financial benefits with 6% interest thereon.

Case Laws Relied on and Referred to :-

1. AIR 2004 SC 1249 : State of Tripura & Ors. Vs. K.K.Roy.
2. (1989) 4 SCC 635 : Council of Scientific and Industrial Research & Anr. Vs. K. G. S. Bhatt & Anr.
3. 1990 (Supp.) SCC 688 : Dr.Ms. O. Z. Hussain Vs. Union of India.

For Petitioner : Mr. Rajendra Krushna Bose, Mr. J.Nayak & Mr. S.K.Nayak.
For Opp. Party : Mr. B.K.Pattnaik, Mr. S.S.Parida & Mr. K. Mohanty.

JUDGMENT Date of Hearing: 19.12.2019 : Date of Judgment: 02.01.2020

BISWANATH RATH, J.

This writ petition is filed for quashing of the order at Annexure-9, for issuing a mandamus against the opposite parties to consider the grievance of the petitioner for promotion at least to the post of Junior Manager (HR) and also to direct the opposite parties to provide promotional avenue for the petitioner keeping in view his qualification and long service of 27 years in one post.

2. Short background involving the case is that petitioner joined as a Telecom Operator in High Skilled 'B' Category under Administration and Clerical Classification on 12.08.1981 in the erstwhile Office of Orissa State Electricity Board (in short 'OSEB'). OSEB was subsequently taken over by GRIDCO. Subsequently, the establishment of GRIDCO is also taken over by the Orissa Power Transmission Company Limited (in short 'OPTCL'), which is in charge of power transmission policy. Petitioner is continuing as an employee under opposite party no.1 presently. Petitioner passed M.A. in Public Administration with special paper as HRM from Utkal University. He obtained his Diploma in Electrical Engineering from Oxford College,

Kolkata. GRIDCO while existing issued a circular vide Circular No.11031, dated 21.5.2002 inviting applications from departmental candidates for the post of Assistant Manager (HRD)/ Assistant Manager (IT)/Assistant Manager (FIN) and qualifications for various disciplines were discussed in the said Circular. For the post of Assistant Manager (HRD), a candidate should possess Post Graduate in any subject or Graduate in Engineering or MBA/PGDBM (of minimum two years duration) from any recognized Institution/University with experience in Establishment, Service Matters, Policies, Industrial Relations, Domestic Enquiries, Welfare and Labour Law etc. It was also decided therein to open the post to the internal candidates in relaxation of age and qualification. In the year 2005, some posts of Assistant Manager/Junior Manager have fallen vacant in different establishment of the GRIDCO, such as, HRD, PR Guest House Management and Junior Manager (HR)/Service Tech. SLDC. Petitioner since got due qualifications for the higher post like Assistant Manager, he had applied to the opposite party no.1 and his application was duly forwarded by the opposite party no.3. However, authority remained silent. Petitioner also applied the authority for considering his case to the post of Junior Manager (HRD) on 22.03.2006. However, opposite party no.3 vide his letter dated 03.06.2006 advised the petitioner to apply to the Director (HRD) along with his HSC certificate and other higher educational qualification certificates for appropriate consideration. In the meanwhile, opposite party no.3 given promotion to one Subodh Chandra Mishra, who of course retired in the meantime. Petitioner submitted another representation on 14.08.2006, wherein he has stated that opposite party no.3 given promotion to Subodh Chandra Mishra to the post of Section Officer, which is a post in E-2 category. It was also submitted therein that one post of Grade-1 Assistant has fallen vacant after promotion of Sri S.C. Mishra to the post of Section Officer and thus, requesting for considering his case for the said post or at least to re-designate the post as Grade-1 Assistant. Simultaneously, he also prayed for promotion to the post of Junior Manager (HRD). Lastly on 20.9.2006, petitioner also represented to opposite party no.2 with copies to opposite party nos.1 and 3 to consider his case for Grade-1 Assistant or Junior Manager (HRD). It was also alleged that in spite of repeated request, petitioner's case has not been considered and on the other hand, there has been appointment of several Assistants in the post of Assistant Manager. Even the petitioner was not provided opportunity to compete along with others. Finding repeated requests of the petitioner even unheard, petitioner was constrained to take shelter of this Hon'ble Court by filing W.P.(C) No.1475/ 2007. This Court disposed of the writ petition

directing therein that the petitioner to pursue the representation pending before the opposite party no.2 and opposite party no.2 was also thereby directed to dispose of the said representation within a period of two months. It is pursuant to such direction of this High Court, the opposite party no.2 though considered the representation but while rejecting the epresentation claimed that since the petitioner was holding the post of Telecommunication Operator his promotion to the post of Junior Manager (HRD) was not permissible. Petitioner also averred that General Manager vide Office Order No.1487, dated 30.04.2001 addressed to opposite party no.2 has recommended and requested either for higher scale or for creation of higher post to the Telecommunication Operator, but however, the authority remained silent. In the meantime, GRIDCO vide Office Order No.12772(5), dated 18.06.2002 circulated the revised GRIDCO structure with field staff norms under implementation plan pertaining to the field office unit, which is relevant for the petitioner as he was also serving in the field unit. In the revised GRIDCO structure, the posts of Section Officer and Telecom Operator are absent. Assailing the rejection order at Annexure-9, petitioner made the prayer as quoted hereinabove in filing the present writ petition.

3. Sri Bose, learned counsel appearing for the petitioner on reiteration of the above facts while justifying the claim of the petitioner contended that a person cannot be appointed in a post and retired in such post after serving for more than three decades and further for the petitioner having sufficient qualifications to hold the higher post, further for the recommendation of the competent authority to either step up the salary of the Telecom Operator or to create promotional post, case of the petitioner should have been considered. It is thus submitted that the rejection of the request of the petitioner is not only opposed to the legitimate expectation of an employee to have minimum stepping up pay by way of promotion in his service career but also involving an inhuman attitude by an employer to its employee. Referring to a decision of the Hon'ble Apex Court in the case of ***State of Tripura and others Vrs. K.K.Roy***, reported in AIR 2004 SC 1249 and the direction therein Sri Bose, learned counsel for the petitioner attempted to justify the petitioner's claim.

4. Learned counsel appearing for the opposite parties on the other hand taking this Court to the counter averments submitted that petitioner since joined knowing fully well that in the post of Telecommunication Operator not only belong to a different cadre, but has also no promotional line. While admitting that petitioner has made several requests, learned counsel

appearing for the opposite parties contended that for the post held by the petitioner has no promotional line, each time the case of the petitioner though was considered but the authority was constrained to reject the case of the petitioner for having no scope for giving promotion to the petitioner, keeping in view the service regulation involving the establishment. It is also urged by the learned counsel for the opposite parties referring to Annexures-G and H that the promotion to the post indicated therein does not have the scope to consider the case of the petitioner, since he was holding the post of Telecom Operator. It is in the circumstances and for the reasons submitted in the counter affidavit and for some financial benefits given to the petitioner, further for abolition of the post of Telecommunication Operator since the petitioner has been assigned with work of corporate relations, estate and other administrative activities of SLDC, counsel for the opposite parties seriously objected the claim of the petitioner and prayed for rejection of the writ petition.

5. Considering the rival contentions of the parties, this Court finds that there is no dispute that petitioner remained all through since 1981 in the post of Telecommunication Operator except in the year 2018 on abolition of post of Telecommunication Operator, the petitioner has been assigned with the work of Corporate Relation, Estate and other Administrative activities of SLDC, as appearing at Annexure-17 involving further affidavit in response to the rejoinder at the instance of the opposite parties. The post, the petitioner is presently holding has also no promotional avenue. For no controversy to the claim of the petitioner that petitioner was continuing in the same post till 2018 when there was only change in the nomenclature of the post, this Court finds petitioner who had joined in the post of Telecommunication Operator appears to be retiring without having any promotional avenue except change in the designation involving the post again having no promotional avenue. There may be some financial benefit here and there. It is at this stage taking into consideration the law of the land in the case of ***Council of Scientific and Industrial Research and another Vrs. K. G. S. Bhatt and another***, (1989) 4 SCC 635, the Hon'ble Apex Court therein held as follows:

> "….It is often said and indeed, adroitly, an organisation, public or private does not hire a hand' but engages or employs a whole man. The person is recruited by an organization not just for a job, but for a whole career. One must, therefore, be given opportunity to advance. This is the oldest and most important feature of the free enterprise system. The opportunity for advancement is a requirement for progress of any organization. It is an incentive for personnel development as well. (See:

Principles of Personnel Management by Flipo Edwin B., 4th Edn., p.246). Every management must provide realistic opportunities for promising employees to move upward."The organisation that fails to develop a satisfactory procedure for promotion is bound to pay a severe penalty in terms of administrative costs, misallocation of personnel, low morale, and ineffectual performance, among both non-managerial employees and their supervisors." (See: Personnel Management by Dr.Udai Pareek, p.277). There cannot be any modern management much less any career planning, manpower development, management development, etc., which is not related to a system of promotions……".

