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ORISSA HIGH COURT, CUTTACK

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Bipasha @ Bipasa -V- Amitava Basu

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above citations is that even though no period has been prescribed for exercising the power under section 38-B of the O.E.A. Act, the revisional authority has to exercise the same within a reasonable time and that to in a reasonable manner – It depends upon the facts and circumstances of each case as to what would be the reasonable time – There cannot be any hard and first rule for that – However, when fraud has been committed in obtaining an order or the decision of the subordinate authority is based on forged documents or there is suppression of material facts or there is violation of the provision of the Act, the revisional authority would be fully justified in exercising its power under section 38-B at any point of time in order to prevent miscarriage of justice or misuse or abuse of the power committed by the subordinate authority in granting relief to any party.

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2020 (I) ILR - CUT- 433 (S.C)

UDAY UMESH LALIT, J & VINEET SARAN, J.

CRIMINAL APPEAL NO(S).246-247/2020
(SLP (Crl.) Nos. 1248-1249/2020 [Diary No (s). 1000/2019])

RAKESH MALHOTRA .....Appellant(s)

.Vs.

KRISHNA MALHOTRA .....Respondent(s)

HINDU MARRIAGE ACT, 1955 – Section 13(1) (i-a) & (i-b) & 25 read with Section 125 of the Code of Criminal Procedure, 1973 – Provisions under – Wife's petition seeking divorce was allowed with grant of permanent alimony under Section 25 of the Hindu Marriage Act, against which an appeal is pending before the High Court – Wife again preferred an application for maintenance under Section 125 CrPC – Dismissed by the magistrate, but High Court allowed the revision petition – Appeal before SC – Held, Since the Parliament has empowered the Court under Section 25(2) of the Act and kept a remedy intact and made available to the concerned party seeking modification, the logical sequittor would be that the remedy so prescribed ought to be exercised rather than creating multiple channels of remedy seeking maintenance – One can understand the situation where considering the exigencies of the situation and urgency in the matter, a wife initially prefers an application under Section 125 of the Code to secure maintenance in order to sustain herself. In such matters the wife would certainly be entitled to have a full-fledged adjudication in the form of any challenge raised before a Competent Court either under the Act or similar such enactments – But the reverse cannot be the accepted norm –The bench then set aside the High Court order and directed that the application preferred under Section 125 of the Code shall be treated and considered as one preferred under Section 25(2) of the Act.

For Petitioner(s) : Mr. Abhay Gupta, Mr. Tanuj Dogra, Ms. Archana Sharma, Mr. Madan Mohan, Mr. Praveen Swarup.

For Respondent(s) : Ms. Fauzia Shakil

ORDER Date of Order : 07.02.2020

BY THE BENCH

Delay condoned.

Leave granted.

These appeals arise out of the Judgment and Final Order dated 14.12.2017 passed by the High Court of Madhya Pradesh, Bench at Gwalior

in Criminal Revision No.807/2014 and also out of the Order dated 02.05.2018 in Misc. Crl. Case No.4414 of 2018.

In the present case, in matrimonial proceedings initiated by the respondent-wife seeking dissolution of marriage under Section 13(1)(i-a) & (i-b) Hindu Marriage Act, 1955 ["the Act" for short], decree for dissolution was passed by the Court of First Additional District Judge, Vidisha (M.P.) in Case No.87-A/2011 to the following effect:

> " (a) Marriage solemnized between petitioner Rakesh Malhotra and respondent Smt. Krishna Malhotra on 21.09.1999 is declared dissolved after expiry of limitation period. After expiry of limitation period of appeal, petitioner and respondent would not remain husband and wife any more.
>
> (b) In compliance of the order dated 23.01.2012 passed by the Hon'ble M.P. High Court, Gwalior Bench in Writ Petition No.6762/11 Rakesh Malhotra versus Smt. Krishna, in case amount of maintenance allowance payable during pendency of the case is due, petitioner would pay the same within the period of one month.
>
> (c) In case respondent Smt. Krishna Malhotra does not go for second marriage, petitioner would pay Rs.13,750/- per month to respondent by 05th of each month throughout her life."

The aforesaid decree passed on 20.02.2013 is presently subject matter of challenge before the High Court in First Appeal No.109/2013. Said appeal is still pending consideration before the High Court.

It must be stated that sometime in 2005, application seeking maintenance under Section 125 Code of Criminal Procedure ["the Code", for short] was preferred by the respondent-wife, which was dismissed by the concerned Court vide order dated 30.06.2014. The challenge was raised by the respondent-wife against such rejection by way of Criminal Revision No.807/2014. Said revision was allowed by the High Court by its order dated 14.12.2017 which is presently under appeal. While considering the claim made by the respondent-wife, the High Court observed as under:-

> "8.5 So far as the question of quantum of maintenance is concerned, the respondent has stated in his evidence that his gross monthly income is Rs.44,000/-, out of which an amount of Rs.24,000/- is being deducted and his take home salary is Rs.20,000/-. The respondent has not placed his salary slip on record to show that under which head the amount of Rs.24,000/- is being deducted. Voluntary deduction under different heads and Compulsory/statutory deduction are two different things. For determining the take home salary, voluntary deductions cannot be taken into consideration because in some of the cases like loan or finance it can be said that the

husband has already taken his salary in advance in the form of loan, which he is now repaying in the form of loan deductions, however, the compulsory deductions are beyond the control of an employee. Since in the present case the respondent has not placed his salary slip on record, therefore, an averse inference has to be drawn against him and it has to be presumed that out of total deduction amount of Rs.24,000/-, most of the deductions must be the voluntary deductions. Furthermore, as the applicant has already been awarded an amount of Rs.13,750/- per month by way of permanent alimony and that part of the judgment has not been stayed by this Court, therefore, taking into consideration the amount of Rs.13,750/-, which has been awarded to the applicant by way of permanent alimony and considering the status of the parties, price index, price of goods of daily needs, inflation rate etc. , it is directed that the applicant shall be entitled for a further amount of Rs.5,000/- per month. The said amount shall be payable by the respondent/husband from 30.06.2014, i.e. the date on which the application filed by the applicant was rejected by the court below."

In these appeals challenging the decision of the High Court, notice was issued to the respondent. However, no appearance was entered on behalf of the respondent-wife and as such Ms. Fauzia Shakil, learned advocate was requested to assist the Court as amicus curiae which request she graciously accepted.

We heard Mr. Abhay Gupta, learned advocate in support of the appeals and Ms. Fauzia Shakil, amicus curiae.

The basic issue that arises for consideration is whether after grant of permanent alimony under Section 25 of the Act, a prayer can be made before the Magistrate under Section 125 of the Code for maintenance over and above what has been granted by the Court while exercising power under Section 25 of the Act. At this juncture, Section 25 of the Act may be extracted as under:-

"25 Permanent alimony and maintenance .

(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall 55 [***] pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant 56 [, the conduct of the parties and other circumstances of the case], it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

> (2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.
>
> (3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, 57 [it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just]."

Section 25(1) of the Act empowers the Court, while passing any decree, to consider the status of the parties and whether any arrangement needs to be made in favour of the wife or the husband; and by way of permanent alimony, an order granting maintenance can also be passed by the Court.

At the stage of passing a decree for dissolution of marriage, the Court thus considers not only the earning capacity of the respective parties, the status of the parties as well as various other issues. The determination so made by the Court has an element of permanency involved in the matter. However, the Parliament has designedly kept a window open in the form of subsections (2) and (3) in that, in case there be any change in circumstances, the aggrieved party can approach the Court under sub-section (2) or (3) and ask for variation/ modification.

Since the basic order was passed by the concerned Court under Section 25(1), by very nature, the order of modification/variation can also be passed by the concerned Court exercising power under Section 25(2) or 25(3) of the Act.

In the present case, the matter that was considered by the High Court was one which was filed in the year 2005 when the matrimonial dispute between the parties was yet to be adjudicated upon while the decree for dissolution and direction for permanent alimony came to be passed in the year 2013 against which the First Appeal is pending in the High Court.

We have been apprised that certain applications have been preferred by the appellant-husband seeking variation/modification in the sum of permanent alimony submitting, inter alia, that after passing of the order, the appellant has retired from Army and as such is not getting emoluments at the same rate. Ms. Shakil, amicus curiae invited our attention to some decisions

including the decision of this Court in Sudeep Chaudhary vs. Radha Chaudhary [(1997) 11 SCC 286]. This decision was relied upon by the High Court while passing the order under appeal. In Sudeep Chaudhary, the initial order was passed by the Magistrate under Section 125 of the Code and subsequently in proceedings under the Act, interim maintenance was granted while exercising power under Section 24. It was in the context of these facts, this Court observed that despite the award of maintenance under Section 125 of the Code, the wife was competent to maintain the proceedings under Section 24 of the Act. But the present case is completely to the contrary.

Since the Parliament has empowered the Court under Section 25(2) of the Act and kept a remedy intact and made available to the concerned party seeking modification, the logical sequittor would be that the remedy so prescribed ought to be exercised rather than creating multiple channels of remedy seeking maintenance. One can understand the situation where considering the exigencies of the situation and urgency in the matter, a wife initially prefers an application under Section 125 of the Code to secure maintenance in order to sustain herself. In such matters the wife would certainly be entitled to have a full-fledged adjudication in the form of any challenge raised before a Competent Court either under the Act or similar such enactments. But the reverse cannot be the accepted norm.

In the circumstances, we allow these appeals, set aside the view taken by the High Court and direct that the application preferred under Section 125 of the Code shall be treated and considered as one preferred under Section 25(2) of the Act.

Since the matter pertains to grant of maintenance, we request the High Court to consider disposing of First Appeal No.109/2013 alongwith all pending applications as early as possible and preferably within six months from today.

Before we part, we must record that by way of order dated 13.12.2019, we had directed the respondent-husband to file an affidavit giving details about the amounts that he had made over to the respondent-wife by way of maintenance as awarded by order dated 20.02.2013. In pursuance of said directions, an affidavit has been filed by the appellant on 03.02.2020 indicating that till now he has deposited Rs.11,44,916/- in respondent-wife's account, in terms of order dated 20.02.2013. Finally, we must express our sincere gratitude for the assistance rendered by Ms Fauzia Shakil, learned amicus curiae. These appeals are allowed in aforesaid terms. No costs.

2020 (I) ILR - CUT- 438 (S.C)

DEEPAK GUPTA, J & ANIRUDDHA BOSE, J.

WRIT PETITION (CRIMINAL) NO. 102/2007 (WITH BATCHES)
(I.A. NO. 24585 OF 2020)

RE EXPLOITATION OF CHILDREN IN ORPHANAGES IN THE STATE OF TAMIL NADU .....Petitioner(s)

.Vs.

UNION OF INDIA & ORS. .....Respondent(s)

THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015, – Sections 10 and 12 – Provisions under – Protection and care of any child alleged to be in conflict with law is apprehended by the police – SC directives – All JJBs in the country must follow the letter and spirit of the provisions of the Act. We make it clear that the JJBs are not meant to be silent spectators and pass orders only when a matter comes before them – They can take note of the factual situation if it comes to the knowledge of the JJBs that a child has been detained in prison or police lock up – It is the duty of the JJBs to ensure that the child is immediately granted bail or sent to an observation home or a place of safety – The Act cannot be flouted by anybody, least of all the police.

For Petitioner(s) : Mr. Huzefa Ahmadi, Sr. Adv. Mr. Zulfiker Ali P.S.
Ms. Shahrukh Alam, Adv. Mr. Thoyyib Hudawai,
Ms. Aparna Bhat, Ms. Karishma Maria, Ms. Shivangi Singh.

For Respondent(s)Mr. Avijitmani Tripathi, Mr. Ranjan Mukherjee,
Mr. Upendra Mishra, Mr. K. V. Kharlyngdoh, Mr. Ashutosh Dubey,
Mr. Rajshri Dubey, Mr. Abhishek Chauhan, Mr. Sushil,
Mr. Rajendra A.Dr. Anindita Pujari, Mr. Om Narayan,
Ms. Nidhi Sharma, Ms Tanushree Luthra, Mr. Deval Singh,
Ms. A. Subhashini, Mr. Kuldip Singh, Mr. Abhishek Atrey,
Ms. Aparna Bhat, Mr. V. G. Pragasam,
Mr. S. Prabu Ramasubramanian, Mr. S. Manuraj,
Mr. Ashok Panigrahi, Mr. Dharmendra Kumar Sinha, Mr. Naresh K.Sharma,
Mr. Kamal Mohan Gupta, Mr. K.V. Jagdishvaran,
Ms. G. Indira, Mr. S. Thananjayan, Ms. Hemantika Wahi,
Mr. P. V. Yogeswaran, Mr. Anil Shrivastav, Mr. M. Shoeb Alam,
Mr. Mojahid Karim Khan, Mr. Gopal Prasad,
Mr. Jayesh Gaurav, Ms. Shalya Agarwal,
Mr. Balaji Srinivasan, M/S. Arputham Aruna And Co,
Mr. Jatinder Kumar Bhatia, Mr. M. Yogesh Kanna,
Mr. Rajarajesh Waran S. Adv. Ms. Uma Prasuna Bachu,
Ms. Madhvi Diwan, ASG, Ms. Vaishali Verma,
Mr. Rajnish Prasad, Ms. Vimla Sinha,
Mr. Adit Khorana, Mr. Gurmeet Singh Makker,
Ms. Asha Gopalan Nair, Mr. Sanjeeb Panigrahi,
Mr. Vikas Mahajan, AAG,Mr. Aakash Varma,
Mr. Vinod Sharma, Mr. Anil Kumar,

Mr. Ashutosh Kumar Sharma, Mr. Rajeev Dubey,
Mr. Kamlendra Mishra, Mr. Farrukh Rasheed,
Mr. Shuvodeep Roy, M/S. Corporate Law Group,
Ms. Garima Prashad, Mr. V. N. Raghupathy,
Mr. Manendra Pal Gupta, Mr. Amit Kumar Singh,
Ms. K. Enatoli Sema, Mrs. Swarupama Chaturvedi,
Mr. Gopal Singh, Mr. Srikaanth S.
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Mr. Aniruddha P. Mayee, Ms. Deeanwita Priyanka,
Mr. Siddhesh Kotwal, Ms. Bansuri Swaraj, Mr. Arshiya Ghose,
Mr. Divyansh Tiwari, Ms. A. Upadhyay, Mr. T.N. Rama Rao,
Mr. Hitesh Kumar Sharma, Mr. S.K. Rajora, Mr. Akhileshwar Jha,
Mr. G.N. Reddy, Mr. T. Vijaya Bhaskar Reddy,
Mr. Digvijay Harichandran, Mr. T.V. Veera Reddy,
Dr. Rajesh Pandey, Ms. Tanuja Mujari Patra,
Ms. Shweta Mulchandani, Ms. Aswathi M.K. Mr. S. Udaya Kumar Sagar,
Ms Swati Bhardwaj, Mr. Sachin Patil, Mr. Rahul Chitnis,
Mr. Aaditya A. Pande, Mr. Geo Joseph, Mr. Basant R, Sr. Adv.
Mr. R. Basant, Ms. Liz Mathew, Ms. Mahamaya Chatterjee,
Ms. R. Bala Subramanian, Sr. Adv.Mr. B.V. Balaram Das,
Mr. A.K. Sharma, Mr. Raj Bahadur, Ms. Vimla Sinha,
Ms.Rashmi Malhotra, Mr. Raghvendra Kumar,
Mr. Anand Kr. Dubey.

ORDER Date of Order: 10.02.2020

BY THE BENCH

This is an I.A. moved by the amicus curiae seeking some directions. On 5/12/2018 while disposing of WP(C) No. 102/2007, we had given liberty to the amicus curiae to revive the matter(s) after the report prepared by the Union of India through the National Commission for Protection of Child Rights (NCPCR for short), is made available to her.

This obviously envisages that reports were to be furnished to the amicus curiae so that she can decide whether to revive the matter(s). We direct NCPCR and the Union of India to furnish reports, if any, within three weeks from today so that amicus curiae has all the requisite information.

The amicus curiae has also drawn our attention to two instances and certain allegations which have appeared in the newspapers related to children being detained in police custody and being tortured in Delhi and Uttar

Pradesh. We direct notice to be issued to the Uttar Pradesh State Commission for Protection of Child Rights and Delhi Commission for Protection of Child Rights, who may submit their responses within three weeks from today.

The NCPCR may also look into the matter(s) and submit a report within three weeks from today. Union of India to also look into the matter(s)and file response within three from today.

The Juvenile Justice (Care and Protection of Children) Act, 2015, (hereinafter referred to as the Act) is a special enactment meant for protection of children. Section 10 of the Act, lays down that when any child alleged to be in conflict with law is apprehended by the police, such child should be placed under the charge of the special juvenile police unit or the designated child welfare officer. The Section further provides that such authority should produce the child before the Juvenile Justice Board (JJB for short)Board without any loss of time but not more than 24 hours after the child is apprehended. The proviso to the Section clearly lays down that a child alleged to be in conflict with law shall not be placed in a police lockup or lodged in a jail.

Once a child is produced before a JJB, bail is the rule. Section 12 of the Act reads as follows :-

> 12. Bail to a person who is apparently a child alleged to be in conflict with law.- (1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:
>
> Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.
>
> (2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail..

Sub-section (1) makes it absolutely clear that a child alleged to be in conflict with law should be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person. The only embargo created is that in case the release of the child is likely bring him into association with known criminals or expose the child to moral, physical or psychological danger or where the release of the child would defeat the ends of justice, then bail can be denied for reasons to be recorded in writing. Even if bail is not granted, the child cannot be kept in jail or police lockup and has to be kept in an observation home or place of safety.

All JJBs in the country must follow the letter and spirit of the provisions of the Act. We make it clear that the JJBs are not meant to be silent spectators and pass orders only when a matter comes before them. They can take note of the factual situation if it comes to the knowledge of the JJBs that a child has been WP(Crl) No. 102/2007 8 detailed in prison or police lock up. It is the duty of the JJBs to ensure that the child is immediately granted bail or sent to an observation home or a place of safety. The Act cannot be flouted by anybody, least of all the police.

The Registry is directed to send a copy of this order to the Registrar Generals of all High Courts so that the order is placed before the Juvenile Justice Committee of each High Court who shall in turn ensure that the copy of this order is sent to the JJBs to ensure strict compliance of this order. List this I.A. on 6th March, 2020.

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2020 (I) ILR - CUT- 441

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

W.P.(C) NO. 7618 OF 2009

SASWATI DAS .....Petitioner

.Vs.

ASST. COMMISSIONER OF INCOME TAX, CIRCLE-1(2)-CUM-ASSESSING OFFICER, BHUBANESWAR & ANR. ..... Opp. Parties

INCOME TAX ACT, 1961 – Sections 148 read with section 151 – Provisions under – Notice issued by the Assistant Commissioner of Income Tax under Section 148 of the Income Tax Act, 1961 after obtaining necessary approval of the Additional Commissioner of Income Tax – Writ petition challenging such notice – Plea that Additional Commissioner of Income Tax is not competent to approve such notice and as per section 151 the competent officer should accord approval – Held, yes, the impugned notice under Section 148 of the Act was issued in respect of Assessment Year 2002-03, which is clearly after four years from the end of the relevant assessment year – The Additional Commissioner is not equivalent to the rank of Commissioner or any other designation as defined under Section 151 (1) of the Act. – Therefore, the impugned notice which has been issued to the petitioner, is bad in law and is required to be quashed and the same is quashed. (Paras 7 & 8)

Case Laws Relied on and Referred to :-

1. (2010) 320 ITR 561 (SC) : Commissioner of Income-Tax Vs. Kelvinator of India Ltd. & Anr.
2. (2012) 346 ITR 443 (Bom) : Ghanshyam K. Khabrani Vs. Assistant Commissioner of Income-Tax & Ors.
3. (2012) 345 ITR 223 (Delhi) : Commissioner of Income-Tax Vs. SPL's Siddhartha Ltd.
4. (2018) 406 ITR 545 (Bom) : Commissioner of Income-Tax Vs. Aquatic Remedies P. Ltd.
5. (2007) 288 ITR 347 (MP) : Ramballabh Gupta Vs. Assistant Commissioner of Income-Tax & Ors.

For Petitioner : M/s. Siddhartha Ray & S. Day
For Opp. Parties : Mr. T.K. Satapathy, Senior Standing Counsel

JUDGMENT Date of Hearing & Judgment: 20.11.2019

K.S. JHAVERI, C.J.

By way of this writ petition, the petitioner has challenged the notice dated 27.03.2009 (Annexure-1) issued by the Assistant Commissioner of Income Tax, Bhubaneswar under Section 148 of the Income Tax Act, 1961 (for short 'the Act') after obtaining necessary approval of the Additional Commissioner of Income Tax.

3. Mr. Ray, learned counsel for the petitioner contended that notice issued by the Assistant Commissioner of Income Tax is in contravention of Section 151 (1) of the Act, which reads as under:

> *"**151. Sanction for issue of notice**.-(1) No notice shall be i`ssued under section 148 by an Assessing Officer, after the expiry of a period of four years from the end of the relevant assessment year, unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer, that it is a fit case for the issue of such notice."*

4. It is further contended that no satisfaction is recorded by the competent authority as required under Section 151 (1) of the Act, namely, either Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner. The authority has taken permission of the Additional Commissioner, who is not competent under Section 151(1) of the Act to record such satisfaction. 'Joint Commissioner' is defined under sub-section 28-C of Section 2 of the Act, which reads as under:

> *"28-C. "Joint Commissioner" means a person appointed to be a Joint Commissioner of Income Tax or an Additional Commissioner of Income Tax under sub-section (1) of section 117."*

Therefore, the Additional Commissioner of Income Tax is not in the rank of Commissioner and recording of satisfaction by him in the impugned notice is in clear contravention of Section 151 (1) of the Act.

5. In support of his contention, Mr. Ray, learned counsel for the petitioner also relied upon various decisions in the cases of ***Commissioner of Income-Tax –v- Kelvinator of India Ltd. & another***, reported in (2010) 320 ITR 561 (SC), ***Ghanshyam K. Khabrani –v- Assistant Commissioner of Income-Tax and others***, reported in (2012) 346 ITR 443 (Bom), ***Commissioner of Income-Tax –v- SPL's Siddhartha Ltd.***, reported in (2012) 345 ITR 223 (Delhi), ***Commissioner of Income-Tax –v- Aquatic Remedies P. Ltd***., reported in (2018) 406 ITR 545 (Bom) and ***Ramballabh Gupta –v- Assistant Commissioner of Income-Tax and others***, reported in (2007) 288 ITR 347 (MP).

6. Mr. Satpathy, learned counsel for the opposite parties tried to justify the impugned notice by relying upon the averments in the counter affidavit which has been filed by the Department pursuant to the notice issued by this Court, wherein it has been stated at paragraph-9 as under:

> *"9. That in reply to the averments in Para-8 & 8.1 and it is humbly submitted that in this case a search assessment u/s. 153A/143(3) of the I.T. Act, 1961, was completed on 31.12.2007 on a total assessed income of Rs.22,91,170/-. The said*

order was challenged by the assessee before the Ld. CIT(A), BBSR. The Ld. CIT(A), Bhubaneswar vide order passed in ITA No. 0002/2010-11 dated 18.10.2011 has annulled the assessment. Once the original assessment u/s. 153A is annulled, there is no bar to use the findings of the search to initiated proceeding u/s. 147 of the I.T. Act, 1961. The approval of the designated authority before issuance of notice u/s. 148 of the Income Tax Act, 1961, that in the case of the assessee, due approval as required u/s. 151(2) of the Income Tax Act, 1961 which was taken from the Additional Commissioner of Income Tax, Range-1, Bhubaneswar. Since the regular assessment made u/s. 153A was annulled by the Ld. CIT (A), Bhubaneswar vide order passed in ITA No. 0002/2010-11 dated 18.10.2011, it was not required to take approval u/s. 151(1) of the Income Tax Act from the Commissioner or the Principal Commissioner of Income Tax. Therefore, the approval with the rank of Additional Commissioner of Income Tax is legal and within the jurisdiction."

7. Admittedly, the impugned notice under Section 148 of the Act was issued in respect of Assessment Year 2002-03, which is clearly after four years from the end of the relevant assessment year.

8. In our considered opinion, the contention of learned counsel for the parties is not acceptable. The Additional Commissioner is not equivalent to the rank of Commissioner or any other designation as defined under Section 151 (1) of the Act. Therefore, the impugned notice (Annexure-1), which has been issued to the petitioner, is bad in law and is required to be quashed and the same is quashed. Rule is made absolute to the aforesaid extent.

9. This writ petition deserves to be allowed and the same is allowed.

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2020 (I) ILR - CUT- 444

KUMARI SANJU PANDA, A.C.J & S.K. SAHOO, J.

O.J.C. NO. 3839 OF 1994

ANADI CHARAN SAHOO (SINCE DEAD) & ORS. .....Petitioners

.Vs.

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

(A) ORISSA ESTATES ABOLITION ACT,1951– Section 38-B – Revisional power of the Member, Board of Revenue – Plea of limitation raised – The settlement of land was made with disregard to the provisions under O.E.A. Act and relevant documents were not taken into account – Handwritten patta by the Ex-intermediary was accepted as genuine without Ekpadia prepared by the Ex-intermediary – Continuous

rent receipts from the date of grant of lease patta were not produced to substantiate possession of the land –Tenancy ledger was not verified and the signatures of the Tahasildar in the order sheet on three different dates which were stated to have been passed within a period of fifteen days did not tally with each other – Effect of – Held, the legal principle which is set out from the above citations is that even though no period has been prescribed for exercising the power under section 38-B of the O.E.A. Act, the revisional authority has to exercise the same within a reasonable time and that to in a reasonable manner – It depends upon the facts and circumstances of each case as to what would be the reasonable time – There cannot be any hard and first rule for that – However, when fraud has been committed in obtaining an order or the decision of the subordinate authority is based on forged documents or there is suppression of material facts or there is violation of the provision of the Act, the revisional authority would be fully justified in exercising its power under section 38-B at any point of time in order to prevent miscarriage of justice or misuse or abuse of the power committed by the subordinate authority in granting relief to any party. (Para 4)

(B) ORISSA ESTATES ABOLITION ACT, 1951 – Section 8 (1) – Provisions under – Proceeding initiated and order passed directing correction of entry in the ROR by the Tahasildar – Revised by Member, Board of Revenue – Plea that the order passed under section 8(1) of the Act being an administrative order cannot be revised under section 38-B of the O.E.A. Act – Held, No, its not an administrative order – Reasons indicated.

"*Section 8 of the O.E.A. Act, which deals with continuity of tenure of tenants clearly stipulates that the tenant inducted by an Ex-intermediary who was in possession of the lands on and from the date of vesting, shall be deemed to be tenant under the State Government. Such person shall hold the land in the same rights and subject to the same restrictions and liabilities as he was entitled or subject to immediately before the date of vesting. This section even does not contemplate for making of an application and initiation of a proceeding by the O.E.A. Collector within the meaning of the Act. No quasi-judicial proceeding is required to be initiated. Section 8(1) does not contemplate any determination of rights by the authorities under the Act in respect of rival claims claiming tenancy though on the administrative side, the appropriate authority may try to find out the person from whom rent is to be accepted. The Tahasildar is not always bound to accept a claim raised by a person to the effect that he was inducted as a tenant, without verifying as to whether the claim is genuine or not. For arriving at such satisfaction, the Tahasildar has to conduct an enquiry which is more in the nature of administrative enquiry and not quasi-judicial. In the order passed by the Tahasildar, Bhubaneswar,*

opposite party no.4, a clear finding has been arrived at that the lessee Anadi Charan Sahoo in the Vesting Case No.795/70-71 was a tenant under the Ex-intermediary before the vesting of the estate and he is deemed to be tenant under the Government on and from the date of vesting in the same rights and subject to same restrictions and liabilities as he was entitled to immediately before the date of vesting as contemplated under section 8(1) of the O.E.A. Act. We are of the view that such order passed by the opposite party no.4 cannot be said to be an administrative order inasmuch as the lands were never settled under the lease principle rather the opposite party no.4 held that the lands were deemed to have been settled in favour of Anadi Charan Sahoo under the O.E.A. Act. Without most vital documentary evidence like continuous rent receipts, Ekpadia prepared by the Ex-intermediary or verification of tenancy ledger, the opposite party no.4 seems to have invoked the deeming provision under section 8(1) of the O.E.A. Act and ordered correction of the entry in the R.O.R. in favour of Anadi Charan Sahoo. The record of right of the lands showed that the same was recorded in Rakhit khata in favour of the State Government in the year 1974 and without any order of dereservation from the Collector as provided under the Odisha Government Land Settlement Act, 1962, the opposite party no.4 has settled the land in favour of a private person like Anadi Charan Sahoo. Therefore, in view of the decision of the Hon'ble Supreme Court, we find no illegality on the part of the Board of Revenue in initiating the revisional proceeding under section 38-B of the O.E.A. Act on the reference from Collector, Puri for revising the order of the Tahasildar, Bhubaneswar passed in the vesting case" *(Para 5)*

Case Laws Relied on and Referred to :-

1. Vol.73 (1992) CLT 868 : Smt. Basanti Kumari Sahoo Vs. State of Orissa & Ors.
2. Vol. 100 (2005) CLT 329 : Daitary Rout Vs. State of Orissa.
3. 2008 (II) OLR 838 : Bhagaban Kar Vs. State of Orissa.
4. A.I.R. 1991 S.C. 744 : Rai Chand Jain Vs. Chandra Kanta Khosla.
5. 1961 ILR 595 : Basiruddin Vs. State of Orissa.
6. Vol. 31 (1965) CLT 654 : The State of Orissa Vs. Bhakta Charana Naik.
7. Vol. 35 (1969) CLT 552 : The Collector of Puri Vs. Budhinath Samantray.
8. A.I.R. 1964 Orissa 16 : Naban Bewa Vs. Nabakishore Samal.
9. Vol. 40 (1974) CLT 888 : Jagannath Nanda Vs. Bishnu Dalei.
10. A.I.R. 1973 Madras 262 : Gangayya Vs. S. Mandan Chand Samdaria.
11. A.I.R. 1963 S.C. 1094 : Pyare Lal Bhargava Vs. State of Rajasthan
12. 1991 (II) OLR 50 : Sri Laxman Kanda Vs. State of Orissa.
13. 1996 (I) OLR 180 : Mst. Surya Rana Vs. State of Orissa.
14. Vol. 76 (1993) CLT 937 : Labanyabati Devi Vs. Member, Board of Revenue.
15. 1996 (II) OLR 262 : Nityananda Satpathy Vs. Member, Board of Revenue.
16. 1995 Supp. (3) SCC 249 : State of Orissa & Ors. Vs. Brundaban Sharma & Anr.
17. (2003) 7 SCC 667 : Ibrahimpatnam Taluk Vyavasaya Coolie Sangham Vs. K. Suresh Reddy & Ors.
18. (2009) 9 SCC 352 : Santoshkumar Shivgonda Patil & Ors. Vs. Balasaheb Tukarm Shevale & Ors.
19. A.I.R. 1962 Orissa 107 : Gerua Biswal .Vs. Kshyama Biswal.
20. Vol.31 (1965) CLT 33 : Dandapani Sahoo Vs. Kshetra Sahoo & Ors.
21. A.I.R. 1964 S.C. 477 : Syed Yakoob Vs. K.S. Radhakrishnan.

For Petitioners : Mr. Ganeshwar Rath (Sr.Adv.)
For Opp. Parties: Mr. Kishore Kumar Mishra, (Addl. Govt.Adv.)

JUDGMENT Date of Judgment: 14.01.2020

S. K. SAHOO, J.

The petitioners in this writ petition have challenged the impugned order dated 30.04.1994 passed by the Member, Board of Revenue, Odisha, Cuttack in O.E.A. Revision Case No.46 of 1992 vide Annexure-7 in exercise of the power under section 38–B of the Odisha Estates Abolition Act, 1951 (hereafter 'O.E.A. Act') in setting aside the order dated 30.07.1979 of the Tahasildar, Bhubaneswar passed in Vesting Case No.795/70-71 vide Annexure-4.

2. The case of the petitioners is that on 25.04.1936 through Hata Patta, Raja Madhusudan Dev of Patia gave the agricultural land situated in Mouza Chandrasekharpur, area Ac.1.43 dec. and Ac.1.07 dec. in sabik plot nos.300 and 299 respectively in favour of late Anadi Charan Sahoo, the grandfather of the petitioners for cultivation as a tenant under him. The said land corresponds to Hal Plot nos.334 and 335 respectively under Rakhit Holding no.472. The status of land in dispute was 'Niji Chasa' as per R.O.R. published in the year 1931 vide Annexure-1. The grandfather of the petitioners being a tenant under Raja of Patia, paid the rent which was accepted by Raja of Patia and rent receipt thereof was issued vide Annexure-2. In the year 1943, Raja of Kanika purchased the estate of Patia by auction and became landlord in respect of agricultural land in dispute and grandfather of the petitioners became deemed tenant under Raja of Kanika, who also accepted the rent for the year 1943 onwards and issued rent receipts in favour of the grandfather of the petitioners. The estates were vested in the State Government in the year 1954 and accordingly, estate of Kanika was vested in the said year and grandfather of the petitioners being in possession of the agricultural land in dispute by raising paddy crops became tenant under State Government by paying rent. The Tahasildar, Bhubaneswar initiated a proceeding under section 8(1) of the 'O.E.A. Act' to enquire about the possession and tenancy of the grandfather of the petitioners and the same was registered as Vesting Case No.795/70-71 and after due enquiry and on receipt of Amin's report, he passed the order dated 30.07.1979 (Annexure-4) in favour of the grandfather of the petitioners and held him to be a tenant and settled the land with him. The R.O.R. was corrected in exercise of the powers conferred under Rule 34 of the Odisha Survey and Settlement Rules, 1962

and published accordingly in the year 1981 vide Annexure-5 recording the name of late Anadi Charan Sahoo in respect of land in dispute and rent was paid and accepted by the State Government for the years 1974 to 1981, 1982 to 1985, 1985-1986 and for the year 1989 to 1994 and rent receipts were issued vide Annexures-8/a, 8/b, 8/c, 8/d, 8/e, 8/f and 8/g annexed to the affidavit of petitioner no.2 Jitendra Kumar Sahoo dated 13.08.2019. The petitioners in shape of memo filed the order sheet of Suit No.2794 of 1987 initiated under section 22(3) of Odisha Survey and Settlement Act, 1958 by the Settlement Authority and the order sheet indicates that notice was issued to the G.A. Department who did not appear and participate in the enquiry in respect of village-Chandrasekharpur, P.S.-New Capital, Unit No.41, Dist.-Puri and the grandfather of the petitioners was accepted as 'stitiban rayat' and accordingly, R.O.R. was published in the year 1988 and the grandfather of the petitioners was recorded as 'stitiban status' and the State Government accepted rent for the year 2000 to 2001 and issued rent receipt in favour of late Anadi Charan Sahoo. On the basis of reference from Collector, Puri for revising the aforesaid order dated 30.07.1979 of Tahasildar, Bhubaneswar passed in Vesting Case No.795/70-71, O.E.A. Revision Case No.46 of 1992 under section 38-B of the O.E.A. Act was initiated by the Member, Board of Revenue. In the reference letter, it was indicated that while recognizing Anadi Charan Sahoo as a tenant under section 8(1) of the O.E.A. Act and correcting the current R.O.R., the Tahasildar failed to verify the Ekpadia as well as the genuineness of the 'handwritten Patta'. The Collector also expressed doubts about the genuineness of the orders as the signatures of the Tahasildar on the case record on 15.07.1979, 16.07.1979 and 30.07.1979 did not appear to tally with each other.

The Member, Board of Revenue after hearing the respective parties, in the impugned order dated 30.04.1994 has been pleased to hold as follows:-

> "7. A perusal of the L.C.R. shows that the opp. party filed an application in Form "H" for settlement of suit land. Section 8-A(1) read with Rule 6 of O.E.A. Act prescribes Form "H" for settlement of homestead and agricultural lands under sections 6 and 7 of the said Act. The claim for settlement under sections 6 and 7 is meant for the Ex-intermediary. In the instant case, the claim petition was filed by the opp. party when evidently he was not an intermediary. There was no scope for the opp. party to apply under sections 6 and 7 for settlement of land on which his tenancy right is claimed to have been created before the date of vesting.
>
> 8. Besides, the opp. party produced some rent receipts before Tahasildar only for the years 1942, 1943 and 1952 though he claims to have acquired the land since the issue of the "hand written Patta" i.e. from 25.04.36. Unless continuous rent

receipts from the date of granting of lease Patta namely 1936 till the year of vesting namely 1954 are produced, it cannot be presumed that opp. party's possession was continuous on regular payment of rent to the Ex-intermediary from the time the hand written Patta was granted in the year 1936. Out of this relevant period, the rent receipts produced in this Court by the opp. party relate to 1942 (with 3 years back rent) and 1952 only. The rent receipts relating to the years after 1979 i.e. after the date of the Tahasildar's order settling the land with the opp. party are not material in the present context. The Tahasildar also failed to verify the Ekpadia or Tenant's Ledger. Now the opp. party is also unable to file this very important and relevant document i.e. Tenant's Ledger. The list of documents filed by the opp. party shows against serial No.5 that the Tenant's Ledger is filed by him. On verification of the said document, it is clear that this is a document issued by the Tahasildar after settlement of land in favour of the opp. party and it is not a Tenant's Ledger which is opened in the Tahasil on the basis of Ekpadia filed by the Ex-intermediary and on the basis of which the rent is collected. In the absence of the proper Tenant's Ledger and continuous rent receipts, a deeming provision like section 8(1) of the O.E.A. Act will not have any application as the opp. party cannot prove his continuity of tenure as a tenant immediately before the date of vesting. Hence it appears that the Tahasildar acted beyond his jurisdiction by entertaining an application which was misconceived and settling the land on a wrong interpretation of the relevant provisions in the statute.

9. It is further seen that the R.O.R. is finally published in favour of the State Government and without making State as a party to the case, the Tahasildar -cum-O.E.A. Collector should not have settled land in favour of the opp. party. The land reserved for "Unnat Jojana Jogya" should not have been settled without de-reservation by the Collector under Orissa Government Land Settlement Act. The Tahasildar is competent to correct the R.O.R. for any event which takes place after its final publication but for any event which takes place prior to final publication of the R.O.R., the Tahasildar is incompetent to correct the R.O.R. as the forum is available under section 15 of the Orissa Survey & Settlement Act. Moreover the estate vested in the year 1954 and the opp. party filed his claim for the disputed land in 1971 after a lapse of 17 years.

10. I also find from the L.C.R. that the signatures of the Tahasildar on 15.07.79, 16.07.79 and 30.07.79 do not appear to tally with each other. This lends credence to the Collector's reservation about the genuineness of the orders."

After analysing the above, the Member, Board of Revenue has been pleased to hold that the Tahasildar, Bhubaneswar exercised a jurisdiction which was not vested on him and passed orders which are erroneous and need revision. Accordingly, the order dated 30.07.79 of Tahasildar, Bhubaneswar passed in Vesting Case No.795/70-71 was set aside

3. Mr. Ganeshwar Rath, learned Senior Advocate appearing for the petitioners in his imitable style contended that the order of the Tahasildar, Bhubaneswar dated 30.07.1979 is an administrative order under section 8(1)

of the O.E.A. Act and therefore, it is not revisable under section 38-B of the O.E.A. Act. He placed reliance on the Full Bench decision of this Court in the case of **Smt. Basanti Kumari Sahoo -Vrs.- State of Orissa and others reported in Vol.73 (1992) Cuttack Law Times 868** which was followed in the cases of **Daitary Rout -Vrs.- State of Orissa reported in Vol. 100 (2005) Cuttack Law Times 329** and **Bhagaban Kar -Vrs.- State of Orissa reported in 2008 (II) Orissa Law Reviews 838**. It was argued that even though the Hata Patta dated 25.04.1936 issued by Raja of Patia was unregistered but rent was paid by the deceased Anadi Charan Sahoo which was accepted and when Raja of Kanika purchased the estate of Patia, he also accepted rent from the deceased Anadi Charan Sahoo treating him as a tenant and cultivating agricultural land. He placed reliance on section 49 of the Registration Act, 1908 which deals with effect of non-registration of documents required to be registered and more particularly placed emphasis on the proviso to the said section which states that an unregistered document affecting immovable property and required by the Registration Act, 1908 or the Transfer of Property Act, 1882 to be registered might be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 or as evidence of any *collateral transaction* not required to be effected by registered instrument. Reliance was placed in the case of **Rai Chand Jain -Vrs.- Chandra Kanta Khosla reported in A.I.R. 1991 S.C. 744** and it was argued that an unregistered lease deed can be looked into for collateral purpose. He placed reliance in some of the cases of this Court i.e. **Basiruddin -Vrs.- State of Orissa reported in 1961 India Law Reports 595**, **The State of Orissa -Vrs.- Bhakta Charana Naik reported in Vol. 31 (1965) Cuttack Law Times 654**, **The Collector of Puri -Vrs.- Budhinath Samantray reported in Vol. 35 (1969) Cuttack Law Times 552**, **Naban Bewa -Vrs.- Nabakishore Samal reported in A.I.R. 1964 Orissa 16** and **Jagannath Nanda -Vrs.- Bishnu Dalei reported in Vol. 40 (1974) Cuttack Law Times 888** to substantiate that for creating an agricultural tenancy, no formal document is required to be executed but it can be created by giving possession and accepting rent and issuing rent receipts. Learned counsel further placed reliance in the case of **Gangayya -Vrs.- S. Mandan Chand Samdaria reported in A.I.R. 1973 Madras 262** to argue that unregistered lease can be used to prove the date on which possession in the hands of the tenant commenced. It was further argued that the Collector, Puri doubted the genuineness of the orders passed by the Tahasildar as the signatures of the Tahasildar on three different dates did not *appear* to tally with each other which was also accepted by the Member, Board of Revenue

without any cogent reason. According to the learned counsel the word *'appears'* imports lesser degree of probability than proof as per the decision of the Hon'ble Supreme Court in the case of **Pyare Lal Bhargava -Vrs.- State of Rajasthan reported in A.I.R. 1963 S.C. 1094**. He emphasized that when the Tahasildar, Bhubaneswar passed the order settling the land with deceased Anadi Charan Sahoo on 30.07.1979, almost about fifteen years after, it was not proper on the part of the Member, Board of Revenue to revise the order exercising power under section 38-B of the O.E.A. Act. Reliance was placed on several decisions of this Court in the cases of **Sri Laxman Kanda -Vrs.- State of Orissa reported in 1991 (II) Orissa Law Reviews 50**, **Mst. Surya Rana -Vrs.- State of Orissa reported in 1996 (I) Orissa Law Reviews 180**, **Labanyabati Devi -Vrs.- Member, Board of Revenue reported in Vol. 76 (1993) Cuttack Law Times 937** and **Nityananda Satpathy -Vrs.- Member, Board of Revenue reported in 1996 (II) Orissa Law Reviews 262**. While concluding his argument, the learned counsel submitted that since the impugned order suffers from non-application of mind and there is patent illegality in the order, the same is liable to be set aside.