Similarly in the case of ***Dr.Ms. O. Z. Hussain Vrs. Union of India***, reported in 1990 (Supp.) SCC 688, the Hon'ble Apex Court again held as follows:

"….Promotion is thus a normal incidence of service. There too is no justification why while similarly placed officers in other ministries would have the benefit of promotion, the non-medical 'A' Group scientists in the establishment of Director General of Health Services would be deprived of such advantage. In a welfare State, it is necessary that there should be an efficient public service and, therefore, it should have been the obligation of the Ministry of Health to attend to the representations of6 the Council and its members and provide promotional avenue for this category of officers….."

6. Taking into consideration the directions of the Hon'ble Apex Court in the above cited Supreme Court decisions, the Hon'ble Apex Court again in the case of *State of Tripura and others (supra)* in Paragraphs 6 and 7 came to hold as follows:

"6. It is not a case where there existed an avenue for promotion. It is also not a case where the State intended to make amendments in the4 promotional policy. The appellant being a State within the meaning of Article 12 of the Constitution should have created promotional avenues for the respondent having regard to its constitutional obligations adumbrated in Articles 14 and 16 of the Constitution of India. Despite its constitutional obligations, the State cannot take a stand that as the respondent herein accepted the terms and conditions of the offer of appointment knowing fully well that there was no avenue of promotion, he cannot resile therefrom. It is not a case where the principles of estoppels or waiver should be applied having regard to the constitutional functions of the State. It is not disputed that the other States in India, union of India having regard to the recommendations made in this behalf by the Pay Commission introduced the scheme of Assured Career Promotion in terms whereof the incumbent of a post if not promoted within a period of 12 years is granted one higher scale of pay and another upon completion of 24 years if in the meanwhile he had not been promoted despite existence of promotional avenues. When questioned, the learned counsel appearing on behalf of the appellant, even could not point out that the State of Tripura has introduced such

> a scheme. We wonder as to why such a scheme was not introduced by the Appellant like the other States in India, and what impeded it from doing so. Promotion being a condition of service and having regard to the requirements thereof as has been pointed out by this Court in the decisions referred to hereinbefore. It was expected that the Appellant should have followed the said principle.
>
> 7. We are, thus, of the opinion that the respondent herein is at least entitled to grant of two higher grades, one upon expiry of the period of 12 years from the date of his joining of the service and the other upon expiry of 24 years thereof."

7. Keeping in view the catena of decisions of the Hon'ble Apex Court holding that a person is joining in a post and retiring in the said post, such action being violative of Articles 14 and 16 of the Constitution of India, more particularly, keeping in view the directions therein in paragraph-7 of the *State of Tripura and others (supra)*, this Court while setting aside the impugned order vide Annexure-9 directs the opposite parties to consider the case of the petitioner in terms of the direction of the Hon'ble Apex Court therein in paragraph-7. Considering that the petitioner has already put up several decades of service and he is entitled to promotion at least upto two stages he may be provided with consequential financial benefits along with arrear with interest @6% all through. The entire exercise in the light of the above be completed by the opposite party no.1 within a period of one and half months from the date of communication of the judgment. Writ petition succeeds but however to the extent indicated hereinabove. With the above observation, the writ petition stands disposed of. No costs.

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2020 (I) ILR - CUT- 406

BISWANATH RATH, J.

W.P.(C) NO. 371 OF 2006

AJIT NARAYAN MOHAPATRA ………Petitioner

.Vs .

UNION OF INDIA & ORS ………Opp. Parties

SERVICE LAW – Promotion to the post of A.D.I.G – Adverse Remark in C.C.R – "Good" – Non communication of the such remark – Effect of – Held, for non communication of the C.C.R of the petitioner has a civil consequence because, it has affected the chance of promotion and other benefits and it is therefore observed that non-communication of the C.C.R has no place in the eye of law.

Case Laws Relied on and Referred to :-

1. (2008) 8 SCC 725 : Dev Dutt Vs. Union of India & Ors.
2. (2019) 4 SCC 276 : Anil Kumar Vs. Union of India & Ors.
3. (2006) 1 SCC 368 : Union of India & Anr Vs. Major Bahadur Singh.

For Petitioner : Mr. U. K. Samal, Mr.B.R.Barick, Mr.C.D.Sahoo, Mr. N.P. Rayand & Mr. M.R. Mohapatra

For Opp. Party: Mr.Gyanalok Mohanty, CGC

JUDGMENT Date of Hearing & Judgment : 07.01.2020

BISWANATH RATH, J.

In the instant writ petition, the petitioner has prayed inter alia for the following reliefs:

"It is, therefore, prayed that this Hon'ble Court may graciously be pleased to :-

a) admit the writ petition.

b) call for the records.

c) issue rule Nisi calling upon the opposite parties as to why the letter dtd.14.2.2006 under Annexure-7 shall not be quashed and the petitioner shall not be promoted to the post of A.D.I.G. of C.I.S.F., w.e.f. the date when his Junior in the cadre of Sr. Commandant have been given promotion to the post of A.D.I.G. if required by holding a review DPC and to declare the preparation of the extended panel as unlawful and invalid as the said panel lost its identity on the end of the calendar year i.e., 31st December, 2005. The scale of pay of the petitioner be fixed in the post of Additional DIG, w.e.f 1.2.2006 and the financial benefit be provided to the petitioner along with the consequential financial benefit till date of superannuation and other post retirement benefits.

d) if the opposite parties do not show cause or show insufficient cause, issue a writ in the nature of mandamus or any other appropriate writ/writs, order/orders, direction/directions in quashing the letter dtd.14.2.2006 under Annexure-7 and direct the opp. parties to give promotion to the petitioner to the post of A.D.I.G. of C.I.S.F., if required by holding a review D.P.C. from the date when his Junior in the cadre of Sr. Commandant have been given promotion to the post of A.D.I.G. and to declare the preparation of extended panel as unlawful and invalid as the same has lost its identity on the end of the calendar year i.e. 31st December, 2005. The scale of pay of the petitioner be fixed in the post of Additional DIG, w.e.f. 1.2.2006 and the financial benefit be provided to the petitioner along with the consequential financial benefit till date of superannuation and other post retirement benefits.

And pass such other order(s) which will be deemed fit and proper for the ends of complete justice.

And for this act of kindness, the petitioners as in duty bound shall ever pray."

2. Heard Mr.U.K. Samal, learned counsel for the petitioner and Mr.Gyanalok Mohanty, learned Central Government Counsel for the opposite party nos.1 to 4.

3. Writ petition and the prayer based therein raises a question as to if rejection of the case of the petitioner for promotion to the post of Additional Deputy Inspector General on the basis of un-communicated C.C.R. permissible in the eye of law? Referring to the prayer after two stages of amendment being allowed by this Court, Sri Samal, learned counsel appearing for the petitioner further referring to the C.C.R. for the year 2002-03 marked as "Good" having not been communicated to the petitioner contended that non-communication of C.C.R. for a particular year could not have an adverse effect in the promotion of the petitioner to the post of Additional Deputy Inspector General (A.D.I.G.), Central Industrial Security Force. It is taking this Court to the factual aspect involving herein Sri Samal, learned counsel for the petitioner submitted that even though the petitioner has been promoted to the post of A.D.I.G. on 2.4.2007, contended that had the non-communicated adverse entry for the year 2002-2003 been ignored, the petitioner would have been promoted at the minimum from 01.02.2006, i.e. since when his immediate junior Mr.Ved Prakash was promoted. Referring to the decisions of the Hon'ble Apex Court in the case of ***Dev Dutt Vrs. Union of India and others***, reported in (2008) 8 SCC 725, which was also being considered in the case of ***Anil Kumar Vrs. Union of India and others,*** (2019) 4 SCC 276, referring to paragraphs-18 and 20 therein. Sri Samal, learned counsel for the petitioner contended that the decisions indicated hereinabove have direct application to the case of the petitioner and as such, the petitioner deserves reliefs sought for.

4. Mr.Mohanty, learned Central Government Counsel appearing for the opposite party nos.1 to 4 on the other hand taking this Court to the consideration of the C.C.R. of the petitioner for five years, i.e. 1999 to 2004 more particularly for improvement in the rating of C.C.R. involving the petitioner for the year 2003-04 contended that non-communication of C.C.R. for the year 2002-03 has in fact no effect in the matter of consideration of the case of the petitioner for the post of A.D.I.G., CISF in the year 2002. Taking this Court to the counter submissions, learned Central Government Counsel also contended that there has been no infirmity in the decision making process thereby requiring interference of this Court. It is further submitted that the judgment cited at Bar has no applicability to the case of the petitioner at hand. Mr. Mohanty, learned Central Government Counsel rather relied on

a decision of the Hon'ble Apex Court in the case of ***Union of India and another Vrs. Major Bahadur Singh***, reported in (2006) 1 SCC 368.

5. Considering the rival contentions of the parties and taking into account the questions involved herein, this Court finds decision involving *Dev Dutt* (supra) is considering a case of similar nature though involving promotion in the Border Roads Engineering Service. This Court further finds in paragraphs-9, 10 and 33 of the judgment of the Hon'ble Apex Court in the case of *Dev Dutt* (supra), wherein the Hon'ble Apex Court has observed as under:

> "9. In the present case the benchmark, (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have "very good" entry for the last five years. Thus in this situation the "good" entry in fact is an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a "good" entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.
>
> 10. Hence, in our opinion, the "good" entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-1994 should be upgraded from "good" to "very good". Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the "good" entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the "good" entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the "good" entry was arbitrary and hence illegal, and the decisions relied upon by the learned counsel for the respondent are distinguishable.
>
> 33. In our opinion, fair play required that the respondent should have communicated the "good" entry of 1993-1994 to the appellant so that he could have an opportunity of making a representation praying for upgrading the same so that he could be eligible for promotion. Non-communication of the said entry, in our opinion, was hence unfair on the part of the respondent and hence violative of natural justice."

In paragraphs-41 and 43, the Hon'ble Apex Court held as under:

> "41. In our opinion, non-communication of entries in the annual confidential report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution.

> 43. We are informed that the appellant has already retired from service. However, if his representation for up-gradation of the "good" entry is allowed, he may benefit in his pension and get some arrears. Hence we direct that the "good" entry of 1993-1994 be communicated to the appellant forthwith and he should be permitted to make a representation against the same praying for its upgradation. If the upgradation is allowed, the appellant should be considered forthwith for promotion as Superintending Engineer retrospectively and if he is promoted he will get the benefit of higher pension and the balance of arrears of pay along with 8% per annum interest.

6. This Court reading through the judgment of the Apex Court in the case of *Anil Kumar* (supra) in paragraph-15 observed as under:

> "15. The appellant did not have the benefit of submitting his representation when the Screening Committee took up the case for financial upgradation. CSIR by reason of its autonomy may have certain administrative privileges. No authority can, however, claim a privilege not to comply with a judgment of this Court. Once the law was enunciated in *Dev Dutt's* case, all instrumentalities of the State were bound to follow the principles laid down by this Court. CSIR was no exception."

In making reference to the decision referred to herein above.

7. Considering the submissions of the parties and looking to the ruling of the Hon'ble Apex Court, this Court finds the facts involving the case at hand is similar to the pleadings in paragraph-3 of the case of *Dev Dutt* (supra). In such view of the matter, this Court in application of the judgments referred to herein above and as both the above judgments have direct application to the case at hand is inclined to interfere in the action of the management and accordingly declare that rejection of the case of the petitioner based on un-communicated C.C.R. for promotion in the year 2002 is bad and not sustainable in the eye of law.

8. For non-communication of the C.C.R. of the petitioner has a civil consequence because it has affected the chance of promotion and other benefits and it is therefore observed that non-communication of the C.C.R. has no place in the eye of law. Further considering that the petitioner has already been retired from service, this Court further directs while permitting the petitioner to make an application against the non-communicated C.C.R. for the year 2002-03. The "Good" entry for the year 2002-03 be communicated to the petitioner within a period of two months from the date of receipt of copy of this judgment and on being communicated to the petitioner, he may make a representation if he is so advised against such entry and on consideration of the representation within two months, if the entry is up-graded, the petitioner's case shall be considered for promotion

retrospectively from 01.02.2002, i.e. the date when his next junior was promoted. In such event also the action involving promotion to the petitioner with retrospective effect as well as the consequential financial benefits including higher pension shall be released within a further period of one month. Arrear if any shall be paid along with interest @ 8% all through. With the above observation, the writ petition is disposed of. No costs.

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2020 (I) ILR - CUT- 411

P.PATNAIK, J.

W.P.(C) NO.1060 OF 2011

GOPINATH GAJAPATI NARAYAN DEO ……….Petitioner

.Vs.

SARVGNYA JAGANNATH NARAYAN DEV & ORS. ……….Opp.parties

CODE OF CIVIL PROCEDURE, 1908 – Order XVIII Rule 1 – Right to begin by defendant – When? – Principles – Held, under the following two circumstances i.e (I) The defendant admitted the facts alleged by the plaintiff in the plaint. (II) The defendants contend that either any point of law or on some other additional facts stated in the written statements, the plaintiff is not entitled whole or any part of the relief which he seeks. If the party satisfies the court about two ingredients then the court should direct the defendant to begin. Therefore, the plaintiff to begin the hearing of the suit is usually the rule and to direct the defendant to begin is an exception. Therefore, the court while exercising judicial discretion to direct defendants to begin is to scrutinize the matter in threadbare.

For Petitioner : Mr. Sidhartha Mishra
For Oopp.Parties : Mr. R.K. Rath, Senior Counsel

JUDGMENT Date of Hearing :12.12.2019 : Date of Judgment:24.12.2019

P.PATNAIK, J.

The aforesaid writ petition has been filed assailing the order dated 15.12.2010 passed by the learned civil Judge (Senior Division), Parlakhemundi arising out of partition suit being C.S. no.22 of 2006 in allowing an application filed by the plaintiff under Order XVIII Rule 1 of the

Code of Civil Procedure praying therein to direct the defendants to begin hearing of the suit.

2. The Plaintiff-opposite party No.1-Sarvagnya Jagannath Gajapati Narayan Dev filed a civil suit being C.S.No.22 of 2006 before the learned Civil Judge (Senior Division), Parlakhemundi against Gopinath Gajapati Narayan Deo, the petitioner herein and other members of the family. The prayer sought for by the opposite party Nos. 1 and 2 in the partition suit are as follows:

> (a) Direct the suit schedule properties to be partitioned vide three equal share and to put both the plaintiffs in exclusive possession of each one such 1/3rd share within a specified period.
>
> (b) And in case if the defendant Nos.1,2 and 3 fail to oblige the terms and condition of the preliminary decree, make the same into final by deputing a Commission to partition the suit schedule property into three equal share after taking into consideration the market value, location of the said property and to adjust/allot the property already alienated by the 1st defendant (without the consent of the plaintiff towards his 1/3rd share to prevent multiple litigation.

3. In the said suit, the petitioner filed the written statement by disputing the joint status of the family. It has also been pleaded that there was a partition of the suit property earlier on various occasions from 1972 till 1987 based on some unregistered and other documents and further pleaded that there was also consent decrees/compromise suit earlier. Further, it has been pleaded that the plaintiff and defendants have been enjoying and have also alienated their properties as absolute owners and the suit for partition is barred by time. It has also been pleaded that family arrangement deed dated 02.04.1987 all disputes regarding share of movable properties have been resolved whereby the defendant No.1 had given away sizeable properties. In view of family arrangement of dispute regarding partition of properties and share between the plaintiff and defendant no.1 have been finally resolved.

4. After completion of pleadings the plaintiff filed a petition under Order XVIII Rule 1 of the Code of Civil Procedure praying inter alia to direct the defendants-petitioner herein to begin hearing of the suit and to adduce evidence ahead of the plaintiffs. In the said petition, the plaintiff claimed that once any party to the suit asserts his exclusive right/claim over the entire or specific portion of the suit property then the entire burden on him with clear and cogent evidence about the division of joint status by way of partition wherein he has to further establish that such properties were allotted to him

towards his share. The petitioner along with opposite party Nos.3 and 4 filed objection to the application under Order XVIII Rule 1 of the Code of Civil Procedure sating therein a suit for partition the burden always rests upon the plaintiff (opposite party Nos.1 and 2 herein) to prove the joint status of the properties.