Mr. Kishore Kumar Mishra, learned Addl. Govt. Advocate on the other hand supported the impugned order and submitted that the claim of the petitioners relating to possession over Sabik Plot Nos.300 and 299 in Mouza Chandrasekharpur which corresponds to Hal Plot Nos.334 and 335 respectively under Rakhit holding No.472 is based on the handwritten unregistered patta executed by the late Raja Madhusudan Dev of Patia. The handwritten patta by the Ex-intermediary dated 25.04.1936 cannot be accepted as genuine in the absence of Ekpadia prepared by the Ex-intermediary. It is further argued that it cannot be presumed that the petitioner was in possession on the date of vesting in absence of continuous rent receipts. While recognizing the deceased Anadi Charan Sahoo as a tenant under section 8(1) of the O.E.A. Act, the Tahasildar, Bhubaneswar did not take into account the genuineness of the handwritten patta. He placed reliance in the case of **State of Orissa -Vrs.- Baidyanath Jena reported in Vol.116 (2013) Cuttack Law Times 805** and argued that a tenant can only be recognized under section 8(1) of the O.E.A. Act if the intermediary was validly inducted with registered document as per section 17 of the Registration Act. He argued that the Amin's report with regard to the land in question showed that the same had been recorded in Rakhit Khata in favour of State in the record of rights of the year 1974 and as such the Tahasildar has

no jurisdiction to settle such land in favour of a private person like the deceased Anadi Charan Sahoo without first dereserving it as per the order of the Collector. It is contended that the petitioners produced rent receipt before the Tahasildar only for the year 1942, 1943 and 1952 though they claim to have acquired the land since 1936. According to Mr. Mishra, the order passed by the Tahasildar, Bhubaneswar cannot be said to be an administrative order under any stretch of imagination as the Tahasildar by his order dated 30.07.1979 has arrived at a clear finding that the lessee in the Vesting Case No.795/70-71 was a tenant under Ex-intermediary before the vesting of estate and he would be deemed to be a tenant under Government from the date of vesting in the same rights and subject to the same restrictions and liabilities as he was entitled to immediately before the date of vesting as contemplated under section 8(1) of the O.E.A. Act. Such a finding of the Tahasildar, Bhubaneswar is totally erroneous in the eye of law as the petitioners failed to produce continuous rent receipts. It is contended that since there is no illegality or perversity in the impugned order passed by the Member, Board of Revenue and the conclusions arrived at by the revisional authority are reasonable, the writ petition should be dismissed.

4. There is no dispute that the impugned order under Annexure-7 has been passed in exercise of the power conferred under section 38-B of the O.E.A. Act which was about fifteen years after the passing of the order by Tahasildar, Bhubaneswar in the vesting case. The section clearly states that for the purpose of satisfying itself regarding the regularity of any proceeding in which any subordinate authority has made any decision or passed an order under the O.E.A. Act and also for verifying the correctness, legality or propriety of the decision taken by such subordinate authority, the Board of Revenue can call for and examine the record of such proceeding on its own motion or on a report submitted by the Collector. If the revisional authority feels that any decision or order passed by the subordinate authority needs to be modified, annulled or remitted, it may pass the order accordingly which can be done only after giving opportunity of hearing to the concerned parties.

In the case of **Sri Laxman Kanda** (supra) which was relied upon by the learned counsel for the petitioners, taking into account the fact that the petitioner in that case was a tribal and he was in possession of the land since 1945 and since 1965 his sons were in possession of the land, it was held that 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 attached when the person concerned is one such. The initiation of the

proceeding by the Revenue Divisional Commissioner under section 12(3) of the Orissa Prevention of Land Encroachment Act, 1972 against the petitioners in the year 1983 was held to be erroneous in law and accordingly quashed.

In the case of **Mst. Surya Rana** (supra), it is held that the legality of the order passed by the Revenue Divisional Commissioner in exercise of the power conferred under Rule 38-A(2)(bb) read with Rule 38-A(10)(bb) of the Orissa Land Reforms (General) Rules, 1965 framed under the Orissa Land Reforms Act, 1960 has to be tested on touchstone of reasonableness of time. Even though no period of limitation is prescribed, power has to be exercised in a reasonable manner which inheres the concept that it must be done within a reasonable time. Absence of a provision prescribing a period 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 misuse or abuse of the power by lower authorities. It is true that when benefit has been obtained by fraud, it does not lie in the mouth of the party to the fraud to plead limitation to get away with the order. Lapse of time is no excuse to refrain the authority exercising statutory powers to unravel fraud and set the matter right.

In the case of **Labanyabati Devi** (supra), it is held that since the learned Member, Board of Revenue exercised his suo motu jurisdiction under section 59(2) of the Orissa Land Reforms Act, 1960 after a lapse of twelve years, it was held to be a case of unreasonable delay and accordingly, the order passed by learned Member was quashed.

A Division Bench of this Court in the case of **Nityananda Satpathy** (supra) held that the power of the Board of Revenue under section 38-B of the O.E.A. Act to revise a decision or order of any authority subordinate to it, has to be exercised in a reasonable manner within a reasonable time and no hard and first rule can be laid down as to what should be the reasonable time as each case has to be decided on facts and circumstances peculiar to it. In that case since the power under section 38-B was exercised more than a quarter of century, it was held that during such long years, the lands might have suffered transfer from one hand to another creating new rights and liabilities amongst themselves and unsettling a settled position in abject disregard of consequences cannot be countenanced and accordingly, the entire proceeding before the Member, Board of Revenue was quashed on the ground that the revisional authority failed to exercise the power in a

reasonable manner within a reasonable time. The decision rendered by this Court in **Nityananda Satpathy**'s case was set aside on some other grounds by the Hon'ble Supreme Court in Civil Appeal No.7670 of 1997 decided on 31.07.2003 which is reported in **(2003) 7 Supreme Court Cases 146**.

In the case of **State of Orissa and others -Vrs.- Brundaban Sharma and another reported in 1995 Supp. (3) Supreme Court Cases 249**, a question arose before the Hon'ble Apex Court as to whether Board of Revenue was justified in exercising its jurisdiction under sec. 38-B of the O.E.A. Act after a lapse of twenty seven years. The Hon'ble Court held 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. It was further held that it cannot be said that the Board of Revenue exercised the power under section 38-B after an unreasonable lapse of time, though from the date of grant of patta by the Tehsildar was of twenty seven years.

In the case of **Ibrahimpatnam Taluk Vyavasaya Coolie Sangham - Vrs.- K. Suresh Reddy and others reported in (2003) 7 Supreme Court Cases 667**, the Hon'ble Apex Court had the occasion to consider section 50-B(IV) of the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950, which provides that the Collector might suo motu at any point of time, call for and examine the record relating to any certificate issued or proceedings taken by the Tahasildar under the section for the purpose of satisfying himself as to the legality or propriety of such certificate or as to the regularity of such proceedings and pass such order in relation as he may think fit. Exercise of suo motu power *at any time* only means that no specific period such as days, months or years are not prescribed reckoning from a particular date but that does not mean that at any time should be unguided and arbitrary. In this view, *at any time* must be understood as within a reasonable time depending on the facts and circumstances of each case in the absence of prescribed period of limitation.

In the case of **Santoshkumar Shivgonda Patil and others -Vrs.- Balasaheb Tukarm Shevale and others reported in (2009) 9 Supreme Court Cases 352**, the Hon'ble Apex Court held that it seems to be fairly

settled that if a statute does not prescribe the time-limit for exercise of revisional power, it does not mean that such power can be exercised at any time; rather it should be exercised within a reasonable time. It is so because the law does not expect settled things to be unsettled after a long lapse of time. Where the legislature does not provide for any length of time within which the power of revision is to be exercised by the authority, suo motu or otherwise, it is plain that an exercise of such power within reasonable time is inherent therein.

Thus the legal principle which is set out from the above citations is that even though no period has been prescribed for exercising the power under section 38-B of the O.E.A. Act, the revisional authority has to exercise the same within a reasonable time and that to in a reasonable manner. It depends upon the facts and circumstances of each case as to what would be the reasonable time. There cannot be any hard and first rule for that. However, when fraud has been committed in obtaining an order or the decision of the subordinate authority is based on forged documents or there is suppression of material facts or there is violation of the provision of the Act, the revisional authority would be fully justified in exercising its power under section 38-B at any point of time in order to prevent miscarriage of justice or misuse or abuse of the power committed by the subordinate authority in granting relief to any party.

In the case in hand, the settlement of land is stated to have been made with disregard to the provisions under O.E.A. Act and relevant documents were not taken into account before settling the land, handwritten patta by the Ex-intermediary was accepted as genuine without Ekpadia prepared by the Ex-intermediary, continuous rent receipts from the date of grant of lease patta were not produced to substantiate possession of the land, tenancy ledger was not verified and the signatures of the Tahasildar in the order sheet on three different dates which were stated to have been passed within a period of fifteen days did not tally with each other. Therefore, the submission of the learned counsel for the petitioners that even in such a case also, power under section 38-B of the O.E.A. Act should not have been exercised by the revisional authority almost about fifteen years after the order passed by the Tahasildar, cannot be accepted.

5. Coming to the next contention raised by the learned counsel for the petitioners that the order of the Tahasildar, Bhubaneswar dated 30.07.1979 is an administrative order under section 8(1) of the O.E.A. Act and therefore, it

cannot be revised under section 38-B of the O.E.A. Act, let us first take into account the citations placed in that respect.

In the case of **Smt. Basanti Kumari Sahoo** (supra), a Full Bench of this Court while considering the provisions under sections 8(1) and 38-B of the O.E.A. Act held that section 8(1) of the Act is declaratory in nature and no proceeding is contemplated under section 8(1) and therefore, no power of adjudication of tenancy right is vested in any revenue authority and it does not envisage settlement of land belonging to the Government with tenancy right. The State being the owner of the land i.e. landlord, is entitled to receive rent from its tenants including persons deemed to be tenants under it under section 8(1). Its rights are akin to a landlord. No enquiry is contemplated and the decision may partake the trappings of adjudication, it is not one in exercise of powers under section 8(1) which does not authorise a proceeding or adjudication, but the enquiry is akin to an enquiry necessitated to be undertaken by an agent of landlord. It is further held that if in exercise of power under section 8(1), the officer settles the land with the applicant in course of a proceeding and confers tenancy right, the proceeding, the adjudication and the settlement are without jurisdiction and the Board of Revenue in exercise of power conferred by section 38-B would be entitled to annul the same. The Court went on to decide the question as to whether the order which was annulled by the Board of Revenue was passed in purported exercise of jurisdiction under section 8(1) or that order was an administrative order of the officer, in charge of collection of revenue on behalf of the State. The Hon'ble Court held that the application filed by the petitioner under section 8(1) of the O.E.A. Act seeking settlement of the land with her was disposed of by the officer as Estate Abolition Collector purporting to exercise jurisdiction under section 8(1) which he did not possess. It was held that the Board of Revenue had jurisdiction under section 38-B to revise the order passed by the Estate Abolition Collector, Bhubaneswar. It was further held that even though the petitioner might have misconceived the position of law and made application under section 8(1), the Tahasildar should have considered the same on administrative side with a view to satisfy himself if the petitioner was a tenant under the State prior to vesting. The misconceived application did not absolve the Tahasildar from proceeding in the right manner. It was further held that the provisions contained in section 8(1) is a decision on the administrative side and not an order passed under section 8(1) so as to liable to be revised by the Board of Revenue under section 38-B. Having said so, the Hon'ble Court held that where the land has been settled,

fresh tenancy right has been created in purported exercise of powers under section 8(1), the Board of Revenue would be entitled to annul the decision or correct the error in exercise of powers conferred on it under section 38-B. Accordingly, the decision of the Board of Revenue annulling the order of the Tahasildar was held to be justified and the Tahasildar was directed to consider the application filed by the petitioner afresh on the administrative side and to take his own decision. The petitioner challenged the order of the Full Bench before the Hon'ble Supreme Court in Civil Appeal No.118 of 1995 which arises out of SLP(C) No.10014 of 1992 and the Hon'ble Supreme Court vide order dated 23.01.1995 reported in **1995 (I) Orissa Law Reviews (SC) 587** held that the High Court justified the Board's order to the extent it annulled the Tahasildar's order but interfered with it solely on the ground that the Board has no jurisdiction since the Tahasildar's order was not a quasi-judicial order. In other words, according to the High Court, the Tahasildar's order was an administrative order. It was further held by the Hon'ble Supreme Court that if that be so, one fails to understand why the matter should be remitted to the Tahasildar once again to take an administrative decision. The order of the High Court was accordingly set aside and it was directed to the High Court to proceed to decide the matter on merits on the premise that the Board of Revenue had exercised the right of jurisdiction under section 38-B of the Act. In the case of **Bhagaban Kar** (supra), a Division Bench of this Court relying upon the Full Bench decision of this Court in the case of **Smt. Basanti Kumari Sahoo** (supra) held that a tenant cannot claim settlement of a land in his favour under the O.E.A. Act and he is only to be recognized as a tenant under the State. In the case of **Daitary Rout** (supra), it was held that the order under section 8(1) of the O.E.A. Act passed by the O.E.A. Collector cannot be construed to be an order creating any right in favour of the petitioner for the first time and therefore, cannot be subjected to the revisional jurisdiction of the Board of Revenue under section 38-B of the O.E.A. Act.

Section 8 of the O.E.A. Act, which deals with continuity of tenure of tenants clearly stipulates that the tenant inducted by an Ex-intermediary who was in possession of the lands on and from the date of vesting, shall be deemed to be tenant under the State Government. Such person shall hold the land in the same rights and subject to the same restrictions and liabilities as he was entitled or subject to immediately before the date of vesting. This section even does not contemplate for making of an application and initiation of a proceeding by the O.E.A. Collector within the meaning of the Act. No

quasi-judicial proceeding is required to be initiated. Section 8(1) does not contemplate any determination of rights by the authorities under the Act in respect of rival claims claiming tenancy though on the administrative side, the appropriate authority may try to find out the person from whom rent is to be accepted. The Tahasildar is not always bound to accept a claim raised by a person to the effect that he was inducted as a tenant, without verifying as to whether the claim is genuine or not. For arriving at such satisfaction, the Tahasildar has to conduct an enquiry which is more in the nature of administrative enquiry and not quasi-judicial.

In the order passed by the Tahasildar, Bhubaneswar, opposite party no.4, a clear finding has been arrived at that the lessee Anadi Charan Sahoo in the Vesting Case No.795/70-71 was a tenant under the Ex-intermediary before the vesting of the estate and he is deemed to be tenant under the Government on and from the date of vesting in the same rights and subject to same restrictions and liabilities as he was entitled to immediately before the date of vesting as contemplated under section 8(1) of the O.E.A. Act. We are of the view that such order passed by the opposite party no.4 cannot be said to be an *administrative order* inasmuch as the lands were never settled under the lease principle rather the opposite party no.4 held that the lands were deemed to have been settled in favour of Anadi Charan Sahoo under the O.E.A. Act. Without most vital documentary evidence like continuous rent receipts, Ekpadia prepared by the Ex-intermediary or verification of tenancy ledger, the opposite party no.4 seems to have invoked the deeming provision under section 8(1) of the O.E.A. Act and ordered correction of the entry in the R.O.R. in favour of Anadi Charan Sahoo. The record of right of the lands showed that the same was recorded in Rakhit khata in favour of the State Government in the year 1974 and without any order of dereservation from the Collector as provided under the Odisha Government Land Settlement Act, 1962, the opposite party no.4 has settled the land in favour of a private person like Anadi Charan Sahoo. Therefore, in view of the decision of the Hon'ble Supreme Court, we find no illegality on the part of the Board of Revenue in initiating the revisional proceeding under section 38-B of the O.E.A. Act on the reference from Collector, Puri for revising the order of the Tahasildar, Bhubaneswar passed in the vesting case.

6. The next contention raised by the learned counsel for the petitioner is that even though the Hata Patta issued by Raja of Patia was an unregistered one but rent was paid by the deceased Anadi Charan Sahoo which was accepted and when Raja of Kanika purchased the estate of Patia, he also

accepted rent from the deceased Anadi Charan Sahoo treating him as a tenant and cultivating agricultural land. It is pertinent to note that Ekpadia prepared by the Ex-intermediary was not produced. Even though the deceased Anadi Charan Sahoo claimed to have been inducted as a tenant since 1936 but some rent receipts for the year 1942, 1943 and 1952 were produced before the Tahasildar. The continuous rent receipts have not been produced. The tenancy ledger was also not verified by the opposite party no.4. Thus there cannot be any doubt that the aforesaid documents which were very much essential for entertaining a claim of continuous possession of the land with the deceased since 1936 were not verified by the opposite party no.4.

Section 49 of the Registration Act, 1908 deals with effect of non-registration of documents required to be registered. An unregistered document affecting immovable property and required by the Registration Act, 1908 or by the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be affected by registered instrument. By virtue of section 6 of Act 48 of 2001, with effect from 24.09.2001, the words "*or as evidence of part performance of a contract for the purposes of section 53-A of the Transfer of Property Act, 1882*" was omitted. Thus even an unregistered document can be received as evidence for the purposes mentioned in the proviso to section 49 of the Registration Act.

The learned counsel for the petitioner submitted that unregistered handwritten patta can be used for collateral purpose in view of the proviso to section 49 of the Registration Act. The literal meaning of the word 'collateral' itself shows that it is only 'supplementary or secondary purpose' and 'not direct'. Passing of the title to the lessee of land by an instrument cannot be said to be collateral purpose i.e. supplementary or secondary purpose. It is the main purpose for which the instrument is executed affecting the immovable property comprised in the said instrument. The expression "collateral purposes" is a very vague one and the Court must decide in each case whether the purpose for which unregistered document is sought to be used as really a collateral one or is to establish directly the title to immovable property sought to be conveyed by the document. By the simple device of calling "collateral purpose", a party cannot use an unregistered document in any legal proceedings to bring about indirectly the fact which would have had

it registered. Therefore, as a rule, as a proof of passing of title in favour of any person, an unregistered document cannot be received in evidence. A document required by law to be registered, if unregistered, is inadmissible as evidence of a transaction affecting the immovable property but it may be admitted as evidence of collateral facts or for any collateral purpose i.e. for any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immovable property. An unregistered document can be looked into for collateral purposes even though it does not create title in respect of the land and the factum of date of commencement of possession on the basis of such document can be taken into account provided there is other evidence to show the continuity of possession.

In the case of **Gerua Biswal -Vrs.- Kshyama Biswal reported in A.I.R. 1962 Orissa 107**, it is held that, where in the case of an unregistered Kararnama when the members of a joint family effect a severance in status and each of the parties gave up his claim in respect of certain family lands already in the exclusive possession of the other, the document is inadmissible under section 49 of the Registration Act as evidence of any transaction affecting the properties for want of registration and further no oral evidence can be given to prove the terms of the partition in view of section 91 of the Evidence Act. Though the document could be used for 'collateral' purpose for proving the severance of joint family status, it would not be admissible to prove the nature of possession subsequent to the execution of the document because that would be using the document virtually for proving the allotment of the properties at the partition, the very purpose for which it is prohibited to be used under section 49 of the Act. In the case of **Dandapani Sahoo -Vrs.- Kshetra Sahoo and others reported in Vol.31 (1965) Cuttack Law Times 33**, it was held that there is no dispute over the proposition that an unregistered partition deed can be used as an evidence to show severance of joint status, but it is not admissible to prove the actual allotment of specific properties to different shares.

In the case of **Baidyanath Jena** (supra) on which the learned counsel for the State placed reliance, it was held that a tenant can only be recognized under section 8(1) of the O.E.A. Act if the intermediary was validly inducted with registered document as per section 17 of the Registration Act, sections 105 and 107 of the Transfer of Property Act and followed by Ekpadia submitted by the intermediary with the approval of the Board of Revenue under section 5 of the O.E.A. Act.

Though reliance was placed by the learned counsel for the petitioners in the case of **Rai Chand Jain** (supra) that an unregistered lease deed executed by both the parties can be looked into for collateral purposes and also in the case of **Gangayya** (supra) to fortify the contention that unregistered lease deed can be used to prove the date on which possession in the hands of the tenant commenced, but it cannot be lost sight of the fact that though it is the case of the petitioners that the deceased Anadi Charan Sahoo was inducted as a tenant by Raja Madhusudan Dev of Patia since 1936 for agricultural purposes but only rent receipts for the year 1942, 1943 and 1952 were produced before the Tahasildar. In absence of any continuous rent receipts or tenancy ledger and Ekpadia prepared by the Ex-intermediary the continuity of possession with the deceased on the date of vesting cannot be accepted. Moreover the copy of the unregistered Hata Patta annexed as Annexure-1 to the writ petition does not contain any seal of Raja Madhusudan Dev of Patia or the signatures of the Raja or the tenant. The top and bottom date of the document vary. The document seems to have been executed on 25.04.1936 but one person has signed the document putting the date as 24.04.1936. Therefore, the authenticity of the document is also doubtful. Therefore, we are of the humble view that the unregistered Hata Patta is no way helpful to show that the deceased was in possession of the land as a tenant under the Ex-intermediary before the date of vesting and therefore, he would be deemed to be a tenant under the State Government from the date of vesting.

At this stage, some of the decisions of this Court cited by the learned counsel for the petitioners needs consideration. In the case of **Basiruddin** (supra), it is held that no formal document is necessary to create an agricultural tenancy. In the said case, while considering section 175(3) of the Government of India Act, it was held that the State like any ordinary landlord, can induct a tenant for cultivation of land for agriculture purposes who may acquire all the rights of a tenant available to him in law without a formal document being executed and the question of execution of a document in the manner prescribed under section 175(3) does not arise at all. In the case of **Bhakta Charana Naik** (supra), it is held that it is open to a landlord to create a tenancy by giving possession and accepting rent and such a tenancy can be proved by evidence other than the production of the lease deed. In the case of **Budhinath Samantray** (supra), even though it was a case of unregistered lease deed but it was held that plaintiff can prove his tenancy by payment and acceptance of rent from him by the landlord by proving the rent

receipts. In the case of **Naban Bewa** (supra), it is held that if the lease was for agricultural purposes, under section 117 of the Transfer of Property Act, a lease can be created orally and by delivery of possession and in order to confer any lease-hold right, a registered document is not essential. In the case of **Jagannath Nanda** (supra), it is held that a formal document is not necessary to create an agricultural tenancy and a tenant can be inducted to one agricultural holding by mere acceptance of rent whereafter he would acquire the status of a tenant.

The above decisions cited by the learned counsel for the petitioners are no way helpful for the petitioners as even though it is claimed to be an agricultural tenancy from the year 1936 by virtue of Annexure-1, the authenticity of which is doubtful feature but continuous rent receipts are lacking apart from the vital documents like tenancy ledger and Ekpadia.

7. In the reference letter submitted to the Member, Board of Revenue, it is indicated that while recognizing the deceased Anadi Charan Sahoo as a tenant under section 8(1) of the O.E.A. Act and correcting the current R.O.R. under Rule 34 of Orissa Survey and Settlement Rules, 1962, the Tahasildar failed to verify the Ekpadia as well as the genuineness of the 'handwritten patta'. The Collector also expressed doubts about the genuineness of the orders as the signatures of the Tahasildar on the case record on 15.07.1979, 16.07.1979 and 30.07.1979 did not appear to tally with each other.

The Member, Board of Revenue initiating a revision proceeding under section 38-B of the O.E.A. Act after receipt of the reference letter verified the lower Court record and found that the deceased Anadi Charan Sahoo filed an application in Form 'H' for settlement of suit land. Form 'H' as per Rule 6 of the Odisha Estate Abolition Rules, 1952 is for settlement of homestead and agricultural land under sections 6 and 7 of the O.E.A. Act which is meant for the Ex-intermediary. Since the deceased Anadi Charan Sahoo was not an intermediary, the learned Member rightly held that there was no scope on the part of the deceased to apply in Form 'H' for settlement of land on which his tenancy right was claimed to have been created before the date of vesting. According to us, there is no perversity in such finding.

The rent receipts pertaining to the years 1942, 1943 and 1952 were produced before the Tahasildar by the deceased claiming to have acquired the land through handwritten patta in the year 1936. The learned Member held that the rent receipts are not continuous till the year of vesting from the date

of handwritten patta. The rent receipt vide Annexure-3 to the writ petition does not indicate the signature of the issuing person. The years have been overwritten. Therefore, we are of the view that the learned Member rightly held that in absence of continuous rent receipts, proper tenant's ledger and Ekpadia, a deeming provision like section 8(1) of the O.E.A. Act will have no application.

It is also not disputed that even though the estate was vested in the year 1954 but the deceased Anadi Charan Sahoo filed his claim application in the year 1971 which was after a lapse of seventeen years. The lands in question as per 1974 settlement operation was recorded under Rakhita Khata and kissam was 'Unnat Jojana Jogya' and no possession note in favour of the deceased was mentioned in the R.O.R. and there was no dereservation order passed by the Collector under Odisha Government Land Settlement Act and therefore, the learned Member rightly held that the Tahasildar -cum- O.E.A. Collector should not have settled the land in favour of the deceased.

The learned Member also on verification of the L.C.R. found that the signatures of the Tahasildar on three different dates within a span of fifteen days did not appear to tally with each other. Even though in the case of **Pyare Lal Bhargava** (supra), it is held that the word *'appears'* imports lesser degree of probability than proof but there are several other grounds as discussed above were taken into account by the learned Member to hold the illegality committed by the Tahasildar in holding the deceased Anadi Charan Sahoo to be a tenant under section 8(1) of the O.E.A. Act.

We are satisfied that there is proper assessment of the facts and circumstances of the case as well as the documents by the learned Member, Board of Revenue while passing the impugned order under Annexure-7 in setting aside the order dated 30.07.1979 of the Tahasildar, Bhubaneswar in Vesting Case No.795/70-71 and it stands the test of judicial scrutiny. We find no illegality, impropriety or perversity in the said order rather it appears to be a reasoned order. Therefore, in view of 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 do not find it to be a fit case to exercise our certiorari jurisdiction to interfere with the impugned order.

In view of the foregoing discussions, we find no merit in the writ application which is accordingly dismissed. The interim order dated 01.06.1994 passed in Misc. Case No.4000 of 1994 stands vacated. No cost.

2020 (I) ILR - CUT- 464

KUMARI SANJU PANDA, A.C.J & S.K. SAHOO, J.

W.P.(C) NO. 9463 OF 2019

VICE PRESIDENT, EMAMI PAPER MILLS LTD. .....Petitioner

.Vs.

PRESIDING OFFICER, LABOUR COURT & ANR. ..... Opp. Parties

(A) LABOUR SERVICE – Domestic enquiry – Enquiry Officer was appointed by the Management to make an inquiry and to submit the report – Order sheet of the Enquiry Officer indicates that in all the dates posted for enquiry, he directed the second party workman to produce his witnesses and documents – The management was not directed first to produce its witnesses and documents – Relevant documents not supplied to the workman – Effect of such domestic enquiry – Procedure and principles to be followed – Held, we are of the view that while adjudicating the preliminary issue regarding validity of domestic enquiry, the learned Labour Court rightly held in the impugned order dated 08.05.2015 that the Enquiry Officer followed a wrong procedure by asking the second party workman to produce his witness first inasmuch as in such domestic enquiry, it was the duty of the management first to prove the allegations made against the second party workman by leading evidence and thereafter, the second party workman would have been asked to produce his witnesses and documents.

"Law is well settled that before proceeding with the domestic enquiry against a delinquent, he must be informed clearly, precisely and accurately the charges leveled against him and the charge sheet should specifically set out all the charges which the workman is called upon to show cause against and should also state all relevant particulars without which he cannot defend himself properly. The object of such requirement is that the delinquent employee must know what the charges against him are and the nature of misconduct alleged against him and he must get ample opportunity to meet such charges and to defend him by giving proper explanation. If the charges are not precise and definite, the delinquent employee would not be able to understand those charges and defend himself effectively and in such a case, it cannot be said to be a fair and just enquiry." *(Paras 8 & 9)*

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the award passed by the Presiding Officer, Labour Court pursuant to a reference made in exercise of the power conferred upon it by sub-section (5) of section 12 read with clause (c) of sub-section (1) of section 10 of the Industrial Disputes Act, 1947 – Award passed directing reinstatement with full back wages

– Finding of fact – Interference by High Court in exercise of writ jurisdiction questioned – Principles – Held, a finding of fact cannot be challenged on the ground that relevant materials and evidence adduced before the Court below was insufficient or inadequate to sustain the findings – The adequacy or sufficiency of evidence and the inferences to be drawn from the evidence are the exclusive domain of the Court below and the same cannot be agitated before this Court – Even if another view is possible on the evidence adduced before the learned Court below, this Court would not be justified to interfere with the findings recorded by the Court – When the findings recorded by the Court are perverse or irrational or arrived at by ignoring materials on record or arbitrary or contrary to the principles of natural justice, the same can be interfered with by this Court in a petition under Article 226 of the Constitution. (Para 9)

Case Laws Relied on and Referred to :-

1. (2011) 5 SCC 142 : Chairman -cum- Managing Director, Coal India Ltd. Vs. Ananta Saha.
2. A.I.R. 1957 Allahabad 1: Ajodhya Prasad Bhargava Vs. Bhawani Shankar Bhargava.
3. A.I.R. 1964 S.C. 477 : (2019) 7 SCC 797 : Shashi Bhusan Prasad Vs. Inspector General.
4. A.I.R.1964 S.C.477 : Syed Yakoob Vs. K.S. Radhakrishnan.
5. A.I.R. 1988 S.C. 117 : Chandrama Tewari Vs. Union of India.
6. A.I.R. 1998 S.C. 3038 : State of U.P. Vs. Shatrughan Lal.
7. (2007) 1 S.C.C 338 : The Government of Andhra PradeshVs. A. Venkata Rayudu.
8. (1999) 7 S.C.C 409 : Zunjarrao Bhikaji Nagarkar -Vs. Union of India.
9. A.I.R. 2006 S.C. 355 : R.M. Yellatti Vs.The Assistant Executive Engineer.
10. (2004) 8 S.C.C 195 : Municipal Corporation, Faridabad -Vs. Siri Niwas.
11. A.I.R. 1964 S.C. 477 : Syed Yakoob Vs. K.S. Radhakrishnan
12. (2013) 5 S.C.C 136 : Asst. Engineer, Rajasthan Dev. Corp. & Anr. Vs. Gitam Singh
13. (2007) 1 SCC 575 : State of M.P. & Ors -Vs. Lalit Kumar Verma.
14. (2007) 9 S.C.C 353 : Uttaranchal Forest Development Corporation Vs. M.C. Joshi.
15. (2008) 5 S.C.C 75 : Sita Ram & Ors Vs. Motilal Nehru Farmers Training Institute.
16. (2008) 4 S.C.C 261 : Ghaziabad Development Authority Vs. Ashok Kumar.
17. (2009) 15 SCC 327 : Jagbir Singh Vs. Haryana State Agriculture Marketing Board & Anr
18. 2011 (Supp.I) OLR 556 : Executive Engineer,Badanala Irrigation Division, Kenduguda Vs**.** Ratnakar Sahoo & Anr.
19. (2018) 12 S.C.C 298 : District Development Officer Vs. Satish Kantilal Amrelia

For Petitioner : Mr. Nitish Kumar Mishra, A.K. Roy, A. Mishra S. Samantaray.

For Opp. Party: Mr. Suvashis Pattnayak, S. Dash, S.S. Sahoo

JUDGMENT Date of Judgment: 04.02.2020

S. K. SAHOO, J.

The petitioner has filed this writ petition seeking for a direction to quash the impugned order dated 08.05.2015 (Annexure-4) passed by the Presiding Officer, Labour Court, Bhubaneswar in Industrial Dispute Case No.428 of 1995 in deciding the preliminary issue against the first party management (petitioner in the writ petition) and holding that the domestic enquiry conducted against the second party workman (opposite party no.2 in the writ petition) was not valid. A further prayer has been made in the writ petition to quash the award dated 30.10.2018 (Annexure-5) directing the first party management to reinstate the second party workman in service with full back wages along with all other consequential service benefits within one month from publication of the award by the Government, failing which the second party would be entitled to interest @ 6% per annum on the monetary benefit.

2. The reference which was made on 04.12.1995 by the Government of Odisha, Labour and Employment Department in exercise of the power conferred upon it by sub-section (5) of section 12 read with clause (c) of sub-section (1) of section 10 of the Industrial Disputes Act, 1947 (hereafter 'I.D. Act') to the Presiding Officer, Labour Court, Bhubaneswar for adjudication is as follows:

> "Whether the action of the management of M/s. Emami Paper Mills Ltd., Balgopalpur, Balasore in dismissing Sri Muralidhar Das, Helper from service w.e.f. 10.11.1994 is legal and/or justified? If not, to what relief the workman is entitled?"

3. It is the case of the opp. party no.2 workman that he was appointed as helper in the establishment of the petitioner w.e.f. August 1991. He along with other workers associated to form a new Trade Union in the name of Emami Sramik Karmachari Sangha for which the management became vindictive and took action against him to victimize on illegal and fabricated charges and suspended him during lock out period by way of unfair labour practice. He was charge sheeted on 06.05.1994 and also suspended on that day just before unauthorized lock out. He prayed to issue odia charge sheet to submit his reply but the management did not issue the same and despite that he denied the charges and agreed to appear in the enquiry with his representative, but the management did not allow his representative though the management appointed one Advocate as an Enquiry Officer. It is the

further case of the opposite party no.2 that the Enquiry Officer was partial to the management and basing upon the ex-parte enquiry, the petitioner management dismissed him from service. The opposite party no.2 prayed to set aside the enquiry and cancel the dismissal order with a further prayer to reinstate him in service with all service benefits.

4. The petitioner management filed its written statement before the Labour Court stating therein that before terminating the opposite party no.2 from his service, enquiry was conducted but the opposite party no.2 did not participate in the enquiry despite repeated opportunities being given to him. The Enquiry Officer followed the principle of natural justice and fairly conducted the enquiry and found the opposite party no.2 guilty of all charges and the management carefully considered all the charges, the report of Enquiry Officer and the gravity of incidents and thought it just and proper to terminate the opposite party no.2 from his service for industrial peace and discipline. It is further stated in the written statement that in the event the Court did not accept the enquiry report as just and fair, the management should be given an opportunity to adduce evidence in support of the charge sheet framed against the opposite party no.2.

5. The learned Tribunal framed the following issues:

> "(i) Whether the domestic enquiry is fair and proper.
>
> (ii) Whether the action of the management of M/s. Emami Paper Mills Ltd., Balgopalpur, Balasore in dismissing Sri Muralidhar Das, Helper from services w.e.f. 10.11.1994 is legal and/or justified?
>
> (iii) To what relief the workman is entitled to?"

The petitioner management filed a petition before the learned Tribunal to decide issue no.(i) as preliminary issue which was rejected vide order dated 05.09.2014. Against the said order, the petitioner management preferred W.P.(C) No.17464 of 2014 before this Court which was disposed of as per order dated 21.10.2014 directing the learned Labour Court to decide issue no.(i) as preliminary issue with a further direction that if the finding of the preliminary issue goes against the petitioner management, it should be given an opportunity to adduce evidence in respect of the merit of the reference. Accordingly, the learned Labour Court took up issue no.(i) as preliminary issue. The second party workman (opposite party no.2) examined himself as W.W.1 and proved twelve documents marked as Exts.1 to 12 to substantiate that the domestic inquiry conducted by the petitioner

management was not valid one. The first party management (petitioner) examined two witnesses and proved documents marked as Exts. A to Z/2 on its behalf. The Presiding Officer, Labour Court in its impugned order dated 08.05.2015 came to hold that the domestic enquiry was not a valid one and accordingly, the preliminary issue was answered against the petitioner management.

Assailing the impugned order dated 08.05.2015, the petitioner management filed another writ petition before this Court vide W.P.(C) No.9855 of 2015 which was disposed of as per order dated 30.01.2018 directing the Labour Court to proceed with the matter by affording opportunity to the parties to lead evidence, without being influenced by the observations made in the order dated 08.05.2015.

After remand of the case record, the petitioner management examined four witnesses before the learned Labour Court as M.W. Nos.3 to 6 on its behalf and placed reliance on a number of documents marked as Exts.A to Z/2 which had already been marked during the hearing of preliminary issue. The opposite party no.2 examined himself as W.W. No.1 and relied on thirteen documents marked Exts. 1 to 13, out of which twelve documents had already been marked as Exts.1 to 12 during the hearing of preliminary issue.

6. The learned Labour Court in the impugned award dated 30.10.2018 while adjudicating issue no.(ii) has been pleased to hold that there is no dispute that the second party workman was a helper in the establishment of the first party and he joined under the management since August 1991 and he was dismissed from service w.e.f. 10.11.1994 on the allegation of misconduct. It is further held that the allegations made in para-7 and 8 of the charges (Ext.1) and para-2 of page-2 of the charges (Ext.1) are vague and ambiguous and no proceeding should be allowed to sustain on the basis of such vague allegations made in the charge sheet. It is further held that on the close scrutiny of the evidence led by the management, the charges could not be proved against the workman. The management did not lodge any complain with the local police station against the workman alleging any misconduct and no station diary entry was also proved in connection with the alleged occurrence which according to the learned Labour Court creates reasonable suspicion about happening of such occurrence. It is further held that there is no cogent material to hold the charges as sustainable rather it was found that charges were framed intentionally so that the workman could be dismissed from his service and the action of the management in dismissing the opposite

party no.2 from service was found to be illegal and unjustified and accordingly, the first party management was directed to reinstate the second party workman in service with full back wages along with all other consequential service benefits within one month from publication of the award by the Government, failing which the second party workman would be entitled to interest @ 6% per annum on the monetary benefit.

7. Mr. Nitish Kumar Mishra, learned counsel appearing for the petitioner contended that the impugned order dated 08.05.2015 and the award dated 30.10.2018 passed by the learned Labour Court are not sustainable in the eye of law. He argued that the opposite party no.2 after initial appearance in the domestic enquiry, remained absent willfully for which the enquiry was conducted ex-parte and therefore, the opposite party no.2 is precluded from raising any plea of prejudice and bias against the Enquiry Officer. He further submitted that there was no prejudice caused to the opp. party no.2 in the facts and circumstances of the case and relied upon the decision of the Hon'ble Supreme Court in the case of **Chairman -cum- Managing Director, Coal India Ltd. -Vrs.- Ananta Saha reported in (2011) 5 Supreme Court Cases 142**. It is further contended that the learned Labour Court has committed error of record in holding that there is absence of time of occurrence, lack of F.I.R. or station diary and that the charges are vague, ambiguous and unsustainable. Notwithstanding the erroneous finding against the management as per preliminary issue no.(i), the management adduced additional evidence of M.W. Nos. 3 to 6, whereas the workman examined himself alone on merits. According to Mr. Mishra, all the management witnesses are eye witnesses to the misconduct committed by the workman and they have specifically proved the charges and the workman has not been able to shake the credibility of such evidence in any manner. It is argued that relying upon the original certified copy of deposition in a criminal case in 2 C.C. Case No.184 of 1994 filed at the time of argument, the learned Labour Court has rejected the evidence of all the management witnesses pertaining to the incident of 05.05.1994 on the ground of vital contradictions. The evidence relating to the incident of 28.03.1994 was also rejected as unreliable due to lack of F.I.R. being lodged and the evidence relating to the incident of 01.05.1994 was not accepted on a wrong notion that the same is not a misconduct due to the meeting held on May Day i.e., International Labour Day outside the factory premises. Mr. Mishra further argued that in the impugned award, the learned Labour Court has erroneously discarded the evidence on merit tendered by the management witnesses on unjust and

erroneous consideration of extraneous materials like evidence adduced by M.W. No.5 in a criminal proceeding as P.W.2 even though such evidence was never confronted to M.W. No.5 as per the provision under section 145 of the Evidence Act as well as the settled principle governing such cases as laid down by the Hon'ble Courts. Reliance was placed on the Full Bench decision of Allahabad High Court in the case of **Ajodhya Prasad Bhargava -Vrs.- Bhawani Shankar Bhargava reported in A.I.R. 1957 Allahabad 1**. It is further argued that while the plea of the workman is that he was not a party to the criminal proceeding, evidence of M.W. No.5 as P.W.2 and the ultimate judgment in the said proceeding have been used and accepted by the learned Labour Court. Placing reliance on the decision of the Hon'ble Supreme Court in the case of **Shashi Bhusan Prasad -Vrs.- Inspector General reported in (2019) 7 Supreme Court Cases 797**, it is argued that the degree of proof in a disciplinary proceeding and criminal proceeding are distinct and different inasmuch as the disciplinary proceedings are proved on the basis of preponderance of probabilities whereas a criminal offence requires proof beyond all reasonable doubt. According to Mr. Mishra, there is no bar to charge sheet an employee in the absence of F.I.R. as misconduct in employment are internal matters which are to be dealt under the Code framed for such purposes.