5. The learned trial court vide order dated 15.12.2010 basing on the pleadings in the plaint as well as in the written statement has been pleased to pass the impugned order dated 15.12.2010 basing on the following observations:

> "On perusal of the case record, it is found that the defendants admitted that the Schedule-A property was originally joint family property till the year 1976. Then the landed properties were partitioned amongst the co-sharers. It is further stated that the Schedule-B properties are not the joint family properties, but it is exclusive property of defendant No.1. Similarly, the defendants further stated that the Schedule C and properties are not liable to be partitioned. But the dispute between the parties is relating to partition amongst the co-sharers. The plaintiffs stated that no partition has been made in respect of joint family properties whereas the defendants have taken plea that joint family properties have been partitioned. In the Division bench decision of the Hon'ble High Court their Lordships held that in a suit for partition the defendants having pleaded previous partition, the decision relied by Advocate for the defendants are not acceptable in the facts and circumstances of this case and in view of the Division Bench decision of Hon'ble High Court reported in 1992(1) OLR-72 (supra).

In the result, the petition filed by the plaintiffs is allowed. The defendants are directed to adduce evidence prior to the evidence of the plaintiff. Put up on 23.12.2010 for trial."

6. Being aggrieved and dissatisfied with the impugned order dated 15.12.2010 the instant writ petition has been filed and vide order dated 21.01.2011 while issuing notice in the writ petition interim order of stay in Misc.Case No.841 of 2011 has been passed.

7. Mr.Sidhartha Mishra, learned counsel for the petitioner while assailing the impugned order submitted with vehemence that Court has no power to compel the defendant to lead evidence first. However, the Rule being enabling Rule, in case of contingencies mentioned in Rule, Defendant can exercise his right to lead evidence prior to plaintiff. In absence of any contingencies, trial Court is not empowered to direct Defendant to lead evidence first. Further the learned counsel for the petitioner submits that in a suit for partition burden always rests upon Plaintiff not only to prove that suit schedule properties is liable for partition, but also to establish his entitlement for a share in it. Denial by the defendant of any plea raised by

Plaintiff would only lead to a necessity, to undertake trial. Mere fact that the defendant had pleaded to the contrary, does not alter the sequence provided for under Oder 18 Rule 1 C.P.C.

8. In order to get a relief under Rule 1 of Oder XVIII of the Code of Civil Procedure certain ingredients are to be satisfied and exception case has to be made out and if the plaintiff satisfies the court about existence of the ingredients.

> (i) The defendant admitted the facts alleged by the plaintiff in the plaint.
>
> (ii) The defendants contend that either any point of law or on some other additional facts stated in the written statement, the Plaintiff is not entitled whole or any part of the relief which he seeks. If the applicant satisfies the court about two ingredients then the Court should direct the defendant to begin. Therefore, the plaintiff to begin the hearing of the suit is usually the Rule and to direct the defendants to begin is an exception. Therefore, the Court while exercising judicial discretion to direct defendants to begin is to scrutinize the matter in threadbare.

9. Mr.R.K.Rath, learned senior counsel for the opposite parties however by referring to the written statement more particularly paragraphs-3,22,23 has stoutly defended the impugned order passed by the learned Civil Judge (Senior Division), Parlakhemundi.

10. In Balakrishna Kar and another-vrs.-H.K.Mahatab, AIR 1954 ORISSA 191, the Division Bench of this Court in paragraph-5 of the said report held as follows:-

> "(5) It should therefore be borne in mind that the right to begin is not the same as the adducing of evidence in support of a party's case. There is a distinction between the two. It is open to the plaintiff to say that although he has the right to begin he may rest content with relying upon the averments made in the written statement and may say that he does not propose to adduce further evidence, but the plaintiff should make this statement before the defendant is called upon to adduce evidence. Unfortunately, the Court below has confused the issue and has called upon the defendant to open his case even before the plaintiff went into the box or testified to the truth of his story. We are clearly of opinion that the order of the learned Subordinate Judge is erroneous and must be set aside."

11. In Chittaranjan Das vrs-Janaranjan Das and others, 84 (1997) CLT 296, it is held that the plaintiff in all cases has the right to begin, exception being that when the defendant admits the facts and contends either in the point of law or on some additional facts alleged by the defendants the plaintiff is not entitled to any part of the relief which he seeks in the suit and in that event only the defendant is to begin.

12. In Purastam alias Purusottam Gaogouria and others-v.Chatru alias Chaturbhuja Gaigouria, 1992 (I) OLR 72, A Division bench of this Court in para-5 of the report held thus:

> "5. In this case, the plaintiff sought partition alleging that the property was joint family property and had not been decided by metes and bounds. The defendant-petitioners placed a previous partition since 1960-61 to defeat the plaintiff's suit. In view of the plea of the defendants that there was a previous partition, the learned Subordinate Judge called upon the defendants to begin. The plaintiff's plea that the property was joint family property having been admitted by the defendants and the latter having pleaded previous partition, the defendants are to lose if neither party adduced evidence, the burden being on the defendants to prove previous partition. Only when the defendants lead some evidence in proof of previous partition, the plaintiff would be obliged to lead evidence in rebuttal."

13. On scrutiny of records and on perusal of the decisions reported (supra) the order passed by the learned trial Court does not suffer from any infirmity or illegality nor the said order can be said to be perfunctory or flawed warranting interference of this Court under Article 226 and 227 of the Constitution of India.

Before parting with the case since the suit is of the year 2006 and has been pending on such a trivial and tiny issue, the learned trial court is directed to take steps for expeditious disposal of the suit. The parties are directed to cooperate with the trial court. If possible the learned trial court shall do well to dispose of within a period of one year from the date of appearance of the parties, if there is no legal impediment. The learned trial court shall act upon production of certified copy of the order. Interim Order dated 21.01.2011 passed in Misc.Case No.841 of 2011 stands vacated. Accordingly, the writ petition is dismissed. No costs.

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2020 (I) ILR - CUT- 415

P.PATNAIK, J.

W.P.(C) NO.1340 OF 2013

KALYANI PATTNAIK ……..Petitioner

.Vs.

REGISTRAR, UTKAL UNIVERSITY & ORS. ……..Opp.Parties

SERVICE LAW – Regularisation of service – Petitioner was appointed as a Hindi teacher – Continuous service of 37 years – Non regularisation of service – Denial of regularisation on the ground that, petitioner has worked against a non-existent & non-admissible post –

Claim of regularisation in view of utilisation continuous service – Direction issued to regularise service along with the payment of all financial benefits.

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

1. AIR 2006 SC 1806 : Secretary, State of Karnatak Vs. Uma Devi & Ors.
2. AIR 2018 SC 3589 : Narendra Kumar Tiwari & Ors. Vs. State of Jharkhand & Ors.
3. (2014) 7 SCC 223 : State of Jharkhand & Ors. Vs. Kamal Prasad & Ors
4. AIR 2013 SC 3547 : Bhupinder Singh & Ors. Vs. State of Punjab & Ors:

For petitioner : Mr. B.P. Das.
For opp. parties : Mr. P.P. Mohanty, Addl. Govt. Adv.
Mr. S. Samal, S.C for the S & M.E (for O.P No.3)
Miss Mira Ghosh, (for O.P No.1.)

JUDGMENT Date of Hearing :13 .11.2019 : Date of Judgment: 19.12.2019

P.PATNAIK, J.

In the accompanied writ petition, the petitioner who is a retired Hindi Teacher having put in 37 years of uninterrupted and unblemished service in the Utkal University High School, Vani Vihar, Bhubaneswar in assailing the lackadaisical and indifferent action of the opposite parties for non-payment of post retirement benefits, has approached this Court under Articles, 226 and 227 of the Constitution of India, praying inter alia for direction to the opposite parties to consider the case of the petitioner for grant of ACP and for disbursement of the pension and other pensionary benefits including the GPF, gratuity and unutilised leave salary etc.

2. Undisputed facts as borne out from the records reveals that the petitioner having the requisites qualification was appointed as Hindi teacher in the Utkal University High School, Vani Bihar vide office order issued by the Registrar Utkal University dated 20.03.1975 and in pursuance of the said order, the petitioner joined in her duties with effect from 20.03.1975. The petitioner continued in the said post till her retirement from service on 31.05.2012. During the continuance, the petitioner crossed her first EB (Efficiency Bar) in the year 1993 and second E.B.(Efficiency Bar) in the year 1994, as evident from Annexure-4 series. The petitioner has also got TBA (Time Bound Advancement) Scale for 15 years vide office order no.38378 dated 19.01.2001 as per Anneure-1. During her tenure, the petitioner also contributed towards GPF (General Provident Fund) from her salary. Despite her continuance in service nearly 37 years, since the petitioner was not granted post retirement benefits, she submitted a representation dated 30.11.2012 addressed to opposite party no.1 as per Annexure-7. The representation of the petitioner fell in deaf ears since the

opposite parties did not take any tangible steps for release of post retirement benefit. Left with no alternative, efficacious and speedy remedy, the petitioner knocked the doors of this Court for redressal of her grievances.

3. Mr.Das, learned counsel for the petitioner submits with vehemence that the service of the petitioner ought to have been regularised in view of Clause-3 (a) (ii) of the Orissa Aided Educational Institutions (Appointment of Teachers" Validation) Act,1978 since the petitioner was appointed by the Board prior to 1st December,1976 and the date of appointment of the petitioner being 01.04.1975, the said validation Act is applicable to the case of the petitioner. Learned counsel for the petitioner further submits that the letter dated 02.12.2010 vide Annexure-14 to the writ petition pertains to creation of one post of Hindi Teacher for the University High School, Vani Bihar, Bhubaneswar for regularisation of service of the petitioner. Even in the said letter there was a proposal for creation of supernumerary post of Hindi Teacher with effect from 20.03.1975 to 31.03.2005, but the said letter from the Hon'ble Chancellor office did not see the light of the day. Learned counsel for the petitioner further referred to the rejoinder affidavit filed by the petitioner to the counter filed by opposite party no.3 dated 26.06.2019 wherein the District Education Office, Khurda's letter dated 08.08.2018 has addressed to the Director, Secondary Education, Odisha, Bhubaneswar requesting issuance of necessary instructions towards sanction of pension/pensionary benefit in favour of the petitioner. In the counter affidavit of the opposite party no.1 to rejoinder affidavit filed dated 24.04.2014 refers to a letter dated 09.02.2011, i.e., Annexure-I/1 wherein a request has been made by the Joint Secretary, Chancellor to the opposite parties for regularisation of the services of the petitioner. Learned counsel for the petitioner further in order to buttress his submission has referred to the decision rendered by the Hon'ble Apex Court in the case of **Secretary,** ***State of Karnatak v. Uma Devi and others: AIR 2006 SC 1806***, ***Narendra Kumar Tiwari and Ors. V. State of Jharkhand and Ors: AIR 2018 SC 3589, State of Jharkhand and others v. Kamal Prasad and others :(2014) 7 SCC 223*** & ***Bhupinder Singh & Ors. V. State of Punjab & Ors: AIR 2013 Supreme Court 3547.***

4. Controverting the averments made in the writ application, counter affidavit has been filed by opposite party no.2, wherein it has been submitted that the allegations drawn up by the petitioner are based on misconception and distortion of facts. From the date of her joining in the High School as referred above, she has worked against a non-existent and non-admissible post of Hindi Teacher as standard staffing pattern for Government Secondary Schools allows one sanctioned post of such Hindi Teacher as per erstwhile Education and Youth Service (in short, 'EYS') Department letter no.53541 dated 18.12.1980 and such

sanctioned post of Hindi teacher was filled up by her predecessor namely, Mrs. Kamala Kumari Das by the time of her joining till 31.03.2005. As it is well settled under law that two persons cannot continue against one post at one time, hence regularization of the present petitioner against the only sanctioned post of Hindi Teacher from 20.03.1975 till 31.03.2005 is not at all possible as during the said duration the sole sanctioned post was filled up by her predecessor and therefore, the present petitioner was regularized against the post when it fell vacant with effect from 31.03.2005 due to superannuation of such predecessor.

Further it has been submitted that more so this is a case of employment beyond the sanctioned post allowed to be continued by the Utkal University for which no service benefit like allowing the benefit of ACP as well as terminal benefits in view of her superannuation cannot be accorded by this opposite party no.1. As such, the claim substantiated by the petitioner to avail the benefit of regularization against a non-existent post from the date of her joining till she was regularized against a sanctioned post is nevertheless a misnomer and if such claim is entertained, it will certainly cause unsettling the settled position of law.

A counter affidavit has been filed by opposite party no.1 dated 17.3.2013 wherein it has been requested to opposite party no.2 for regularisation of the service of the petitioner for the period from 20.03.1975 to 31.03.2005 vide Annexure-E/1 series. Another affidavit has been filed by opposite party no.1 dated 15.12.2016 wherein it has been submitted that the petitioner was adjusted and served as a Hindi Teacher in a non-existent post but she has been adjusted against the substantive post of Hindi teacher after retirement of Smt. Kamala Das with effect from 01.04.2005 and retired on 31.05.2012. Since the yardstick permits only one Hindi teacher it is necessary to create a second post of Hindi Teacher in order to regularise the service of the petitioner for the period from 20.03.1975 to 31.03.2005. For creating a post the sanction of the State Government is necessary.

Sec.22(3) of O.U. Act is quoted below for ready reference:

> "Whenever posts are created beyond the yardstick approved by the State Government under sub-section(1), prior concurrence of the State Government shall be obtained"

Further it has been submitted that since as per the Rule 47 of O.C.S. Pension Rules 1992, a Government servant, who retired from service after completing the qualifying service of 10 years is entitled to get pensionary benefit. In the instant case, the petitioner has rendered qualifying service for

seven years only and it is necessary to get the clearance from the State Government to regularize her entire period of service in order to extend pensionary benefit to her.

Further, it has been submitted that during the pendency of the writ as per the direction of this Court P.F. dues of the petitioner to the tune of Rs.3,40,517/- has been deposited vide Account on 21.09.2013 and also the GPF interest amounting to Rs.26,719/- vide the same account number.

5. Mr. Mohanty, learned Additional Government Advocate on behalf of opposite party no.2 apart from reiterating the submission made in the counter affidavit has strenuously urged that the Validation Act as has been submitted by the learned counsel for the petitioner is not applicable to the case of the petitioner in view of the case reported in ***1993 (I) OLR 519: Biswanath Pati v. State of Orissa & Others.*** However, he does not dispute the legal proposition with regard to regularisation of service of the petitioner, as has been enunciated in the dictum of the Hon'ble Apex Court in the case of ***Biswanath Pati*** (supra).

6. After hearing the learned counsel for the respective parties at length and on perusal of the records, this Court is of the considered view that the petitioner has been able to make out a case for interference due to the following reasons:

(i) Admittedly, the petitioner has rendered 37 years of service from 20.03.1975 till 31.05.2012 as Hindi Teacher of Utkal University High School, Vani Bihar having been duly selected by the competent authority. Though her service has been regularized from 20.03.1975 to 31.03.2005 till her retirement her past service has not been counted towards qualifying period of service, so as to entitle her for grant of post retirement benefits.

(ii) The various correspondences and communications made by the University-opposite party no.1 to the opposite party no.2 for regularisation of service and for release of post retirement benefits have yielded, no result compelling the petitioner to invoke the extra ordinary jurisdiction of this Hon'ble Court for mitigating her grievances.

The decision of the Hon'ble Apex Court with regard to regularisation is squarely applicable to the petitioner's case for regularisation of her service. It would be apposite to refer the case in ***Uma Devi (supra),*** ***Narendra Kumar Tiwari*** (supra), ***State of Jharkhand and others*** (supra) and ***Bhupinder Singh*** (supra).

7. In view of the decision of the Hon'ble Apex Court, the petitioner case deserves to be regularised taking into consideration her considerable period of service from 20.03.1975 to 31.03.2005 for that the petitioner is entitled to all retirement benefits.

8. On cumulative effect of the reasons and judicial pronouncements and in order to subserve the interest of justice, the opposite parties are directed to regularise the services of the petitioner since the opposite parties utilised her service for a prolonged period of 37 years.

9. In the back drop of the aforesaid reasons, the opposite parties are directed to regularise the petitioner's service from 20.03.1975 to 31.03.2005 and consequent upon the regularisation, appropriate order be passed to compute the said period for grant of admissible post retirement benefits and thereby disburse the same to the petitioner as expeditiously as possible. The entire exercise be completed within a period of four months from the date of receipt of certified copy of the order. With the aforesaid observation and direction, the writ petition stands disposed of.

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2020 (I) ILR - CUT- 420

K.R. MOHAPATRA, J.

R.S.A NO. 207 OF 2019

SANDHYA RANI MAJHI ....Appellant

.Vs.

CHAMPA BEWA & ANR. ....Respondents

CODE OF CIVIL PROCEDURE, 1908 – Section 100 – Second Appeal – Maintainability – Whether upon dismissal of first appeal on the ground of limitation, second appeal is maintainable? – Ans. Yes. – Held, order of dismissal of an appeal filed under section 96 of the Civil Procedure Code as a consequence of rejection of a petition seeking condonation of delay in filing the said appeal, amounts to formal adjudication of the lis(appeal) and the said order is a decree under section 2(2) of the Code for all purposes and as such, second appeal is held to be maintainable.