Mr. Suvashis Pattnayak, learned counsel appearing for the opposite party no.2 on the other hand supported the impugned order of the learned Labour Court holding the domestic enquiry as invalid while deciding the preliminary issue as well as the award of reinstatement with full back wages along with consequential service benefits. He argued that the scope of interference with an award of the learned Labour Court by this Court exercising jurisdiction under Article 226 of the Constitution of India by issuing a writ of certiorari has been well settled in the case of **Syed Yakoob -Vrs.- K.S. Radhakrishnan reported in A.I.R. 1964 S.C. 477** by a Constitution Bench of the Hon'ble Supreme Court and this Court exercising such jurisdiction is not entitled to act as an appellate Court. He argued that when the findings recorded by the Labour Court are not perverse or irrational or arrived at by ignoring materials on record or arbitrary or contrary to the principles of natural justice, the same should not be interfered with by this Court and the writ petition should be dismissed.

8. Domestic enquiry in an industrial establishment is governed by the Standing Orders applicable thereto and it is required to be conducted in terms

of such Standing Orders. Even though it was argued before the learned Labour Court that the Enquiry Officer conducted the enquiry in accordance with the provisions laid down in the Certified Standing Order of the company but no such Standing Order was filed nor proved during the hearing by the petitioner management. Law is well settled that even if specific rules have not been provided, then general principles of enquiry have to be adopted in case of domestic enquiry which requires that a charge sheet has to be served by the concerned authority of the institution to the employee indicating the specific charges against him and by appointing an Enquiry Officer, the enquiry has to be conducted in consonance to the principles of natural justice and in case of non-cooperation by the employee, the enquiry may also be conducted ex-parte on the basis of available documents and witnesses and on analysis of material documents and records referred and relied upon, that too, in consonance to the principles of natural justice and on the basis of the fact-finding report rendered by the Enquiry Officer, the competent authority may take appropriate subsequent decision.

In the case of **Ananta Saha** (supra), the Hon'ble Supreme Court has held that in case the delinquent does not participate or cooperate in the enquiry, the Enquiry Officer may proceed ex-parte passing an order recording reasons.

When issue no.(i) was framed by the learned Labour Court with regard to the fairness of the domestic enquiry against the opposite party no.2 workman and a petition filed by the petitioner management to decide the issue no.(i) as preliminary issue was turned down by the learned Labour Court, on being approached by the petitioner management, this Court in W.P.(C) No.17464 of 2014 directed the learned Labour Court to decide the issue no.(i) as preliminary issue.

During adjudication of preliminary issue, the Enquiry Officer was examined by the first party management as M.W.2. It appears from his evidence that notice was issued to the second party workman on 06.08.1994 vide Ext.Q to attend the enquiry on 18.08.1994 but the workman did not turn up to participate in the hearing and ultimately the case was posted for hearing to 19.10.1994 and on that day, the workman was set ex-parte. The order sheet of the Enquiry Officer indicates that in all the dates posted for enquiry, he directed the second party workman to produce his witnesses and documents. The management was not directed first to produce its witnesses and documents. Therefore, we are of the view that while adjudicating

the preliminary issue regarding validity of domestic enquiry, the learned Labour Court rightly held in the impugned order dated 08.05.2015 that the Enquiry Officer followed a wrong procedure by asking the second party workman to produce his witness first inasmuch as in such domestic enquiry, it was the duty of the management first to prove the allegations made against the second party workman by leading evidence and thereafter, the second party workman would have been asked to produce his witnesses and documents.

It is the case of the opposite party no.2 workman that the first party management did not supply the relevant documents relied upon by it during domestic enquiry along with charge sheet supplied to him in spite of his repeated request, on the other hand he was asked to submit his explanation within seven days of receipt of charge sheet. According to the opposite party no.2, non-supply of material documents has caused serious prejudice to him.

After examination of witnesses from the respective sides and proof of documents during hearing of the preliminary issue, the learned Labour Court on perusal of the record found that the first party management has not supplied any document along with the charge sheet to the second party workman. The Court took into account two letters proved by the second party workman marked as Ext.5 which is dated 30.06.1994 and Ext.7 which is the letter dated 14.07.1994 which were issued by the workman to the management asking for documents relied on by the first party management in the charge sheet. The learned Labour Court held that no such documents as was sought for by the workman in Exts.5 and 7 were supplied to him by the management at the time of issuance of charge sheet or prior to recording of evidence by the Enquiry Officer. The learned Labour Court further took into account a document marked as Ext.6 issued by the management to the second party workman which is dated 06.07.1994, wherein it is mentioned by the management that the copies of the documents which are required to be produced by the management at the time of enquiry to prove the charges would be supplied to the second party before the commencement of enquiry. Accordingly, it was held that Ext.6 indicates that till its issuance, no document was supplied to the second party workman. The learned Labour Court further held that the management relied on a lot of documents like Exts. A, B, C, D and E which were also utilized against the second party workman during the domestic enquiry but those documents were not supplied to the workman by the management.

In the case of **Chandrama Tewari -Vrs.- Union of India reported in A.I.R. 1988 S.C. 117**, it is held as follows:-

> "It is now well settled that if copies of relevant and material documents including the statements of witnesses recorded in the preliminary enquiry or during investigation are not supplied to the delinquent officer facing the enquiry and if such documents are relied in holding the charges framed against the officer, the enquiry would be vitiated for the violation of principles of natural justice. Similarly, if the statements of witnesses recorded during the investigation of a criminal case or in the preliminary enquiry are not supplied to the delinquent officer that would amount to denial of opportunity of effective cross-examination. It is difficult to comprehend exhaustively the facts and circumstances which may lead to violation of principles of natural justice or denial of reasonable opportunity of defence. This question must be determined on the facts and circumstances of each case. While considering this question, it has to be borne in mind that a delinquent officer is entitled to have copies of material and relevant documents only which may include the copies of statements of witnesses recorded during the investigation or preliminary enquiry or the copy of any other document which may have been relied in support of the charges. If a document has no bearing on the charges or if it is not relied by the enquiry officer to support the charges or if such document or material was not necessary for the cross-examination of witnesses during the enquiry, the officer cannot insist upon the supply of copies of such documents, as the absence of copy of such document will not prejudice the delinquent officer. The decision of the question whether a document is material or not will depend upon the facts and circumstances of each case."

In the case of **State of U.P. -Vrs.- Shatrughan Lal reported in A.I.R. 1998 S.C. 3038**, it is held as follows:-

> "Now, one of the principles of natural justice is that a person against whom an action is proposed to be taken has to be given an opportunity of hearing. This opportunity has to be an effective opportunity and not a mere pretence. In departmental proceedings where charge sheet is issued and the documents which are proposed to be utilised against that person are indicated in the charge sheet but copies thereof are not supplied to him in spite of his request, and he is, at the same time, called upon to submit his reply, it cannot be said that an effective opportunity to defend was provided to him."

In the facts and circumstances of the case, we find it impossible to hold that the opp. party no.2 workman was afforded reasonable opportunity to meet the charges leveled against him. Whether or not refusal to supply copies of documents or statements has resulted in prejudice to the employee facing the departmental inquiry depends on the facts of each case. We are not prepared to accede to the submission urged on behalf of the learned counsel for the petitioner that there was no prejudice caused to the opp. party no.2 and that he is precluded from raising any plea of prejudice.

9. It is needless to mention that when the impugned order dated 08.05.2015 passed by the learned Presiding Officer, Labour Court in deciding the preliminary issue against the petitioner management was challenged by the petitioner in W.P.(C) No.9855 of 2015, this Court as per order dated 30.01.2018 did not delve into the merits of such order rather directed the learned Labour Court to proceed with the matter by affording opportunity to the parties to lead evidence, without being influenced by any observation made in such order.

Law is well settled that before proceeding with the domestic enquiry against a delinquent, he must be informed clearly, precisely and accurately the charges leveled against him and the charge sheet should specifically set out all the charges which the workman is called upon to show cause against and should also state all relevant particulars without which he cannot defend himself properly. The object of such requirement is that the delinquent employee must know what the charges against him are and the nature of misconduct alleged against him and he must get ample opportunity to meet such charges and to defend him by giving proper explanation. If the charges are not precise and definite, the delinquent employee would not be able to understand those charges and defend himself effectively and in such a case, it cannot be said to be a fair and just enquiry. In the case of **The Government of Andhra Pradesh -Vrs.- A. Venkata Rayudu reported in (2007) 1 Supreme Court Cases 338**, it is held that a charge sheet should not be vague but should be specific. In the case of **Zunjarrao Bhikaji Nagarkar -Vrs.- Union of India reported in (1999) 7 Supreme Court Cases 409**, it is held that initiation of disciplinary proceedings against an officer cannot take place on an information which is vague or indefinite.

The learned Labour Court examined the validity of the charge memo issued to the second party workman and found that in paragraphs 7 and 8 of the charges (Ext.1), there is no specific mention of date of the alleged occurrence and in paragraph 9 of the charges, there is no specific mention of time of such alleged occurrence.

According to Mr. Mishra, the learned Labour Court has made unjust and erroneous consideration of extraneous materials like evidence adduced by M.W. No.5 Prakash Nagar in a criminal proceeding as P.W.2 even though such evidence was never confronted to M.W. No.5 as per the provision under section 145 of the Evidence Act. According to him, the original certified copy of deposition of P.W.2 in the criminal case i.e. 2 C.C. Case No.184 of 1994 was filed at the time of argument.

It appears that co-workman Radhakrishna Maharana and Santosh Kumar Maharana were facing criminal trial relating to an incident which took place on 05.05.1994 in the Court of learned S.D.J.M., Balasore in the aforesaid 2 C.C. Case No.184 of 1994 and M.W. No.5 Prakash Nagar was examined in the said case as P.W.2. Learned Labour Court took into account the admission made by M.W.5 in his cross-examination that he had adduced evidence in relation to the fact of the case before the learned S.D.J.M., Balasore. Even though the evidence of Prakash Nagar as P.W.2 in the criminal proceeding was not confronted to him when he was examined as M.W. No.5 but all the same, the learned Labour Court compared the evidence adduced by the said Prakash Nagar as M.W.5 vis-a-vis as P.W.2 and held that there are vital contradictions in the evidence.

Now, the question comes up for consideration whether the learned Labour Court was justified in comparing the evidence of Prakash Nagar in two different proceedings. It cannot be lost sight of the fact that the opposite party no.2 was not facing trial in 2 C.C. Case No.184 of 1994 but two of his co-workers were facing the same. Even though the incident in question relates to 05.05.1994 in connection with which Prakash Nagar gave evidence in both the proceedings and his attention was not drawn to the relevant parts of his evidence as P.W.2 when he was examined as M.W. No.5 and such evidence was only produced at the time of argument but all the same, everything depends upon the applicability of the Evidence Act to an Industrial Disputes Act proceeding. In the case of **R.M. Yellatti -Vrs.- The Assistant Executive Engineer reported in A.I.R. 2006 S.C. 355**, it is held that the provisions of the Evidence Act in terms do not apply to the proceedings under section 10 of the Industrial Disputes Act. In the case of **Municipal Corporation, Faridabad -Vrs.- Siri Niwas reported in (2004) 8 Supreme Court Cases 195**, it is held that the provisions of the Indian Evidence Act per se are not applicable in an industrial adjudication. The general principles of it are, however applicable. The decision relied upon by the learned counsel for the petitioner in the case of **Ajodhya Prasad Bhargava** (supra) is not regarding the applicability of section 145 of the Evidence Act to an Industrial Disputes Act proceeding rather it was in the context of adjudication of a civil suit proceeding. Therefore, we are not inclined to place any reliance on such decision. However, we are of the view that the method adopted by the learned Labour Court in comparing the evidence of Prakash Nagar in two different proceeding to find out contradictions particularly when the opp. party no.2 was not an accused in the criminal case proceeding, was not proper and justified.

M.W. No.5 Prakash Nagar in his evidence affidavit in paragraph 4 has stated about the misconduct of opp. party no.2 in the incident dated 05.05.1994. However, in the cross-examination he has admitted that he was not present at the spot and also at the relevant time during the incident as described by him under paragraph 4 of his affidavit upon which F.I.R. was lodged by the Management. He further stated that no F.I.R. was lodged with regard to the alleged incident dated 05.05.1994. Therefore, the evidence of M.W. No.5 relating to the incident dated 05.05.1994 alleging misconduct against opp. party no.2 is not acceptable. Though M.W. No.5 stated in his evidence affidavit relating to some incident stated to have taken place on 28.03.1994 in paragraph 6 but in paragraph 23 of his cross-examination, he stated that he did not remember whether any show cause notice was issued by the management in relation to the incident dated 28.03.1994 and he admits that no F.I.R. was lodged with regard to the alleged incident dated 28.03.1994. Even though M.W. No.5 stated that on 01.05.1994 the opp. party no.2 and other workers organized a meeting in front of the factory main gate without obtaining any permission from the concerned authority and persuaded the willing workmen not to join the duty on that day and threatened them with dire consequence in case they join their duties but the learned Tribunal analysed the evidence and held that if at all any meeting was organized on the 'May Day' i.e. International Workers Day which is a holiday and that too outside the factory premises, the same can by no stretch of imagination be construed as misconduct in employment and no charge sheet can be sustained for such alleged act.

The learned Labour Court also analysed the evidence of other witnesses like M.W. No.3 Om Prakash Sharma, M.W. No.4 Padma Lochan Nayak and M.W.6 Kajol Ray Chowdhury examined by the management and found the same to be not reliable and trustworthy. All these three witnesses stated about the incident that took place on 05.05.1994 in which the opposite party no.2 workman and others stated to have entered inside the chamber of M.W. No.5 forcibly and unauthorizedly and demanded withdrawal of show cause letters issued against two workmen and ultimately M.W. No.5 was rescued by police. Since M.W. No.5 himself states that he was not present at the spot on that day, the evidence of these three witnesses do not inspire confidence. It was further held by the learned Labour Court that no station diary entry was proved relating to the alleged occurrence which creates reasonable suspicion about its happening. The learned Court found that there is no cogent material to hold the charges as sustainable rather the charges

were framed intentionally so that the workman could be dismissed from his service. The findings recorded by the Court are neither perverse nor irrational. In the case of **Shashi Bhusan Prasad** (supra), it is held that the two proceedings criminal and departmental are entirely different and they operate in different fields and have different objections. Even if do not consider the evidence of M.W. No.5 as given in the criminal case relating to the incident dated 05.05.1994, we find as per the discussion above that the evidence of the management witnesses are not acceptable to sustain the charges which are also defective as pointed out in the impugned award. A finding of fact cannot be challenged on the ground that relevant materials and evidence adduced before the Court below was insufficient or inadequate to sustain the findings. The adequacy or sufficiency of evidence and the inferences to be drawn from the evidence are the exclusive domain of the Court below and the same cannot be agitated before this Court. Even if another view is possible on the evidence adduced before the learned Court below, this Court would not be justified to interfere with the findings recorded by the Court. When the findings recorded by the Court are perverse or irrational or arrived at by ignoring materials on record or arbitrary or contrary to the principles of natural justice, the same can be interfered with by this Court in a petition under Article 226 of the Constitution. (Ref:-**A.I.R. 1964 S.C. 477**, **Syed Yakoob -Vrs.- K.S. Radhakrishnan**)

10. In view of the foregoing discussions, we do not find any perversity or error apparent on record or illegality in the impugned order dated 08.05.2015. We also agree with the view taken by the learned Labour Court in the impugned award dated 30.10.2018 that the action of the petitioner management in dismissing the opp. party no.2 workman with effect from 10.11.1994 was not legal or justified.

11. The question that now remains for consideration is whether the order of reinstatement with full back wages along with all other consequential service benefits in favour of the opp. party no.2 as was directed by the learned Labour Court is also to be confirmed or not or any other relief is to be granted to the opposite party no.2 in the interest of justice.

In the case of **Asst. Engineer, Rajasthan Dev. Corp. & Another - Vrs.- Gitam Singh reported in (2013) 5 Supreme Court Cases 136**, the Hon'ble Supreme Court held that it can be said without any fear of contradiction that the Supreme Court has not held as an absolute proposition that in cases of wrongful dismissal, the dismissed employee is entitled to

reinstatement in all situations. It has always been the view of the Supreme Court that there could be circumstance(s) in a case which may make it inexpedient to order reinstatement. Therefore, the normal rule that the dismissed employee is entitled to reinstatement in cases of wrongful dismissal has been held to be not without exception. Insofar as wrongful termination of daily-rated workers is concerned, the Supreme Court has laid down that consequential relief would depend on post of factors, namely, manner and method of appointment, nature of employment and length of service. Where the length of engagement as daily wager has not been long, award of reinstatement should not follow and rather compensation should be directed to be paid. It was further held that a distinction has to be drawn between a daily wager and an employee holding the regular post for the purposes of consequential relief. In the said case, the Hon'ble Supreme Court set aside the order of the learned Single Judge as well as the Division Bench of the High Court in confirming the award of the Labour Court in directing reinstatement of the respondent Gitam Singh and also 25% of back wages and held that compensation of Rs.50,000/- by the appellant to the respondent shall meet the ends of justice. Similar view has been taken by the Hon'ble Supreme Court in the cases of **State of M.P. and others -Vrs.- Lalit Kumar Verma reported in (2007) 1 Supreme Court Cases 575**, **Uttaranchal Forest Development Corporation -Vrs.- M.C. Joshi reported in (2007) 9 Supreme Court Cases 353**, **Sita Ram and others -Vrs.- Motilal Nehru Farmers Training Institute reported in (2008) 5 Supreme Court Cases 75**, **Ghaziabad Development Authority -Vrs.- Ashok Kumar reported in (2008) 4 Supreme Court Cases 261** and **Jagbir Singh -Vrs.- Haryana State Agriculture Marketing Board and another reported in (2009) 15 Supreme Court Cases 327**. The aforesaid view has also been reiterated by this Court in the case of **Executive Engineer, Badanala Irrigation Division, Kenduguda -Vrs.- Ratnakar Sahoo and another reported in 2011 (Supp.I) Orissa Law Reviews 556**.

In the case of **District Development Officer -Vrs.- Satish Kantilal Amrelia reported in (2018) 12 Supreme Court Cases 298**, it is held that even though the termination was bad due to violation of section 25-G of the I.D. Act but it would be just, proper and reasonable to award lump sum monetary compensation to the respondent in full and final satisfaction of his claim of reinstatement and accordingly a total sum of Rs.2,50,000/- was directed to be paid to the respondent in lieu of his right to claim reinstatement and back wages in full and final satisfaction of the dispute.

It is not in dispute that the opp. party no.2 was appointed as a helper w.e.f. August 1991 and he was terminated from his service w.e.f. 10.11.1994. The opp. party no.2 is now aged about 56 years as mentioned in his Vakalatnama filed on 18.11.2019. Considering the nature of his employment, his age, passage of 25 years since the date of termination, we are of the view that in the peculiar facts and circumstances of the case, the direction of reinstatement in service to the opposite party no.2 is not sustainable in the eye of law. However, taking into account the length of period he faced litigation in different forums, the litigation costs incurred by him, his sufferings and the fact that we are not in favour of his reinstatement, we are of the humble view that in lieu of his reinstatement, full back wages along with all other consequential service benefits as was directed by the learned Labour Court, an amount of compensation of Rs.3,00,000/- (rupees three lakhs only) in favour of opp. party no.2 would be just, proper and reasonable. The petitioner shall pay the compensation amount to the opp. party no.2 within a period of three months from today. With the aforesaid observation, the writ petition is disposed of.

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2020 (I) ILR - CUT- 479

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

WA NO.142 OF 2019

SUDHAKAR TIPATHY ……..Appellant

Vs.

STATE OF ORISSA & ORS. ……Respondents

LETTERS PATENT APPEAL – The question arose as to whether writ appeal is maintainable against the order rejecting the interim prayer? – Held, for the purposes of Letters Patent the test is whether the order is a final determination affecting vital and valuable rights and obligations of the parties concerned and that has to be ascertained on the facts of each case.

Case Laws Relied on and Referred to :-

1. 2010(II) OLR 85 : The Management of D.A.V. Public School, Chandrasekharpur Vs. State Government of Orissa, & Anr.
2. JT 2001(2) SC 87 : Employer in Relation to Management of Central Mine Planning and Design Institute Ltd. Vs.. Union of India & Anr.

For Appellant : Mr. K.K.Swain
For Respondents : Mr. J.Katikia

ORDER Date of Order : 01.05.2019

Heard Mr. K.K.Swain, learned counsel for the appellant and Mr. J.Katikia, learned Additional Government Advocate for the State.

Learned counsel for the appellant cited two decisions, i.e., **The Management of D.A.V. Public School, Chandrasekharpur v. State Government of Orissa**, **represented by its Secretary and another**, reported in 2010(II) OLR 85 and **Employer in Relation to Management of Central Mine Planning and Design Institute Ltd. v. Union of India & Anr.,** reported in JT 2001(2) SC 87, to contend that this writ appeal is maintainable against the impugned order dated 13.03.2019 passed by the learned Single Judge in I.A. No. 4092 of 2019 pending W.P.(C) No. 17167 of 2017. The writ petition was filed to regularize the services of the petitioner-appellant against the post of Pharmacist with all consequential benefits within a time limit on quashing of Annexures- 11 and 12.

I.A. No. 4092 of 2019 was filed to stay the order dated 16.02.2019 in Annexure-14 till disposal of the writ appeal. By that order of the Executive Officer, Puri Municipality dated 16.02.2019 vide Annexure-14, the appellant was directed to hand over the detailed charges to one Padosh Mumar Swain, Pharmacist, in charge of Pharmacist, Muncipal Hospital, Swargadwara and Dolabedikona Dispensary with immediate effect. Learned Single Judge dismissed the interlocutory application (I.A.) stating that "since the petitioner was appointed against the substantive post of a Dresser, he was directed to hand over the detailed charge to one Pradosh Mumar Swain and thereby no illegality or irregularity was committed by the authority so as to warrant interference by this Court."

In the cited **D.A.V. Public School, Chandrasekharpur** case (supra) decision of this Court it has been stated that "It is well settled legal position of law that any order that would be passed including an order of either granting an interim order or not granting an interim order is appealable under Section 10 of L.P.A."

The Hon'ble Supreme Court in **Employer in Relation to Management of Central Mine Planning** case (supra) has clarified that "appeal lies against intermediary or interlocutory judgment where "such

other orders which possess the characteristics and trappings of fanality and may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding."

In that case it is held that for the purposes of Letters Patent the test is whether the order is a final determination affecting vital and valuable rights and obligations of the parties concerned and that has to be ascertained on the facts of each case.

In the instant case, the question is whether the right of the appellant is affected under Annexure-14 by ordering to hand over charge. There is no dispute that the petitioner-appellant was holding the post of 'Dresser' and in absence of available of substantive post of Pharmacist he was in charge of that.

The process of making over and taking over charge is a necessary adjunct of duty of an employee. It is a routine business of the employer to ask employee to make over and take over charge but when such direction affects the service condition of the post the employee held, the same can be said to have effect on the right incidental to the 'post' or breach of service condition. Otherwise the employee is to yield to such discretion of the employer.

The petitioner has no absolute right over the properties of which he is directed to make over. Such direction does not affect the conditions precedent to the performance of the duties attached to the post of Dresser. If he feels aggrieved, it is not for the post he substantially holds but the post he wants to hold in future if created. A duty akin to the future post does not need protection in presenti stay order, pending final adjudication of the writ petition.

In view of the above analysis, the right and obligation of the appellant is no way found to have been affected by the order under Annexure-14 and the impugned order refusing to stay Annexure-14 is not appealable in this intra court appeal.

The appeal is not maintainable and accordingly the same is dismissed.

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2020 (I) ILR - CUT- 482

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

CRLA NO. 74 OF 2001

NAKULA BAG …….Appellant

.Vs.

STATE OF ORISSA …….Respondent

CRIMINAL TRIAL – Offence under section 302 and 201 of Indian Penal Code – Conviction – Sentenced to undergo imprisonment for life - Case is entirely based on circumstantial evidence – Circumstances are that deceased Bibachha Dhangada Majhi had illicit relationship with the accused Lochana Bag the wife of the present appellant and he has spent his money lavishly on accused Lochana Bag – The second circumstance is that on the date of occurrence the deceased Bibachha Dhangada Majhi entered into the house of the appellant Nakula Bag and thereafter could not be seen by anybody for which P.W.4 and her husband searched for the deceased – Third circumstance is that the other witnesses have told about the leading to discovery of the torch light and the Pudapitha thenga on the information given by the appellant Nakula Bag while in police custody – Fourth circumstance is that the cement floor of the house of the appellant Nakula Bag stained with blood which was found in chemical examination – Plea of the appellant that the circumstances have not been established cogently and clearly – Principles to be followed – Held, any case which is based on circumstantial evidence has to be judged in the light of five golden principles that constitute the Panchsheel to prove a case based on circumstantial evidence – From the evidence it appears that the chain of circumstances have broken and it is not forming the chain of circumstances complete – Conviction and sentence set aside.

Case Laws Relied on and Referred to :-

1. AIR 1984 SC 1622 : Sharad Birdhichand Sarda Vs. State of Maharashtra.
2. AIR 2011 SC 2283 : Sk. Yusuf Vs. State of West Bengal.

For Appellant : M/s. D.K. Mishra, Prabhav Behera, S.C. Mohanty, G.K. Nayak and R. Mahalik.

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

JUDGMENT Date of Hearing and Judgment : 18.12.2019

S. K. MISHRA, J.

In this CRLA, the sole appellant assails his conviction and sentence to undergo imprisonment for life for commission of offence under Section

302 of the I.P.C. and to undergo imprisonment for one year for commission of offence under Section 201 of the Indian Penal Code, 1860 (hereinafter referred to as "the I.P.C." for brevity) recorded by the learned Sessions Judge, Kalahandi-Nuapada, Bhawanipatna in Sessions Case No.75 of 1999 vide the judgment of conviction and order of sentence dated 28.03.2001. In the said case, it has further been directed that both the sentences are to run concurrently.

2. The case of the prosecution in short is that on 17.04.1999 at about 5.30 P.M. the complainant Kalakanhu Dhangada Majhi of village Kapsara appeared before the Officer-In-Charge of Sadar Police Station, Bhawanipatna and presented a written report alleging therein that on 08.04.1999 at about 7.00 P.M. his son Bibachha Dhangada Majhi went away to somewhere after taking his night meal wearing pant and shirt and holding a torch light and did not return even on the following morning. As such, his family members searched for him, far and near the village, and could not trace him out. On 17.04.1999 at about 12.00 noon, he came to know that a dead body of a person was lying near the Dengachanchara Nala. He went there and after due verification identified the dead body of his son from the sight of his shirt on the body and Turkish towel lying near the dead body which belonged to his son Bibachha Dhangada Majhi. He further reported that some unknown persons have killed his son and thrown his dead body there. The Officer-in-Charge, Sadar Police Station, Bhawanipatna registered the case and investigated the same.

2.1. In course of investigation, the Officer-in-Charge, Sadar Police Station, Bhawanipatna examined the witnesses, held inquest on the dead body of the deceased, made seizures, dispatched the dead body of the deceased for post-mortem examination, arrested the accused persons, recorded the statement of the sole appellant under Section 27 of the Indian Evidence Act, 1872 (hereinafter referred to as "the Evidence Act" for brevity) and sent the material objects for chemical examination and upon completion of the investigation, submitted charge-sheet under Sections 302 and 201 read with Section 34 of the I.P.C. against six persons including the present appellant treating him to be the main accused.

3. In this case, the defence took a plea of simple denial and false accusation. Only the appellant was convicted and rest of the accused persons were acquitted.

4. In order to prove its case, the prosecution has examined as many as 12 witnesses and the defence has examined none. The prosecution has also led a number of documents as exhibits but the same has not led into evidence any material object in this case.

5. P.W.1-Kalakanhu Dhangada Majhi, happens to be the father of the deceased Bibachha Dhangada Majhi. P.W.4 Nira Dhangada Majhi happens to be the mother of the deceased and is an important witness so far the prosecution is concerned. P.W.2-Aswini Kumar Bemal has scribed the F.I.R. P.W.3- Drona Nag and P.W.6- Nabe Dhangada Majhi have witnessed the seizure of torch light and Pudapitha thenga on the discovery statement of the accused/appellant. P.W.5 has witnessed to the alleged discovery statement made by the accused/ appellant while in the custody of the police. P.W.7-Sadhu Bhoi has stated about the illicit relationship between the accused Lochana Bag who is acquitted in this case and the deceased Bibachha Dhangada Majhi. P.W.8-Jaya Dhangada Majhi attended the inquest over the dead body of the deceased and stated about the relationship between the accused Lochana Bag and the deceased Bibachha Dhangada Majhi. P.W.9-Surendranath Dhangada Majhi, the Havildar of Fire Brigade, has brought out the torch light from the well after draining of water from the said well. P.W.10-Bhaskara Chandra Patra, Assistant Fire Officer in whose presence, torch light was seized. P.W.11-Dr. Malaya Kumar Behera has conducted post-mortem examination on the dead body of the deceased. P.W.12- Kishore Kumar Panda is the Officer-In-Charge of Sadar Police Station, Bhawanipatna who has completed the investigation and submitted charge-sheet against the appellant and other accused persons.

6. Taking into consideration the evidence of P.W.11, learned Sessions Judge, Kalahandi-Nuapada, Bhawanipatna came to the conclusion that the death of the deceased, as stated by him which is also reflected in the post-mortem examination report, was homicidal in nature and he died due to the injury to the brain which can be caused by a hard and blunt weapon.

7. Learned counsel for the appellant does not dispute this finding of the learned Sessions Judge, Kalahandi- Nuapada, Bhawanipatna. But, he seriously contends that the circumstances appearing in this case do not for a complete chain of circumstances unerringly pinpointing to the guilty of the appellant. So, as this aspect is not challenged, we need not further examine the evidence of P.W.11 and the post-mortem report as it is not in dispute.

8. Admittedly, the case is entirely based upon the circumstantial evidence and the circumstances which are appearing in this case have been described by the learned Sessions Judge, Kalahandi-Nuapada, Bhawanipatna in paragraph-24 of the of the aforesaid judgment. The circumstances are as follows:

(i) the deceased Bibachha Dhangada Majhi had illicit relationship with accused Lochana Bag and has lavishly spent on Lochana Bag from the amount which he brought from Bombay;

(ii) on the date of occurrence, deceased Bibachha Dhangada Majhi had entered into the house of the appellant Nakula Bag and thereafter he could not be seen by anybody;

(iii) while in police custody, the accused-appellant Nakula Bag led to seizure of the torch light from the well and also the Pudapitha thenga on his information;

(iv) the cement floor of the house of the appellant Nakula Bag stained with blood and the appellant Nakula Bag had brought the Pudapitha thenga from the Mancha which he had concealed in the Mancha and gave to the police officer for seizure.

9. From the evidence of P.Ws.2, 3 and 4 the mother of the deceased it is proved that deceased Bibachha Dhangada Majhi had illicit relationship with the accused Lochana Bag the wife of the present appellant and he has spent his money lavishly on accused Lochana Bag from the amount which he earned from Bombay. The second circumstance is that on the date of occurrence the deceased Bibachha Dhangada Majhi entered into the house of the appellant Nakula Bag and thereafter could not be seen by anybody for which P.W.4 and her husband searched for the deceased. Third circumstance is that the other witnesses have told about the leading to discovery of the torch light and the Pudapitha thenga on the information given by the appellant Nakula Bag while in police custody. Fourth circumstance is that the cement floor of the house of the appellant Nakula Bag stained with blood which was found in chemical examination.

10. This being the circumstances, the learned counsel for the appellant argues that the said circumstances have not been established cogently and clearly. In this regard, he relies upon the off-qouted judgment passed in the case of **Sharad Birdhichand Sarda –vrs.- State of Maharashtra**: reported in AIR 1984 SC 1622, wherein the Hon'ble Supreme Court has held that:

> "the following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established;

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

xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx

(2) the facts so established should be consistent only with the hypothesis of the guilt 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."

These five golden principles constitute the Panchsheel of the proof of a case based on circumstantial evidence. Any case which is based on circumstantial evidence has to be judged in the light of these particular five golden principles.

11. The first circumstance is that the deceased Bibachha Dhangada Majhi had illicit relationship with the wife of the appellant, namely, Lochana Bag. That aspect is not disputed by the learned counsel for the appellant. But, he seriously disputes the second circumstance i.e. the deceased Bibachha Dhangada Majhi had entered into the house of the appellant Nakula Bag in the night of occurrence. It is seen that P.Ws.2, 3 and 4 have been relied upon by the learned Sessions Judge, Kalahandi-Nuapada, Bhawanipatna to come to the conclusion that the deceased Bibachha Dhangada Majhi had entered into the house of the appellant Nakula Bag in that fateful night. For that it is needed to examine the evidence of these three witnesses. P.W.2- Aswini Kumar Bemal has stated that he knew P.W.1- Kalakanhu Dhangada Majhi. As per his instructions, he (P.W.2) scribed the F.I.R. which he read over to him (P.W.1) and he has not been cross-examined. This witness (P.W.2) has not stated regarding the entry of the deceased Bibachha Dhangada Majhi in the house of the appellant Nakula Bag in that fateful night. P.W.3-Drona Nag has been examined as a witness to the seizure of one torch light and he has signed the seizure list. He has also witnessed to the recording of statement of the appellant Nakula Bag under Section 27 of the Evidence Act. From the evidence of this witness, it is also seen that he has not stated anything regarding the entry of the deceased Bibachha Dhangada Majhi into the house of the appellant Nakula Bag in that fateful night. P.W.4-Nira Dhangada

Majhi who has allegedly stated about the occurrence. She has stated that near their house, a shop situates. The deceased Bibachha Dhanga Majhi came from Bombay with Rs.20,000/-. He gave the same to her. She and her husband wanted to get him married. But deceased Bibachha Dhangada Majhi told them that first the house should be constructed. Regarding the fateful night at paragraph-3 of her examination-in-chief she has stated that about one and half year back on a Thursday in the night, she served food to the deceased Bibachha Dhangada Majhi. Then he took his meal. Thereafter, the deceased Bibachha Dhangada Majhi wore pant, shift and took with him one torch light. The colour of the shift was red and the pant was black and blue. He also took with him one towel (Gamchha). Then he went and sat in the shop of Sadhu Bhoi (P.W.7). This witness had seen the deceased while he was sitting in the shop of Sadhu and thereafter he focused the torch light and then Lochana made a sound of "Khan Khan" and came to him. They talked in low voice. Then this witness needed to go to answer the call of nature and told her husband to accompany her. When she again came back, she did not find her son there. So, it is clear that this witness has stated nothing regarding entry of the deceased into the house of the appellant Nakula Bag. Even the evidence of Sadhu Bhoi (P.W.7) does not help to the prosecution, as P.W.7 has not stated about the occurrence that the deceased met Lochana and entered into the house of the appellant Nakula Bag. So, this circumstance is not established by the prosecution.

12. The next circumstance is leading to discovery of the torch light and the weapon of offence. In this connection, learned counsel for the appellant relies upon the reported judgment passed in the case of **Sk. Yusuf -vrs.- State of West Bengal**: AIR 2011 SC 2283 wherein the Hon'ble Supreme Court has held that the nature of admissibility of the fact discovered pursuant to the statement of the accused under Section 27 of the Indian Evidence Act, 1872 is very limited. It has been further held that if an accused deposes to the police officer the fact as a result of which the weapon with which the crime is committed is discovered, and as a result of such disclosure, recovery of the weapon is made, no inference can be drawn against the accused, if there is no evidence connecting the weapon with the crime alleged to have been committed by the accused. In this case, firstly, the torch light has been recovered basing on the discovery statement made by the accused/ appellant. But, none of the witnesses identified the same in the Test Identification Parade and deposed that torch light discovered from the well belonged to the deceased. So, there is no connection between the offence and the object discovered in this case so far as the torch light is concerned.

13. The second object Pudapitha thenga was sent for chemical examination. The chemical examination report is marked as Ext.15. Ext.15 reveals that the wooden thenga has been marked as Ext. 'F' and it was not detected with any blood stain. So, there is no connection between the object discovered i.e. the Pudapitha thenga and the crime in this case and the case cited by the learned counsel for the appellant squarely applies to this case.

14. Since, in this case, the chain has broken and it is not forming a chain of circumstances 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, we are of the opinion that the judgment of conviction and order of sentence rendered by the learned Sessions Judge, Kalahandi-Nuapada, Bhawanipatna in Sessions Case No.75 of 1999 is liable to be interfered with.

15. Accordingly, we allow this CRLA and set aside the conviction and sentence of the appellant under Sections 302 and 201 of the I.P.C. recorded by the learned Sessions Judge, Kalahandi-Nuapada, Bhawanipatna in the aforesaid case. The appellant is, therefore, acquitted of the charges in the aforesaid case.

16. Learned counsel for the appellant submits that the appellant is on bail. Hence, the learned Sessions Judge, Kalahandi-Nuapada, Bhawanipatna shall cancel the bail bond in the aforesaid case. The L.C.R. be returned back forthwith.

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2020 (I) ILR - CUT- 488

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

MATA NO. 18 OF 2016
(MISC. CASE NO. 150 OF 2016)

BIPASHA @ BIPASA .....Appellant

Vs.

AMITAVA BASU .....Respondents

HINDU MARRIAGE ACT, 1955 – Section 9, 12 (1) (c) and 24 – Provisions under – Husband filed petition under section 12(1) (c) to declare the marriage a nullity on the ground that his consent for marriage was obtained by fraud as to burn injury concerning the wife – Wife filed a

petition under section 9 of the Act for restitution of conjugal right – Petition filed by husband allowed and the petition of wife dismissed – Appeal by wife against the order declaring the marriage a nullity along with a petition for directing payment of interim maintenance – Objection raised by husband that the petition under section 24 seeking interim maintenance not maintainable as the marriage has already been declared a nullity – Whether legally acceptable? – Held, No, the petition seeking interim maintenance maintainable.

"An order of interim maintenance under Section 24 of the Act is not a final determination and does contemplate a summary enquiry. The provision clearly provides that the Court may order for maintenance pendent lite in any proceeding under the Act. The initial words of the section clearly encompass any proceeding including the proceeding under Section 12 of the Act. There is no ambiguity in the initial words covering "any proceeding under this Act." No distinction has been made for claiming maintenance pendent lite in the proceedings between Sec. 12 or any other section of the Act. Such initial words being clear and unambiguous, no interpretation to exclude Sec.12 of the Act proceeding is attributable. It is not a slippery slope for the section read as a whole to admit exclusion as argued by the learned counsel for the opposite party. The claim of maintenance pendent lite is maintainable in this appeal where declaring the marriage null and void under Section 12 of the Act is assailed." *(Para 3-A)*

Case Laws Relied on and Referred to :-

1. AIR 2005 SC 422 : Ramesh Chandra Rampratapji Daga Vs. Ramemshwari Ramesh Chandra Daga.
2. 2014(3) KLJ 667 : T.K.Surendran Vs. P.Najima Bindu.
3. 2005 (3) SCC 636 : Savitaben Somabhai Bhatiya Vs. State of Gujarat and Ors.
4. 1993 SCC (3) 406 : Smt Chand Dhawan Vs. Jawaharlal Dhawan.
5. AIR 2004 Jharkhand 22 : Sandeep Kuar @ Bobby Vs. The State of Jharkhand & Anr.

For Appellant : H.B. Dash, A.R. Das
For Respondents : M/s. Goutam Mukeherji, A.C.Panda, S.Sahoo, S. Priyadarsin, M.Chatterjee.

ORDER Date of Order : 29.01.2020

This is an application under Sec. 24 of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act" in brevity) filed by the petitioner-wife.