Case Laws Relied on and Referred to :-

1. 1984 (I) OLR 819 : Ainthu Charan Parida .Vs. Sitaram Jayanarayan Firm, represented by Ramnibas & Anr
2. AIR 2005 SC 226 : Shyam Sundar Sarma .Vs. Pannalal Jaiswal & Ors.
3. (2017 SCC OnLine Bom 8471: Chandrakant Somnath Melge .Vs. Balasaheb Somnath Melge
4. 2015 (II) CLR 599 : Fakira Mishra .Vs. Biswanath Mishra & Ors.
5. 2019(I) ILR-CUT-535 : Jitendra Naik .Vs. Radhyashyam Naik & Ors.

For Appellant : M/s. Mr. Amit Prasad Bose, S.K. Dwibedi & D.J. Sahoo
For Respondents : ---------

ORDER Heard and Disposed of on 09.01.2020

K.R. MOHAPATRA, J.

The appellant in this appeal assails the order dated 03.05.2019 passed by the learned District Judge, Mayurbhanj at Baripada in R.F.A. No.41 of 2016, whereby he dismissed the appeal on the ground of limitation.

2. The appellant framed the following questions for consideration:

> *"(i) Whether the learned Lower Appellate Court was correct in disbelieving the illness of the appellant because there was no scrap of paper showing the regular check up of the patient by the Doctor.*
>
> *(ii) Whether the learned Lower Appellate Court was correct in not treating the illness and medical certificate of the appellant is sufficient cause when the factum of sufficient cause has not definite meaning but the subjective satisfaction by court.*
>
> *(iii) Whether the learned Lower Appellate Court was correct in dismissing the regular first appeal on the ground of limitation when it should be heard on merit."*

3. At the outset, the position of law should be clarified with regard to maintainability of appeal under Section 100 of Code of Civil Procedure, 1908 (for short, 'the Code') against an order dismissing the appeal filed under Section 96 of the Code as a consequence of rejection of a petition for condonation of delay in filing the said appeal.

3.1 The Full Bench of this Court in the case of ***Ainthu Charan Parida –v- Sitaram Jayanarayan Firm****,* represented by ***Ramnibas and another***, reported in 1984 (I) OLR 819 held as under:

> *" 31. For the reasons recorded by R.C. Patnaik, J. in the order of reference and in view of what has been stated above, we hold that an order rejecting a memorandum of appeal or dismissing an appeal following the rejection of an application under Section 5 of the Limitation Act for condonation of delay in preferring the appeal is not a decree within the meaning of Section 2(2) of the Code of Civil Procedure. The Civil Revision may now be placed before our learned brother R.C. Patnaik, J. for a decision."*

3.2 However, Hon'ble Apex Court in the case of ***Shyam Sundar Sarma v. Pannalal Jaiswal and Others***, reported in AIR 2005 SC 226 held as under:

> *"10. The question was considered in extenso by a Full Bench of the Kerala High Court in Thambi v. Mathew [(1987) 2 KLT 848 (FB)] . Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of the law for all purposes and an order dismissing*

the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3-A of Order 41 introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered under Rule 9 of Order 41 of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.

11. Learned counsel for the appellant relied on the Full Bench decision of the Calcutta High Court in Mamuda Khateen v. Beniyan Bibi [AIR 1976 Cal 415 : 81 CWN 111 (FB)] to contend that an order rejecting a time-barred memorandum of appeal consequent upon refusal to condone the delay in filing that appeal was neither a decree nor an appealable order. On going through the said decision it is seen that though the Full Bench referred to the divergent views on that question in the Calcutta High Court prior to the rendering of the decision of this Court in Mela Ram and Sons [1956 SCR 166 : AIR 1956 SC 367] it had not considered the decisions of this Court in Raja Kulkarni [1954 SCR 384 : 1954 Cri LJ 351] and in Mela Ram and Sons [1956 SCR 166 : AIR 1956 SC 367] in coming to that conclusion. In fact it is seen that there was no discussion on that aspect as such, though there was a reference to the conflict of views in the decisions earlier rendered by the Calcutta High Court. Since the ratio of that decision runs counter to the principle laid down by this Court in Mela Ram and Sons [1956 SCR 166 : AIR 1956 SC 367] obviously the same could not be accepted as laying down a correct law."

3.3 In the case of ***Chandrakant Somnath Melge v. Balasaheb Somnath Melge*, **(2017 SCC OnLine Bom 8471), the High Court of Bombay at paragraph-8 held as follows:

"8. What is relevant for the purposes of section 100 of the Code of Civil Procedure is that, there must be a decree passed by the first Appellate Court. A decree means a formal expression of adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The matter in controversy in the appeal between the parties was as to the entitlement of the Appellant herein to challenge the ex parte decree passed against him by the trial Court. That matter is conclusively determined and the right of the Appellant with regard to the same is conclusively denied, when in the appeal an order was passed on the application for condonation of delay, rejecting the same, and thereby dismissing the appeal. Just because there is no formal merger between the appellate order and the decree passed by the trial Court in the sense of the doctrine of merger implied by law, it cannot be said that there is no decree of the Appellate Court. Since in this case, the appeal is dismissed on the ground that delay is not condoned, the order passed by the Appellate Court is nevertheless a decree and a second appeal from such decree would certainly lie under section 100 of the Code if it does give rise to a substantial question of law."

4. In view of the ratio decided by the Hon'ble Supreme Court in ***Shyam Sundar Sarma (supra)***, the view expressed in ***Ainthu Charan Parida*** (FB)

supra can no more held to be good law, as the same is impliedly overruled. Thus, an appeal under Section 100 of the Code (Second Appeal) would lie against an order dismissing the appeal under Section 96 of the Code as a consequence of rejection of a petition for condonation of delay in filing the said appeal.

5. My view gets support from the decision in ***Fakira Mishra –v- Biswanath Mishra and Others,*** reported in 2015 (II) CLR 599, wherein it is held as under:

> *"3. A Full Bench of this Court, in the case of Ainthu Charan Parida v. Sitaram Jayanarayan Firm represented by Ramnibas and another, 58 (1984) CLT 248 (F.B), held that an order rejecting a memorandum of appeal or dismissing an appeal following the rejection of an application under Section 5 of the Limitation Act for condonation of delay in preferring the appeal is not a decree within the meaning of Section 2(2) of the Code of Civil Procedure. But then, the apex Court, in the case of Shyam Sunder Sarma v. Pannalal Jaiswal and others, AIR 2005 SC 226, held that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.*

5.1 Further, this Court in ***Jitendra Naik –v- Radhyashyam Naik and others***, reported in 2019(I) ILR-CUT-535, it is held as under:

> *"4. The seminal question that hinges for consideration of this Court is that an order rejecting a memorandum of appeal or dismissing an appeal following rejection of an application under Sec.5 of the Limitation Act for condonation of delay in preferring the appeal is a decree or order?*
>
> *5. The subject-matter of dispute is no more res integra. An identical matter came up for consideration before this Court in the case of Fakira Mishra v. Biswanath Mishra & others, 2015 (II) CLR*
>
> *599. This Court held as follows:*
>
> *"3. A Full Bench of this Court, in the case of Ainthu Charan Parida v. Sitaram Jayanarayan Firm represented by Ramnibas and another, 58 (1984) CLT 248 (F.B), held that an order rejecting a memorandum of appeal or dismissing an appeal following the rejection of an application under Section 5 of the Limitation Act for condonation of delay in preferring the appeal is not a decree within the meaning of Section 2(2) of the Code of Civil Procedure. But then, the apex Court, in the case of Shyam Sunder Sarma v. Pannalal Jaiswal and others, AIR 2005 SC 226, held that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.*
>
> *4. In Shyam Sunder Sarma (supra), the view of the Full Bench of the Calcutta High Court, in the case of Mamuda Khateen and others v. Beniyan Bibi and others, AIR*

> *1976 Calcutta 415, that an order rejecting a time barred memorandum of appeal consequent upon refusal to condone the delay in filing that appeal was neither a decree nor an appellable order, was held to be not laying down a correct law.*
>
> *5. Further, the Full Bench decision of the Kerala High Court, in the case of Thambi v. Mathew, 1987 (2) KLT 848, that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal, was approved by the apex Court.*
>
> *Be it noted that the aforesaid decision of the Calcutta High Court was approved by the Full Bench of the Orissa High Court in the case of Ainthu Charan Parida (supra).*
>
> *6. In view of the authoritative pronouncement of the apex Court in the case of Shyam Sunder Sarma (supra), the Full Bench decision of this Court in the case of Ainthu Charan Parida (supra) has been impliedly overruled, the same being contrary to the enunciation of law laid down by the apex Court."*

5.2 Thus, there remains no iota of doubt that order of dismissal of an appeal filed under Section 96 of the Code as a consequence of rejection of a petition for condonation of delay in filing the said appeal, amounts to formal adjudication of the lis (appeal) and the said order is a decree under Section 2(2) of the Code for all purposes. As such, this appeal is held to be maintainable.

6. On perusal of the impugned order, it appears that there is a delay of 462 days in filing the appeal. It is apparent that the appellant in order to explain the delay in filing the appeal had only relied upon the documentary evidence, which is a medical certificate issued by one Dr. A.K. Bhuyan. The medical certificate attached to the limitation petition disclosed that the appellant was suffering from Hyper-Tension and Poly Arthritis and was under treatment by Dr. A.K. Bhuyan for the period from 27.11.2014 to 2.8.2016 and was advised complete bed rest for the said period. After recovery from her ailment, the appellant had filed the appeal. On appreciation of the facts, learned 1st Appellate Court disbelieved the plea taken by the appellant and came to a conclusion that the cause shown is not sufficient to condone the delay of 462 days.

7. Mr. Bose, learned counsel for the appellant submits that although the 1st Appellate Court in the concluding paragraph of the impugned order has observed that the treating physician had advised for repeated check-up, but from the medical certificate attached to the limitation petition, it would be clear that there was no such advice by the treating physician. Such an observation is perverse and the appeal should be admitted on the said question of law, as the appellant is going to lose a substantial right.

8. Taking into consideration the submissions made and on perusal of the record, it appears that learned 1st Appellate Court on appreciation of averments as well as documentary evidence available on record, came to a conclusion that the explanation of delay in filing the appeal are not sufficient to condone the delay of 462 days in filing the appeal. Even though the observation of the 1st Appellate Court to the effect that the appellant was advised for repeated check up is omitted, then also there is no material in support of the medical certificate to show that the appellant was confined to bed for the aforesaid period. On the other hand, respondents had taken a plea that during the said period the appellant was hale and hearty and doing her house-hold work normally, to which there is no denial by the appellant.

9. As submitted by learned counsel for the appellant that sufficient cause has no definition, but it is the subjective satisfaction of the Court and thus a judicial review of such subjective satisfaction is permissible in law. In my opinion, subjective satisfaction depends upon appreciation of facts and circumstances in a particular case. When the 1st Appellate Court, on appreciation of averments made and materials available on record, held that there is no sufficient cause shown for condonation of delay, the same cannot be gone into in an appeal under Section 100 of the Code, as it would amount to re-appreciation of facts.

10. In the instant case, finding of learned 1st Appellate Court is based on documentary evidence available on record.

11. Since questions raised for consideration depends upon appreciation of evidence available on record and are questions of appreciation of facts, I am not inclined to entertain this appeal. Accordingly, this appeal is dismissed.

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2020 (I) ILR - CUT- 425

DR. A .K. MISHRA, J.

CRLA NO. 290 OF 2015

MOHAMMAD AWESH MEMON & ANR. ……..Appellants

.Vs.

STATE OF ODISHA ……….Respondent

NARCOTIC DRUGS & PSYCHOTROPIC SUBSTANCES ACT, 1985 – Sections 42 & 50 read with sections 100 & 165 of the CR.P.C – Non compliance of the mandatory provisions of the Act – Whether Such non compliance of mandatory provisions can be avoided or excused by taking plea of the provisions of Sections 100 & 165 of the Code? – Ans. No. – Held, it has no application since the recovery was not from the person of the appellants but from the vehicle.

Case Laws Relied on and Referred to :-

1. (2018) 72 OCR (SC) 196 : Mohan Lal Vs. State of Punjab.
2. (2019) 73 OCR (SC) 946 : Varinder Kumar Vs. State of Himanchan Pradesh.
3. 2019) 75 OCR 387 : Haren Mandal Vs. State of Odisha.
4. (2009) 44 OCR (SC) 183 : Karnail Singh Vs. State of Haryana.

For Appellants : M/s. Miss Deepali Mohapatra, S. Parida & M. M. Ansari ,
M/s. Manas Chand, M. B. Patra & R. R. Mishra,
M/s. Satyabrata Pradhan, Prahalad Sahu,
C. Mohanty, A. K. Dash & P. Dutta; & Miss. A. K. Dei.

For Respondent: Mr. Prem Kumar Patnaik, Addl. Govt. Adv.

JUDGMENT Date of Hearing : 11.12.2019 : Date of Judgment : 18.12.2019

DR.A .K. MISHRA, J.

Appellants have assailed their conviction U/s.20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act (in short NDPS Act) and sentence to undergo R.I. for ten years and to pay a fine of Rs.1,00,000/- each, in default to undergo R.I. for one year in the judgment dtd.25.3.2015 / 6.5.2015 passed by the learned Sessions Judge-cum-Judge, (Special Court), Sambalpur in T.R. Case No.55 of 2012.

2. Tersely put, the prosecution case is that on 22.7.2012 at about 12.30 P.M. at Bhabanipali, while P.W.3 – the Inspector of Excise along with his staff including P.W.1 – Constable was patrolling, intercepted one Indigo Car bearing registration No.CG-04-HD-1338 on suspicion. Both the appellants were inside the vehicle. Appellant Baldev was the driver. Appellant Mohammad Awesh Memon was the occupant. Both of them were interrogated and were given option U/s.50 of NDPS Act. They expressed to be searched by P.W.3. Thereafter in presence of one independent witness (P.W.,2), search of the vehicle was conducted by P.W.3. A Jery bag containing 60 Kg. of Ganja was recovered. It was weighed. P.W.3 collected two sample packets each containing 50 gm. from the bulk and using his brass

seal, sealed the bulk packet vide Ext.A (M.O.I), Ext.A-a – Ext.A-b (M.O.II). He prepared seizure list, recorded statement of accused persons and ascertained that the seized ganja was procured from one Iswar Prasad Satpathy (acquitted) and one Brahmanandam Jarvadi was the owner of the seized vehicle. P.W.3 – Inspector forwarded seized ganja to Town Police Station for safe custody and kept accused persons under his guard.

Later, at 1.45 P.M., P.W.3 detected another case involving accused persons and submitted P.R. vide T.R. No.56 of 2012.

On next day, the seized ganja was produced before court and one sample packet (Ext.A-b) was sent for chemical examination by S.D.J.M., Sambalpur. Chemical examination report in positive was received vide Ext.8. After completion of investigation P.W.3 submitted prosecution report No.15 of 2012 before the Special Court, Sambalpur against four accused persons including present two appellants and acquitted accused Iswar Prasad Satpathy. The fourth accused was Brahmanandam Jarvadi. The Special Court took cognizance of offence U/s.20(b)(ii)(c) of the N.D.P.S. Act. The case against Brahmanandam Jarvadi was split up vide order dtd.16.8.2013. Consequently, three accused persons faced trial to the charge.

2-A. Denial was the plea of accused persons. Prosecution examined three witnesses in all. P.W.1 is a constable. P.W.3 is the Inspector who detected and conducted investigation. P.W.2, the sole independent witness, is declared hostile. Eighteen documents are exhibited. Bulk ganja and one sample packet are made M.O.I and M.O.II.

Defence adduced no evidence, either oral or documentary.

2-B. Learned Special Judge has mentioned in judgment para 2 as follows:-

> *"2. Before entering into the discussion of the facts of the case in hand, a little reference to the backdrop needs mention. That, two cases have been detected by the then Inspector of Excise, District Mobile, Sambalpur, on a single day, i.e. on 22.7.2012, with a gap of one hour and fifteen minutes. While the case in hand was detected at about 12.30 P.M., the second case in TR No.56 of 2012 was detected at about 1.45 P.M. The subject matter involved in both the cases are interlinked inter alia. Thus, both the cases were heard together on some common points for better appreciation."*

Analyzing evidence, learned Special Judge held that:

(i) Absence of independent corroboration, i.e. P.W.2 would not shake the evidence of official witnesses P.W.1 and P.W.3 as they are reliable.

(ii) Non-compliance of Section 42 and 50 of the NDPS Act is not fatal as the empowered officer (P.W.3) conducted search U/s.100 and Section 165 of the Cr.P.C. and the empowered officer is not required to inform the Superior Authority.