2. The facts hovering in the backdrop may be recapitulated thus:-

The petitioner-wife married opposite party on 11.03.2011 as per the Hindu rites and customs. It was an arranged marriage. On 26.03.2011 during

fourth-night the husband detected burn injury from belly to the knee of the wife and the marriage was not consummated. On 28.03.2011 the wife was left to stay in her father‟s house. Since then both of them have been staying separately. The husband filed C.P. No. 82 of 2011 to declare the said marriage nullity under Section 12 (1)(c) of the Act on the ground that his consent was obtained by fraud as to burn injury concerning the wife. The petitioner-wife also filed C.P.No.216 of 2011 under Section 9 of the Act for restitution of conjugal rights. Both the petitions were taken-up by the learned Judge, Family Court, Rourkela for hearing. Finally vide judgment dated 28.1.2016 the proceeding of the wife for restitution of conjugal rights was dismissed. The prayer of the husband was allowed and the marriage was declared null and void. The wife has filed this appeal assailing the decree of nullity.

2-A. In this appeal this petition under Section 24 of the Act is filed praying Rs.10,000/-(Rupees ten thousand) per month for her maintenance on the ground that the petitioner is unable to maintain her-self as she has no income and the husband working in a company is getting Rs.50,000/(Rupees fifty thousand) per month. It is also averred that wife was allowed interim maintenance in the lower court @ Rs.2000/-(Rupees two thousand) per month.

The opposite party-husband has filed objection contending that when the marriage is declared null and void, the wife is not entitled to for interim maintenance. Further he has no income as he has already out of service and is unemployed. The husband has also stated that the petitioner-wife being a qualified singer has been earning a good amount.

2-B. Mr. Pabitra Kumar Nayak, learned counsel for the petitioner-wife submitted that as the appeal is thecontinuation of the proceedings, the wife is entitled to interim maintenance as she is unable to maintain her-self. He relied upon the decisions reported in (1) AIR 2005 SC 422: **Ramesh Chandra Rampratapji Daga Vrs. Ramemshwari Ramesh Chandra Daga** and (2) 2014(3) KLJ 667: **T.K.Surendran Vrs. P.Najima Bindu.**

Mr. G. Mukharji, learned senior counsel for opposite party husband submitted that when the marriage is declared nullity on the ground of suppression of material fact, the wife is not entitled to maintain a petition under Section 24 of the Hindu Marriage Act and learned lower court has not allowed any alimony. Further the husband is not capable to give any interim

maintenance as he has no source of income. He relied upon a decision reported in 2005 (3) SCC 636: **Savitaben Somabhai Bhatiya Vrs. State of Gujarat and Ors**.

3. Now descending to the point of law, it is found that the cited judgment in Sabitaben‟s case deals with the scope and ambit of Sec.125 of the Cr.P.C. and the Hon‟ble Supreme Court held in the factual situation that the wife whose marriage is ab-initio null and void cannot claim maintenance under Section 125 Cr.P.C. The ratio decided therein is no way helpful to this proceeding under Section 24 of the Act. The judgment of Hon‟ble Kerala High Court in T.K.Surendran‟s case also deals with the dispute under Section 125 of the Cr.P.C. Hon‟ble Supreme Court in the decision of **Smt Chand Dhawan Vrs. Jawaharlal Dhawan**: reported in 1993 SCC (3) 406 has observed that:-

> "On the other hand, under the Hindu Marriage Act, in contrast, her claim for maintenance pendente lite is durated (sic) on the pendency of a litigation of the kind envisaged under sections 9 to 14 of the Hindu Marriage Act, and her claim to permanent maintenance is based on the supposition that either her marital status has been strained or affected by passing a decree for restitution of conjugal rights or judicial separation in favour or against her, or her marriage stands dissolved by a decree of nullity or divorce, with or without her consent. Thus when her marital status is to be affected or disrupted the court does so by passing a decree for or against her."

3-A. In that judgment the Hon‟ble Apex Court has also observed that an order of interim maintenance can be made at the outset without much contest. The above judgment of Chand Dhawan‟s case is reiterated in Ramesh Chandra Rampratapji Daga case (supra). In a decision reported in AIR 2004 Jharkhand 22: **Sandeep Kuar @ Bobby Vrs. The State of Jharkhand and Anr.,** the Hon‟ble Jharkhand High Court has expressed in the light of our view in the following words:-

> "6. So far as maintenance pendent lite and expenses of proceeding are concerned no distinction has been made under Section 24 of the Hindu Marriage Act relating to right of a wife for maintenance in case preferred under Sections 12 or 13 of the Hindu Marriage Act."

An order of interim maintenance under Section 24 of the Act is not a final determination and does contemplate a summary enquiry. The provision clearly provides that the Court may order for maintenance pendent lite in any proceeding under the Act. The initial words of the section clearly encompass

any proceeding including the proceeding under Section 12 of the Act. There is no ambiguity in the initial words covering "any proceeding under this Act." No distinction has been made for claiming maintenance pendent lite in the proceedings between Sec. 12 or any other section of the Act. Such initial words being clear and unambiguous, no interpretation to exclude Sec.12 of the Act proceeding is attributable. It is not a slippery slope for the section read as a whole to admit exclusion as argued by the learned counsel for the opposite party. The claim of maintenance pendent lite is maintainable in this appeal where declaring the marriage null and void under Section 12 of the Act is assailed.

4. The petitioner-wife has stated about the income of her husband-opposite party as a service holder in the petition supported by an affidavit. She has also stated therein that she has no source of income. The objection of the husband is not supported by any affidavit. No documentary evidence is filed by either of the parties. It is not disputed that the petitioner-wife was getting Rs.2000/-(Rupees two thousand) as interim maintenance during pendency of the proceeding before the learned Judge, Family Court, Rourkela.

The object of Sec. 24 of the Act is to ensure that a party to a proceeding does not suffer during the pendency of the proceeding by reason of poverty. Maintenance is not a charity, which is given by the husband to the wife. It is the duty of the husband to see that the wife does not starve and thereby become incapable to prosecute the appeal. Subsistence is a bare need and the husband during pendency of the appeal cannot escape from that responsibility. For the limited purpose of Section 24 of the Act, having carefully gone through the respective contentions and pleadings, we are of the considered view that the petitioner-wife has no source of income and the husband being an able bodied man is capable to earn minimum wages and thereby can spare Rs.3000/-(Rupees three thousand) per month as interim maintenance. This factual finding is the outcome of the assessment of the respective claims made in their petition and argument advanced in absence of any document.

5. The proceedings in the appeal are the continuation of the proceedings of which decree is assailed. This Court is competent to make an order as an appellate court U/s.24 of the Act. The court exercises a wide discretion in the matter of granting alimony pendent lite, the said discretion is guided by

sound principles. Having arrived at such conclusion, we feel it reasonable regards being had to the requirement of the wife and ability of the husband to allow a sum of Rs.3000/-(Rupees three thousand) per month as maintenance pendent lite to be paid from date of filing of this petition.

In the result, the misc. case is allowed on contest without costs. The opposite party- husband is directed to pay a sum of Rs.3000/-(Rupees three thousand) per month towards maintenance pendent lite to the petitioner-wife with effect from the date of filing of this petition i.e., 12.09.2016. Accordingly, the Misc. Case is disposed of.

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2020 (I) ILR - CUT- 493

DR. B.R. SARANGI, J.

W.P.(C) NO. 22693 OF 2010

SMT. SABITA DAS .....Petitioner

.Vs.

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

ORISSA FOREST ACT, 1972 – Section 56 – Confiscation Proceeding – Offence report for violation of Rule 4 of the Orissa Timber and Other Forest Produce Transit Rules, 1980 and Section 3 of Orissa Kendu leaves (Control of Trade) Act, 1961 punishable under Section 14 of the said Act – Order of confiscation passed and confirmed by District Judge – Writ petition – Plea that the Authorized Officer-cum-Asst. Conservator of Forests while adjudicating the confiscation proceeding has not taken note of the material evidence available on record – Materials available supports the plea – Both the orders set aside, matter remanded to Authorized officer for fresh order. (Paras 8 & 9)

On careful perusal of the evidence, reproduced hereinbefore, vis-à-vis the impugned judgment and order passed by the Authorized Officer, this Court comes to a definite conclusion that the highlighted and underlined portion of the evidence, which were very much available on record, ought to have been taken into consideration by the Authorized Officer for just and proper adjudication of the confiscation proceeding, and that too by affording opportunity of hearing to the parties.

For Petitioner : M/s. Dharanidhar Nayak, U.R. Jena & D.K. Sahoo
For Opp. Parties : Mr. D.K. Pani, Addl. Standing Counsel

JUDGMENT Decided On : 17.12.2019

DR. B.R. SARANGI, J.

The petitioner has filed this writ petition to quash the judgment and order dated 12.09.2008 passed by the Authorized Officer-cum-Asst.

Conservator of Forests, Athmallik Forest Division in C.P. Case No.04 of 2007-08 (arising out of O.R. Case No.160 H of 2007-08) in Annexure-3, which has been confirmed vide judgment and order dated 30.11.2010 passed by the learned District Judge, Dhenkanal in F.A.O. No.39 of 2008 under Annexure-4.

2. The factual matrix of the case, in hand, is that on 21.10.2007 at about 5 A.M., the Forester, Handapa Section, in presence of other forest staff and independent witnesses, seized one vehicle (Bolero) bearing registration No. OR 05 A-4042 carrying 122 bundles of Kendu leaves weighing 5.73 quintals illegally, but accused persons fled away from the place of seizure. Accordingly, U.D. case No.21-H of 2007-08 was registered. During enquiry, it was found that petitioner is the owner of the vehicle and one Manoj Samal of village Sainbiri, District-Dhenkanal was the driver of the aforesaid vehicle. Hence, the said U.D. case was converted to OR case No.160 H of 2007-08. The seized kendu leaves and the vehicle were kept under the custody of Rahas Sahu, Forester. During enquiry, he recorded the statements of Prasanna Kumar Pradhan, Forester Bamur; Kartikeswar Sahu; Sudhir Kumar Sahu and the petitioner-Sabita Das, owner of the vehicle. After due enquiry, the Range Officer, Handapa submitted Offence Report for violation of Rule 4 of the Orissa Timber and Other Forest Produce Transit Rules, 1980 and Section 3 of Orissa Kendu leaves(Control of Trade) Act, 1961 punishable under Section 14 of the said Act and requested to initiate confiscation proceeding under Section 56 of Orissa Forest Act, 1972. After inspecting the vehicle, along with seized produce, and believing that prima facie evidence existed in the case, the confiscation proceeding under Section 56 of Orissa Forest Act, 1972 was initiated. Show cause notice was issued to the petitioner and driver of the vehicle, Manoj Samal, vide memo nos.527 and 528 respectively, on 16.02.2008. The show-cause notice to the driver returned with the postal remark “insufficient address”. The petitioner submitted her reply stating that she had engaged Manoj Samal as the driver of her Bolero since September, 2007 on monthly payment basis. On 19.10.2007, the driver took the vehicle to Cuttack for major repair, but he did not return on that day. On 20.10.2007, she and her husband decided to lodge F.I.R. at Paradeep Police Station, but the I.I.C., Paradeep Police Station instructed her to search for the driver. On 28.10.2007, she read from the news paper “The Samaj” that a Bolero vehicle of Paradeep had been seized by Forest Department at Athmallik. Then, she lodged an F.I.R. in this regard at Paradeep Police Station. She further stated that the driver had used the vehicle for illegal purpose without her knowledge. Hence, she prayed for release of her vehicle.

3. The Authorized Officer-cum-Asst. Conservator of Forests, Athmallik Forest Division, vide judgment and order dated 12.09.2008 passed in C.P. Case No.04 of 2007-08 (arising out of O.R. Case No.160 H of 2007-08) in Annexure-3, confiscated the seized vehicle as well kendu leaves under Section 56 of the Orissa Forest Act. Against the said order, the petitioner preferred F.A.O. No.39 of 2008 before the learned District Judge, Dhenkanal, who, vide judgment and order dated 30.11.2010 confirmed the order passed by the Authorized Officer-cum-Asst. Conservator of Forests, Athmallik Forest Division. Hence this application.

4. Mr. D.K. Sahoo, learned counsel for the petitioner contended that the Authorized Officer-cum-Asst. Conservator of Forests, Athmallik Forest Division, vide order dated 12.09.2008 in C.P. Case No.04 of 2007-08 (arising out of O.R. Case No.160 H of 2007-08) directed the vehicle as well as seized materials to be confiscated to the State, and the said order has been confirmed by the learned District Judge, Dhenkanal in F.A.O. No.39 of 2008. While passing the said order, the Authorized Officer-cum-Asst. Conservator of Forests, Athmallik Forest Division has not taken into consideration the material evidence available on record. Had those evidence taken into consideration, the vehicle in question would have been released by the said authority. It is also contended that this Court, vide order dated 05.09.2011, passed interim order directing the Authorized Officer-cum-Asst. Conservator of Forests, Athmallik Forest Division to release the vehicle in question in favour of its registered owner on such terms and conditions as would be deemed just and proper along with cash certificate (N.S.C.) equivalent to the value of the vehicle to be assessed by the R.T.O., concerned. In compliance thereof, the Authorized Officer-cum-Asst. Conservator of Forests, Athmallik Forest Division has already released the vehicle in favour of the petitioner and as such, the said vehicle is in custody of the petitioner. It is further contended that had opportunity been given to the petitioner enabling her to participate in the process of hearing, she would have brought the discrepancies to the notice of the Authorized Officer and, in such event, the order impugned would not have passed. Therefore, the petitioner seeks for quashing of the same.

5. Mr. D.K. Pani, learned Additional Standing Counsel arguing with vehemence contended that since the vehicle in question was involved in forest offence, the same was seized. Accordingly, the Authorized Officer-cum-Asst. Conservator of Forests, Athmallik Forest Division by following due procedure envisaged under Section 56 of the Orissa Forest Act, 1972,

vide judgment and order dated 12.09.2008, directed for confiscation of the vehicle in question as well Kendu leaves and, as such, said order of confiscation has been confirmed by the learned District Judge, vide judgment and order dated 30.11.2010 passed in F.A.O. No.30 of 2008. Both the fact finding courts, having come to a concurrent conclusion that the same are liable to be confiscated, this Court should not interfere with the same. It is further contended that question of non-consideration of evidence by the Authorized Officer-cum-Asst. Conservator of Forests, Athmallik Forest Division cannot be a ground to release the vehicle in favour of the petitioner by closing down the confiscation proceeding.

6. This Court heard Mr. D.K. Sahoo, learned counsel for the petitioner and Mr. D.K. Pani, learned Additional Standing Counsel. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

7. Main thrust of argument of learned counsel for the petitioner is that the Authorized Officer-cum-Asst. Conservator of Forests, Athmallik Forest Division, while adjudicating the confiscation proceeding finally, has not taken note of the material evidence available on record, otherwise the vehicle in question would have been released, and for non-consideration of the evidence available on record, the petitioner has been seriously prejudiced.

8. In view of such position, the evidence, which has been extracted in paragraph-7 of the writ petition, is reproduced hereunder:

> *"7. That the prosecution to substantiate the case has examined as many as five witnesses, out of them*
>
> *P.W.1- Sri Prasanna Kumar Pradhan, Forester, Bamur. He has stated in his deposition to the extent that without receiving their signal one Bolero vehicle has rashly fled away towards Boinda and accordingly when he reached Boinda he has come to know that the said vehicle was caught hold by the forester Boinda at Jamunali. He has stated that* ***in his presence nothing has been seized and no seizure list was prepared although he has reached the spot after few minutes of the seizure****.*
>
> *P.W.2- Sri Kartikeswar Sahoo, who is the watcher and so far his statement is concerned he has stated that one vehicle was seized at Jamunali which was coming from the side of Boinda and he has stated at about 3 A.M. the vehicle was seized and the seizure list was prepared at Hondapa Range Office and he has signed there and* ***without knowing anything he has signed in the said seizure list at his office****.*

P.W.3-Gajendra Behera who is also an employee of Forest Department. He has stated that one vehicle was coming from Jamunali bye-pass and in the middle of the Jamunali village the vehicle was stopped and three persons have fled away from the said vehicle. He has stated that he has not been examined by the Range Officer nor he has been asked for about the case. He has further submitted that the seizure was prepared at the spot.

P.W.4-Sambhunath Sahoo. He claims he is also an employee of the Forest Department. He stated ***that one vehicle was seized in the middle of the village Jamunali*** *and three persons fled away from the spot.*

P.W.5- Rahas Sahoo, Forester and I.O. of this case. He has stated that he has recorded the statement of the seizure witnesses and some independent witnesses, but the witnesses have not supported the same. ***In a straight question put to him by the defence counsel i.e. whether the Kendu Leaves were there in the vehicle when he reached the spot?-no****.*

On the other hand the defence has examined three witnesses.

D.W.1- Smt. Sabita Das, owner of the seized vehicle.

D.W.2- Narayan Chandra Das, husband of the owner, and

D.W.3-Bidu Bhusn Sahoo of village Jamunali. The said witness is an independent witness and has stated that he has seen one vehicle was lying in the ditch and nothing was inside the vehicle."

On careful perusal of the evidence, reproduced hereinbefore, vis-à-vis the impugned judgment and order passed by the Authorized Officer, this Court comes to a definite conclusion that the highlighted and underlined portion of the evidence, which were very much available on record, ought to have been taken into consideration by the Authorized Officer for just and proper adjudication of the confiscation proceeding, and that too by affording opportunity of hearing to the parties.

9. In view of such position, this Court is of the considered view that the judgment and order dated 12.09.2008 passed by the Authorized Officer-cum-Asst. Conservator of Forests, Athmallik Forest Division in C.P. Case No.04 of 2007-08 (arising out of O.R. Case No.160 H of 2007-08) in Annexure-3, which has been confirmed by the learned District Judge, Dhenkanal, vide judgment and order dated 30.11.2010 passed in F.A.O. No.39 of 2010 under Annexure-4 cannot sustain in the eye of law and the same are hereby quashed. The matter is remitted back to the Authorized Officer-cum-Asst. Conservator of Forests, Athmallik Forest Division for reconsideration of the evidence available on record and passing a fresh order in accordance with law by affording opportunity of hearing to all the parties. Since the vehicle in

question has been released by virtue of interim order dated 05.09.2011, it is open to the Authorized Officer-cum-Asst. Conservator of Forests, Athmallik Forest Division to take back the same to his custody, subject to the fresh order to be passed in the confiscation proceeding. Needless to say that the entire exercise shall be completed as expeditiously as possible, preferably within a period of four months from the date of production of certified copy of this judgment.

10. With the above observation and direction, the writ petition stands disposed of. No order as to costs.

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2020 (I) ILR - CUT- 498

DR. B.R. SARANGI, J.

W.P.(C) NOS. 10176 & 23492 OF 2017

ANUSAYA GADANAYAK .....Petitioner

Vs.

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

AND

W.P.(C) NO. 23492 OF 2017

SRIKANTA SAHU .....Petitioner

.Vs.

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

(A) ORISSA MISCELLANEOUS CERTIFICATE RULES, 1984 – Rules 6,7 and 8 – Tahsildar issued caste certificate by passing an order under Rule 6 – Rule 7 is for review and rule 8 for appeal by 'any person aggrieved' – Caste certificate obtained by playing fraud – Tahsildar filed appeal before the Sub-Collector for cancellation of caste certificate – After providing opportunity of hearing the certificate was cancelled – Writ petition – Challenge is made to order cancelling the caste certificate on the ground that the appeal at the instance of the Tahsildar not maintainable – Whether can be accepted? – Held, No.

"*In view of aforesaid facts and circumstances, it can safely be concluded that the documents, which were produced for verification and issuance of SEBC certificate in favour of Anusaya Gadanayak were fraudulent and the SEBC certificate was obtained by her by perpetuating fraud. Consequentially, this Court is of the considered view that the SEBC certificate having been issued fraudulently in favour of Anusaya Gadanayak and the same having been cancelled by the superior*

authority, namely, Sub-Collector, Hindol, when it was brought to its notice, after causing enquiry and giving opportunity of hearing to the parties, this Court does not find any illegality or irregularity in the order dated 02.05.2017 passed by the Sub-Collector, Hindol in Appeal No.01 of 2017 so as to warrant interference of the same."
(Paras 9, 10 & 13)

(B) WORDS AND PHRASES – Fraud – Meaning of – Order obtained by fraud – Effect of – Held, it is settled proposition of law that where an applicant gets an order by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eye of law – Fraud and justice never dwell together (*fraus et jus nunquam cohabitant*) and it is a pristine maxim which has never lost its temper over all these centuries – The ratio laid down by the Supreme Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. (Para 12)

Case Laws Relied on and Referred to :-

1. (1956) 1 QB 702 : (1956) 1 All ER 341 : (1956) 2 WLR 502 : Lazarus Estates Ltd. Vs. Beasley.
2. E(2010) 8 SCC 383 : lektrim SA Vs. Vivendi Universal SA
3. (2008) 12 SCC 481 : K.D. Sharma Vs. SAIL
4. (1994) 1 SCC 1 : S.P. Chengalvaraya Naidu Vs. Jagannath.
5. (2003) 8 SCC 319 : Ram Chandra Singh .Vs. Savitri Devi.

For Petitioner : M/s. D.K. Dhar, R.B. Mishra & P.K. Dhal.
M/s P.S. Nayak & S.K. Jena

For Opp. Parties : Mr. D.K. Mohanty, Addl. Standing Counsel
M/s P.S. Nayak, S.K. Jena & D.K. Das.
Mr. D.K. Mohanty, Addl. Standing Counsel
M/s. D. Dhal, R.B. Behera, P.K. Dhal & R.B. Mishra

JUDGMENT Date of Hearing : 09.12.2019 : Date of Judgment: 20.12.2019

DR. B.R.SARANGI, J.

Anusaya Gadanayak has filed W.P.(C) No.10176 of 2017 seeking following relief:-

> *"The petitioner therefore prays that this Hon'ble Court may graciously be pleased to issue a Rule Nisi calling upon the Opp. Parties as to why a writ of certiorari or any appropriate writ/s shall not be issued;*
>
> *i) To quash the order dated 2.5.2017 passed by the learned Sub-Collector, Hindol in Appeal No.1 of 2017.*

ii) If the opposite parties fails to show cause or show insufficient cause to make the rule absolute and pass such other order/orders that may be deem fit in the facts and circumstances of the case."

Whereas Srikanta Sahu has preferred W.P.(C) No.23492 of 2017 with following prayer:

"Therefore the petitioner prays that your lordship may graciously be pleased to consider the facts stated in the petition admit the same, issue Rule NISI to the Opp. Parties as to why a writ of Certiorary shall not be issued to quashed the order dated 21.10.17 passed by the Sub-Collector, Hindol in Miscellaneous Certificate Appeal No.02 of 2017 and as to why a writ of Mandamus shall not be issued directing the O.P. No.2 to rehear the appeal and pass the order as per law on merit;

And if the opp. Parties fails to show cause or show insufficient cause them make the rule absolute.

And pass any other writ/writs, order/orders, direction/directions as your lordships may deem just and proper.

Since both the above mentioned writ petitions are interconnected, they were heard together and are disposed of by this common judgment.

2. Anusaya Gadanayak, petitioner in W.P.(C) No. 10176 of 2017, on 11.01.2017 applied for SEBC certificate from Tahasildar, Hindol through online. Accordingly, SEBC certificate No.192/2017 was issued in favour of her on 15.01.2017. Srikanta Sahu-petitioner in W.P.(C) No.23492 of 2017 lodged a written complaint before the Tahasildar, Hindol with regard to grant of SEBC certificate in favour of Anusaya Gadanayak. On the basis of such complaint, Tahasildar, Hindol on 7.03.2017 directed the Revenue Inspector (R.I.) to cause preliminary enquiry, who submitted report on the very same day stating, inter alia, that Anusaya Gadanayak forged the R.I. report and ROR. Consequentially, Tahasildar, Hindol lodged an FIR against Anusaya Gadanayak on 08.03.2017 and also filed an appeal bearing No.01 of 2017 before the Sub-Collector, Hindol for cancellation of SEBC certificate issued in favour of Anusaya Gadanayak. The Sub-Collector, Hindol, vide order dated 02.05.2017, cancelled the said SEBC certificate issued by the Tahasildar, Hindol on 15.01.2017 in Misc. Certificate Case No.SEBC/192/2017. Challenging the said order, Anusaya Gadanayak filed W.P.(C) No.10176 of 2017.

2.1 Challenging the SEBC certificate issued in favour of Anusaya Gadanayak by the Tahasildar, Hindol on 15.01.2017 in Misc. Certificate Case

No.SEBC/192/2017, Srikanta Sahu also filed a Miscellaneous Certificate Appeal under Rule 8 of the Orissa Miscellaneous Certificate Rules, 1984 on 01.06.2017 before the Sub-Collector, Hindol, who rejected the said appeal, vide order dated 21.10.2017. Challenging the said order, Srikanta Sahu has filed W.P.(C) No.23492 of 2017.

3. Both the writ petitions, being interdependent to each other, for just and proper adjudication of the case, the factual matrix of W.P.(C) No.10176 of 2017 has been taken into consideration.

3.1 Anusaya Gadanayak, petitioner in W.P.(C) No. 10176 of 2017, is continuing as Sarpanch of Kadala Gram Panchayat under Hindol Block. She applied for caste certificate before Tahasildar, Hindol with necessary documents before notification of the Gram Panchayat election. She produced the Patta (RoR), Kabala (saledeed) and mutation papers before the authority, wherein her father's name recorded as Nidhi Majhi and caste as "Khandayat". On her application, Revenue Inspector (R.I.) enquired into the matter and suggested for issuance of SEBC certificate in her favour. On the basis of aforementioned documents as well as enquiry report submitted by the R.I., opposite party no.3-Tahasildar, Hindol on 15.01.2017 passed order for issuance of SEBC certificate in favour of the petitioner vide Misc. Case No.SEBC/192/2017 from Common Service Centre, Nizigarh, Hindol operated by "Kiosk Operator" Sri Rabinarayan Pattnaik.

3.2 Pursuant to such caste certificate, petitioner-Anusaya Gadanayak contested the election for the post of Sarpanch of Kadala Gram Panchayat and elected as Sarpanch. Opposite party no.4-Srikanta Sahu in W.P.(C) No.10176 of 2017 and petitioner in W.P.(C) No.23492 of 2017, the rival contestant, filed a petition before the Tahasildar, Hindol for cancellation of SEBC certificate issued in favour of Anusaya Gadanayak. On his petition, Tahasildar, Hindol directed the R.I. to cause an inquiry about the matter. Pending such inquiry, the Tahasildar, Hindol filed Appeal Case No.01 of 2017 before the Sub-Collector, Hindol. Accordingly, the Sub-Collector, Hindol issued notice to petitioner-Anusaya Gadanayak and called for the records. The petitioner filed show-cause raising maintainability of the appeal. But, finally the Sub-Collector, Hindol heard and disposed of the said appeal, vide order dated 02.05.2017, cancelling the SEBC certificate issued in favour of petitioner-Anusaya Gadanayak, which is the subject-matter of challenge in W.P.(C) No.10176 of 2017.

4. Mr. D.K. Dhar, learned counsel for the petitioner in W.P.(C) No. 10176 of 2017, arguing with vehemence, contended that the Sub-Collector, Hindol, while disposing of the Appeal Case No.01 of 2017, has ignored the procedure, law and rules. It is further contended that Rule-8 of the Orissa Miscellaneous Certificate Rules, 1984 prescribes that any person aggrieved by an order passed by the Revenue Officer under Rule-6 of the said Rules may prefer an appeal before Sub-Divisional Officer or Collector or Revenue Divisional Commissioner. Therefore, the language employed in Rule-8 that 'any person aggrieved by the order' has not been considered properly by the Sub-Collector, Hindol, who passed the order impugned dated 02.05.2017 cancelling the SEBC certificate issued in favour of the petitioner. It is also contended that the judgments, on which reliance has been placed by the appellate authority, have no application to the present context. As such, under the Orissa Miscellaneous Certificate Rules, 1984, there is no provision at all for appeal by the original court suo mottu, but there is a provision under Rule-7 for review of the order. So the appeal filed by the Tahasildar, Hindol before the Sub-Collector, Hindol is not sustainable or maintainable under the Rules, 1984. It is further contended that the petitioner also admitted that she applied for grant of caste certificate and after inquiry conducted by the concerned R.I. and on the basis of the documents as well as inquiry report, SEBC certificate was issued in favour of the petitioner, but, subsequently without complying the procedure, the Sub-Collector, Hindol, vide order dated 02.05.2017 in Appeal Case No.01 of 2017, cancelled the SEBC certificate issued by the Tahasildar, Hindol, therefore, the said order should be quashed.

5. Mr. P.S. Nayak, learned counsel appearing for opposite party no.4 contended that since the petitioner received SEBC certificate by playing fraud and giving forged documents, she is not entitled to claim any relief. As such, even if the person aggrieved has not filed the appeal before the Sub-Collector, Hindol, when fraud is detected and came to the notice of the authority, the said authority can act upon the same. Thereby, the Sub-Collector, Hindol is well justified in passing the order impugned dated 02.05.2017 in Appeal Case No.01 of 2017 cancelling the SEBC certificate issued in favour of the petitioner.

6. This Court heard Mr. D.K. Dhar, learned counsel for the petitioner, Mr. D.K. Mohanty, learned Additional Standing Counsel, and Mr. P.S. Nayak, learned counsel appearing for opposite party no.4. Pleadings having been exchanged between the parties, except the State opposite parties, with

the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission taking into consideration the urgency that challenging the election of petitioner-Anusaya Gadanayak, opposite party no.4 has filed Election Misc. Petition No.03 of 2017 before Addl. Civil Judge (Jr. Division), Hindol, which has been heard and the result of the said case is waiting for want of final decision on the caste certificate issued to the petitioner.

7. The Government have had under consideration for some time past the question of framing of a set of Comprehensive Executive Rules regulating the issue of certificate by the Revenue Officers in the State in miscellaneous matters like identity, nativity, income, solvency, legal heir, etc. With a view to removing certain difficulties encountered by the Revenue Officers at the time of issue of such certificates, after careful consideration, Government have been pleased to frame, in supersession of all the earlier instructions, including G.O. No.27003-R dated the 16th May 1970, the Orissa Miscellaneous Certificates Rules, 1984 were framed, which have come into force with immediate effect.

8. In the aforementioned Rules, under Rule-3, categories of miscellaneous certificates have been provided, wherein caste certificate comes under clause-(vi), i.e. Other Certificates of miscellaneous nature. Under Rule-4 it is stipulated that a person desirous of obtaining a certificate shall file before a Revenue Officer an application in prescribed Form No.1, affixing court fee stamps of denomination of Rs.3.00 or such amount as would be revised from time to time, specifying therein his name and full address, the nature of the certificate prayed for and the purpose for which it is required. Under Rule-5, the Revenue Officer shall initiate a case record, scrutinize the documents furnished by the applicant, verify the relevant records, if any, in the office and wherever necessary, may himself inquire into the matter or call for a report of inquiry by a specified date from an officer subordinate in rank. If on the basis of the documents, records, and the result of the inquiry, if any, the Revenue Officer is of the view that the certificate applied for may be granted, he shall pass necessary orders in the case record and sign the appropriate certificate specifying the purpose solely for which it has been granted under Rule-6 of the Rules, 1984 and the certificate shall be handed over to the applicant or his duly authorized agent on due acknowledgment of receipt. If the Revenue Officer is of the view that the certificate applied for may not be granted, he shall pass necessary orders

in the case record, briefly recording the reasons therefor. Rule-7 states that notwithstanding anything contained in these rules, if it is revealed on subsequent verification or otherwise that the certificate should not have been granted or the contents thereof require modification, the Revenue Officer or any officer superior to him in the Revenue Administrative hierarchy shall be competent to review the orders granting the said certificate and after giving the person concerned an opportunity of making any representation which he may will to make, pass such orders as he deems just and proper in the circumstances of the case. Appeal provision has been provided under Rule-8, wherein it has been specifically mentioned that any person aggrieved by an order passed by the Revenue Officer under Rule-6 may prefer an appeal before the authority specified under sub-clause A to C.

9. In view of provisions contained in Rules, 1984, when the caste certificate was issued in favour of Anusaya Gadanayak as per Rule-6 by the Tahasildar, Hindol, but subsequently when it was found that the said certificate was issued on the basis of fraudulent report and documents, Tahasildar, Hindol filed appeal before the Sub-Collector, Hindol under Rule-8 for cancellation of such certificate. In such appeal, the order impugned dated 02.05.2017 was passed cancelling the SEBC certificate issued in favour of Anusaya Gadanayak. It is contended that Tahasildar cannot be construed as person aggrieved by an order passed by him. Thereby, at his behest, Misc. Appeal No.1 of 2017 is not maintainable. Opposite party no.4-Srikanta Sahu also filed an appeal under Rule-8 of the Orissa Miscellaneous Certificate Rules, 1984. In Misc. Appeal No.1 of 2017 preferred by the Tahasildar, Hindol, the Sub-Collector, Hindol, vide impugned order dated 02.05.2017, cancelled the SEBC certificate issued by the Tahasildar, Hindol in favour of the petitioner, whereas rejected the appeal preferred by Srikanta Sahu, vide order dated 21.10.2017, stating, inter alia, that the impugned order dated 15.01.2017 passed by the Tahasildar in SEBC certificate Case No.E-SEB-192/2017 issuing SEBC certificate in favour of Anusaya Gadanayak was totally forged and ill intended.

10. In view of aforesaid facts and circumstances, objection has been raised by Anusaya Gadanayak that the Tahasildar, Hindol was not the 'person aggrieved' and at his instance the appeal was entertained and the caste certificate issued by the Tahasildar, Hindol was cancelled, which is illegal and arbitrary. On perusal of Rule-8, it reveals that any person aggrieved by an order passed by the Revenue Officer under Rule-6 may prefer appeal. As it

appears Srikanta Sahu-opposite party no.4 filed objection as intervenor in the appeal before the Sub-Collector, Hindol stating, inter alia, that Anusaya Gadanayak, who belonged to caste "Khetriya" was issued with a forged SEBC certificate by manipulating caste in the copy of the ROR. Consequentially, the Sub-Collector, Hindol called for records from the office of the Tahasildar, Hindol and scrutinized the documents filed by Anusaya Gadanayak. On scrutiny, he found that the ROR of village Thokar revealed that the holding No.139 stands recorded in the name of Fakir Majhi, the grandfather of Anusaya Gadanayak, having Caste "Khetriya", but Anusaya Gadanayak has manipulated her caste as "Khandayat" in the copy of the RoR and submitted false declaration, along with copy of RoR, for issuance of SEBC certificate in Common Service Centre, Hindol. The enquiry report, seal and signature of R.I., Ranjagol submitted by Anusaya Gadanayak in Common Service Centre, Hindol were also found to be false. Since fraud vitiates the entire proceeding, thereby if by playing fraud, the said caste certificate was obtained from the authority, that itself cannot sustain in the eye of law.

11. In ***Webster's Third New International Dictionary*** "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or pubic policy forbids as being prejudicial to another.

In ***Black's Law Dictionary***, "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

In ***Concise Oxford Dictionary***, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick.

According to ***Halsbury's Laws of England***, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act, 1872 defines "fraud" as an act committed by a party to a contract with intent to deceive another. From the dictionary meaning or even otherwise fraud arises

out of the deliberate active role of the representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false.

12. In a leading English case i.e. ***Derry v. Peek***, (1886-90) All ER Rep 1 : (1889) 14 AC 337 : 61 Lt 265 (HL) what constitutes "fraud" was described thus : (All ER p.22 B-C),

> *"Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false."*

"Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Camus, who exulted in his ability to, "wing me into the easy-hearted man and trap him into snares".

In ***Lazarus Estates Ltd. v. Beasley***, (1956) 1 QB 702 : (1956) 1 All ER 341 : (1956) 2 WLR 502 (CA) Lord Denning observed at QB pp.712 and 713: (All ER p. 345 C)

> *"No judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."*

The apex Court in ***Elektrim SA v. Vivendi Universal SA***, (2010) 8 SCC 383 while considering Section 17 of Contract Act, 1892 held as follows:

> *"Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage."*

It is settled proposition of law that where an applicant gets an order by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eye of the law. Fraud and justice never dwell together (*fraus et jus nunquam cohabitant*) and it is a pristine maxim which has never lost its temper over all these centuries. The ratio laid down by the Supreme Court in various cases is that dishonestly should not be permitted to bear the fruit and benefit to the persons who played fraud or

made misrepresentation and in such circumstances the Court should not perpetuate the fraud.

In ***K.D. Sharma v. SAIL***, (2008) 12 SCC 481, the apex Court held as follows:

> *"Fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. In fraud one gains at the loss and cost of another. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam."*

In ***S.P. Chengalvaraya Naidu v. Jagannath***, (1994) 1 SCC 1, the apex Court held as follows:

> *"A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage."*

In ***Ram Chandra Singh v. Savitri Devi***, (2003) 8 SCC 319, the apex Court held as follows:

> *""Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letters or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letters. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata."*

13. In view of aforesaid facts and circumstances, it can safely be concluded that the documents, which were produced for verification and issuance of SEBC certificate in favour of Anusaya Gadanayak were fraudulent and the SEBC certificate was obtained by her by perpetuating

fraud. Consequentially, this Court is of the considered view that the SEBC certificate having been issued fraudulently in favour of Anusaya Gadanayak and the same having been cancelled by the superior authority, namely, Sub-Collector, Hindol, when it was brought to its notice, after causing enquiry and giving opportunity of hearing to the parties, this Court does not find any illegality or irregularity in the order dated 02.05.2017 passed by the Sub-Collector, Hindol in Appeal No.01 of 2017 so as to warrant interference of the same.

14. Accordingly, the writ petition bearing W.P.(C) No. 10176 of 2017 merits no consideration and the same is hereby dismissed, and that bearing W.P.(C) No. 23492 of 2017 stands disposed of in terms of the findings recorded hereinabove. No order as to costs.

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2020 (I) ILR - CUT- 508

DR. B.R. SARANGI, J.

W.P.(C) NO. 3459 OF 2010

SMT. BHARATI DAS .....Petitioner

.Vs.

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

(A) SERVICE LAW – Scale of pay – Grant of – Petitioner initially appointed as a teacher and subsequently designated as special educator from 07.12.1984 by the management of the school for mentally retarded – The school in question was recognized and received grant-in-aid – State Government formulated a set of rules for the institutions imparting education to blind, deaf and mentally retarded children, but the said rule did not have any provision for recruitment of teachers or their scale of pay –The State Government, vide resolution dated 28.12.1987, amended 1985 Rules incorporating provisions for engagement and salaries of teachers, but the same was not implemented – Consequentially, vide resolution dated 24.02.1994, the State Government formulated a separate set of rules laying down the norms for fixation of yardsticks for teaching and non-teaching staff of the schools for mentally retarded children – Claim of regular scale of pay with effect from 1994 – Not granted, however said benefit was extended to the petitioner with effect from 01.07.2008 but reasons for

not extending such benefit with effect from 24.02.1994 was not spelt out – Writ petition claiming regular scale of pay from 1994 – No reason shown as to why the regular scale of pay shall not be granted from 1994 – Writ petition allowed.

(B) WORDS AND PHRASES – 'Reasons' – Meaning of – Discussed.

(Paras 8 to 11)

Case Laws Relied on and Referred to :-

1. (1968) 1 All E.R. 694 : Padfield Vs. Minister of Agriculture, Fisheries and Food.
2. AIR 1974 SC 87 : Union of India Vs. Mohan Lal Capoor.
3. AIR 1981 SC 1915 : Uma Charan Vs. State of Madhya Pradesh.
4. AIR 1971 SC 862 : Travancore Rayons Ltd. Vs. The Union of India.

For Petitioner : M/s. Bikram Pratap Das, S.K. Mishra and S. Rath.

For Opp. Parties : Mr. S. Palit, Addl. Govt. Adv.

JUDGMENT Decided on : 03.01.2020

DR. B.R. SARANGI, J.

The petitioner, who was initially appointed as a teacher and now designated as Special Educator, by way of this application, seeks direction to opposite party no.1 to grant regular pay scale w.e.f. 24.02.1994, as per the Government resolution dated 24.02.1994 in Annexure-2, by quashing the decision of opposite party no.1 dated 04.10.2008 in Annexure-8 allowing regular pay scale with effect from 01.07.2008.

2. The factual matrix of the case, in hand, is that "School for Mentally Retarded, Balasore" was established in the year 1982 by the Handicapped Welfare Institute, a society registered under the Societies Registration Act, 1860. The petitioner was initially appointed as a teacher and subsequently designated as special educator from 07.12.1984 by the erstwhile management of the school for mentally retarded with a consolidated salary of Rs.500/- per month. The school in question was recognized by opposite party no.1 and has been receiving the grant-in-aid from the Government since 1986-89. Consequentially, vide resolution dated 31.12.1985, the State Government formulated a set of rules for the institutions imparting education to blind, deaf and mentally retarded children. But the said rule did not have any provision for recruitment of teachers or their scale of pay. The State Government, vide resolution dated 28.12.1987, amended 1985 Rules incorporating provisions for engagement and salaries of teaches, but the same was not implemented.

2.1 Consequentially, vide resolution dated 24.02.1994 in Annexure-2, the State Government formulated a separate set of rules laying down the norms for fixation of yardsticks for teaching and non-teaching staff of the schools for mentally retarded children. As per the said rules, a special educator was entitled to a scale of pay of Rs.1400-2600/-. As the scale of pay prescribed for special educators was not allowed to the staff of the school, the petitioner filed OJC No. 2310 of 1996 with a prayer to allow her the prescribed scale of pay w.e.f. 01.04.1994. Two other special educators of the school also filed similar writ petitions. This Court, vide order dated 18.08.1999, disposed of the three writ petitions directing the opposite party no.1-State Government to consider the proposal of the management of the school for fixing pay scale, which, as per the management, had already been submitted. After the order was passed by this Court on 18.08.1999, the opposite party no.1, vide letter dated 29.11.1999 in Annexure-3, directed opposite party no.4-society to resubmit proposal with proceedings and recommendations of the selection committee. On 30.07.2003 in Annexure-4, the opposite party no.1 wrote to opposite party no.4 to furnish certain documents for consideration of the proposals. On 24.09.2003 vide Annexure-5, the opposite party no.1 wrote to opposite party no.4 to furnish a fresh selection committee report recommending the petitioner and other two special educators, who were unable to receive salary, and consequentially issued reminder on 09.01.2004 under Annexure-6. Accordingly on 21.01.2004, the opposite party no.4 sent the proceedings of the selection committee dated 21.01.2004 with specific recommendation. Pursuant thereto, on 04.10.2008, the opposite party no.1 issued letter to opposite party no.4 intimating the approval of regular pay scale inter alia in respect of petitioner w.e.f. 01.07.2008 and the grant-in-aid in the approved pay scale was released in favour of the petitioner on 28.02.2009. The petitioner, on 17.04.2009, submitted a representation to opposite party no.1 pointing out that she was entitled to regular scale of pay w.e.f. 24.02.1994, as per the yard stick prescribed in the Government Resolution dated 24.02.1994, and not from 01.07.2008, and prayed for consideration of her case. The same having not been acceded to, the petitioner has approached this Court by filing this application.

3. Mr. Bikram Prasad Das, learned counsel for the petitioner contended that the entitlement of the petitioner to receive the benefit of regular pay scale w.e.f. 24.02.1994 is based on the government resolution dated 24.02.1994 in Annexure-2, but the petitioner has been extended such benefit w.e.f. 01.07.2008, without taking into account the government resolution referred to

above. If the resolution dated 24.02.1994 is taken into consideration, the petitioner will be eligible to receive the benefit of regular pay scale w.e.f. 24.02.1994, instead of 01.07.2008.

4. Mr. S. Palit, learned Addl. Government Advocate for the State contended that whatever benefit admissible to the petitioner has already been released by way of letter dated 04.10.2008 giving effect from 01.07.2008. But so far as the claim made by the petitioner that she is entitled to get the benefit in terms of the resolution 24.02.1994, such relief cannot be granted to the petitioner as she has accepted the benefit already granted to her w.e.f. 01.07.2008, thereby, the writ petition is liable to be dismissed.

5. This Court heard Mr. Bikram Prasad Das, learned counsel for the petitioner and Mr. S. Palit, learned Addl. Government Advocate appearing for the State opposite parties, and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. In view of the facts and contentions delineated above, the only question to be considered in this writ petition is, whether the petitioner is entitled to receive the benefit of regular pay scale with effect from 01.07.2008, as has been already granted, or w.e.f. 24.02.1994, pursuant to resolution passed by the Government on 24.02.1994 in Annexure-2.

7. Since the staff of the schools for the mentally retarded children were not extended with the benefit of revised scale of pay, the Government of Orissa in Panchayati Raj Department passed a resolution on 24.02.1994 in Annexure-2 with regard to grant of grant-in-aid for teaching and non-teaching staff of the institutions for the mentally retarded children. As per clause-5 of the above resolution, the payment of salary of staff of schools for the mentally retarded children shall have to be governed under the Rules, as amended vide resolution dated 28.12.1987, as detailed in paragraph-6 of the said resolution, which reads thus:-

> *"6. The management shall be eligible to receive 90% grant-in-aid from the Government to meet the expenses on account of salary subject to the following conditions.*
>
> *(i) A person who has successfully completed the Junior Educator Course/Diploma Course organized by or in Colaboration with National Institute for the Mentally Handicapped, Secunderabad shall be deemed to have acquired a qualification*

equivalent to the Teachers Certificate (C.T.) recognized by the Education Department.

(ii) A person already engaged in a recognized institution having passed the minimum qualification required for the post will be allowed salary as per norms.
(iii) The list of staff members and their scales of pay have been approved by the Government.

(iv) Recruitment of qualified staff has been made against the posts already approved by the Government.

(v) Recruitment of staff has been done by a Selection Committee comprising of the District Social Welfare Officer of the district, Inspector of Schools and the Secretary of the Organization observing all formalities and duly approved by the Director, Social Welfare, Panchayati Raj Department Government of Orissa.

(vi) No assistance shall be made available in respect of posts created or staff appointed by the organization unless it has obtained prior approval of Government.

(vii) The assistance shall be reduced or revised if the voluntary organization receives any assistance for the same purpose from the Government of India or any other source."

In view of sub-clause (ii) of Para-6, a person already engaged in a recognized institution, having passed the minimum qualification required for the post, will be allowed salary as per the norms. Annexure-A appended to the said resolution clearly indicates that for the post of Special Educator-cum-Social Worker (T.G.) requisite qualification is B.A., B.Ed. with D.M.R., preference would be given to one having sociology/social work as optional paper in graduation and would be entitled to get the scale of pay of Rs.1400-2600/-. The petitioner's case is squarely covered by the resolution dated 24.02.1994, as she continued as a Special Educator-cum-Social Worker (T.G.), and is eligible to get the scale of pay of Rs.1400-2600/-. The said benefit has already been extended to the petitioner with effect from 01.07.2008, vide letter dated 04.10.2008, but reasons for not extending such benefit with effect from 24.02.1994 has not been spelt out anywhere.

8. ***Franz Schubert*** said-

"*Reason is nothing but analysis of belief.*"

In ***Black's Law Dictionary***, reason has been defined as a-

"faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions."

It means the faculty of rational thought rather than some abstract relationship between propositions and by this faculty, it is meant the capacity to make correct inferences from propositions, to size up facts for what they are and what they imply, and to identify the best means to some end, and, in general, to distinguish what we should believe from what we merely do believe.

Therefore, reasons being a necessary concomitant to passing an order allowing the authority to discharge its duty in a meaningful manner either furnishing the same expressly or by necessary reference.

9. "***Nihil quod est contra rationem est licitum***" means as follows:

> *"nothing is permitted which is contrary to reason. It is the life of the law. Law is nothing but experience developed by reason and applied continually to further experience. What is inconsistent with and contrary to reason is not permitted in law and reason alone can make the laws obligatory and lasting."*

Therefore, recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is pertinent to note that a decision is apt to be better if the reasons for it are set out in writing because the reasons are then more likely to have been properly thought out. It is vital for the purpose of showing a person that he is receiving justice.

In *Re*: ***Racal Communications Ltd. (1980)2 All ER 634 (HL)***, it has been held that the giving of reasons facilitates the detection of errors of law by the court.

In ***Padfield v. Minister of Agriculture, Fisheries and Food*** (1968) 1 All E.R. 694, it has been held that a failure to give reasons may permit the Court to infer that the decision was reached by the reasons of an error in law.

10. In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87 it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an

assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken in ***Uma Charan v. State of Madhya Pradesh***, AIR 1981 SC 1915.

11. In ***Travancore Rayons Ltd. v. The Union of India,*** AIR 1971 SC 862 it is observed by the apex Court that the necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental process by which the conclusion is reached in cases where a non-judicial authority exercises judicial functions is obvious. When judicial power is exercised by an authority normally performing executive or administrative functions, the Supreme Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency. The court insists upon disclosure of reasons in support of the order on two grounds: one, that the party aggrieved in a proceeding before the court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.

12. As no reason has been assigned in letter dated 04.10.2008 extending the benefit w.e.f. 01.07.2008, this Court, vide order dated 25.01.2019, passed the following order:

> *"Mr.S. Mishra, learned Addl. Government Advocate seeks time to obtain instructions in the matter why the date of approval of the petitioner made 01.07.2008.*
>
> *Put up this matter after three weeks."*

13. In response to the above, an affidavit has been filed by opposite party no.3, in paragraphs-2 and 3 whereof, it has been stated as follows:

> *"2. That the deponent humbly submitted that, the petitioner was appointed as Teacher on 01.12.1984 and is rendering his service from 7.12.1984. As the resolution dated 24.02.1994 clearly stipulates that no assistance shall be made available in respect of the post created or staff appointed by the organization unless it is obtained prior approval of the Govt. Accordingly, the selection committee on 21.01.2004 recommended the name of the petitioner for regularization with effect from 24.02.1994. The recommendation was considered by the Govt. and allowed for regular scale of pay with effect from 01.07.2008.*

> *3. That the deponent further humbly submitted that no record is available in the office of the deponent, as to why the Govt. accorded approval for the post of the petitioner with effect from 01.07.2008. In the meantime, a new Department was created for Social Security and the matter pertaining to the present dispute is coming the administrative control of newly created Department of Social Security and Empowerment of Persons with Disability. As such the record has already transferred to the said Department."*

On perusal of the aforesaid paragraphs 2 and 3, it would be evident that reasons for not extending the benefits of the scale of pay admissible to the petitioner pursuant to resolution dated 24.02.1994 has not been indicated. Furthermore, there is no rationale behind extension of benefit to the petitioner with effect from 01.07.2008, instead of 24.02.1994.

14. In view of such position, this Court is of the considered view that the petitioner is entitled to get the regular scale of pay w.e.f. 24.02.1994, pursuant to resolution dated 24.02.1994, and not with effect from 01.07.2008 as has already been granted. Thereby, the benefit admissible to the petitioner should be calculated and extended w.e.f. 24.02.1994, pursuant to resolution dated 24.02.1994 in Annexure-2, as recommended by the management, instead of 01.07.2008. Accordingly, the State opposite parties are directed to compute the entitlement of the petitioner, as per the above observation, and release such benefits in favour of the petitioner as expeditiously possible, preferably within a period of three months from the date of communication of this order.

15. The writ petition is thus allowed. No order to costs.

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2020 (I) ILR - CUT- 515

DR. B.R. SARANGI, J.

CRLMP NO. 1249 OF 2019

ANSIUDDIN KHAN @ ANSUDDIN KHAN .....Petitioner

.Vs.

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

GENERAL RULES AND CIRCULAR ORDERS (GRCO), CRIMINAL – Chapter-XVIII – Rules 172 to 187 – Custody and Disposal of Property

which has been kept in Malkhana of the Court – A licensed gun was seized in connection with a case and was kept in Court Malkhana – Order of release of the gun was passed as the gun was not involved in the alleged criminal case – Gun could not be handed over to licensee as the same was missing in the Malkhana – Claim of compensation by the Licensee – Whether can be acceded to? – Held, yes, the well said dictum of law is that no one shall be prejudiced for the acts of the Court 'Actus curiae Neminem Gravabit' (the act of the Court harms no one). (Paras 9 to 16)

Case Laws Relied on and Referred to :-

1. (2008) 39 OCR 629: State of M.P. & Others Vs. Madhukar Rao.
2. AIR 1977 SC 1749 : Basavva Kom Dyamangouda Patil Vs. State of Mysore and Ors.
3. AIR 1980 SC 951 : Inter Continental, Agencies Pvt. Ltd. Vs. Amin Chand Khanna & Ors.
4. AIR 1965 1069 : Jeejeebhoy Vs. Asst. Collector, Thana.
5. AIR 1969 SC 634 : State of Gujarat Vs. Shantilal Mangal Das.
6. AIR 1998 Ori 159 : Kiranbal Bandapat Vs. Secy. Grid corporation of Orissa Ltd.

For Petitioner : M/s. A. Tripathy & A.K. Behera.

For Opp. Parties : Mr. A.K. Mishra, Addl. Govt. Adv.

JUDGMENT Date of Hearing : 21.01.2020 : Date of Judgment : 28.01.2020

DR. B.R. SARANGI, J.

The petitioner, by way of this application, seeks direction to the opposite parties to release the SBBL 12 BORE Catridge Gun No. 35002 of Company W.J. Jeffery and Co. Ltd., which was seized in connection with 2(b)CC Case No. 39 of 2006 on the file of learned J.M.F.C, Daspalla, or in alternative pay compensation to him, as the same has been lost in the Court Malkhana.

2. As per the prosecution allegation, on 20.05.2006 at 10.30 AM., while the petitioner was proceeding in a Maruti Van, the Forester, namely, Laxman Baral, along with other forest and police staff, stopped the said vehicle. On search, they found a gun, i.e., SBBL 12 BORE Catridge Gun No. 35002 of Company W.J. Jeffery and Co. Ltd. inside the Maruti Van along with some dead birds. The Forester seized the said gun, arrested the petitioner and forwarded him to the Court.

3. The case of the petitioner, in brief, is that he is the licence holder of the seized gun and authorized to keep the same for the purpose of safety of

his life and protection of his crops, and was permitted a limited area to move with the said gun. The petitioner, along with his brother, was taken by Daspalla Police and then the OIC, Daspalla P.S. called the forest personnel, forwarded the petitioner and his brother, and produced the seized gun in the Court of J.M.F.C., Daspalla, which was kept in the safe custody of Malkhana of the said Court on 20.05.2006. The gun of the petitioner is partly made of iron and partly made of wood, for which frequent service is required for its maintenance or else the gun will be damaged by rust and white ant. Since the seized gun is available in the Court's Malkhana of J.M.F.C., Daspalla, the said Court has jurisdiction to pass an order for its release in the zima of its owner (petitioner) as per the provision of law. Therefore, relying upon the judgment of the apex Court in ***State of M.P. & Others v. Madhukar Rao***, (2008) 39 OCR 629, an application was filed under Section 451 Cr.P.C. by the petitioner on 01.06.2006 before the learned J.M.F.C., Daspalla, in 2(b)CC Case No. 39 of 2006 for release of the seized gun, and the learned J.M.F.C., Daspalla passed order on 15.05.2018, the effective part of which runs as follows:-

> *"Hence, taking into account all the above facts into consideration, and the case law that I relied upon, I am of the opinion that the petitioner is the bonafide owner of the said seized gun as per the available documents produced before this Court and has no involvement in the said case leading to seizure of the same. Let the said seized gun bearing SBBL 12 Bore Catridge Ltd., be released in favour of the petitioner by furnishing an indemnity bond of Rs.30,000/- (Thirty thousand Rupees) only or cash of the like amount, subject to the following conditions:*
>
> *1) The petitioner shall not use the said gun in any criminal activities, and shall not change its colour,*
>
> *2) He will produce the said gun before the Court during trial as and when required.*
>
> *3) He shall not change the ownership and alienate the same during the pendency of the case."*

In compliance of the said order, the petitioner furnished indemnity bond of Rs.30,000/- along with surety, affidavit, ROR, rent receipt, Aadhar Card and other relevant documents. On perusal of the same, the learned J.M.F.C., Daspalla passed an order on 02.07.2018 directing the Malkhana I/C to release the seized gun forthwith. Even, on the very same day, vide a later order, the Nazir, Malkhana I/C was directed to release the said gun in favour of the petitioner on execution of proper zimanama. On 03.07.2018, on the report noted in the order sheet by the Nazir, Malkhana I/C of that Court, the J.M.F.C.,

Daspalla passed order that it has to be satisfied about the existence of the said gun of the petitioner in the Court Malkhana only after making inventory, and accordingly directed to put up the matter on 20.07.2018. Thereafter, what has happened in that case, nothing has been placed on record.

As the gun in question has not been released in favour of the petitioner, this application has been filed on 11.09.2019 seeking following reliefs:

> *"(i) Admit the writ application;*
>
> *(ii) Call for the records;*
>
> *(iii) Issue rule nisi calling upon the opposite parties to show cause as to why departmental proceeding shall not be initiated against them;*
>
> *(iv) If the opposite parties fail to show cause or show insufficient cause, make the said Rule absolute by initiating departmental proceeding against the authority concern;*
>
> *(v) Issue a writ of mandamus or any other appropriate writ/writs, order/orders, direction/directions directing the opposite parties to pay compensation to the petitioner for lost of his gun SBBL 12 BORE Cartridge Gun No. 35002 of Company W.J. Jeffery and Co. Ltd., in the Court Malkhana."*

This Court, vide order dated 20.09.2019, noted that despite passing of the order dated 15.05.2018 in 2(b) CC No. 39 of 2006 by the learned J.M.F.C., Daspalla directing release of seized gun styled as SBBL, Bore Gun No. 35002 manufactured by W.J. Jeffery & Col. Ltd. in favour of the petitioner, the same has not yet been released, as the same is not available in the Malkhana of the said Court, and consequentially called for a report from the learned District Judge, Nayagarh. As no report was received, vide order dated 14.11.2019, a reminder was sent. Pursuant to order dated 20.09.2019, the learned District & Sessions Judge, Nayagarh has submitted a report. On perusal of such report, it is observed that the seized gun styled as SBBL 35002, 12 Bore Catridge manufactured by W.J. Jeffery and Company Ltd. has been found missing from Daspalla Court Malkhana during the incumbency of Sri Sukanta Kumar Satapathy, the then Malkhana Clerk. It has also been indicated that after receipt of explanation from Sukanta Kumar Satapathy, the office will initiate both administrative and legal action against him.

4. In the above backdrop of the case, learned counsel for the petitioner submitted that a direction be issued to the learned J.M.F.C.,Daspalla to conclude the trial in 2(b)CC Case No. 39 of 2006 within a specific time.

Accordingly, this Court, vide order dated 09.12.2019, directed learned J.M.F.C., Daspalla to submit a report as to within what time he can conclude the trial of the said case. In response to the said order, learned J.M.F.C., Daspalla reported that sanction of PR in 2(b)CC Case No. 39/2009 was received on 23.12.2019 and its trial can be concluded within a period of four months. But the learned counsel appearing for the petitioner pressed hard for grant of compensation for loss of the seized gun. Thereby, this Court passed an order on 10.01.2020 calling upon the counsel for the petitioner to satisfy the Court by citing judgments that in the event of loss of any product kept in the Court Malkhana, its owner would be entitled to get compensation. In compliance thereof, Mr. A. Tripathy, learned counsel appearing for the petitioner relied upon the judgments of the apex Court in ***Basavva Kom Dyamangouda Patil v. State of Mysore and Ors.*** AIR 1977 SC 1749 and ***Inter Continental, Agencies Pvt. Ltd. v. Amin Chand Khanna and Ors.*** AIR 1980 SC 951.

5. Mr. A.K. Mishra, learned Addl. Government Advocate argued with vehemence and contended that since the trial in 2(b)CC Case No. 39/2009 has not been concluded and on the basis of the report received if the learned J.M.F.C., Daspalla would take four months time to conclude the trial, in that case, the petitioner should wait till conclusion of trial and then ask for release of the seized gun, which was kept in Court Malkhana, or else if the petitioner wants to get compensation for the lost gun, he has to approach the very same Court for consideration of his grievance, instead of filing this CRLMP application.

6. This Court heard Mr. A. Tripathy, learned counsel for the petitioner and Mr. A.K. Mishra, learned Addl. Government Advocate appearing for the State, 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. On the basis of factual matrix, as discussed above, the SBBL, Bore Gun No. 35002 manufactured by W.J. Jeffery & Col. Ltd. was seized by the forest and police authorities from the Maruti Van of the petitioner for alleged commission of forest offence and the same was kept in Malkhana of the J.M.F.C., Daspalla in connection with 2(b) CC Case No. 39/2009. As it was found that there was no involvement of the said gun in the offence alleged, the learned J.M.F.C., Daspalla, vide order dated 15.05.2018, directed for

release of the gun by furnishing an indemnity bond of Rs.30,000/- or cash of the like amount subject to certain conditions mentioned therein. The petitioner, having complied with the same, as a necessary corollary, the gun should have been released in his favour, pending trial of the case. But subsequently, when the gun was found lost from the Court Malkhana, the petitioner filed this writ petition seeking direction to the opposite parties to pay compensation for the lost gun from Malkhana of the J.M.F.C., Daspalla.

8. On examination of relevant provisions of the Criminal Procedure Code, this Court finds that where the property which has been the subject-matter of an offence is seized by the police, it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice. The object of the Code seems to be that any property which is in the control of the Court either directly or indirectly should be disposed of by the Court and a just and proper order should be passed by the Court regarding its disposal. In a criminal case, the police always acts under the direct control of the Court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the Court exercises an overall control on the actions of the police officers in every case where it has taken cognizance. Taking into the aforementioned object and scheme of various provisions of the Code and applying to the present context, since the gun in question was seized by the police and kept in Malkhana of the J.M.F.C., Daspalla, such order passed by the Court on 15.05.2018 for release of the same in favour of its owner (petitioner) by furnishing a bond of Rs.30,000/- or cash of the like amount subject to the conditions stipulated therein. On receipt of the report from the learned District & Sessions Judge, Nayagarh, this Court finds that the said gun has been lost and thereby proceeding has been initiated against the person concerned. As all steps have taken to find out the gun in question, but the same is still missing, the petitioner claims that he should be duly compensated for the loss of gun from the custody of the Malkhana of the Court.

9. In ***Basavva Kom Dyamangouda Patil*** (supra), the apex Court passed order that the appellant in the said case was entitled to receive cash equivalent to the property lost which was held to be Rs.10,000/- and such amount should be paid to the complainant by the State.

10. Similarly, in ***Inter Continental, Agencies Pvt. Ltd.*** (supra) the apex Court held that it was the duty of the Court to probe into the matter, make a full enquiry, and trace the whereabouts of the buses. If the buses could not be so traced or if the buses could not be delivered to the owner for any reason the duty of the Court to direct the culpable party to pay the value of the vehicles to the appellant.

11. Reliance has also been placed on the provisions of the G.R.C.O. (Criminal) Vol., Chapter-XVIII, which deal with "Custody and Disposal of Property" from Rule 172 to 187, wherein the manner has been prescribed to take custody and disposal of property which has been kept in Malkhana of the Court. Since the gun in question, which was kept in the Malkhana of the J.M.F.C., Daspalla, is found missing and despite the direction given by the Court for release of such gun in favour of the owner (petitioner), if the same is not released, in that case for causing loss of the gun, the petitioner is to be paid compensation.

12. In ***Jeejeebhoy V. Asst. Collector, Thana,*** AIR 1965 1069, it has been held that the expression 'compensation' means 'just equivalent of what the owner has been deprived of.'

13. In ***State of Gujarat v. Shantilal Mangal Das,*** AIR 1969 SC 634, the apex Court held that 'compensation' means anything given to make things equivalent, a thing given to or to make amends for loss, recompense, remuneration or pay.

14. In ***Kiranbal Bandapat v. Secy. Grid corporation of Orissa Ltd.,*** AIR 1998 Ori 159, this Court held as follows :

> *'Compensation' means anything given lo make things equivalent, a thing given or to make amends for loss, recompense, remuneration or pay; it need not, therefore, necessarily be in terms of money, because law may specify principles on which and manner in which compensation is to be determined as given. Compensation is an act which a Court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damified may receive equal value for his loss or be made whole in respect of his injury; something given or obtained as equivalent;*

rendering of equivalent in value or amount an equivalent given for property taken or for an injury done to another; a recompense in value; a recompense given for a thing received recompense for whole injury suffered, remuneration or satisfaction for injury or damage or every description. The expression 'compensation' is not ordinarily used as an equivalent to 'damage' although compensation may often have to be measured by the same rule as damages in an action for a breach."

15. The well said dictum of law is that no one shall be prejudiced for the acts of the Court 'actus curiae Neminem Gravabit' (the act of the Court harms no one).

16. In view of propositions of law, as discussed above, the petitioner has not placed on record the cost of the gun which has been found missing. Therefore, this Court is unable to make any assessment thereof to give compensation to the petitioner for the missing gun more particularly when trial, as well as proceeding against the alleged erring persons is still pending consideration. In such circumstance, this Court is of the considered view that the petitioner may, if so advised, by filing a properly constituted application, approach the court below, which shall take into consideration the same and pass appropriate order in awarding compensation, which may be in cash equivalent to the price of the lost/missing gun, after following due procedure of law.

17. With the above observation and direction, the CRLMP stands disposed of. No order as to costs.

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2020 (I) ILR - CUT- 522

D. DASH, J.

W.P.(C) NO. 21195 OF 2016

GEETANJALI KANHAR & ORS. ……..Petitioners

.Vs.

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

(A) CONSTITUTION OF INDIA, 1950 – Arts.226 & 227 – Writ petition – Challenge is made to the conversion of the land from 'Gochara' to 'Patita' under the Scheduled Area – Conversion made by Govt. for the purpose of establishment of "Battalion" by following the OGLS Act –

But such conversion challenged under section 4 of the Panchayats(Extension to the Scheduled Areas) Act,1996 – Use of such land for the purpose of burial as well as cattle grazing pleaded – Further pleaded that, neither "Grama Sabha" nor the "Panchayat" have been consulted before the conversion – Applicability of the section 4 of the PESA Act questioned – Provisions of section 4 interpreted – Held, there being no 'acquisition' of these land for the purpose, the provisions of section 4 has no application and consultation of panchayat or Grama Sabha is not required – Writ Petition is dismissed.

(B) CONSTITUTION OF INDIA, 1950 – Arts.226 & 227 – Frivolous/ mischievous Writ petition – Clearly seen to be vexatious/running against the interest of the public and standing on the way of discharge of the State's solemn function and duty as ordained under the Constitution – Courts to react and respond appropriately – Cost imposed.

"The path of litigation has been chosen for achieving such mischievous objective at the cost of the interest of the public at large and in that, they having obtained an interim order, have succeeded in depriving the citizens of their right for over a period of more than two (2) years. The intervenor-petitioners have also come to join the petitioners at a later stage in raising their objections, although in a different way; nonetheless the aim stands the same so as to block the implementation of the decision of the State. The time has come for the courts to appropriately react and respond in such matters and in my considered view, it is a fit case to so rise."

For Petitioners : M/s. A.K.Sahoo, S. Pradhan & N. Mallick

For Opp. Parties: Mr. S.Palit, AGA, M/s. J.Bhuyan, A.Routray, D. Behera and P.K. Jena, M/s. S. Jena, G.B. Jena & J. Mohanty

JUDGMENT Date of Hearing: 29.01.2020: Date of Judgment :03.02.2020

D. DASH, J.

The petitioners, by filing this writ application, have prayed for a declaration that the action of the Collector, Kandhamal, (Opposite Party no.2), Sub-Collector, Kandhamal, (Opposite Party no.3) as also the Tahasildar, Khajuripada, (Opposite Party no.3) in converting the Kisam of the land measuring Ac.5.932 decimals covered under 10 plots of Khata No.218 from "GOCHAR" to "PATITA" being assigned with Khata No.220 under said 10 plots as illegal. They havefurther prayed to direct the Opposite Party no.2 to consider their grievance as also those of other co-villagers in this regard.

2. Facts necessary for the purpose are as under:

The villages, namely, Kaladi and Tilakpada under Khajuripada Tahasil in the sub-division of Kandhamal of the district of Kandhamal is a Scheduled Area as per the Presidential Order, i.e, the Scheduled Areas (States of Bihar, Gujurat, Madhyapradesh and Odisha) Order, 1977 made in exercise of powers conferred by sub-paragraph 6 of the 5th Schedule of the Constitution of India.

It is stated that the opposite party no.4 suddenly affixed a proclamation/notification in mouza Kaladi and Tilakpada regarding establishment of Durgapati 8th Specialized India Reserved Battalion (hereinafter called as 'the Battalion') and for the purpose, ten plots of land of Gochar kisam in mouza Kaladi under Khata No.218 measuring Ac.5.932 decimals have been converted to kisam Patita under Khata no.220. It is said that said establishment of Battalion had been objected to by the people of the locality by conversion of said land from Gochar to Patita. It is further stated that although the petitioners and others had raised serious objection to such conversion of kisam of land after having come to know about the move by notice dated 21.12.2018 as under Annexure-1 series, those have not been duly considered. In this way, the conversion of kisam of the aforesaid land having been made, opposite party no.4 made a proclamation on 11.07.2016 for establishment of the Battalion over that land under Khata no.220 as it stood after conversion of kisam. This was again objected to by the petitioners and others and so also the subsequent communication made by the opposite party no.4 in that connection. A meeting in the village being convened, said action of opposite parties for establishment of the Battalion over the land by conversion of its kisam from Gochar to Patita was deprecated and it was decided to raise objection in proper quarters.

It is the case of the petitioners that the villagers of the said locality are depending on said land kept for being used for grazing of cattles. It is next stated that the land in question in the area being within the declared Scheduled Area, the provisions of Panchayats (Extension to the Scheduled Areas) Act, 1996 (in short, 'the PESA') is fully applicable. So, it is said that such action of the opposite parties as to conversion of the kisam of the land from Gochar to Patita is in contravention of the provisions of clause (i) and

(n) of section 4 of PESA. Their case is that the provision of the aforesaid Act having been thrown to the winds by the State authorities-opposite parties in the matter, said order of conversion of kisam of land is illegal and thus liable to be quashed.

It may be stated here that on 21.12.2015, notification as to establishment of the Battalion at Mouza-Kaladi had been published after conversion of the kisam of the land from Gochar to Patita. On 11.2.2016 and 26.2.2016, communications were made for the awareness of the general public as regards such move inviting their objections/suggestions, if any. On 11.7.2016, proclamation was issued for establishment of the Battalion. On 10.8.2016, the petitioners and others raised their objection in the above connection as regards the establishment of the Battalion on the following grounds:

> "(i) contravention of clause (i) and (n) of section 4 of PESA; and
> (ii) existence of burial ground over the land."

3. The opposite parties 2 and 4, in their counter, have averred that for such conversion of kisam of land, all the procedures as prescribed in Odisha Government Land Settlement Act and rules made thereunder have been scrupulously followed and so also in the matter of alienation of the land after said conversion of kisam of land. It is stated that the villagers have been given the opportunity to raise their objection at every stage and they having been heard with reference to the objections, the decisions have been taken.

While not disputing that the provisions of PESA have their applicability in so far as the place where the land in question situates; it is stated that since the provisions of PESA does not at all get attracted for the subject matter, viewed with the purpose, the decision so taken is not in contravention of clause (i) and (n) of section 4 of PESA. It is stated that such process of alienation does not also affect any individual right.

It has been further averred that the objections raised are with ulterior motive with a bid to somehow put to block the process and move of the State for prevention of nuxlite activities in the area, which has already witnessed a communal riot as also in relation to serious law and order problems.

4. It is pertinent at this stage, to mention that on 27.1.2020, the original petitioner nos .2, 3 and 5 have filed three affidavits separately. They have

stated that although they were raising objections for the Battalion being established at the place, presently they do not have any objection since the Government has decided for establishment of a Medical College and Hospital over that land by putting up required constructions having taken a decision as to shift of the Battalion to a nearby place at Belaguntha in the district of Ganjam where the constructions for the establishment of the Battalion have already started. Filing such affidavits, they stated to be no more interested to remain within the arena of the proceeding as petitioners. In view of that, their names have been deleted in the cause title and they are no more in the arena of this proceeding.

The intervener-petitioners vide I.A. No.4184 of 2018 at this belated stage have come to be added as opposite parties 6 to 12 and their petition has been allowed vide order dated 29.1.2020 passed by this Court. They have stated that in view of the prevailing Maoist activity in the district of Kandhamal and other adjacent district with the growing and continuous demand from the side of the local inhabitants to combat the same by deployment of Battalion in the locality for progress of developmental process; there should be establishment of Battalion over the land and that being earmarked for the purpose be not used for any other purpose, whatsoever including the setting up of Medical College and Hospital.

The opposite parties 13 to 18 have come to be added as as such as their belated intervention application vide I.A. No.9418 of 2019 has been allowed by this Court on 29.1.2020. Their case is that the district being a riot prone area and since had witnessed a serious communal riot in December, 2007, the decision for establishment of the Battalion need be carried out. In so far as the land in question is concerned, it is submitted that the conversion of the kisam of the land from Gochar to Patita is not in contravention of the provision of PESA. They submit that the writ application has been filed with ulterior motive to see that the decision of the Government for establishment of the Battalion is somehow foiled.

5. Reiterating the averments made in the writ application, learned counsel for the petitioners submitted that in the matter of conversion of kisam of the land in question, there has been contravention of provision in clause (i) and (n) of section 4 of PESA. According to him, in the matter as mandatorily required under clause (i) of section 4 of PESA, the Grama Sabha or the Panchayat at the appropriate level has not been consulted before such

conversion and said power rest with the Panchayat under clause (n) of section 4 of PESA has been usurped by the State, which is not permissible and as such all the actions taken in that regard are illegal. The objection as to the existence of burial ground which had been mentioned in the original objection filed before the authority on 10.08.2016 is not pressed into service and given a gobye. In view of the above, it was submitted that such conversion of kisam of the land is nonest in the eye of law being without jurisdiction. According to him, in the matter of conversion of kisam of land in contravention of the provisions of PESA as applicable and by following the provision of the Odisha Government Land Settlement Act which has no application especially in such matter of conversion of kisam of the land is nonest in the eye of law. He submitted that the decision of conversion of kisam of land being nonest, at present, the kisam of the land is to be taken as Gochar which is objectionable and, therefore, neither the State nor anyone else can put up any such construction over the said land which cannot be used for any purpose whatsoever other than as it stood recorded.

Learned counsel for the opposite parties-intervenors have reiterated the stand as taken in their counter as aforementioned.

6. Learned Additional Government Advocate submitted that now the Government has taken a decision for establishment of a Medical College and Hospital in the area using this Government land as also other nearby land. It was submitted that in view of the move of the petitioner before this Court by filing the writ application and for the interim order passed by this Court on 11.01.2017 in Misc. Case No.19481 of 2016, the establishment of the Battalion, which was the urgent need, Government was compelled to take a decision for shifting it to a nearby place in the adjoining district where the construction work has already commenced so far which at present the question of establishment of a Battalion over the land in question is a foregone conclusion. He, however, submitted that it makes no difference in the matter of establishment of the Battalion at Belaguntha in the district of Ganjam, which is at a short distance from the present place as that is also an ideal location best suited for the purpose. It was submitted that the decision for establishment of the Battalion was for the benefit of the general public and so also the present decision for establishment of Medical College and Hospital in catering the need of the inhabitants of the Scheduled Area in getting proper and advanced health care at door step, which is the need of the hour. It was submitted that the submission of the intervenor opposite parties

that establishment of the Battalion is not objected to and it be established in the place is clearly a mischievous one when it is quite certain that the same is no more possible. According to him, these intervenor-petitioners have come when it has become as clear as the noon day that the move of the original petitioners as laid would not succeed in questioning the conversion of kisam of land.

Placing the provisions in clause (i) and (n) of section 4 of PESA, he contended that those provisions have absolutely no application to the matter in hand and thus the question of holding the action as to conversion of kisam of the land to have been taken in contravention of the provisions of PESA does not arise.

7. On the rival submissions, the first question that stands for answer is as to whether the decision of conversion of the Kisam of the land in question from that of 'Gochar' to 'Patita' is in contravention of the provisions of the PESA and the action as is said to have been taken as to conversion of the Kisam of land by following the provisions of Odisha Government Land Settlement Act and the rules made thereunder if has the legal sanction.

8. Section 3 of PESA provides the extension of Part IX of the Constitution relating to Panchayats to the Scheduled Areas with the exceptions and modifications as are provided in section 4 of the said Act.

Section 4 of PESA begins with non-obstante clause that notwithstanding anything contained under Part IX of the Constitution, the Legislature of a State shall not make any law under that Part which is inconsistent with the features as have been stated under clause (a) to (o). Here, the petitioners have alleged contravention of the provision in clause (i) of section 4 of PESA. It says that the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the **acquisition** of land in the Scheduled Areas for development projects and before resettling or rehabilitating persons affected by such projects in the Scheduled Areas, further regarding coordination at the State level as to the actual planning and implementation of the projects in the Scheduled Areas. (Emphasis is provided on the word 'acquisition')

9. In the present case, the State is the owner of the land. It is true that the Kisam of the land stood as Gochar. But, as in this case, the State has not gone for **acquisition** of land and the State having taken a decision that its land is

ideal for use for the purpose other than the purpose as per the recorded Kisam has followed the procedure prescribed under the law made by the Legislature, i.e, Odisha Government Land Settlement Act and the rules made thereunder for such conversion of the kisam, there arises no case for contravention of the provision of PESA. The PESA has empowered the Grama Sabha/Panchayat at appropriate level with the right to mandatory consultation in land **acquisition**, resettlement and rehabilitation of displaced person. But here there being no **acquisition** of these land belonging to anyone for the purpose, the provisions of clause (i) of section 4 has no applicability at all that in such matter of conversion of the Kisam of the land. For the purpose, thus said consultation was not the legal need. It is not denied that in taking the decision as to conversion of the kisam, objections have been invited, there being hearing; other process, as provided in the Act and rules, have been followed.

10. In view of the above, the objection that the decision of conversion of the kisam of the land from 'Gochar' to 'Patita' being without jurisdiction is nonest does not hold water. The kisam of the land having been changed to Patita, the State being its owner, when decided that over that land and other lands nearby, a Medical College and Hospital would be established to cater the need of the people of the area as to getting the proper attention in the matter of immediate Health Care with advanced treatment as also the development of the area in serving public good in so many ways, the very moves of the petitioners as also the intervenors clearly appear to be vexatious and must fail.

11. As regards the decision for establishment of the Battalion over the land and nearby land in the Scheduled Area, it is clearly seen to be in the direction of discharge of the State's function and duty in doing the needful for the peaceful living of its citizen in an atmosphere being duly maintained with the law and order in further providing the people to live in a free and fearless manner/way and environment being in a position to exercise all such rights guaranteed and as available to them for their decent living with human dignity as a part of the constitutional right, i.e. right to life as guaranteed under Article 21 of the Constitution.

In so far as the decision for establishment of the Medical College and Hospital over there, it is again in the direction of providing proper and advanced health care facilities to the inhabitants of the locality as well as all others, at the door step which right they enjoy under the Constitution as a part

of their right to life as citizens when it rests with the State as its duty to so provide proper health care and medical aid to protect their health as is now available in the present days without being faced with any such hurdles in view of inequality in any such front which is their fundamental right. This decision under challenge being wholly in the direction of securing such right to the citizens as guaranteed under the Constitution, present move of these petitioners on such frivolous grounds is clearly seen to be vexatious running against the public interest and standing on the way of discharge of the State's solemn function and duty as ordained under the Constitution in securing its citizens and their enjoyment of the rights as guaranteed to them under the Constitution.

The path of litigation has been chosen for achieving such mischievous objective at the cost of the interest of the public at large and in that, they having obtained an interim order, have succeeded in depriving the citizens of their right for over a period of more than two (2) years. The intervenor-petitioners have also come to join the petitioners at a later stage in raising their objections, although in a different way; nonetheless the aim stands the same so as to block the implementation of the decision of the State. The time has come for the courts to appropriately react and respond in such matters and in my considered view, it is a fit case to so rise.

In view of all the aforesaid discussion and reasons, the writ application stands dismissed. Consequently, the interim order of status quo passed by this Court on 11.1.2017 in Misc. Case No.19481 of 2016 stands vacated.

Each of the petitioners are imposed with cost of Rs.30,000/- (rupees thirty thousand) and each of the intervenors are also imposed with cost of Rs.10,000/- (rupees ten thousand) to be deposited with the Registry of this Court within a period of two months. On deposit of the amount as above, the Registry would do well to transfer the same to the account of the Odisha State Legal Services Authority for its proper utilization in providing free legal aid and services to those in need.

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2020 (I) ILR - CUT- 531

D. DASH, J.

W.P.(C) NO. 20151 OF 2019

SMT. RENU SETHI .....Petitioner

.Vs.

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

THE ORISSA GRAMA PANCHAYATS ACT, 1964 – Sections 14(1), 15,17 & 24(2), (4) – Resolution of "No confidence motion" against the petitioner/Sarapanch – Notice issued – Such notice challenged on the ground that the statutory periods of two years and six months have not been elapsed since the date entering his office as Sarapanch – Result of Grama Panchayat declared on 27.02.17 – First meeting of Panchayat held on 10.03.17 – Meeting for election of Naib-Sarapanch held on 29.03.17 – Requisition for "No confidence motion" dispatched on 11.09.19 – Petitioner pleads that, the statutory periods of two and half years to be counted from 29.03.17 not from 10.03.17 as Naib-Sarapanch was elected on that date – Provisions of the Act discussed – Legality of such impugned notice assessed – Held, the lock-in period has to be computed from the date on which Sarapanch entered his office i.e from 10.03.17 not from the date on which Naib-Sarapanch elected i.e from 29.03.17. – So the requisition in the instant case is maintainable.

For Petitioner : Mr. Nilamadhab Bisoi and S.Swain

For Opp. Parites : Addl. Standing Counsel
M/s.J.K.Naik, R.B.Mohapatra & A.K.Pujhari

JUDGMENT Date of Hearing:29.01.2020: Date of Judgment :25.02.2020

D. DASH, J.

The petitioner by filing this writ application seeks to assail the decision of the Sub-Collector, Jajpur (opposite party no.3) in convening the special meeting for vote of 'No Confidence Motion' against the petitioner who is the elected Sarpanch of Routarapur Grama Panchayat followed by issuance of notice dated 10.10.2019 under Annexure-1.