(iii) Fact of sealing being not disputed during production in the Court, non-production of brass seal is no way prejudicial to the accused persons.

(iv) Only material against Accused Iswar Prasad Satpathy is co-accused statement and the investigation is not proper to that extent.

Accordingly, he acquitted accused Iswar Prasad Satpathy of the charge but convicted both the appellants and passed sentence as stated above.

3. Learned counsel for appellant Mr. Manas Chand submitted that learned Special Court has committed error in not considering the material inconsistent testimonies of P.W.1 and P.W.3 which excludes the presence of accused persons at the spot. Further, when the informant is the investigating officer, the non-production of brass seal in court and absence of any evidence that the seized ganja was kept in police station Malkhana till production in court, create doubt about reliability of P.W.3. Added to that, he submitted that non-compliance of Section 42 is prejudicial to the interest of defence. For such defective investigation, when trial court has considered two cases detected in one hour gap, the accused persons should have been given benefit of doubt as per decision reported in (**2018) 72 OCR (SC) 196 Mohan Lal Vrs. State of Punjab**.

3-A. Learned Addl. Government Advocate Mr. P. K. Patnaik repelled the above argument contending that the well reasoned impugned judgment does not merit any interference in the appeal. He submitted that the Mohan Lal"s case (supra) has been clarified by the Hon"ble Apex court in the decision reported in **(2019) 73 OCR (SC) 946 Varinder Kumar Vrs. State of Himanchan Pradesh**.

4. Learned Special judge at the prologue of the judgment (extracted in para 2-B) has mentioned about two cases detected within one hour fifteen minutes involving accused persons by P.W.3 and thereby he heard both the cases together. P.W.3 in cross-examination para 6 has stated that "it is a fact that Iswar Prasad Satpathy was arrested in another case and also utmost during the course of investigation of this case. Baladev Jadab and Md. Awes

Memon were also arrested in another case and forwarded to court on the same day. Soon after the seizure I sent the property to Town Police Station through Birabara Swain, the constable."

The second case is TR No.56 of 2012. The cardinal principle of criminal trial is that evidence of one case cannot be used in another case unless brought in as per Law. Trial of two cases for being interlinked and hearing together for some common points, is not commensurable with the principle of fair trial. In the **Varinder Kumar** decision (supra) it is observed as follows:-

> *"14. The principle of fair trial now informs and energises many areas of the law. It is a constant, ongoing, evolutionary process continually adapting itself to changing circumstances, and endeavouring to meet the exigencies of the situation – peculiar at times – and related to the nature of crime, persons involved, directly or operating from behind, and so many other powerful factors which may come in the way of administration of criminal justice, wherefore the endeavour of t he higher courts, while interpreting the law, is to strike the right balance."*

5. Appellate Court is under legal obligation to make independent appreciation of the evidence to arrive at a conclusion.

The gamut of prosecution evidence is three prosecution witnesses who were in whole cited in the prosecution report. P.W.1 is the constable while P.W.3 is the investigating officer who detected and lodged report. P.W.2 an independent witness does not support prosecution telling that his signatures were taken in blank papers. There is no reason to discard the testimonies of P.W.1 and P.W.3 because they are police officials. Both of them testified that on 22.7.2012 at 12.30 P.M. one Indigo Car proceeding towards Sambalpur was detained and searched. A Jery bag containing 60Kg. ganja (M.O.I) was recovered. It was weighed and sample of two packets A/a and A/b were extracted using brass seal and the brass seal was left in zima of P.W.2 under Zimanama (Ext.3).

P.W.3 has stated about seizure list (Ext.1). Most importantly, P.W.1 in cross-examination para-2 has stated that accused Baldev Yadav was not present during the time of detection of the case. In para-4, he further states that "after detaining the vehicle we found only two persons there in it, namely, Mohammad Memon and Iswar Prasad Satpathy."

This part of evidence that Iswar Chandra Satpathy was present and Baldev Yadav was not present during detection, runs contrary to P.W.3 who

detected and arrested the accused persons. Ext.9 and Ext.10 are the arrest memos which reveal that on 22.7.2012 at 1.20 P.M, both the accused persons were arrested at spot. Both of them, as per LCR order-sheet, were produced before court on 23.7.2012.

From above evidence, the credibility of two official witnesses, whom prosecution relies, does not inspire confidence. Either of them is to be disbelieved. Such doubtful and untrustworthy testimonies cast shadow about the presence of two appellants at the time of detection particularly when another case was detected after one hour and fifteen minutes at the spot by P.W.3. Learned trial court has ignored this part of evidence while appreciating official witnesses P.W.1 and P.W.3

6. On the aspect of the safe custody of seized „Ganja" from the time of seizure till production in the court, the evidence of the prosecution is neither clinching nor un-impeachable. P.W.3 states that he seized bulk ganja packet Ext.A, Ext.A/a, Ext.A/b using brass seal under Ext.1. The seized ganja was kept in the safe custody of the Town Thana. He proved the requisition Ext.6 and on next day he received back the same from police station. In cross-examination para-5 he states that the seized properties were sent by Birabara Swain (not examined) one of our staff to town P.S. He has admitted in cross-examination para 5 that P.R. did not disclose this fact. He has not seized any document of Town P.S. including Malkhana Register.

P.W.1 in para 6 has stated that after collecting the sample ganja, the same were kept by Sesadev Dash (P.W.3) and he has not signed in the sample packets. The sample packets were kept by the Inspector and they all then came back to the office at Sambalpur. He further states that on the same day at 3.30 P.M., the accused persons with seized properties were produced before the Court. Hence, P.W.1 runs contrary to P.W.3. With such vital discrepancies, the L.C.R. reveals that accused persons were produced on 23.7.2012 and seized articles and brass seal were produced at the same time.

Section 55 of the N.D.P.S. Act provides the manner of keeping the seized articles in safe custody at police station and use of seal of the officer in charge of the police station.

P.W.3 does not follow any such procedure. No corroborative evidence comes from the source of police station.The person who took seized articles is not examined.

The infirmities noted above make the matter of safe custody mysterious.

In the decision reported in **(2019) 75 OCR 387 Haren Mandal Vrs. State of Odisha** it is held as follows:-

> *"9. xxxxxxx. It is the duty of the prosecution to adduce cogent, reliable and unimpeachable evidence to prove that the contraband articles after its seizure were not only properly sealed and kept in safe custody before its production in Court and that there was no chance of tampering with the same, but also the articles which were produced in the Court, were the very articles which were seized in the case. The entire path right from the point of the seizure of contraband articles till its production before the Court for its dispatch to the chemical examiner has to be covered by the prosecution by adducing clinching evidence as the punishment prescribed for the offences under the N.D.P.S. Act are very stringent in nature."*

7. Learned Lower court found that compliance with section 42 of NDPS by I.O. is not necessary as he is the empowered officer. This is not correct in view of the ratio laid down in the Constitution Bench judgment of the Hon"ble Apex Court in the case of **Karnail Singh Vrs. State of Haryana** reported in **(2009) 44 OCR (SC) 183** wherein it is held as follows:-

"17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in sub-section (1) of section 42 from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) *While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001."*

7-A. As far as Section 50 of N.D.P.S. Act is concerned, it has no application since the recovery was not from the person of the appellants but from the vehicle.

8. What is demonstrative from the non-compliance of section 42 of N.D.P.S. Act and mysterious path adopted to keep the custody of seized article is that the investigation is so defective that prejudice has been caused to accused persons. Learned Trial Court"s view on this score is not tenable.

8-A. In the **Varinder Kumar** decision (supra) their Lordships clarifying the **Mohan Lal's** decision, have stated as follows:-

> *"18. The criminal justice delivery system, cannot be allowed to veer exclusively to the benefit of the offender making it unidirectional exercise. A proper administration of the criminal justice delivery system, therefore requires balancing the rights of the accused and the prosecution, so that the law laid down in Mohan Lal (supra) is not allowed to become a spring board for acquittal in prosecutions prior to the same, irrespective of all other considerations. We therefore hold that all pending criminal prosecutions, trials and appeals prior to the law laid down in Mohan Lal (supra) shall continue to be governed by the individual facts of the case."*

9. In the wake of above Law, on the independent analysis of the evidence on record, this court finds every reason to upset the conviction of appellants extending benefit of doubt.

In the result, the appeal is allowed. The conviction and sentence of the appellants in T.R. Case No.55 of 2012 by learned Sessions Judge-cum-Judge (Special Court), Sambalpur is set aside and both the appellants are acquitted of the charge. Both the appellants be set at liberty if their detention is not required in any other case / cases. L.C.Rs. be returned immediately.

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