2. The facts necessary for the purpose are as under:-

The petitioner is the elected Sarpanch of Routarapur Grama Panchayat under Rasulpur Block in the district of Jajpur. The result of the

election of Rautarapur Grama Panchayat was declared and published by notification under section 15 of the Odisha Grama Panchayat Act, 1964 (for short, 'the OGP Act') on 27.02.2017, the petitioner has been functioning as Sarpanch since then. The Sub-Collector, Jajpur having received a requisition as also the proposed resolution from ten members of the Grama Panchayat including the Naib Sarpanch has taken the decision to convene the special meeting for discussion of the 'No Confidence Motion' against the petitioner and issued notice under Annexure-1 to the petitioner as also all other members of the Grama Panchayat enclosing the copy of the requisition as well as the proposed resolution made by those requisitionists who proposed to place that for discussion in the special meeting so convened for being so passed.

This notice has been impugned here in the writ application.

3. Learned counsel for the petitioner submitted that sdaid decision of the Sub-Collector to convene the special meeting for discussion and vote on the 'No Confidence Motion' and consequential issuance of notice is not in conformity with the provision of law as contained under sub-section 2 of section 24 and sub-section 4 of section 24 read section 7,10, 14, 15 and 17 of the Act as also rule-2, 1(k) of the Grama Panchayat Rules read with rules 52, 56, 76, 80, 81 and 83 of the Odisha Grama Panchayat Election Rules. It is also said to be not in consonance with rules 1, 5 and 8 of the Rules of Business as annexed to the Odisha Grama Panchayat Rules.

It was his specific submission that so as to record vote of no confidence against the Sarpanch, a meeting of the Grama Panchayat has to be specially convened and 2/3rd of the total number of the members of hip of the Grama Panchayat have to vote expressing their want of confidence with the Sarpanch.

Placing the definition of Grama Panchayat as contained in section 2(j) of the OGP Act, he contended that 'Grama Panchayat' means the Executive Committee of Grama Sasana established under section 7 of the OGP Act. Inviting the attention of the Court to sub-section (1) of section 10 of the OGP Act, he submitted that the Grama Panchayat shall be composed of a member to be elected by the persons referred to in sub-section (1) of section 4 of the OGP Act from amongst themselves, i.e, the voters of the Gramas who shall be the Sarpanch and a member to be elected from each of the Wards by the persons on the electoral roll for the Ward from amongst themselves. He

further contended that as provided in sub-section (2) of section-10, there shall be a Naib Sarpanch in respect of every Grama Panchayat to be elected under section 14 of the Act from amongst the members. He, therefore, submitted that the term of the office of Sarpanch of a Grama Panchayat, as provided in section 14 of the Act, here in the case, has to commence on and from 29.03.2017 when the first meeting of the Grama Panchayat was held and not from 10.03.2017 when the meeting for election of Naib-Sarpanch had taken place as the first meeting as per the Rules of Business annexed to the Odisha Grama Panchayat Rules, would be taken as to have been held on 29.03.2017. So, the lock-in period for the purpose of bringing the no confidence motion ought to have been computed from that date, i.e, 29.03.2017. In view of that, he contended that here the date of dispatch of the requisition, i.e, on 11.09.2019, is falling within the lock-in period of two years and six months as provided in sub-section (4) of section 24 of the OGP Act for which it is not maintainable and, therefore, the decision to convene the special meeting for the purpose of record of no confidence is wholly unsustainable in the eye of law.

The learned counsel for the State and learned counsel for the opposite party nos.7 to 16 submitted that the provision of section 24 of the Act has to be read independent of Rules of Business annexed to the Odisha Grama Panchayat Rules and it prescribes the lock-in period for the purpose of sending the requisition to be two years and six months from the date from which the Sarpanch or Naib Sarpanch enters the office. They submitted that the Sarpanch is deemed to have entered the office on the date of first meeting of the Grama Panchayat and that here in the case, as per law when the meeting was held on 10.03.2017, wherein the Naib-Sarpanch was elected.

4. Provision of section 24 of the Act reads as under:

> "24. Vote of no confidence against Sarpanch or Naib-Sarpanch
>
> (1) xx xx xx xx
>
> (2) In convening a meeting under Sub-section (1) and in the conduct of business at such meeting the procedure shall be in accordance with the rules, made under this Act, subject however to the following provisions, namely:
>
> (a) no such meeting shall be convened except on a requisition signed by at least one-third of the total membership of the Grama Panchayat along with a copy of the resolution of proposed to be moved at the meeting;
>
> (b) the requisition shall be addressed to the Sub-Divisional Officer;

(c) the Sub-Divisional Officer on receipt of said requisition, shall fix the date, hour and place of such meeting and give notice of the same to all the Members holding office on the date of such notice along with a copy of the resolution and of the proposed resolution, at least fifteen clear days before the date so fixed;

(d) xx xx xx xx
(e) xx xx xx xx
(f) xx xx xx xx
(g) xx xx xx xx;
(h) xx xx xx xx;
(i) xx xx xx xx;
(j) xx xx xx xx; and
(k) xx xx xx xx"

(3) When a meeting has been held in pursuance of Sub-section (2) for recording want of confidence in the Sarpanch or Naib-Sarpanch, as the case may be, no fresh requisition for a meeting shall be maintainable.

(a) in cases falling under Clauses (i) and (j) of the said sub-section or where the resolution is defeated after being considered at the meeting so held, before the expiry of one year from the date of such meeting; or

(b) where the notification calling for general election to the Grama Panchayat has already been published under or in pursuance of Section 12.

(4) Without prejudice to the provisions of Sub-section (3) no requisition under Sub-section (2) shall be maintainable in the case of a Sarpanch or Naib-Sarpanch, as the case may be, before the expiry of two years from the date on which such Sarpanch or Naib-Sarpanch enters office ;

Provided that all requisitions received under Sub-section (2) prior to the date of commencement of the Orissa Grama Panchayats (Second Amendment) Act, 1993, in which no meeting for recording want of confidence has been held by the said date, shall stand abated.

Explanation - The expression "total membership of the Grama Panchayat" shall refer to the total number of members specified in Sub-section (1) of Section 10 together with the number of members, if any, actually holding office at the relevant date in pursuance of Sub-section (3) of the said section.

A careful reading being given to the same makes it very clear that the lock-in period has to be computed from the date on which said Sarpanch enters the Office. As provided in sub-section (1) of Section 17 of the Act, the Sarpanch would be deemed to have entered the office as such on the date of first meeting of the Grama Panchayat as provided under sub-section (1) of section 14 of the OGP Act. The provisions are very clear and have no reference to the Rules of Business annexed to the Odisha Grama Panchayat

Rules. Morevoer, Naib Sarpanch is elected by the members from amongst the Ward Members and he functions as Naib Sarpanch and discharges the duty as such along with his primary duty as the representative of a Ward from which he has been elected by its voters of that ward whereas Sarpanch is elected directly by the voters of all the Wards to act in heading the Grama Panchayat. So the requisition in the instant case is maintainable and Sub-Collector (opposite party no.2), has committed no illegality in convening the special meeting by issuing notice under Annexure-1.

Thus the submission of the learned counsel for the petitioner does not merit acceptance.

5. In the result, the writ application stands dismissed. The interim order dated 24.10.2019 passed by this Court in I.A. No.14691 of 2019 stands vacated. Consequent upon the above, if the specially convened meeting, as scheduled in the notice under Annexure-1, has already been held and the result of the No Confidence Motion has been kept in the sealed cover, the same be declared forthwith and action in accordance with law be taken pursuant to such resolution.

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2020 (I) ILR - CUT- 535

BISWANATH RATH, J.

W.P.(C) NO. 8209 OF 2018

BISWADEEP KHADENGA .....Petitioner

.Vs.

STATE OF ORISSA REPRESENTED BY HOME SECRETARY & **ORS.** ..... Opp.Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order directing disconnection of power supply to the Handloom Unit of the petitioner in the name of maintaining law and order by the Administration – In an earlier proceeding the Unit obtained necessary pollution clearance certificate

to run the same – Agitation by people – IIC and Addl. Tahsildar directed CESU to disconnect the power supply – Whether such an order can be legally tenable? – Held, No, it amounts to abuse of power – Reasons indicated.

"Considering the above and looking to the documents at Annexures-5 (series), this Court finds, pursuant to the direction of the Collector entering into necessary inspection the State Pollution Control Board on 31.08.2017 has granted "Consent to operate" in favour of the petitioner under the provision at Section 25/26 of the Water (PCP) Act, 1974 and U/s.21 of the Air (PCP) Act, 1981. The "Consent to operate" also clearly reveals that the "Consent to operate" has been given on 31.8.2017 and to continue till 31.03.2022. It is, in the circumstance, assuming that even there is further complaint by the villagers and in the event any law and order situation arises there, for involvement of a round of exercise ended with grant of "Consent to operate" with maintenance of certain conditions therein, a duty cast on the Addl. Tahasildar as well as on the O.I.C., Tigiria Police Station to control the law and order by protecting the implementation of valid orders by taking action as appropriate to subside such agitation rather than protecting the complainants. Both the Officers i.e. the Opposite party nos.4 & 5 had no authority to protect the petitioner for the petitioner's obtaining a "Consent to operate" already. For the permission of the Collector is already there coupled with grant of "Consent to operate", this Court observes, there is abuse of power by both the Additional Tahasildar, Tigiria and O.I.C., Tigiria Police Station in this matter and in the process, while cautioning the Additional Tahasildar, Tigiria and O.I.C., Tigiria Police not to indulge in such affair and to follow the procedure of law in such cases, this Court holds the actions of the opposite party nos.4, 5 & 8 as bad."

For Petitioner : M/s. Lalitendu Mishra, R. Pattrayak, R. Pattnayak.

For Opp.Parties : M/s. P.K. Jena, D.P.Mohapatra, M/s. Prasanta Ku. Jena, D.P. Mohapatra, M/s. Shanti Prakash Mohanty, P.Lenka,M/s. B.k.nayak-1, A.Dash, S.Rout, M/s. Ghasiram Verma, S.K.Varma, P.K.Panda, M/s. S.N. Rath, S. Swain.

ORDER Date of Order : 05.12.2019

BISWANATH RATH, J.

Heard Shri L. Mishra, learned counsel for the petitioner, Miss. S. Misra, learned Additional Standing Counsel for the State-opposite party, Shri G. Verma, learned counsel for the opposite party no.6, Shri S. Rout, learned counsel for the opposite party no.8, Shri S.P. Mohanty, learned counsel for the opposite party no.9, Shri S.N. Rath, learned counsel for the opposite party no.10 and Shri P.K. Jena, learned counsel for the interveners.

This Writ Petition involves the following prayer:

> "It is therefore humbly prayed that this Hon'ble Court may graciously be pleased to admit the writ petition, issue rule nisi calling upon the Opp.Parties to show cause as to why an appropriate nature of writ / writs shall not be issued by directing the Opposite party no.2 (The Collector, Cuttack), Opposite party no.3 (The S.P. Rural, Cuttack), Opposite party No.4 (The O.I.C., Tigiria P.S., Tigiria) Opposite party No.5 (the Additional Tehsildar, Tigiria), The Opposite party No.7 (the Sub-Sub-Collector, Athagarh), Opposite party No.8 (The S.D.O. CESU, Athgarh Division, Athagarh) to reconnect the electricity supply to the handloom unit of the petitioner and to further direct the aforementioned opposite parties to ensure, the smooth functioning of the handloom unit of the petitioner by controlling the strikes and bandh orchestrated by the O.P. No.6 and his accomplices; And causes shown insufficient be pleased to make the said rule absolute.;"

Short background involved in this matter is that on the allegation of the neighbors regarding noise pollution and thereby creation of pollution hazard in the locality and on being directed by this Court in disposal of the W.P.(C) No.22840 of 2016 a joint inspection process was undertaken by the Collector as appearing at Annexure-9. The Team undertaken such exercise has given its report with specific direction at para 3 therein. It is consequent upon the above, final order was passed by the Collector but however after giving opportunity of hearing to the complainant as well as the persons affecting the petitioner. It also appears, the Collector while imposing certain restriction on the petitioner has directed the petitioner to obtain "Consent to operate" from the Pollution Control Board following the notification dated 4.09.2016 of the Forest & Environment Department, Government of Odisha. It is pursuant to such direction the petitioner while complying the restriction made therein inasmuch as shifting of some of Power loom Machines to a distance place, while also maintaining the operational time as directed, made an approach to the Pollution Control Board by the petitioner. It appears, the Pollution Control Board has also given "Consent to operate" by the order vide Annexures-4 & 5 and the same appears to be valid till 31.3.2022. It is, at this stage of the matter when the petitioner restarted functioning of his Power loom basing on the "Consent to operate" order by the competent authority, a group of villagers raised protest involving such issue. Consequent upon which and on the intervention of the Police authority, the O.I.C., Tigiria Police Station-opposite party no.4 and the Tahasildar, Tigiria in the name of maintaining Law and Order situation directed the S.D.O., Central Electricity Supply and Utility, Odisha, Athagarh Division-opposite party no. 8 to disconnect the power supply to the Power loom of the

petitioner. As a consequence of such direction the Opposite party no.8 has disconnected the power supply to the petitioner's power loom unit giving rise for filing of the Writ Petition.

Challenging the inaction of the opposite parties, taking this Court to the development that pursuant to the direction of the Collector the "Consent to operate" order has been given by the competent authority in favour of the petitioner and for his compliance of the direction of the Collector thereby shifting two of the Power loom Units to outside, Shri L. Mishra, learned counsel for the petitioner contended that for a permission being granted under the law by the competent authority in favour of the petitioner and after spending so much amount involving installation of the Power loom, the opposite party nos.4 & 8 have no authority to interfere with the functioning of the petitioner and illegally obstructing the functioning of the petitioner's power loom. It is, in the above background of the matter, learned counsel for the petitioner sought for a mandamus against the opposite party no.8 for restoration of the electricity to the Power loom units of the petitioner forthwith.

Shri Nayak, learned counsel for the opposite party no.8, on the other hand, taking this Court to the averments made in paragraph nos.5 & 6 of the counter affidavit at the instance of the opposite party no.8, contended that the Officers of the opposite party no.8 are under threat of opposite party nos.4 & 5 on the pretext of maintenance of law and order situation in the locality and as such it had no other option than to succumb to the situation in the locality at that point of time. Shri Nayak, learned counsel however ultimately submitted that they have no objection in restoration of the electricity to the Power loom unit of the petitioner.

Shri S.P. Mohanty, learned counsel for the opposite party no.9, on the other hand, did not dispute to the fact that the State Pollution Control Board have granted the "Consent to operate" in favour of the petitioner by the order vide Annexure-5 (series) and it remains valid and that they have not receipt of any complaint alleging violation of conditions therein.

Miss S. Misra, learned Additional Standing Counsel and Shri P.K. Jena, learned counsel for the intervener on the other hand, however jointly resisted the stand taken by Shri L. Mishra, learned counsel for the petitioner on the premises of pollution hazard in the locality. Shri P.K. Jena, learned counsel also resisted the functioning of the establishment in the locality on

account of pollution hazard. Both the counsels however did not dispute the fact that based on a previous complaint there is already a direction by this Court in disposal of the W.P.(C) No.22840 of 2016 and it is pursuant to intervention of the Collector an on spot enquiry was also conducted and for the grant of "Consent to operate" by the competent authority the petitioner restarted the Power loom unit.

Considering the rival contentions of the parties, this Court finds, in an earlier move one Dillip Kumar Barik appearing to be the just neighbor to the petitioner's Power loom unit filed Writ Petition bearing No.22840 of 2016. In disposal of the said Writ Petition looking to the allegation made therein, this Court directed the Collector to have a joint inspection involving the Sub-Collector, Athagarh, Regional Officer, SPCB, Cuttack, Deputy Environment Scientist, SPCB, Cuttack, Shri Dillip Kumar Barik, complainant and the owner of the power loom unit namely M/s. Shree Guru Handloom Fabrics. After entering into the joint inspection the Committee comprises of the above persons, has given its report and in para-3 therein mentioned as follows:

> "3. Earlier power loom units were coming under green category and were exempted from consent administration of the Board as per the order of F & E Deptt. Govt. of Odisha dtd. 7.08.2015. However, as per the recent order of the Forest & Environment Deptt. Govt. of Odisha vide order No.ENV-I-75/2016/16780/ F&E dtd.9.9.2016, it is categorized under 'green' and it needs to obtain consent to establish/operate from the Board. The unit has not obtained CTE/CTO from the Board so far."

It is pursuant to submission of such joint inspection report, it appears, the Collector took up the matter by providing personal hearing to the parties likely to be affected and the complainant. It is on consideration of the report and the submission of the respective parties appeared before him, the Collector by his order dated 7.06.2017 directed as follows:

> "After considerate hearing of both the parties, General Manager, DIC, Cuttack, Regional Officer, SPCB, Cuttack ,Deputy Env. Scientists, SPCB, Cuttack and taking into consideration of the technical view reflected in the joint enquiry report, the noise level at House of the Petitioner, Power Loom Unit of the defendant are within the prescribed day time standard in residential area is accepted. Sri Biswadeep Khadenga (OP No.7) is directed shift the 2(two) power loom machines installed adjacent to the wall of the residential house of the petitioner and relocate the same at a reasonable distance. The power loom machines shall not be operated during 06.00 P.M to 06.00 AM and due precautions shall be adhered during operation of the power loom machines in order to maintain the prescribed standard noise level.

> Besides, the O.P. No.7 shall have to obtain CTE/CTO from the State Pollution Control Board, Cuttack for operation of the power loom unit in adherence to the Notification No.ENV-I-75/2016/16780/F&E. Dt.9.9.2016 of Forest & Environment Department, Odisha. Accordingly the grievance petition of the petitioner is disposed off.
>
> Joint Inspection report submitted by the Sub-Collector, Athagarh and Regional Officer, State Pollution Control Board, Cuttack is a part of this record."

Considering the above and looking to the documents at Annexures-5 (series), this Court finds, pursuant to the direction of the Collector entering into necessary inspection the State Pollution Control Board on 31.08.2017 has granted "Consent to operate" in favour of the petitioner under the provision at Section 25/26 of the Water (PCP) Act, 1974 and U/s.21 of the Air (PCP) Act, 1981. The "Consent to operate" also clearly reveals that the "Consent to operate" has been given on 31.8.2017 and to continue till 31.03.2022. It is, in the circumstance, assuming that even there is further complaint by the villagers and in the event any law and order situation arises there, for involvement of a round of exercise ended with grant of "Consent to operate" with maintenance of certain conditions therein, a duty cast on the Addl. Tahasildar as well as on the O.I.C., Tigiria Police Station to control the law and order by protecting the implementation of valid orders by taking action as appropriate to subside such agitation rather than protecting the complainants. Both the Officers i.e. the Opposite party nos.4 & 5 had no authority to protect the petitioner for the petitioner's obtaining a "Consent to operate" already. For the permission of the Collector is already there coupled with grant of "Consent to operate", this Court observes, there is abuse of power by both the Additional Tahasildar, Tigiria and O.I.C., Tigiria Police Station in this matter and in the process, while cautioning the Additional Tahasildar, Tigiria and O.I.C., Tigiria Police not to indulge in such affair and to follow the procedure of law in such cases, this Court holds the actions of the opposite party nos.4, 5 & 8 as bad.

As a consequence, this Court issues Writ of mandamus to the opposite party no.8 to forthwith restore the power supply to the petitioner's power loom unit. Further this Court also directs the opposite party nos.4 & 5 to see that the petitioner's Power loom unit is running without being affected by any person in any event. The Writ Petition stands disposed of with the above direction.

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2020 (I) ILR - CUT- 541

BISWANATH RATH, J.

W.P.(C) NO. 834 OF 2002

TRILOCHAN DASH ……..Petitioner

.Vs.

CHAIRMAN-CUM-M.D.,UNION BANK OF INDIA, MUMBAI & ORS. ……..Opp. Parties

SERVICE LAW – Departmental Proceeding – Petitioner was working as a cashier in the bank – Allegation of doing the acts which are prejudicial to the interest of the bank resulting monetary loss – Charges proved against the petitioner – There is no actual loss to the bank – Petitioner prayed for exoneration from the charges – Prayer of the petitioner considered – Held, the charges being proved, this court finds that there is no question of showing any leniency or sympathy to a bank officer – Hence the writ petition is dismissed.

Looking to the findings of the Enquiry Officer and the Charge Nos.1 to 9 being fully established, this Court finds for the material available therein and for establishment of above charges each of the charge since serious for the involvement of offence involving financial institute, this Court is of the view that establishment of each charge itself is sufficient to inflict punishment of dismissal. On the allegation that no loss being sustained by the Bank, the petitioner should have been exonerated from the charges, this Court finds for the serious financial irregularities at the instance of the delinquent petitioner, it is not a question whether there is loss of one pie or thousand pies. The question for determination as to whether there occurred financial irregularities or not? And whether the petitioner is responsible for the same or not? For the clear and cogent finding on the charges indicated hereinabove and further based on material charges being proved, this Court finds there is no question of showing any leniency and/or sympathy involving a Bank Officer. In the result, this Court finds the writ petition has no merit, as a consequence, the writ petition stands dismissed. No costs.

Case Laws Relied on and Referred to :-

1. AIR 1984 SC 289 : Shambhu Nath Goyal Vs. Bank of Baroda & Ors.

For Petitioner : Mr.M.K.Mallick, C.R.Mallick, Mr.J.N.Sahu, Mr. B.K. Mohanty & Mr. B.M.Mohapatra
For Opp.Party : Mr. S.Das, Mr.S.Mohanty & Mr.G.B. Jena

JUDGMENT Date of Hearing: 11.12.2019 : Date of Judgment:02.01.2020

BISWANATH RATH, J.

The writ petition involves a challenge to the order of termination being passed by the Disciplinary Authority and the order of rejection of appeal involving termination of the petitioner by the Appellate Authority vide Annexures-3 and 4 and thereby directing opposite party nos.1 to 3 to reinstatement the petitioner in service with all service benefits.

2. Heard Mr. M.K.Mallick, learned counsel for the petitioner and Mr.S.Das, learned counsel for the opposite party nos.2 and 3. None appears for opposite party nos.1 and 4.

3. Short background involving the case is petitioner joined the Union Bank of India as a Clerk-cum-Cashier at its Angul Branch on 28.5.1977. In May, 1985, petitioner was promoted to the post of Head Cashier. Petitioner's next promotion would have been to the post of Scale-I Officer. On 02.12.1999, when the petitioner while was working as a 'C' category Head Cashier in the Union Bank of India, Balukhanda Branch, Puri, he was suspended by the Assistant General Manager, Regional Office, Bhubaneswar on 02.12.1999 vide Annexure-5. Pending initiation of a disciplinary proceeding, a departmental proceeding was initiated. Charge-sheet was communicated to the petitioner on 16.3.2000. On the allegations made therein, petitioner submitted his explanation to the charge-sheet vide Annexure-7 completely denying the allegations made against him. In response to the same, the Disciplinary Authority intimated to the petitioner on 10.6.2000, vide Annexure-6 that the Disciplinary Authority is not satisfied with the defence plea. While the matter stood thus, opposite party no.4 was appointed as Enquiry Officer on 10.6.2000. As a consequence, the Enquiry Officer communicated to the petitioner that he has been appointed as an Enquiry Officer-cum-Disciplinary Authority to enquire into the allegations involving the petitioner. Upon completion of the enquiry, the Enquiry Officer communicated his assessment in the enquiry on 31.05.2001 as appearing at Annexure-15 and thereby suggesting punishment of dismissal from service from the Bank with stoppage of increment for six months without cumulative effect. Second show-cause was issued to the petitioner. Personal hearing was conducted by opposite party no.4 on 28.06.2001 in the capacity of Disciplinary Authority finally opposite party no.4 passed the order of punishment vide Annexure-3 giving scope for filing of an appeal. Appeal was also dismissed by the Appellate Authority as appearing at Annexure-4.

Advancing his submission on the maintainability of the enquiry proceeding through opposite party no.4, learned counsel appearing for the petitioner explaining the position of opposite party no.4 and the provision of the service rules of the Bank called as 'Union Bank of India Officer Employees' (Discipline and Appeal) Regulations, 1976' contended that for the provision therein opposite party no.4 can never act as a Disciplinary Authority of the petitioner. In addition to the above, he also challenged the enquiry proceeding for having no merit. Learned counsel for the petitioner also contended that the order of the Appellate Authority is a biased one, as the Appellate Authority has not taken into account the points raised by the petitioner in the memorandum of

appeal. More particularly, in the matter of competency of opposite party no.4 to impose punishment of termination on the petitioner. In the process, the petitioner claimed that the enquiry report being a void report, no action could have been contemplated involving such report. Petitioner contended that since opposite party no.4 was not the appointing authority; he could not have been engaged as a Disciplinary Authority. It is also contended that since the charge-sheet against him and the disciplinary proceeding were all initiated by opposite party no.1, action of opposite party no.4 remain incompetent.

Learned counsel for the petitioner also contended that order of punishment is also void ab initio making thereby the order of the Appellate Authority inconsequential. Learned counsel for the petitioner taking this Court to the material particulars as well as evidence recorded during the enquiry proceeding contended that for the amount involved therein being refunded by the beneficiaries, there is in fact no loss to the Bank as a consequence and for no suffering of the Bank, there would not have been punishment of termination involving the petitioner. It is accordingly contended that the order of termination also remained not in consonance with the volume of charges.

4. In his response Mr.S.Das, learned counsel appearing for the Bank Authority while referring to the stand taken by the opposite party through their counter while justifying the appointment of opposite party no.4 as the Enquiry Officer-cum-Disciplinary Authority taking this Court to the gravity of charges and establishment of most of the serious charges against the petitioner contended that there is no infirmity in the impugned orders. Sri Das, learned counsel for the Bank Authority also contended that for the fairness in the disciplinary proceeding with the fullest opportunity to the petitioner, petitioner having failed to establish the charges wrong and not proved against him, Sri Das, learned counsel for the Bank Authority further contended that for the limited role of the High Court and for involvement of concurrent finding by both the authorities including that of the Appellate Authority, this Court cannot sit as appellate authority over the appellate authority. Sri Das, learned counsel for the Bank taking this Court to the provisions of award popularly known as *'Sastry Award as well as Desai Award'* contended that for the provision contained therein, there is no illegality in the appointment of opposite party no.4 as Enquiry Officer. Sri Das also taking reference to a decision of the Hon'ble Apex Court in similar situation in the case of ***Shambhu Nath Goyal Vrs Bank of Baroda and others,*** reported in AIR 1984 SC 289, contended that similar context involving another employee of the same Bank having been considered and similar action of the management having been approved by the Hon'ble Apex Court. Sri Das submitted that there is absolutely no illegality in the appointment of

opposite party no.4 as a consequence there is no illegality in the enquiry being conducted by opposite party no.4 functioning as Enquiry Officer as well as Disciplinary Authority. On the allegation of punishment disproportionate to the quantum of offence, Sri Das taking this Court to the proving of serious charges against the petitioner contended that each of the charge involved therein considered as a serious charge and establishment of a single charge even would have entail the order of dismissal. Sri Dash thus requested this Court for dismissal of the writ petition for having no merit in it.

5. It is at this stage considering the contentions of the petitioner and the rival contention of the opposite party nos.2 and 3 on the question of appointment of opposite party no.4 as Enquiry Officer as well as Disciplinary Authority, this Court finds in a similar situation again involving the provision of *Sashtri and Desai Award* referring to herein above, the Hon'ble Apex Court in *Shambhu Nath Goyal (supra)* in paragraphs-12, 13 and 14 observed as follows:

> "12. Before us arguments were advanced by Mr. P.P. Rao, Senior Advocate and Mr. F.D. Damania, Advocate appearing for the workman and management respectively. Only two questions were raised before us, namely, whether or not Sen Gupta who held the domestic enquiry and passed the order of dismissal of the workman was Disciplinary Authority competent to award the punishment and whether the learned Judge of the High Court was or was not justified in remitting the matter to the Tribunal for the management having an opportunity to adduce further evidence in support of the charges and also to consider the question whether the workman was or was not gainfully employed in the intervening period. It is not disputed that no additional statement were filed and no further evidence was let in by the parties after this Court held that the dispute is an industrial dispute and remanded the matter to the Tribunal for fresh disposal in accordance with law.
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> 13. Mr. Rao drew our attention to the notice of enquiry dated 23.7.1965 and submitted that it does not specifically clothe Sen Gupta who had been constituted as the Enquiry Officer, with the powers of a Disciplinary Authority without the workman disclosing either in the claim statement filed before the Tribunal or in the arguments before the learned Judge of the High Court are even before us as to who the appointing Authority in relation to the workman was. Mr. Rao submitted that Sen Gupta who was Agent of the Ludhiana Branch of the Bank which was different from the Jullunder Branch in which the workman was employed as a Clerk at the time of his suspension was not the Appointing Authority and that the order of dismissal passed by him pursuant to his finding recorded against the workman in the domestic enquiry is therefore invalid in law. Mr. Damania also could not say who the Appointing Authority was in regard to the workman. But he submitted that the Enquiry Officer and Disciplinary Authority were constituted as per the directions given in para 521(12) of the S astri award and para 18.20 (12) of the

Desai award and, therefore, the question as to who the Appointing Authority was/is not material. He further submitted that the fact as to who was the Disciplinary Authority is clear from the notice of enquiry dated 23.7.1965 and the conduct of the workman. We think Mr. Damania is right in his submission. As observed by the learned Judge of the High Court from the fact that Sen Gupta has been appointed as the Enquiry Officer in the notice of enquiry dated 23.7.1965 and that it has been stated in that notice that any appeal from his order could be made to Majumdar, Chief Agent of the Bank at Delhi, it could be inferred that Sen Gupta has been constituted also as the Disciplinary Authority as otherwise it would not have been stated in that notice that any appeal against his order which could naturally include an order imposing punishment pursuant to any finding recorded in the domestic enquiry conducted by him should be presented before the Chief Agent of the Bank at Delhi. The workman also understood Sen Gupta to be functioning also as the Disciplinary Authority in the enquiry when he did not question his authority to award the punishment but merely stated that the enquiry was arbitrary, biased and improper. Para 521(12) of the Sastri award which has been bodily incorporated in para 18.20(12) of the Desai award reads thus:

"18.20(12) It also seems to us necessary that a bank should decide which officer shall be empowered to take disciplinary action in the case of each office or establishment and that it should also make provision for appeals against orders passed in disciplinary matters to an officer or a body not lower in status than the manager, who shall if the employee concerned so desires in a case of dismissal hear him or his representative before disposing of the appeal. We direct accordingly and further direct that the names of the officers or the body who are empowered to pass the original orders or hear the appeals shall from time to time be published on the bank's notice boards, that an appeal shall be disposed of as early as possible, and that the period within which an appeal can be referred shall be forty-five days from the date on which the original order has been communicated in writing to the employee concerned."

14. It would appear from this portion of the awards that it is not necessary that only the Appointing Authority or any authority superior to that authority can be the Disciplinary Authority in regard to employees of a Bank and that on the other hand the Bank should decide which officer shall be empowered to take disciplinary action in the case of each office or establishment and that it should also make provision for appeals against orders passed in disciplinary matters to an officer or body not lower in status than the Manager. But what is required by that para in the awards is that the names of the officer or body competent to pass the original orders or hear the appeals shall from time to time be published on the Bank's notice boards. The workman has not contended anywhere including in the course of arguments advanced on his behalf even before us that there was no such publication in the notice board in regard to the Jullunder Branch of the Bank where he was employed at the time of his suspension. In these circumstances we are unable to accept the argument of Mr. Rao that the order of dismissal suffers from any lack of authority of Sen Gupta to award that punishment.

6. This Court finds the decision referred to herein above has direct application to the case of the petitioner at hand. Accordingly, this Court holds that there is no infirmity in the appointment of opposite party no.4 as an enquiry officer and simultaneously also to function as Disciplinary Authority.

7. On a cursory perusal of records and on the basis of allegations made against the petitioner, the Enquiry Officer came up with nine contentious issues, which are extracted herein below:

1) Whether, the instrument No.77124 dtd.18.08.1999 in the a/c Nakul Bisoi was posted, cancelled by any of the officers.

2) Whether CSE made entry of this instrument in cash supplementary as well as in cash payment register.

3) Whether CSE made payment to the party even without the procedure followed?

4) Whether CSE had fraudulent motive in this transaction?

5) Whether CSE on 09.10.1999 had scrolled the entry at token No.50 for Rs.60,000?

6) Whether CSE made an entry of cash payment of Rs.60,000/- in cash supplementary and cash payment register.

7) Whether CSE made corresponding debit entry towards such payment in the ledger folio of CC a/c B.K.Sahu.

8) Whether any loose cheque was issued to the party enabling the party to withdraw Rs.60,000/- from his a/c.

9) Whether CSE had dealt with the instrument for Rs.60,000/- or was it merely a fictitious entry

Each of the issues is elaborately discussed by the Enquiry Officer for arriving at a just decision and inviting appropriate punishment against the petitioner. The same reads as under:

> 1) As regard Issue No.1, the Enquiry Officer held that the instrument was not either posted or cancelled by any of the officers. The documents MEX-3 presented in the proceedings bears no such posting and cancellation mark stamping has also not been appeared on the instrument. I have, therefore, reason to believe that the said instrument was cleared by CSE himself without any authority.
>
> 2) As regard Issue No.2, the Enquiry Officer held that while examining the documents MEX-6 and MEX-7 that with deposition of MW-1 and statement of CSE in MEX-12 establishes that CSE himself had made entries in both registers. On the other hand defence has tried to establish that cheque was in order for payment however as per the procedure it was not dealt with by the other officials making the same payable.

3) As regard Issue No.3, the Enquiry Officer held that while examining document MEX-3, i.e. Cheque No.77124 dtd.18.08.1999 of Nakul Bisoi and examining the MEX-6 and MEX-7 it is observed that relevant entries were made by CSE and the payment was effected. However, CSE while making entry in MEX-6 and MEX-7 he has written the name as P.C.Behera instead of Nakul Bisoi. It has not been denied by the defence any where having not effected such payment. On the contrary, the defence has tried to establish under the garb of rendering good customer service, that the CSE had paid the amount.

4) As regard Issue No.4, the Enquiry Officer held that the sequence of events in dealing with this transaction reveals much about the intention of CSE. It is evident from MEX-6 and MEX-7 that CSE made the entries being a Head Cashier in the branch and the title of the instrument was written as Shri P.C.Behera instead of Shri Nakul Bisoi. It is also evident from document MEX-3 that no other procedure like posting, cancelling were carried out before effecting payment on MEX-3. It is also evident on the deposition of W-1 that although the title of instrument was Nakul Bisoi, CSE wrote P.C. Behera in MEX-6 and MEX-7. It is also revealed from the deposition of DW-2 in examination in chief in verbatim "I requested Shri Trilochan Das to make payment. If cheque is not passed I will give a cheque drawn on a/c P.C. Behera, who is my grandson", read with statement of CSE in MEX-12 in verbatim "as he assured me of replacement of the cheque by a cheque drawn by Shri P.C. Behera, I entered the payment in the cash supplementary as a payment in the debit of Shri Behera", which reveals that nothing has happened after completing the transaction in the a/c Nakul Bisoi. It is also observed in MEX-5 Nakul Bisoi's a/c that no entry was effected as on 18.08.99. It is seen from the MEX-5 at the first instance the entry was made in debit side, subsequently it was cancelled and no effect was made in the ledger folio, i.e. MEX-5. It is also observed that effect of this transaction was given after this had been detected in balancing of books and an entry was incorporated in the a/c with a remark "entry of 18.08.99 voucher not posted and cancelled and stamped". This clearly speaks about the motive of CSE in (i) effecting payment on his own (ii) not effecting the relevant debit entries in MEX-5, (iii) not informing the higher authorities of such payment and (iv) not obtaining cheque from P.C. Behera shows mala fide intention of CSE in this transaction.

The deposition of DW-2 is an eyewash having made outside compromise with the party, thereby inviting the party in enquiry proceedings and depose in favour of the defence. Had the CSE clean hand in dealing with this transaction, he would have brought this thing into the knowledge of the Branch Manager in the same evening or on the next day and got the action ratified from him. However, it has not happened so and the payment of Rs.4900/- has not been reflected in the debit side of the concerned a/c. Only on the detection of the matter, whole story has been created by the defence trying to get clean chit in this matter. I have, therefore, reason to believe that CSE wilfully made this transaction, got the payment fraudulently and created the story after detection of the fraudulent motive at the time of balancing of books at the Branch. It is also evident from the limit sanctioned to the party, i.e. Rs.1 lac and the outstanding was the debit balance of Rs.1,14,926/- so that further issuance of cheque would not have been entertained by the Officer concerned. Revealing fact is

that after effecting payment considerable time has been lapsed up-till detection of such fictitious payment in the fag end of November, 1999. CSE has miserably failed to show the irregularities not committed by him which speaks about his mala fide intention.

5) As regard Issue No.5, the Enquiry Officer held that while examining the evidence of MW-1 it is revealed that CSE made an entry in the scroll book at token No.50 for Rs.60,000/- (MEX-9). CSE has also admitted in his explanation dtd.20.04.2000 (MEX-12) that he issued token No.50 along with token No.51 and 52. It has not been refuted by the defence anywhere in the proceedings that token No.50 not scrolled by CSE.

6) As regard Issue No.6, the Enquiry Officer came on the deposition of MW-1 and close look in MEX-10 and MEX-11 came to hold that the relevant entries were made CSE. It is also revealed from the defence arguments dtd.16.01.2001 by CSE himself that he made payment of Rs.60,000/- to B.K. Sahu on 09.10.99. It has not been denied anywhere by the defence having not made such entries by the CSE.

7) As regard Issue No.7, the Enquiry Officer held that it is revealed from the deposition of MW-1 perusing MEX-8, i.e. extract of CC a/c Usharani & Bijoy Kumar Sahu that no entry of withdrawal as on 09.10.99 was made by CSE. It has also not been refuted by the defence anywhere in the proceedings. Hence, it is established that no corresponding debit entry was made towards payment of Rs.60,000/- effected on 09.10.99.

8) As regard Issue No.8, it was held that since no evidence of instrument is available in the records of the Branch it cannot be said that the payment was effected against any instrument. While perusing MEX-9 and MEX-10, no cheque number is written in the relevant registers. Even in the explanation of the CSE dated 20.04.2000, i.e. MEX-12 no such reference is made by the CSE. Other formalities i.e. entering in scroll as well as cash supplementary and payment cashers register have exclusively been dealt with by the CSE, it is therefore, cannot be established that such payment was effected against presentation of any of the instrument. Therefore, the contention of defence having paid Rs.60,000/- against loose cheque No.68736 cannot be accepted. The defence has tried in vain during cross-examination of MW-1 as well as in defence arguments that payment was effected against loose cheque and such contention of the defence cannot be accepted.

9) As regard Issue No.9, the Enquiry Officer came to hold that while observing deposition of the MW-1 and examining the documents MEX-8 to MEX-11 and in absence of the instrument of Rs.60,000/- in the records of the Branch, it has been reason to believe that no such instrument was presented. While perusing MEX-8, MW-1 deposed that no withdrawal was debited in account on 09.10.99. On MEX-9, MW-1 deposed that an entry of Rs.60,000/- in the account of B.K. Sahu at token no.50 was made by CSE. In the same manner MW-1 deposed while perusing MEX-10 and 11 that corresponding entries were made exclusively by CSE only and no other staff was involved. In reply to other question by MR, MW-1 deposed that the instrument is not available and they have searched every books and corner of the

Branch but it could not be traced. Even every concerned officials were consulted at the Branch but nobody could throw light on so called instrument. He has further deposed that after 09.10.99 no theft was occurred at the Branch. Thus, issuance of loose cheque is a brain child of CSE and concocted at the Branch. Thus, issuance of loose cheque is a brain child of CSE and concocted story meted out by the defence. The non-availability of the instrument and no corresponding debit entry made by the CSE forced me to believe that it was merely a fictitious entry rather than presentation of an instrument in the transaction. While examining the deposition of DW-3, it is revealed that DW-3 is a tutored witness trying to establish that he had presented the instrument and received the proceeds of the transaction. It is evident from the deposition of defence witnesses in the enquiry that said payment was purported to have been effected to the party on 09.10.99. Whereas the party had deposited Rs.60,000/- only on 30.11.99, i.e. after detection of irregularities in balancing of books in the fag end of November, 1999 DW-3, i.e. party namely, B.K. Sahu came into picture only after disclosure of unlawful withdrawal from his account. The concocted story have been created aftermath of detection of fraud and defence has tried their level best to present the deposition of DW-3 meticulously. However, whole transaction have been dealt with by CSE himself inclusive of recording the entries, withdrawal of payment speak itself about the fictitious entry made by the CSE.

Since no posting of instrument of Rs.60,000/- was made in the ledger folio of B.K. Sahu, it came to light after nearly 1.5 months from the date of withdrawal, it was debited to suspense a/c to balance the cash credit book. The account holder came into picture only after such detection. It is derived from the mode of transaction that CSE met the customer after detention and convinced him to deposit the amount depicting himself as recipient of the payment. The a/c holder deposited Rs.60,000/- on 30.11.99 with the Bank, however, it could not be accounted for in his a/c. It was credited in suspense a/c as earlier withdrawal was not debited in his a/c. While perusing DEX-4, the a/c. Holder has demanded to account for the said amount in his account. Another revealing fact is that the a/c holder came forward to deposit the money only after detection of the said incident. Had he been genuine recipient of the withdrawal on 09.10.99. On perusing MEX-8 it is observed that there were eight transaction carried out in his account from 10.10.99 to 30.10.99 another transactions might have carried out in a/c till he came to the branch for depositing Rs.60,000/- he would have drawn this matter to the knowledge of the Branch Manager but he has not done so which speaks about his tutored one in his deposition in the proceedings as he is not the recipient of the withdrawal. Under the circumstances deposit of DW-3 appears to be tutored one and deposition made in the proceedings is not reliable hence not acceptable.

In view of the above charges, the Enquiry Officer came to find the CSE is guilty of all the charges levelled against him and imposed punishments accordingly."

8. Now coming to decide on the quantum of punishments being disproportionate to the quantum of offences, this Court finds petitioner has faced the following two charges:

1) Gross Misconduct : Doing acts prejudicial to the interest of the Bank likely to involve the Bank in monetary loss.

2) Minor Misconduct:- Breach of instructions for the running of any department.

From the memorandum of charges, vide Annexure-15, this Court finds the petitioner was held liable involving most of the serious charges by the Enquiry Officer and accordingly awarded with punishment of dismissal from the services of the Bank by the Disciplinary Authority.

9. Looking to the findings of the Enquiry Officer and the Charge Nos.1 to 9 being fully established, this Court finds for the material available therein and for establishment of above charges each of the charge since serious for the involvement of offence involving financial institute, this Court is of the view that establishment of each charge itself is sufficient to inflict punishment of dismissal. On the allegation that no loss being sustained by the Bank, the petitioner should have been exonerated from the charges, this Court finds for the serious financial irregularities at the instance of the delinquent petitioner, it is not a question whether there is loss of one pie or thousand pies. The question for determination as to whether there occurred financial irregularities or not? And whether the petitioner is responsible for the same or not? For the clear and cogent finding on the charges indicated hereinabove and further based on material charges being proved, this Court finds there is no question of showing any leniency and/or sympathy involving a Bank Officer. In the result, this Court finds the writ petition has no merit, as a consequence, the writ petition stands dismissed. No costs.

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2020 (I) ILR - CUT- 550

BISWANATH RATH, J.

W.P.(C) NO. 979 OF 2008

SASHADHAR PRADHAN .....Petitioner

.Vs.

UNION OF INDIA, MINISTRY OF HOME AFFAIRS, NEW DELHI & ORS. .....Opp. Parties

(A) SERVICE LAW – Departmental Proceeding – Alleged misconduct/offence committed by the petitioner during his deputation period in another department – But the departmental proceeding initiated by the parent department – Validity of such departmental

proceeding questioned on the ground of jurisdiction/power of the parent department – Held, the initiation of proceeding by the parent department is valid.

(B) SERVICE LAW – Departmental Proceeding – Non-examination of the complainant – Whether it vitiates the departmental Proceeding? – Held, Yes.

(C) SERVICE LAW – Departmental Proceeding – Allegation of illegal gratification – Mobile conversation between the complainant and the petitioner with regard to payment of money/taking of such gratification – Petitioner requested to conduct polygraph test in order to ascertain the voice of the petitioner – Such test denied by the disciplinary authority – Whether denial of such test vitiates the proceeding? – Held, Yes. (Paras 10 to 12)

Case Laws Relied on and Referred to :-

1. AIR 1976 SC 1737 : Khemi Ram Vs. The State of Punjab.

For Petitioner : Dr. Chitta Ranjan Misra, Mr.G.Misraand Mr. H.K. Mallik.
For Opp. Party : Mr. Gyanaloka Mohanty,CGC

JUDGMENT Date of Hearing: 16.01.2020 : Date of Judgment: 28.01.2020

BISWANATH RATH, J.

This writ petition involves a challenge by the petitioner, the delinquent to the impugned order under Annexure-8 being passed by the Disciplinary Authority involving a disciplinary proceeding initiated against the petitioner.

2. Heard Dr.Chitta Ranjan Misra, learned counsel for the petitioner and Mr.Gyanaloka Mohanty, learned Central Government Counsel appearing for the opposite party nos.1 to 4.

3. Short background involving the case of the petitioner is that petitioner was working as an Inspector/Exe. under the Central Industrial Security Force (in short 'CISF') bearing Force No.813440019. He was posted in CISF Unit-CCWO, Dhanbad was deputed to Central Bureau of Investigation (in short 'CBI'), Orissa. After completion of deputation, he was repatriated back to parent department, i.e. CISF. Pursuant to return back to CISF, the Disciplinary Authority, opposite party no.4 issued memorandum of article of charges against the petitioner along with imputation of misconduct vide

memorandum dtd.26.02.2005. Following receipt of Memorandum of Article of charges, petitioner submitted his explanation to the authority denying all the allegations claimed to be false and baseless. Disciplinary Authority not being satisfied with the explanation submitted by the petitioner directed for conducting an enquiry and appointed an Enquiry Officer. Enquiry was conducted involving the petitioner. It is claimed that during enquiry proceeding, petitioner, the delinquent though requested the Enquiry Officer and the Disciplinary Authority to have the polygraph/voice test of the petitioner to prove his innocence for being falsely implicated by the CBI. Petitioner claims that the Disciplinary Authority unfortunately turned down the request of the petitioner. It is further alleged that the Enquiry Officer after conclusion of enquiry submitted his enquiry report, vide Annexure-5 to the Disciplinary Authority indicating therein that the charges framed against the petitioner have not been proved, however, the Disciplinary Authority on consideration of the report did not agree with the findings and the recommendation of the Enquiry Officer and accordingly sent a show-cause notice to the petitioner the delinquent along with its disagreement note and also the copy of the report of the Enquiry Officer thereby asking the delinquent to submit his response within a period of fifteen days, as appearing at Annexure-6. The Disciplinary Authority not being satisfied with the written reply held the delinquent guilty of article of charges as the charged member the delinquent and under the premises in so far as Charge No.1, the delinquent committed gross-misconduct by demanding and accepting bribe being a public servant from a civilian, who was arrested by C.B.I:SPE, Bhubaneswar and remaining under judicial custody. Accordingly, in exercise of power conferred upon him under Rule 32(1) read with Schedule-I and Rule-36 of CISF Rules, 2001 imposed penalty of compulsory retirement from service with a further direction that the delinquent will be entitled to 80% of pension and gratuity as admissible to him on the date of his compulsory retirement as per Rule-40 of CCS (Pension Rule), 1972, vide Annexure-8.

4. Being aggrieved by the final order of punishment of the Disciplinary Authority, petitioner preferred appeal, vide Annexure-9. The appeal at the instance of the petitioner was rejected by the Appellate Authority on 10/11.08.2006, vide Annexure-10. Petitioner accordingly filed revision, vide Annexure-11, as provided under the Service Rules, which was also rejected by the Revisional Authority on 30.03.2007, vide Annexure-12. Assailing the order of the Disciplinary Authority, Dr.Misra, learned counsel for the

petitioner contended that there has been violation of principal of natural justice involving the disciplinary proceeding involving the petitioner inasmuch as for involvement of consideration of tape recorded evidence is a vital piece of evidence, such document should have been put to test by competent authority to find out the genuineness of the same. Leaned counsel for the petitioner alleged that since the Enquiry Officer did not suo-motu take any action, petitioner, the delinquent was compelled to make a written request for at least having a polygraph test of the voice through a competent agency, which has been illegally rejected. Dr. Misra, learned counsel for the petitioner also challenged the impugned order passed by the Disciplinary Authority on the ground of violation of natural justice to the extent that once the Disciplinary Authority differs from the view of the Enquiry Officer while providing opportunity to show-cause incorporating therein the dissenting note, the Disciplinary Authority should have also given an opportunity of hearing to the delinquent. Dr. Misra also assails the impugned order on the premises that when the Disciplinary Authority involves a complaint in the minimum, the complainant should have been examined as a witness from the prosecution side. Dr. Misra claimed that failure of such examination vitiates the entire proceeding. Dr. Misra also challenged the impugned order on the premises that when prosecution listed 24 witnesses, examination of 19 witnesses and not examining the rest of the witnesses also makes the enquiry fatal keeping in view that the witnesses not examined are the vital witnesses. Dr. Misra thus contended that for not having the polygraph/voice test, for not examining the vital witnesses, such as the complainant and further not providing opportunity of hearing to the complainant and further the Disciplinary Authority differing from the Enquiry Officer report and further in absence of proof of the material evidence relied upon and depended by the prosecution through appropriate witnesses, further withholding many of the vital witnesses, the entire enquiry suffers. Dr.Misra also assailed the action of the Disciplinary Authority on the premises that since the alleged misconduct was relating to the service of the petitioner while he was on deputation to C.B.I. It is the C.B.I. who alone has the power to punish the petitioner in the capacity of the Appointing Authority as well as Disciplinary Authority. The conducting officer of the Disciplinary Authority by any other authority makes the entire disciplinary proceeding otherwise bad. Dr. Misra, learned counsel for the petitioner also taking to the discussion of the Enquiry Officer on evidence and the conclusions thereunder by the Enquiry Officer submitted that for the evidence available on record, there was no scope for differing from the view of the Enquiry Officer by the Disciplinary Authority.

Dr. Misra thus prayed this Court for interfering in the impugned order and also requested for grant of appropriate relief by this Court.

5. Mr.Gyanaloka Mohanty, learned Central Government Counsel appearing for the opposite parties while opposing each of the grounds taken by the petitioner taking this Court to the evidence so recorded giving the dissenting view by the Disciplinary Authority and the reasons of the Disciplinary Authority in passing the order of punishment submitted that the reason of the Disciplinary Authority is based on sufficient material available on record. Mr.Mohanty on the question of natural justice being violated submits that so far as the petitioner's allegation that there has been non-examination of the complainant referring through the evidence of prosecution witnesses, particularly P.Ws.1 and 2 contended that the complainant having already been examined during the preliminary enquiry and establishment of such statement through the prosecution witness, the allegation of violation of natural justice on this count becomes redundant. So far as allegation of violation of natural justice for no polygraph/voice test being allowed in spite of request by the delinquent. Mr. Mohanty, learned counsel appearing for the opposite parties contended that for sufficient material both oral and documentary evidence to establish charge against the delinquent through official witness, there is right rejection of the request of the petitioner by the Enquiry Officer as well as the Disciplinary Authority. On the allegation of withholding of vital witnesses also makes the enquiry fatal, Mr. Mohanty, learned counsel for the contesting opposite parties contended that for examination of number of prosecution witnesses, non-examination of the four witnesses named therein remain immaterial. Mr. Mohanty also contested the allegation of the petitioner on this count on the premises that some of the witness did not turn up in spite of the best effort of the Enquiry Officer and the Disciplinary Authority. Therefore, there is no scope otherwise for the prosecution to bring them to the dock. Mr.Mohanty, learned Central Government Counsel appearing for the opposite parties contended that for clear evidence through the prosecution witnesses supporting the case of the prosecution, more particularly, the witnesses referring to the statement of PWs.1 to 19 attempted to establish the case of the establishment. It is in the above premises and for sufficient material available to establish a clear case of major misconduct on the part of the delinquent, Mr.Mohanty submitted that not only there is no infirmity in the order passed by the Disciplinary Authority but there is also no infirmity in either of the orders of the Appellate

Authority or the Revisional Authority. Mr. Mohanty accordingly claimed for rejection of the writ petition for having no material.

6. Considering the rival contentions of the parties, this Court before going to consider the following questions to have a just decision:-

(A) As to whether the alleged offence being committed by the delinquent while working as an officer in the C.B.I. establishment, the framing of charge and the enquiry conducted by the Office of the Deputy Inspector General, CISF Unit, BCCL, Dhanbad is proper or not?

(B) For non-examination of the complainant involving such serious allegation whether vitiates the disciplinary proceeding?

(C) Further not conducting the polygraph test involving the voice of the delinquent for the nature of allegation involved herein if vitiates the enquiry?

7. Considering the rival contentions of the parties, this Court finds the admitted fact remains under the direction of the Assistant Inspector General/ESTT, the petitioner Sashadhara Pradhan working in the establishment of CISF Employment No.813440019 in the Head Quarter at Chennai was deputed to work under S.P./C.B.I./A.C.B., Ranchi. While working under the C.B.I., the service condition of the delinquent was governed by the standard norms of deputation as contained in DP&T OM No.2 29 91-Estt (Pay II) dated 08.01.2004 and as amended from time to time. He was directed to work there for a period of five years. The further admitted fact remains that the petitioner while working under the C.B.I. establishment on deputation was relieved from service with effect from 07.05.2004 (A/N) on repatriation to his parent department, i.e. CISF. It is also admitted that the disciplinary proceeding involving the petitioner was undertaken by the Deputy Inspector General, CISF. Statement of recall of charge framed against the petitioner reads as follows:

> "That No.813440019 Inspector/Exe S D Pradhan of CISF Unit CCWO Dhanbad while posted and functioning as Inspector CBI Bhubaneswar during deputation in the year 2004 committed gross misconduct in as much as he being a public servant had demanded and accepted a sum of Rs.1,50,000/- from Shri Amaresh Patnaik, elder brother of Shri Subrat Patnaik @ Subha Patnaik who was arrested and put under judicial custody in CBI, SPE Bhubaneswar Case No.RC-04(A)/2004 since 23.01.2004, in order to facilitate immediate release of Shri Subha Patnaik from judicial custody on bail and to ensure that he would not be charge-sheeted in the case. That after release of Shri Subha Patnaik on bail, after staying till 25.02.2004 under judicial custody, and on the insistence of Sri Subha Patnaik, Insp/Exe S.D. Pradhan returned a sum of Rs.1,10,000/- in two instalments of Rs.70,000/- on

> 08.03.2004 and Rs.40,000/- in the last week of April' 2004. That, said Insp/Exe S.D.Pradhan, by the aforesaid commission failed to maintain absolute integrity and acted in a manner unbecoming of a public servant and prejudicial to the interest of the Govt."

8. The recall of charge relates to allegation involving the delinquent while functioning as Inspector, C.B.I., Bhubaneswar, as a deputationist committed gross misconduct. For the application of service condition, the office memorandum is in operation, in support of decision of Hon'ble Apex Court in the case of ***Khemi Ram Vrs. The State of Punjab***, reported in AIR 1976 SC 1737, this Court finds Question (A) is to be answered against the petitioner and the initiation of proceeding by parent department remains valid.

9. Coming to the Question (B), non-examination of vital witness if it vitiates the enquiry? This Court reading through the enquiry report finds admittedly the complainant, namely, Subha Patnaik has not been examined in the enquiry proceeding. This Court however finds Subha Patnaik, the complainant, who was examined during the preliminary enquiry, the statement of complainant produced as Ext.18 being introduced by P.W.9 clearly borne out from the discussion in paragraph-B running page 52-54 of the brief. Taking into consideration the evidence involving the same, this Court finds the Enquiry Officer has the following observation:

> ii) The statements of Sh.Subha Pattnaik, Shri. Amaresh Pattnaik, Sh. Ranjit Patra and Sh. Debi Prasad Pattnaik produced as Exhibits-18, 19, 20 and 21 respectively by PW-09. Shri. R.N.Tripathy Insp. CBI (P.E.O.) and recorded during course of P.E. by the P.E.O. are not signed by the said witnesses. As per laid down procedure of law, the statements of the witnesses recorded during course of P.E. are necessarily required to be duly signed by the witnesses concerned and the P.E.O. will authenticate those statements. But the statements of the above said 04 Nos. of witnesses produced as Exhibits-18, 19, 20 and 21 have not been signed by the witnesses concerned. These statements produced as Exhibits only bears the sig. of P.E.O. Mr. R.N. Tripathy. None of the said 04 Nos. of PW's whose statements have been produced as Exhibits by PW-09 (P.E.O.) in support of the allegations levelled against the Charged Official appeared before the E.O. and attended the D.E. to confirm the veracity/genuineness of their statements produced as Exhibits the PW-09 (P.E.O.). And hence Exhibits-18, 19, 20 & 21 cann't be considered as a Proved document/ evidence until or unless the persons/PW's who prepared or given those statements and produced as Exhibits-18, 19, 20 & 21 states or confirms that they had given those statements to Sh. R.N. Tripathy during the course of P.E.
>
> This Court further finds the enquiry report at Page-54, internal page-20 of the enquiry officer again observed as follows:

iii) Similarly, the Micro Cassette wherein the alleged telephonic conversation of dt:27.04.04 was recorded and produced as Exhibit-06 by the PW-09 Sh.R.N.Tripathy Insp. CBI (P.E.O.) was not signed by the complainant Sh. Subha Pattnaik, Sh. R.K. Sarangi PW-13, Sh. S.N.Das PW-14 and even by PW-01 Sh. S.D.Mishra Insp. CBI who recorded the telephonic conversation and PW-09 itself resulting of which the genuineness and originality of the said Micro Cassette and Exhibit-06 has come under clouds which can't be considered as a proved document.

10. Looking to the above clear recording of the Enquiry Officer, this Court finds not only the statement of the complainant claimed to be recorded during P.E. is not signed but there is even no examination of the complainant at least to establish that the statement produced by way of Exhibit-18 is of himself. Further, so far as material objects, the micro cassette wherein telephonic conversion dated 27.04.2004 was recorded being produced by PW-09, it was found that no signature of the complainant was also obtained on the same. Admittedly there is also refusal of request at the instance of the delinquent to have a polygraph/voice test of such recording to ensure that he is one of the participants. Therefore, there is no other way for the establishment to examine the conversion made in the telephonic through a competent agency. It is at this stage taking into consideration the disagreement note of the Disciplinary Authority, this Court finds the disagreement note only contents some development taking place during the complainant attending the CBI Office pursuant to High Court's order. Further, some developments appearing to be taking place involving the complainant during the P.E. and making a reference to some evidence here and there during the enquiry proceeding. It is surprised to take note here that the Disciplinary Authority has not discussed or communicated in any manner as to why and on which aspect of the Enquiry Officer being differed by him.

11. Taking into consideration the law of the land, this Court here finds on the question of validity of an order of the Disciplinary Authority in absence of examination of the complainant, the vital witness, this Court finds the law of land on this reads as follows:

i) In the case of ***Hardwari Lal Vrs. State of U.P. and others,*** reported in AIR 2000 SC 277, the Hon'ble Apex Court in paragraph-3 of the above cited judgment held as follows:

"3. Before us the sole ground urged is as to the non-observance of the principles of natural justice in not examining the complainant, Shri Virender Singh, and witness, Jagdish Ram. The Tribunal as well as the High Court have brushed aside the

grievance made by the appellant that the non-examination of those two persons has prejudiced his case. Examination of these two witnesses would have revealed as to whether the complaint made by Virender Singh was correct or not and to establish that he was the best person to speak to its veracity. So also, Jagdish Ram, who had accompanied the appellant to the hospital for medical examination, would have been unimportant witness to prove the state or the condition of the appellant. We do not think the Tribunal and the High Court were justified in thinking that non-examination of these two persons could not be material. In these circumstances, we are of the view that the High Court and the Tribunal erred in not attaching importance to this contention of the appellant."

ii) Similarly, in the case of ***Bhubaneswar Chhatria Vrs. Union of India and others,*** reported in 2000 (II) OLR – 564, this Court deals with a situation of non-***examination*** of the vital witnesses. Further, this Court taking into account the decision in the case of *Hardwari Lal (supra)* was also of the view that punishment in the similar circumstance is against law. In another decision of this Court in the case of ***G.S. Srivastav Vrs. Union of India & Ors,*** reported in 2014 (II) ILR – CUT- 618, this Court taking into account non-examination of vital witness came to hold that the order of removal from service passed by the Disciplinary Authority being confirmed by the Appellate Authority and the Revisional Authority becomes bad.

iii) In the case of ***Rajinder Kumar Kindra Vrs. Delhi Administration through Secretary (Labour) and others,*** reported in AIR 1984 SC 1805, the Apex Court held that on the premises that there has been no observance of natural justice inasmuch as finding of the Disciplinary Authority based on no prudent evidence came to observe in paragraph-16 that in the event of finding based on no evidence can be rejected as perverse. For better appraisal, this Court takes note of the observation of the Hon'ble Apex Court in the above record case in paragraph-16, which reads as follows:

"16. Mr. Jain contended that once Mr. Kakkar came to the conclusion that the appellant was given full opportunity to participate in the domestic enquiry neither High Court under Art.226 nor this Court under Art.136 can sit in appeal over the findings of the enquiry officer and reappraise the evidence. We have not at all attempted to re-appreciate the evidence though in exercise of the jurisdiction conferred by Sec.11-A of the Industrial Disputes Act, 1947 both arbitrator and this court can reappraise the evidence led in the domestic enquiry and satisfy itself whether the evidence led by the employer established misconduct against the workman. It is too late in the day to contend that the arbitrator has only the power to decide whether the conclusions reached by the enquiry officer were plausible one deducible from the evidence led in the enquiry and not to re-appreciate the evidence itself and to reach the conclusion whether the misconduct alleged against the workman has been established or not. This Court in *Workmen of M/s. Firestone Tyre & Rubber Co. Of India (P) Ltd. v. Management* (1973) 3 SCR 587: (AIR 1973 SC 1227), held that since the introduction of Sec. 11-A in the Industrial Disputes Act, 1947, the Industrial Tribunal is now equipped with the powers to reappraise the evidence in the domestic enquiry and satisfy itself whether the said evidence

> relied upon by the employer establishes the misconduct alleged against the workman. It is equally well settled that the arbitrator appointed under Sec.10-A is comprehended in Sec.11-A. This Court in *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha* (1980) 2 SCR 146: (AIR 1980 SC 1896), held that an arbitrator appointed under Sec.10-A of the Industrial Disputes Act, 1947 is comprehended in Sec.11-A and the arbitral reference apart from Sec.11-A is plenary in scope. Therefore, it would be within the jurisdiction both of the arbitrator as well as this court to re-appreciate the evidence though it is not necessary to do so in this case. It is thus well settled that where the findings of misconduct are based on no legal evidence and the conclusion is one to which no reasonable man would come, the arbitrator appointed under Sec.10-A of this Court in appeal under Art.136 can reject such findings as perverse. Holding that the findings are perverse does not constitute reappraisal of evidence, though we would have been perfectly justified in exercise of powers conferred by Sec.11-A to do so."

12. Considering the observation of this Court with regard to evidence, the law of the land both referred to hereinabove, this Court finds the order of dismissal remain bad in law. As a consequence, this Court interfering in the order of dismissal passed by the Disciplinary Authority, vide Annexure-8 sets aside the same. As a consequence of setting aside of the order under Annexure-8, the orders of the Appellate Authority and the Revisional Authority, vide Annexures-10 and 12 are also declared as bad and consequently both the Annexures-10 and 12 are also set aside. This Court thus answers the questions (B) and (C) in favour of the petitioner.

13. In the circumstances, this Court while entertaining the writ petition interferes in the order of the Disciplinary Authority as well as the Appellate Authority and the Revisional Authority. While directing authorities to reinstate the petitioner forthwith, this Court also directs that the petitioner is also entitled to get the entire arrear along with interest @6% all through. Arrear may be calculated within a period of one and half months and be released in favour of the petitioner within a period of fifteen days thereafter along with interest as directed. The writ petition is accordingly allowed. There shall be no order as to cost.

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2020 (I) ILR - CUT- 560

S. K. SAHOO, J.

CRIMINAL APPEAL NO. 200 OF 2012

MAYADHAR KABI .....Appellant

Vs.

STATE OF ODISHA .....Respondent

(A) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20(b)(ii)(C) – Offence under – Conviction – Appeal – Plea raised that since the Inspector of Excise, E.I. & E.B., conducted search and seizure and became the Investigating Officer of the case, the trial is vitiated – Whether such plea can be accepted? – Held, No – Reasons explained.

"Adverting to the contentions raised by the learned counsel for the respective parties and coming to the first point canvassed by the learned counsel for the appellant that the appellant is entitled to get benefit of doubt as P.W.5, the Inspector of Excise being an officer who conducted search and seizure also carried out investigation and submitted prosecution report and that the entire investigation is vitiated in the eye of law, I find that in the case of ***Mohan Lal (surpa)****, though the Hon'ble Supreme Court has held that fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person and any possibility of bias or a predetermined conclusion has to be excluded and leaving the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the Courts in a state of uncertainty and confusion, which has to be avoided but in the case of* ***Varinder Kumar (supra)****, it has been held that the criminal justice delivery system, cannot be allowed to veer exclusively to the benefit of the offender making it uni-directional exercise. A proper administration of the criminal justice delivery system, therefore, requires balancing the rights of the accused and the prosecution, so that the law laid down in* ***Mohan Lal (supra)*** *is not allowed to become a spring board for acquittal in prosecutions prior to the same, irrespective of all other considerations. The Hon'ble Court held that pending criminal prosecutions, trials and appeals prior to the law laid down in* ***Mohan Lal (supra)*** *shall continue to be governed by individual facts of the case. In the case in hand, except giving bald suggestion to P.W.5, the IO, that the investigation was perfunctory and that nothing was seized from the house of the appellant from his conscious possession, nothing has been elicited by the defense to show that P.W.5 had any animosity towards the appellant or that he was in any way personally interested in the case or that there was any sort of bias in the process of investigation. Therefore, on this score alone that P.W.5 not only conducted search and seizure but also submitted the prosecution report on completion of investigation, by itself cannot be a ground for acquittal of the appellant."* *(Para 8)*

(B) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20(b)(ii)(C) – Offence under – Conviction – Appeal – Plea that the mandatory requirement as required under Section 42 has not been complied with – Effect of – Held, the Court has to make certain external checks to see whether section 42 of the N.D.P.S. Act has been complied with at right time or not, as the failure to comply renders the entire prosecution case suspect and causes prejudice to the accused and it has got a bearing on the credibility of the evidence of the official witnesses. (Para 9)

(C) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20(b)(ii)(C) – Offence under – Conviction – Appeal – Non compliance of mandatory requirements – Effect of – Held, the conviction not sustainable.

"In view of the foregoing discussions, when there is non-compliance of the provisions under section 42 of the N.D.P.S. Act and keeping of the brass seal in the zima of P.W.4 is doubtful and neither the brass seal nor the specimen seal impression was produced before the Court at the time of production of the seized articles and collection of samples and the order-sheet of the learned S.D.J.M., Balasore dated 05.05.2010 is silent that the seized ganja packets were produced in a sealed condition to rule out the possibility of tampering with the same and above all when P.W.5 being the officer conducting search and seizure has conducted investigation and no explanation is forthcoming from the side of the prosecution as to why any other competent officer was not assigned the role of investigator in the case and when in view of the stringent punishment prescribed for the offence, the prosecution is required to prove its case beyond all reasonable doubt with clinching material, which is lacking in the case, I am of the humble view that the impugned judgment and order of conviction is not sustainable in the eye of law."

(Para 12)

Case Laws Relied on and Referred to :-

1. (2018) 72 OCR (SC) 196 : Mohan Lal .Vs. State of Punjab.
2. 2019 (II) OCR 49 : Sumit Kumar Behera and another .Vs. State of Odisha.
3. (2019) 73 OCR (SC) 946 : Varinder Kumar .Vs. State of Himachal Pradesh.
4. (2004) 5 SCC 230 : S. Jeevanatham .Vs. State through inspector of Police, T.N.
5. (2004) 5 SCC 223 : State .Vs. V. Jayapaul.
6. (2009) 8 SCC 539 : Karnail Singh.Vs. State of Haryana.
7. (2000) 2 SCC 513 : Abdul Rashid Ibrahim Mansuri .Vs. State of Gujarat .
8. (2001) 6 SCC 692 : Sajan Abraham .Vs. State of Kerala .
9. (2018) 71 OCR 413 : Ghadua Muduli and Anr .Vs. State of Orissa.
10. (2003) 26 OCR (SC) 287) : Madan Lal and Anr. .Vs. State of Himachal Pradesh.
11. (2008) 16 SCC 417) : Noor Aga .Vs. State of Punjab.

For Appellant : Mr. Basanta Kumar Das

For Respondent : Mr. Prem Kumar Patnaik, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment: 25.07.2019

S. K. SAHOO, J.

The appellant Mayadhar Kabi faced trial in the Court of learned Additional Sessions Judge, Balasore in Special Case No. 13/36 of 2010 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 05.05.2010 at about 8 a.m., he was found in unlawful possession of Ganja (cannabis) weighing 246 kg. in six plastic jerry bags in village Rampur (Sasanasahi).

The learned trial Court vide impugned judgment and order dated 13.03.2012 found the appellant guilty of the offence charged and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh), in default, to undergo further rigorous imprisonment for period of one year.

2. The prosecution case, in short, is that on 05.05.2010 while P.W.5 Amarendra Kumar Jena, Inspector of Excise, E.I and E.B., Unit-II, Cuttack was performing patrolling duty along with his staff at Rampur chhak on Khaira Agarpada road during the evening hours, he got reliable information regarding possession of huge quantity of ganja in the house of the appellant and accordingly, after recording the statement of the informer, he sent a copy of the information to the Deputy Commissioner of Excise through Sarat Chandra Das, Excise Constable who was present at the spot and he also intimated this fact over phone and proceeded to the spot without requisition of the Executive Magistrate fearing concealment or whisking away of the contraband articles and after ascertaining the house of the appellant from villagers, he conducted search of the house of the appellant in presence of witnesses after observing necessary formalities of search and recovered six plastic jerry bags containing ganja which were found to be 246 kg. in toto. He seized the jerry bags and prepared seizure list and sealed the bags with proper seal taking signatures of the appellant and the witnesses. He affixed the personsl brass seal on each of the bag and the brass seal was handed over in the zima of Patitapaban Kar (P.W.4). The appellant was arrested and he was produced in the Court of Special Judge, Balasore with documents. On the direction of learned Special Judge, the learned S.D.J.M., Balasore collected samples from each bag and sent it to the Chemical Examiner who on

examination found it to be ganja. After receipt of Chemical Examination Report and on completion of investigation, P.W.5 submitted the prosecution report.

3. The appellant was charged under section 20(b)(ii)(C) of the N.D.P.S. Act to which he pleaded not guilty and claimed to be tried.

4. During course of trial, the prosecution examined five witnesses.

P.W.1 Hrusikesh Hota was the A.S.I. of Excise attached to E.I. & E.B., Cuttack who stated about seizure of six bags containing ganja from the house of the appellant under seizure list (Ext.2).

P.W.2 Narayan Ch. Behera was the R.I. at Bartana Circle under Khaira Tahasil and on the requisition of Excise Inspector to the Tahasildar, Khaira, he was deputed to the spot and he prepared the sketch map of the spot room on 19.06.2010. He disclosed that the house in question was owned by Kanhu Kabi, son of Nidhi Kabi of village Rampur. After death of Kanhu Kabi, his two sons Mayadhar Kabi (appellant) and Gayadhar Kabi possessed the house. He further stated that the appellant was residing in the spot house at the relevant point of time. Ext.3 is the report prepared by P.W.2 and Ext.4 is the spot map.

P.W.3 Krushna Ch. Pati stated about the search of the house of the appellant conducted on 05.05.2010 but he did not support the prosecution case for which he was declared hostile.

P.W.4 Patitapabana Kar stated to have put his signature at Rampur chhak on some documents.

P.W.5 Amarendra Kumar Jena was the Inspector of Excise, E.I. & E.B., Cuttack who not only conducted search and seizure but also the Investigating Officer of the case.

The prosecution exhibited twenty three documents. Ext.1 is the written information, Ext.2 is the seizure list, Ext.3 is the report of the R.I., Ext.4 is the sketch map. Ext.5/2 is the option letter of the appellant, Ext.6/2 is the spot map, Ext.7 is the detailed report, Ext.8 is the statement of the appellant, Ext.9 is the statement of the witness Krushna Ch. Pati, Ext.10 is the copy of the requisition issued by the Tahasildar, Ext.11 is the command certificate, Ext.12 is the acknowledgment receipt of sample, Ext.13 is the

chemical examination report, Ext.14 is the paper showing handing over of brass seal, Ext.15 is the copy of the confidential report, Ext.16 is the inventory list, Ext.17 is the rough weighment, Ext.18 is the Panchanama, Ext.19 is the ground of belief, Ext.20 is the zimanama of brass seal, Ext.21 is the seized khatian, Ext.22 is the pan card of the appellant, Ext.23 is the paper showing special training undergone by P.W.5.

The prosecution also proved the bags containing bulk quantity of ganja as M.O.I to M.O.VI and the bag containing the broken seal having the seal of S.D.J.M., Balasore as M.O.VII.

5. The defence plea of the appellant was one of complete denial to the prosecution case.

6. The learned trial Court after analyzing the evidence on record came to hold that the challenge of the defence that there was non-compliance of provision under section 42 of the N.D.P.S. Act cannot be accepted/believed, in view of the fact that sample was collected at the time of seizure and produced before the proper Court. It is further held that there was proper compliance of section 42 of the N.D.P.S. Act and the search and seizure were properly conducted in presence of the witnesses i.e. P.Ws.1 and 5 who were cross-examined at length but they have well stood to the test of cross-examination. Learned trial Court further held that the identity of the articles seized from the appellant was well established by the prosecution and the contraband ganja was seized from the house of the appellant which stands recorded in the name of his deceased father and there is no dispute about the same. The ownership of the land being in possession of the appellant having been well proved and established, the said property being shared by the brother of the appellant cannot absolve the appellant of such a serious charge nor can the presence of any other member would dilute the allegation against the appellant in any manner. It was further held that from the evidence on record including the report of the chemical examiner, it is clear that the appellant knowingly and willfully was in possession of the contraband ganja amounting to 246 kg. for use in commercial transaction. No animosity or ill-feeling is proved by the defence with the excise sleuths who conducted search and seizure and accordingly, the appellant was found guilty under section 20(b)(ii)(C) of the N.D.P.S. Act.

7. Mr. Basanta Kumar Das, learned counsel appearing for the appellant while challenging the impugned judgment and order of conviction submitted

that P.W.5, the Inspector of Excise, E.I. and E.B., Cuttack on receipt of the reliable information not only conducted search and seizure but also carried out the investigation and on completion of investigation, he submitted the prosecution report against the appellant. Relying upon the ratio laid decision by the Hon'ble Supreme Court in the case of **Mohan Lal -Vrs.- State of Punjab reported in (2018) 72 Orissa Criminal Reports (SC) 196**, he argued that the informant and the investigator must not be the same person, as in that case there is possibility of bias on the part of the investigator. Learned counsel further highlighted that there is non-compliance of provision under section 42 of the N.D.P.S. Act and the reliable information and the grounds of belief which were taken down in writing as per Ext.15, though stated to have been sent to the immediate official superior but there is no clinching material in that respect and he placed reliance in the case of **Sumit Kumar Behera and another -Vrs.- State of Odisha reported in 2019 (II) Orissa Law Reviews 49**. It is further argued that even though P.W.5, the Investigating Officer stated that his personal brass seal was given in zima to P.W.4 but P.W.4 is totally silent in that respect and the brass seal was also not produced in Court at any time and even the specimen seal impression was also not produced in Court at the time of production of the seized ganja. He further submitted that the learned Magistrate has committed illegality in collecting samples without comparing the seal impression which was available on the ganja packets with the specimen impression and sending it to the chemical examiner. It is further held that since no sample was collected at the spot and gunny bags were produced in Court after four hours, there is every possibility of tampering with the articles. It is highlighted by the learned counsel for the appellant that since the offence carries stringent punishment, in view of the non-compliance of the provision under section 42 of the N.D.P.S. Act and other lacunas in the case, benefit of doubt should be extended in favour of the appellant.

Mr. Prem Kumar Patnaik, learned Additional Government Advocate, on the other hand, contended that merely because P.W.5, the Inspector of Excise who conducted search and seizure has also conducted the investigation and submitted prosecution report, on that score alone, the appellant cannot be acquitted as the defence has failed to establish any kind of bias or enmity on the part of the Investigating Officer with the appellant. Learned counsel for the State placed reliance on the decision of the Hon'ble Supreme Court in the cases of **Varinder Kumar -Vrs.- State of Himachal Pradesh reported in (2019) 73 Orissa Criminal Reports (SC) 946 and S.**

Jeevanatham -Vrs.- State through inspector of Police, T.N. reported in (2004) 5 Supreme Court Cases 230. It is further contended that P.W.5 was on patrolling duty when he received the reliable information and he immediately reduced the information into writing, which has been proved as Ext.15 which itself reflects that the copy of the same was handed over to one Sarat Chandra Das for its dispatch to the official superior and the defence having been failed to bring anything on record by way of cross-examination that such a document was created just to show pseudo compliance of the provision under section 42 of the N.D.P.S. Act, the contention of the learned counsel for the appellant regarding non-compliance of section 42 of the N.D.P.S. Act cannot be accepted. It is further contended that even though the brass seal was not produced in Court at any point of time but when the gunny bags were produced by the Investigating Officer immediately after its seizure and it was found to be in a sealed condition and there is no material that the seal had been tampered with, the contention of the learned counsel for the appellant that for the non-production of brass seal or the specimen seal impression before the learned Special Judge or the learned S.D.J.M., there is every possibility of manipulation with the seized articles, cannot be sustained. It is contended that the learned trial Court has discussed the evidence of each of the witnesses carefully and meticulously and also the documents proved by the prosecution and has rightly came to the conclusion that the case against the appellant has been proved beyond all reasonable doubts and there is no illegality or infirmity in the impugned judgment and order of conviction and therefore, the appeal should be dismissed.

8. Adverting to the contentions raised by the learned counsel for the respective parties and coming to the first point canvassed by the learned counsel for the appellant that the appellant is entitled to get benefit of doubt as P.W.5, the Inspector of Excise being an officer who conducted search and seizure also carried out investigation and submitted prosecution report and that the entire investigation is vitiated in the eye of law, I find that in the case of **Mohan Lal (surpa)**, though the Hon'ble Supreme Court has held that fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person and any possibility of bias or a predetermined conclusion has to be excluded and leaving the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the Courts in a state of uncertainty and confusion, which has to be avoided but in the case of

Varinder Kumar (supra), it has been held that the criminal justice delivery system, cannot be allowed to veer exclusively to the benefit of the offender making it uni-directional exercise. A proper administration of the criminal justice delivery system, therefore, requires balancing the rights of the accused and the prosecution, so that the law laid down in **Mohan Lal (supra)** is not allowed to become a spring board for acquittal in prosecutions prior to the same, irrespective of all other considerations. The Hon'ble Court held that pending criminal prosecutions, trials and appeals prior to the law laid down in **Mohan Lal (supra)** shall continue to be governed by individual facts of the case.

In the case of **S. Jeevanatham (supra)** in which case the appellant was found guilty under section 8(c) read with section 20(b)(ii) of the N.D.P.S. Act and one of the contentions that was canvassed was that P.W.8, who lodged the F.I.R. had himself conducted the investigation and hence, the entire investigation was vitiated, the Hon'ble Supreme Court referred to the decision in the case of **State -Vrs.- V. Jayapaul reported in (2004) 5 Supreme Court Cases 223** and held as follows:

> "In the instant case, P.W.8 conducted the search and recovered the contraband article and registered the case and the article seized from the appellants was narcotic drug and the counsel for the appellants could not point out any circumstances by which the investigation caused prejudice or was biased against the appellants. P.W.8 in his official capacity gave the information, registered the case and as part of his official duty later investigated the case and filed a charge-sheet. He was not in any way personally interested in the case. We are unable to find any sort of bias in the process of investigation. "

In the case in hand, except giving bald suggestion to P.W.5 that the investigation was perfunctory and that nothing was seized from the house of the appellant from his conscious possession, nothing has been elicited by the defence to show that P.W.5 had any animosity towards the appellant or that he was in any way personally interested in the case or that there was any sort of bias in the process of investigation. Therefore, on this score alone that P.W.5 not only conducted search and seizure but also submitted the prosecution report on completion of investigation, by itself cannot be a ground for acquittal of the appellant. Therefore, the first contention of the learned counsel for the appellant challenging the impugned judgment fails.

9. Coming to the second contention of the learned counsel for the appellant regarding non-compliance of the provisions under section 42 of the

N.D.P.S. Act, P.W.5 stated that on 05.05.2010 at about 6.30 a.m. while he was on patrolling duty along with his excise staff at Rampur Chhak near Khaira Agarpada area, he got information regarding possession and selling/retailing of huge quantity of ganja in the house of the appellant and being satisfied with the information received from the reliable informer, he recorded the statement of the informer and sent a copy of the information to the Deputy Commissioner of Excise through Sarat Chandra Das, Excise Constable, who was present at the spot and he also intimated this fact over telephone. The said information has been marked as Ext.15. On a plain reading of Ext.15, it appears that though there is an endorsement of one Sarat Chandra Das to have received a copy of the same in order to give it to E.D.C. (CD), Cuttack, but the said Sarat Chandra Das has not been examined during trial. Nobody from the office of the Deputy Commissioner of Excise has been examined nor has any document from that office been proved to substantiate that Ext.15 was in fact received in that office. There is no endorsement in Ext.15 relating to receipt of this document in the office of the Deputy Commissioner of Excise. Therefore, except the bald statement of P.W.5 that Ext.15 was sent to the Deputy Commissioner of Excise, there is neither any corroborative oral nor documentary evidence to substantiate such aspect.

In the case of **Karnail Singh -Vrs.- State of Haryana reported in (2009) 8 Supreme Court Cases 539**, the Hon'ble Supreme Court while dealing with the compliance of the requirements under sections 42(1) and 42(2) of the N.D.P.S. Act as was earlier held in the cases of **Abdul Rashid Ibrahim Mansuri -Vrs.- State of Gujarat reported in (2000) 2 Supreme Court Cases 513** and **Sajan Abraham -Vrs.- State of Kerala reported in (2001) 6 Supreme Court Cases 692**, has held as follows:

> "35.....(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."

Since in view of the provisions under section 42(2) of the N.D.P.S. Act, an officer taking down any information in writing under sub-section (1) of the said section or recording grounds of his belief under the proviso thereto, has to send a copy thereof to his immediate official superior within seventy-two hours and it is a case where P.W.5 had the earlier reliable information while he was on patrolling duty and he himself has come up with a case of compliance of section 42, therefore, mere proving of Ext.15 and mere statement of P.W.5 without any corroborative oral and documentary evidence regarding its actual dispatch or receipt in the office of the Deputy Commissioner of Excise, cannot be sufficient to hold compliance of the said section inasmuch as possibility of concoction of such a document at a belated stage making it ante-dated cannot be ruled out. The Court has to make certain external checks to see whether section 42 of the N.D.P.S. Act has been complied with at right time or not, as the failure to comply renders the entire prosecution case suspect and causes prejudice to the accused and it has got a bearing on the credibility of the evidence of the official witnesses.

10. Coming to the next contention raised by the learned counsel for the appellant relating to non-production of brass seal or specimen seal impression at the time of production of seized gunny bags before the learned S.D.J.M., Balasore for collection of samples, I find that P.W.5 has stated that after seizure of the contraband ganja in six bags, those were sealed with paper seal having signatures of the appellant and the witnesses and his personal seal impression was given on each of the bags including the balance and weight and measure and that he handed over the personal brass seal in the zima of P.W.4 Patitapabana Kar. The zimanama has been proved as Ext.20. Most surprisingly, P.W.4 is totally silent to have received any such brass seal from P.W.5. No brass seal was also produced either at the time of production of the seized gunny bags before the learned Special Judge, Balasore or the learned S.D.J.M., Balasore and even it was not produced in the Court during trial. Though the specimen seal impression according to P.W.5 was taken in a paper and it has been marked as Ext.14, but such paper containing specimen seal impression was also not produced before the Court at the time of collection of the sample for verification with reference to the seal impressions which were given on the paper slips attached to the gunny bags. Ext.14 as such indicates that the personal brass seal was returned back by P.W.4 to P.W.5 on 19.06.2010 and the paper containing the specimen seal impression and the endorsement of P.W.4 was produced for the first time before the learned Special Judge on 31.08.2010.

Learned counsel for the petitioner placed reliance in the case of **Ghadua Muduli and another -Vrs.- State of Orissa, reported in (2018) 71 Orissa Criminal Reports 413**, wherein it is held that the brass seal used in sealing the contraband articles should be kept in the zima of a respectable person and it is required to be produced before the Court at the time of production of the seized articles and sample packets for verification by the Court.

The prosecution is required to prove the proper sealing of seized articles and complete elimination of tampering with such articles during its retention by the investigating agency. Burden of proof of entire path of journey of the articles from the point of seizure till its arrival before chemical examiner has to be proved by adducing cogent, reliable and unimpeachable evidence.

Admittedly, the samples were not collected at the spot, but six gunny bags, which were seized at the spot, were first produced before the learned Special Judge, Balasore and then on the direction of the learned Special Judge, those were produced before the learned S.D.J.M., Balasore, where the samples were collected. The learned S.D.J.M., Balasore has opened a part file on 05.05.2010 where he has mentioned regarding production of six nos. of jerry bags and further mentioned that fifty grams of ganja were collected from each of the gunny bags and those were sent to the Chemical Examiner -cum- Deputy Drugs Controller, State Drugs Testing & Research Laboratory, Bhubaneswar through the Investigating Officer for chemical examination and report and the order sheet further reveals that direction was also given to the Investigating Officer to produce the bulk ganja before the Judge in-charge of Malkhana, Balasore. The learned S.D.J.M., Balasore has not mentioned in the order-sheet dated 05.05.2010 that he verified the sealed gunny bags and found it to be intact. The order sheet also does not reveal any production of specimen seal impression or any comparison of the same with any seal, which is stated to have been given on the gunny bags after its seizure. Therefore, since the samples were not collected at the spot and there is no clinching materials that till the gunny bags were produced in the Court, those were in safe custody with proper sealed condition, it cannot be said that possibility of tampering with the articles is totally ruled out. Neither the brass seal nor the specimen seal impression was produced before the learned Special Judge, Balasore as well as before the learned S.D.J.M., Balasore at the time of production of the seized articles and collection of sample packets and no explanation has been offered by the prosecution in that respect and therefore, I am of the humble view that it is a serious lacuna in the prosecution case.

11. There are certain other features in the case which cannot be lost sight of. As per the evidence of the R.I. (P.W.2), the landed property stood recorded in the name of Kanhu Kabi, wife of Nidhi Kabi of village Rampur. Kanhu Kabi was dead and his two sons namely, Mayadhar (appellant) and Gayadhar possessed the said property. Gayadhar was the eldest and Mayadhar (appellant) was the youngest. P.W.3 and P.W.4 both have stated that the appellant was living in a joint family. P.W.5 has stated that the house of the appellant was consisting of five rooms which include three asbestos rooms and two pucca rooms. The recovery was made from the pucca bed room. No personal belongings of the appellant were seized from that room. In absence of seizure of personal belongings and clinching evidence to establish

the physical possession of the appellant relating to the room in question, it is difficult to believe the sole possession of the room with the appellant. It is incumbent upon the prosecution to prove by cogent and reliable evidence that the appellant was in exclusive possession of the contraband ganja. Once exclusive possession is proved, conscious possession which means awareness about a particular fact is presumed unless rebutted by evidence on record. Once possession is established, the person who claims that it is not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. (**Ref:-Madan Lal and Anr. -Vrs.- State of Himachal Pradesh; (2003) 26 Orissa Criminal Reports (SC) 287**). P.W.1 has stated that there were three to four adult members in the house of the appellant and P.W.5 questioned all the adult members. In this case, no other family member is accused and the prosecution has not adduced any evidence as to who was occupying the particular room from where the contraband ganja was seized. This is a serious lacuna in the prosecution case.

Sections 35 and 54 of the N.D.P.S. Act raise presumptions with regard to the culpable mental state on the part of the accused and also place the burden of proof in this behalf on the accused. However, the presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. If the prosecution fails to prove the fundamental facts so as to attract the rigours of section 35 of the N.D.P.S. Act, the actus reus cannot be said to have been established. (**Ref:- Noor Aga -Vrs.- State of Punjab; (2008) 16 Supreme Court Cases 417**).

12. In view of the foregoing discussions, when there is non-compliance of the provisions under section 42 of the N.D.P.S. Act and keeping of the brass seal in the zima of P.W.4 is doubtful and neither the brass seal nor the specimen seal impression was produced before the Court at the time of production of the seized articles and collection of samples and the order-sheet of the learned S.D.J.M., Balasore dated 05.05.2010 is silent that the seized ganja packets were produced in a sealed condition to rule out the possibility of tampering with the same and above all when P.W.5 being the officer conducting search and seizure has conducted investigation and no explanation is forthcoming from the side of the prosecution as to why any other competent officer was not assigned the role of investigator in the case

and when in view of the stringent punishment prescribed for the offence, the prosecution is required to prove its case beyond all reasonable doubt with clinching material, which is lacking in the case, I am of the humble view that the impugned judgment and order of conviction is not sustainable in the eye of law.

Accordingly, the impugned judgment and order of conviction of the appellant under section 20(b)(ii)(C) of the N.D.P.S. Act and the sentence passed thereunder is hereby set aside.

The Criminal Appeal is allowed. The appellant is acquitted of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act. The appellant, who is in jail custody, shall be set at liberty forthwith, if his detention is not required in any other case. Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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2020 (I) ILR - CUT- 573

P. PATNAIK, J.

W.P.(C) NO.14563 OF 2013

SANTOSH KUMAR MOHAPATRA .....Petitioner

.Vs.

CENTRAL BANK OF INDIA & ORS. .....Opp.Parties

SERVICE LAW – Promotion – Denial of promotion on the ground of pendency of departmental proceeding – Departmental proceeding over and the petitioner exonerated – But no promotion was given to the petitioner – Action of the authority challenged – Held, law is well settled that once an employee is exonerated in a disciplinary proceeding and is found not blameworthy, the right of the petitioner for consideration of promotion at par with juniors does not get extinguished though right to promotion is not a matter of right but right to be considered for promotion is a right under service jurisprudence – In the instant case, admittedly, the petitioner has been exonerated from the charges and therefore, the service career of the petitioner is free from blemishes and there cannot be any justifiable reason not to consider the case of the petitioner for promotion from the date of juniors and batch mates were promoted. (Para 8)

Case Laws Relied on and Referred to :-

1. (2012) 13 SCC 337 : Gurpal Singh Vs. High Court of Judicature for Rajasthan.
2. 1991 (4) SCC 109 : Union of India & Ors. Vs. K.V. Jankiraman & Ors.

For Petitioner : Mr. A. Mishra, Sr. Adv.
For Opp.Parties : Mr. P.K. Mohapatra

JUDGMENT Date of Hearing : 18.12.2019 : Date of Judgment: 05.02.2020

P.PATNAIK, J.

In the accompanying writ application, the petitioner has sought for quashing of the impugned order dated 08.06.2013 under Annexure-5 and prayer has been made for direction to the opposite parties to give promotion to the petitioner to the post of Scale-V and Scale-VI with consequential service and financial benefits keeping at par with the batch mate and juniors.

2. The brief facts as delineated in the writ petition is that the petitioner entered into Central Bank Service as Agricultural Financial Officer on 25.10.1985 and confirmed in Scale-II. While continuing as such, due to personal grudge and malafide the petitioner received a Memo dated 06.12.2005 and pursuant to the said Memo, the petitioner submitted his reply. Not being satisfied with the reply, submitted by the petitioner charges were framed against the petitioner asking him for filing of show cause as per the Central Bank of India (Discipline & Appeal) regulation. It is stated that without receiving show cause from the petitioner, the Inquiry Officer and Presenting Officer were appointed by letter dated 12.09.2006. After conclusion of the Departmental Proceeding, the Disciplinary Authority passed order of punishment dated 10.09.2007 by inflicting punishment against the petitioner reducing the petitioner's salary. Being aggrieved by punishment order dated 10.09.2007 the petitioner preferred appeal and the said appeal was rejected confirming the order of the Disciplinary Authority, by enhancing the punishment without giving any opportunity to the petitioner. The petitioner filed writ application, i.e., W.P.(C) No.6550 of 2008 challenging the order of Disciplinary Authority as well as Appellate Authority and the said writ petition was disposed on 30.03.2011 by quashing the order of the disciplinary authority as well as appellate authority and the matter was remitted back to the Disciplinary Authority for fresh consideration. In pursuance of the order passed by this Court dated 30.03.2011, the disciplinary authority vide order dated 05.06.2012 exonerated the petitioner from all the charges, as evident from Annexure-2 to the writ

petition. Thereafter, the petitioner submitted representation dated 13.07.2012 before the Chairman and Managing Director, Central Bank of India, Central Office, Mumbai through proper channel claiming promotion to Scale-V with effect from 04.05.2011 and the representation of the petitioner was duly forwarded to the office of opposite party no.1. Opposite party no.3 has rejected the representation vide letter dated 08.06.2013 vide Annexure-5 which is impugned in this writ petition. In spite of interim order passed in Misc. Case No.5889 of 2008, the opposite parties vide letter dated 01.08.2008 vide Annexure-6 to the writ petition debarred the petitioner from the zone for consideration for promotion to the post of Scale-IV and V under Level Jumping Promotion Process for SMG Scale-IV & SMG Scale-V in Main Stream 2008-2009.

Being aggrieved by the impugned order dated 08.06.2013 vide Annexure-5 the petitioner has been constrained to approach this Court under Articles 226 and 227 of the Constitution of India for redressal his grievances.

3. Additional affidavit has been filed by the petitioner, wherein it has been stated that the petitioner's juniors were promoted in this level jumping promotion to Scale-IV with effect from 01.01.2009 to Scale-V with effect from 04.05.2011 to Scale-VI with effect from 12.05.2013 and as Scale-VII from 01.07.2016.

It has been further stated that level jumping promotion has been made by the Central Bank of India only once till date, thereby the Bank authorities have knowingly and misinterpreting the judicial interim order dated 05.05.2018 have not allowed the petitioner to sit for promotion examination. Therefore, the petitioner is entitled to be considered for promotion to the said rank like his batch mates and juniors on the principle of equality.

It has been further stated that as per the promotion policy prevalent in 2008 an officer is entitled to promotion to different scales with following years of service under normal channel.

Sl.No.	**Scale**	**Min. Service Required**	**Relaxation limit permitted**
1	I to II	7 years	1 year`
2.	II to III	5 years	1 year
3.	III to IV	5 years	1 year
4.	IV to V	3 years	1 year
5.	V to VI	2 years	6 months
6.	VI to VII	3 years	1 year

Further it has been submitted that the petitioner has CAIIB qualification and has completed 23 years as officer out of which 9 years service in Scale-II and 5 years as branch head as required for level jumping promotion and future promotions. Hence, the petitioner has been illegally debarred to appear in level jumping promotion and thereby deprived of promotion prospects. Apart from the factual aspects, the decision of the Hon'ble Apex Court have been cited in the said affidavit, so as to stake his claim for promotion with all consequential benefits at par with batch mate.

4. Mr. A.K. Mishra, learned Senior Counsel for the petitioner has strenuously urged that because of the arbitrary and illegal action of the opposite parties-Bank, the petitioner has been debarred for promotional prospects at par with batch mate and juniors, who have been promoted to different Scales and the petitioner has been subjected to discrimination violating under Articles, 14 and 16 of the Constitution of India.

Learned Senior Counsel for the petitioner has referred to the decision in the cases of ***Gurpal Singh v. High Court of Judicature for Rajasthan: (2012) 13 SCC 337*** and ***Union of India & others v. K.V. Jankiraman and others: 1991 (4) SCC 109.***

The Hon'ble Supreme Court observed in K.V. Janki Raman's case

> "**26.** We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings"

The Hon'ble Supreme Court further observed in Gurpal's case.

> **45.** In this case, it is a matter of record that upon exoneration in the departmental enquiry, the petitioner was reinstated in service. No punishment was inflicted on him at all. However, during the pendency of the criminal trial as also the departmental proceedings, he was not considered for promotion, when the cases of persons junior to him were considered. In our opinion, the High Court erred in directing in the Full Court Resolution dated 29th November,2008, and the communication dated 24th January,2009 that the petitioner shall not be entitled for any promotion.

By placing reliance on the factual as well as legal dictum of Hon'ble Apex Court, the learned Senior Counsel has advanced his argument for relief sought for.

5. Controverting averments made in the writ petition, the counter affidavit has been filed by opposite party no.3 wherein it has been submitted that the representation of the petitioner was rejected by the opposite party no.1 by observing that "during the process of level jumping promotion the petitioner was debarred from participating in promotion process, in view of punishment imposed on him after conducting a regular Departmental Enquiry. Clause-3.8 of promotion policy of officers of the Bank, clearly stipulates that the petitioner will be under debarment for one process or two years whichever is later". The authorities concerned further observed that the claim of sealed cover is also not applicable to the petitioner, since the sealed cover procedure applies only to those officers against whom Disciplinary action is pending or contemplated but in the case of the petitioner is proceeding was completed and punishment was also imposed on him. For better appreciation, clause-3.8 of the Promotion Policy for Officers is quoted below :-

> "**Clause-3.8** : Officers in respect of whom major penalty has been inflicted upon prior to the conduct of promotion process, would not be eligible to participate in the promotion process/s for one process or two years reckoning from the date of infliction of such penalty, whichever is later."

Further it has been submitted that the decision cited by the petitioner passed by the Hon'ble Apex Court in the case of Gurupal Singh v. High Court of Judicature for Rajasthan (Writ Petition (Civil) No.200 of 2006 decided on 27.11.2012 is not applicable to the facts and circumstances of the petitioner's case.

6. Mr. P.K. Mohapatra, learned counsel for opposite party no.3 submits that the petitioner has been debarred from participating in the said in the direct recruitment level jumping promotion in view of clause-3.8 of the promotion policy of Officers of the Bank.

Learned counsel further submits that the sealed cover procedure is not applicable to the petitioner since sealed cover procedure applies for those officers against whom, the disciplinary action is pending or contemplated, but in case of the petitioner proceeding was completed and punishment was imposed on him. Further, the learned counsel for the opposite party no.3 submitted that the punishment was imposed on the petitioner is under Regulation- 4(f) of the central Bank of India Officer Employees (D & A) Regulations-1976 is major one. Therefore, the petitioner's claim, after five years from the date of cause of action for promotion in direct Recruitment

Level Jumping Promotion Scheme 2008-2009 when the said scheme is not force, is not sustainable in the eye of law.

7. Before adverting to the contentions of the respective parties, it would be apposite to refer to the relevant provision of the Promotion Policy for Officers(PPO).

> "3.7 Relaxation in minimum service criteria under certain circumstances-Zone of Consideration.
>
> (a) The Board of Directors may relax the minimum length of service as provided in Clause 3.1 to 3.6 above to the maximum extent given herebelow, for promotion from one Grade/Scale to another where the number of eligible officers is less than 3 times the number of posts available in the next higher grade/scale:

Sl.No.	Scale	Min. Service required	Relaxation limit permitted
1	I to II	5 years	1 year
2	II to III	4 years	1 year
3	III to IV	4years	1 year
4	IV to V	3 years	1 year
5	V to VI	2 years	6 months
6	VI to VII	3 years	1 year

> (b) For promotions to MMG Scale-II and MMG Scale-III under 'Normal Channel' and for promotions to SMG Scale-IV, the eligible candidates who apply in writing in the prescribed format within the stipulated time in terms of a circular issued for each such occasion, shall be arranged as per the inter-se seniority and from this list, number of officers to the extent not exceeding 4 times of the vacancies identified for each such channel/scale, as the case may be' shall be called for participating in the process. This shall be considered as 'Zone of Consideration' for promotions to these scales.
>
> For promotions to SMG Scale V and above, the eligible candidates in the order of seniority, to the extent of 3-4 times of the number of posts for which promotions are being considered, shall be called to participate in the interview. This shall be considered as 'Zone of Consideration' for promotion to these scales.
>
> The Board of Directors may relax the criteria of restricting the 'Zone of Consideration to 4 times the number of vacancies, in exceptional circumstances after recording the reasons in writing.
>
> One of the circumstances in which this relaxation would be considered in when the number of officers who have been superseded on the previous occasion i.e.,

appeared in previous process but were not selected, and are now again eligible to appear for promotion process with the result that fresh candidates in adequate numbers are not available for consideration. In such a situation, the Board would consider calling fresh candidates additionally beyond the prescribed limit of four times the number of posts available in the next higher grade/scale. However, such additional number would not exceed the number of superseded officers in the preceding promotion process.

"Superseded officers" for this purpose shall mean those candidates who were considered in the last promotion exercise, but were not promoted and who were senior to the junior most candidate promoted.

(c) However, in case of promotion from JMG Scale-I to MMG Scale-II under Fast Track Channel (wherever applicable) and Written Test Channel and MMG Scale-II to MMG Scale-III under "Written Test Channel', the names of officers who secure 50% and above in the Written Test shall be arranged in the order of marks obtained and from this list, number of officers to the extent not exceeding 4 times of the vacancies identified for each of the above two channels, shall be called for participating in the interview for selection to MMG Scale-II and MMG Scale III respectively. The officers who secure equal number of marks shall be ranked in the order of their interse seniority. This shall be considered as 'Zone of Consideration' under 'Fast Track Channel' (wherever applicable) and/or 'written test channel', as the case may be.

For removal of doubts, it is clarified that in case the number of candidates securing 50% and above falls below 4 times of the vacancies identified for this channel, then all the candidates who secured 50% and above in the written test shall be called for the interview.

3.8. Officers in respect of whom major penalty has been inflicted upon prior to the conduct of promotion process, would not be eligible to participate in the promotion process/s for one process or two years reckoning from the date of infliction of such penalty, whichever is later.

3.9. **Procedure in case of officers against whom Disciplinary/Court proceedings are pending/initiated as on/after the date of initiation of promotion process.**

Officers who are under suspension or in respect of whom a charge-sheet has been issued and the disciplinary proceedings are pending or in respect of whom prosecution for a criminal charge is pending shall be permitted to participate in the promotion exercise subject to their fulfilling all eligibility conditions specified hereinabove. However, the findings of the Competent Authority in respect of their promotion shall be kept in a Sealed Cover. Further, an officer who is considered eligible for promotion in the promotion process but in whose case any of the circumstances stated above arises after he was found eligible for promotion but before he is actually promoted will be considered as if his case has been placed in the sealed cover.

Further course of action in respect of such officers shall be decided by the Bank as per said Sealed Cover Procedure in terms of the directives/guidelines received from Government from time to time.

The relevant clauses of Recruitment & Promotion Division, Human Resources Development Department more particularly Recruitment of Mainstream & Specialists Officers in Senior Management Grade Scale IV & V in the Central Bank of India are as follows :

"**4**.**Relaxation in Upper Age Limit**:

(i)	Scheduled Caste/Tribe Candidates	By 05 years
(ii)	Other Backward Class (OBC) candidates	By 03 years
(iii)	Ex-Servicemen/Commissioned officers including ECOs/SSCOs who have rendered at least five years of military service and have been released (a) On completion of assignment (including those whose assignment is due to be completed within 12 months from the date of application) otherwise than by way of dismissal or discharge on account of misconduct or inefficiency. (b) On account of physical disability attributable to military service or (c) On invalidment	
(iv)	Persons With Disabilities (PWD)	By 10 years
(v)	Persons domiciled in state of Jammu and Kashmir during the period from 01.01.80 to 31.12.89	By 05 years.
(vi)	Officers in the RRBs who have put in a minimum 5 years of service.	By the number of years of service put in as an officer in a RRB subject to a maximum of 5 years.

Note: The relaxation in age is available to SC/ST/OBC categories on cumulative basis with only one of the remaining categories for which age relaxation is permitted.

5. **Scale of Pay**:

			Approx, total emoluments at the start of the Scale + DA + CCA _ HRA in Metro Centers.
5.1	SMG Scale IV	Rs.20480-560/1-21040-620/5-24140	Rs.29,581.00
5.2	SMG Scale V	Rs.24140-620/4-26620	Rs.34,771.00

In addition, accommodation (in lieu of HRA/Rent Reimbursement), conveyance, medical reimbursement, LFC, Superannuation benefits, etc., as admissible as per the rules of the Bank.

> **6**. SELECTION PROCEDURE:
>
> Selection will be on the basis of written test, Group Discussion and Interview for Post Code 01 & 02 and through Group Discussion and Interview for Post Code 03 & 04 depending on the number of applications received for the post. Merely satisfying the eligibility norms do not entitle a candidate to be called for Written Test, Group Discussion and Interview. The Bank reserves the right to call only the requisite number of candidates for the Written Test, Group Discussion and Interview after preliminary screening/short-listing with reference to candidates qualifications, suitability, experience, etc.
>
> **8**. **INTERVIEW**:
> Wherever the Bank decides to hold the written test, the short listed candidates in the order of ranking in the written test, as per the cut-off marks determined by the Bank shall be called for GD/Personality test/Interview and the decision of the Bank in this regard is final."

After being exonerated from the charges vide order dated 15.06.2012 vide Annexure-2, the petitioner approached the authority of the Bank for consideration of his promotion by appealing for reconsideration of his promotion to Scale-IV and Scale-V since batch mates and juniors to petitioner were promoted during the intervening period of pendency of the disciplinary proceeding.

8. Law is well settled that once an employee is exonerated in a disciplinary proceeding and is found not blameworthy, the right of the petitioner for consideration of promotion at par with juniors does not get extinguished though right to promotion is not a matter of right but right to be considered for promotion is a right under Service Jurisprudence. In the instant case, admittedly, the petitioner has been exonerated from the charges and therefore, the service career of the petitioner is free from blemishes and there cannot be any justifiable reason not to consider the case of the petitioner for promotion from the date juniors and batch mates were promoted. Since it is a trite law, nobody has right for promotion but an employee has right to be considered for promotion. (The Hon'ble Apex Court has been pleased to refer the ***Gurpal Singh's*** case and ***Janki Raman's*** case.)

9. On the cumulative effect of the aforesaid facts, reasons and judicial pronouncements, the impugned order dated 08.06.2013 vide Annexure-5 is liable to be quashed and accordingly the same is quashed and set aside and the opposite parties are directed to consider the case of the petitioner for promotion to Scale-V to Scale-VI from the date of which the batch mate and juniors have been given promotion in view of the ratio of the Hon'ble Apex

Court in decision of ***Gurpal Singh's*** case and ***Janki Raman's*** case. The entire exercise be completed within a period of twelve weeks from the date of receipt of communication of this order. On consideration of the case of the promotion, if the petitioner is found eligible to be promoted from Scale-VI to Scale-VII from the date of the juniors and batch mates were promoted, consequential service benefits as due and admissible be extended to the petitioner within a period of eight weeks thereafter.With the aforesaid observation/direction, the writ petition stands allowed.

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2020 (I) ILR - CUT- 582

P. PATNAIK, J.

W.P.(C) NO. 5858 OF 2015

BISHWONATH BEHERA .....Petitioner

.Vs.

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

SERVICE LAW – Regularisation of service – Petitioner is working as a JCB driver in Cuttack Development Authority – Rendering his services near about two decades without any interruption – Service has not been regularised since the date of joining – Claim of regularisation – Regularisation denied on the ground that, the post is not sanctioned post – Action of the Authority challenged – Long utilisation of services pleaded – Held, the case of the petitioner requires reconsiderations so far as regularisation of service is concerned.

Case Laws Relied on and Referred to :-

1. AIR 2006 SC 1806 : Secretary, State of Karnatak Vs. Uma Devi & Ors.
2. (2018) 8 SCC 238 : Narendra Kumar Tiwari & Ors Vs. State of Jharkhand & Ors.
3. (2014) 7 SCC 223 : State of Jharkhand and others Vs. Kamal Prasad & Ors.

For Petitioner : Miss Deepali Mohapatra.
For Opp.Parties : Mr. D. Mund, Additional Govt. Adv. & Mr. D. Mohapatra.

JUDGMENT Date of Hearing :05.12.2019 : Date of Judgment: 05.02.2020

P.PATNAIK, J.

In the accompanied writ petition, the petitioner has sought for regularization of services as JCB driver as per the recommendation made by the Vice-Chairman, Cuttack Development Authority (CDA)-opposite party

no.2 vide letter no.18584/CDA dated 22.12.2014 and compliance made to opposite party no.1 of his letter dated 19.06.2015 on 28.7.2015 and further prays to quash the tender call notice for the post of petitioner issued by opposite party no.2 under Annexure-9.

2. The brief facts as delineated in the writ petition is that the petitioner was initially appointed on 01.10.2012 on daily wage basis, as JCB driver subsequently the services of the petitioner have been extended time and again and last extension was made vide letter dated 06.01.2015. Since 2012 the petitioner has been continuing in services without any break and interruption of services. While continuing as such, a meeting was convened by the opposite party nos.2 and 3 on 02.12.2014 and in the said meeting, after thorough discussion, it was decided to move Government, in Housing & Urban Development Department for consideration for regularization of services of 16 numbers of DLR/CLR engaged under the opposite party no.2.

Pursuant to the decision taken by the Committee, the opposite party no.3 has recommended the case of the petitioner along with 15 others before the opposite party no.1 for contractual engagement as evident from Annexure-8 to the writ petition. On receipt of the letter from Annexure-8, the opposite party no.1 has directed the opposite party no.3 to submit sufficient justification for engagement of DLR/CLR employees of CDA, Cuttack for onward transmission of the same to Finance department for consideration of the proposal at their end. It has been averred in the writ application that 14 numbers of regular posts are lying vacant and the CDA Authority has the power to engage the petitioner against one of such regular vacancies. In pursuance to the direction of the opposite party no.1, the opposite party no.2 furnished the detailed information on the NMR/DLR/Job Contract workers working under the Establishment of Cuttack Development Authority. It has been further stated that the engagement of NMR/DLR/Daily wage labourer made after 12.04.1993 is illegal and proposal for engagement of those persons on contractual basis does not arise and the said decision of opposite party no.1 is impugned in this writ petition. Being aggrieved by the decision of opposite party no.1, the petitioner has been constrained to approach this Court under Articles, 226 and 227 of the Constitution of India for redressal of his grievances.

3. Ms Deepali Mohapatra, learned counsel for the petitioner submits that the petitioner has rendered services for more than two decades. Since the opposite parties have utilized the services of the petitioner, the services of the

petitioner ought to have been regularized in view of the decision of the Hon'ble Apex Court in the case of ***Secretary, State of Karnatak v. Uma Devi and others : AIR 2006 SC 1806.***

4. Mr. Dayananda Mohapatra, learned counsel for the Cuttack Development Authority by referring to the counter affidavit submitted that the engagement of the petitioner was made illegally and contrary to the instruction of the Government and in absence of sanctioned post. Further it has been mentioned that the Government in consideration of the request of the Authority however issued instruction vide letter dated 26.11.2015 and rejected the proposal for engagement of NMR/DLR/daily wages labourer made after 12.04.1993. It has been further submitted that the petitioner was appointed without following due process of law, nor there exist any vacancy in this said post. The resolution of the authority was in respect of contractual engagement which has not been approved by the Government till yet. With the aforesaid averments, the prayer of the petitioner deserves no consideration.

Learned counsel for the Cuttack Development Authority further submits that services of one similarly situated person, namely, Sri Madhusudan Guru have been regularized in pursuance of the order passed in W.P.(C) No.4189 of 2007, but his appointment was against the vacant sanctioned post and the case of Madhusudan Guru is not applicable to the present case.

5. It would be apposite to refer Sections 4 & 103 of Odisha Development Authorities Act which are quoted hereunder:

> **"4. Staff of the Authority-** (1) Subject to such control and restrictions as may be prescribed by rules, the Authority may appoint a Secretary and such number of other officers and employees (including experts for technical work) as may and employees (including experts for technical work) as may be necessary for the efficient performance of its functions and may determine their designation and grades.
>
> (2) The Secretary and other officers and employees of the Authority shall be entitled to receive from the funds of the Authority such salaries and such allowances, if any, and shall be governed by such conditions of service as may be determined by regulations made in this behalf.
>
> (3) Notwithstanding anything contained in this Act or in the rules or regulations made thereunder, for the purpose of smooth and efficient administration of the affairs of the Authorities, the State Government may, at the instance of any

Authority or otherwise, direct any Authority for transfer of any officer or employee of such Authority, by way of deputation, to another Authority for such period not exceeding six years at a time and on such conditions, as may be specified in the direction.

(4) Whenever, any officer or employee belonging to an Authority is transferred under Sub-section (3), the Authority to which the officer or employee is so transferred shall be bound to accept the joining report forthwith, employ him in the service of the Authority and pay all amounts due to him on account of his pay, allowances and other dues from out of the fund of that Authority.

5. Notwithstanding anything contained in this Act or Rules or Regulations made thereunder, the State Government may, at the instance of any Local Authority or Department of the State Government or any other Authority constituted or incorporated under the provisions of any State Act or otherwise, direct any Authority for transfer of any Officer or employee of such Authority, by way of deputation, to such Local Authority or Department of the State Government or any other Authority constituted or incorporated under the positions of the State Act for such period not exceeding six years at a time and on such terms and conditions, as may be specified in the direction and the provision of sub-section (4), shall apply to such deputation mutatis mutandis"

"**103. Control by State Government**-(1) The Authority shall carry out such directions as may be issued to it, from time to time, by the State Government for the efficient administration of this Act.

(2) If in, or in connection with the exercise of its powers and discharge of its functions by the Authority under this Act, any dispute arises between the Authority and the State Government, the decision of the State Government on such dispute shall be final.

(3) The State Government may, at any time, either on its own motion or otherwise, call for the records of any case disposed of, or order passed by the Authority for the purpose of satisfying itself as to the legality or propriety of any order passed or directions issued and may pass such order or issue such directions in relation, as it may think fit :

Provided that the State Government shall not pass an order prejudicial to any person without giving such person a reasonable opportunity of being heard."

Rule-6 of the Odisha Development Authorities Rule,1983 is hereunder:

"6. **Appointing authority, supervision and** control-(1) The powers of appointment, promotion, and punishment of officers and employees of the Authority other than those on deputation shall vest in the Vice-Chairman:

Provided that in case of appointment, promotion and removal from service of any officer belonging to Class-1 and Class-II Posts, the exercise of such power by the Vice-Chairman shall require previous approval of the Authority.

(2) The Vice-Chairman shall exercise supervision and control over the officers and employees of the Authority and shall subject to the provisions of sub-rule (1), dispose by all questions relating to the services of the said officers and employees and their salaries, allowances and privileges.

(3) The Vice-Chairman, with the prior approval of the Authority may, by order in writing, delegate and of his powers, and functions to any of the members of officers of the Authority, subject to such conditions, if any, as may be specified therein.

(4) (a) During the period of deputation the concerned employee will draw this pay and allowances in the existing scale of pay, which is fixed by his/her parent organization.

(b) He/she shall remain in the cadre of parent orgazaniation during the period of deputation.

(c) Pay and allowances will be borne by the borrowing authority under intimation of parent organization.

(d) The employees will be entitled to Dearness Allowances under the rule of parent organization.

(e) House rent allowances will be paid to the deputationist as per norm fixed by the borrowing authority.

(f) Any loan or advance will be sanctioned by the borrowing authority and the Service Book will be maintained by the borrowing authority.

(g) He/she shall be entitled to the medical facilities as admissible to him/her as per norm fixed by the borrowing authority.

(h) The share of CPF/EPF contribution of the employee concerned will be borne by the borrowing authority as per norm fixed by the parent organization and the borrowing authority will deposit the same in the Heads of Accounts of employee concerned. There is no need of change in respect of quantum of EPF contribution from the different Authority.

(i) The borrowing authority shall sanction leave-

(i) Upto a maximum period days credited to the leave account of the employee during deputation; and

(ii) Exceeding the period as in para (i) above shall be sanctioned by the parent organization.

(j) Joining time-

(i) Not more than one day is admissible to an employee in order to join a new post on transfer within the same Headquarters. A holiday counts as a day for the purpose of this rule.

(ii) Not more than one day excluding holiday and actual time taken for journey in the shortest route is admissible to an employee in order to join a new post when the

appointment to such post necessarily involves on transfer from one station to another.

Provided the Authority may extend the joining time for a maximum period up to six days in special cases where it is not possible on the part of the employee to join in new post within the period stipulated as in paras (i) & (ii) above.

(k) The borrowing authority at any time with concurrence of Administrative Department, may revert/repatriate the employee to his parent organization before completion of deputation period and vice versa.

(l) The employee shall not be entitled to any other remuneration and concession of pensionary value unless it is specified on the terms of his/her deputation without specific sanction of parent organization.

(m) The borrowing authority with prior approval of the Administrative Department may initiate disciplinary action against the employee concerned on the ground of misconduct under Odisha Civil Services (Classification, Control & Appeal) Rules,1962, in case he violates the rules and regulations of the borrowing authority.

(n) No deputation shall exceed six years at a time:

Provided that it is expedient to do so , the Finance Department shall be consulted."

In the case of ***Narendra Kumar Tiwari and others v. State of Jharkhand and others : (2018) 8 SCC 238***, in paragraph-7, it was held that :

"The purpose and intent of the decision in Umadevi(3) was therefore twofold, namely, to prevent irregular or illegal appointments in the future and secondly, to confer a benefit on those who had been irregularly appointed in the past. The fact that the State of Jharkhand continued with the irregular appointments for almost a decade after the decision in Umadevi (3) is a clear indication that it believes that it was all right to continue with irregular appointments and whenever required, terminate the services of the irregularly appointed employees on the ground that they were irregularly appointed. This is nothing but a form of exploitation of the employees by not giving them the benefits of regularization and by placing the sword of Damocles over their head. This is precisely what Umadevi and Kesari sought to avoid."

6. After hearing the learned counsel for the respective parties and on perusal of the records, there is no gainsaying of the fact that the petitioner has rendered services for pretty long period and in view of the decision in the cases of ***Narendra Kumar Tiwari and others*** (supra), ***Uma Devi and others*** (supra) and in the case of ***State of Jharkhand and others v. Kamal Prasad and others:(2014) 7 SCC 223,*** the case of the petitioner requires reconsideration so far as regularization of service of the petitioner is concerned.

7. The writ petition is accordingly disposed of with direction to the opposite parties, more particularly opposite party nos.1 and 2 to consider the case of the petitioner afresh for regularization of service of the petitioner in view of the judgments cited supra within a period of four months and the decision taken thereof be communicated to the petitioner within the aforesaid period.

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2020 (I) ILR - CUT- 588

P. PATNAIK, J.

W.P.(C) NO. 22028 OF 2013

BIBHUTI BHUSAN NAYAK .....Petitioner

.Vs.

LIFE INSURANCE CORPORATION OF INDIA & ORS. .....Opp.Parties

SERVICE LAW – Disciplinary Proceeding – Petitioner was working as cashier in the LIC of India – Allegation of embezzlement of corporation money for his personal gain – Order of dismissal passed by the disciplinary authority and the same was also confirmed by the appellate authority – Plea of disproportionate punishment raised – Power of the Writ court against such confirming order – Discussed – Held, if the conscience of the court is shocked as to the severity of the punishment imposed, it can remand the matter back for fresh consideration to the disciplinary authority concerned – Matter remanded. (Para 7)

Case Laws Relied on and Referred to :-

1. (1995) 6 SCC 157: Ram Kishan Vs. Union of India (UOI) & Ors.
2. (2015) 2 SCC 410 : Collector Singh Vs. L.M.L. Limited.
3. (2007) 7 SCC 257 : Union of India & Ors. Vs. S.S. Ahluwalia
4. 2017 (II) OLR 60 : Arjun Charan Sahoo Vs. State of Odisha & Ors.
5. 2010(I) OLR 742 : Sudarsan Giri Vs. Union of India & Ors.
6. (2014) 2 SCC 748 : Iswar Chandra Jaiswal Vs. Union of India & Ors.
7. (2007) 7 SCC 257 : Union of India Vs. S.S.Ahulwalia.

For Petitioner : Mr.Sourya Sundar Das,
For Opp Parties : Mr.Sanjit Mohanty, Mr.S.C.Samantaray & S.P.Panda.

JUDGMENT Date of Hearing : 28.11.2019 : Date of Judgment:05.02.2020

P.PATNAIK, J.

In the accompanying writ petition, the petitioner, who was working as Higher Grade Assistant in Life Insurance Corporation of India, Paradip

Branch under Cuttack division has assailed the order dated 11.06.2012 passed by Senior Divisional Manager, Divisional Office-opposite party no.2 removing the petitioner from the services of the Corporation vide Annexure-8 and the order dated 13.12.2012 passed by the Zonal Manager- opposite party no.3 vide Annexure-10, the appellate authority upholding the order date 11.06.2012 and the order dated 10.07.2013 passed by Chairman, Central Office-opposite party no.4 rejecting the memorial of the petitioner passed under Annexure-12 and the petitioner has further prayed for quashing Annexures-8,10, and 12 with a direction to the opposite parties for reinstatement in services granting him all consequential service benefits.

2. Bereft of unnecessary details, the petitioner while working as Higher Grade Assistant in Life Insurance Corporation, Paradip Branch Office was served with charge sheet dated 08.12.2009. The gravamen of the charge in nutshell is that while working as Cashier in Cuttack Branch Office-I, the petitioner deposited self cheques in L.I.C Account III form his own Savings Bank Account against the cash collection/deposits from policy holder/agents. It is alleged in the charge sheet that on several occasions the petitioner issued cheques from his account against different policy holders and in one occasion one of the cheque got dishonoured by the bank with the reason "Fund insufficient". Due to the aforesaid alleged conduct he was charged with an allegation of embezzlement of corporation money for his personal gain and as such failed to maintain absolute integrity and devotion to his duties and acted in a manner prejudicial to good conduct and detrimental to the interest of the Corporation thereby violating Regulation 21, 24 read with 39(1) of LIC of India (Staff) Regulations, 1960. While charges alleging violation of Regulation 21,24 and 39(1) was slapped on the petitioner, it was mentioned in the charge sheet that one or more of the penalty specified under Regulation 31(1)(a)(ii)(g) of the Regulation 1960 can be imposed on him. In pursuance of the memorandum of charges, the petitioner submitted his reply by pleading innocence. On receipt of the reply the opposite party no.2 appointed Divisional Manager, Cuttack as Enquiry Officer to enquire into the charges. During enquiry, the petitioner submitted statement of policy holders, who unanimously stated in their statement that they have requested the petitioner to deposit their LIC premium on their behalf and assured him to refund. During enquiry the petitioner asked for certain minutes of the proceeding copies dated 08.02.2010 and 25.02.2010 which has not been provided by the Enquiry Officer. Another charge sheet was filed against the petitioner with the allegation that the petitioner collected cheque from policy

holders towards premium of their policy, but the petitioner manipulated the cheque amount towards the premium of other policy holders. After completion of enquiry, the Enquiry Officer submitted his enquiry report holding charge sheet dated 08.12.2009 established in full and charge sheet dated 01.04.2010 established partially as evident from Annexure-4. Thereafter the Manager (P & IR) issued letter directing the petitioner to submit his comments on the enquiry report. The petitioner submitted his comments stating therein that the enquiry was not conducted in a fair and transparent manner. The opposite party no.2 issued show cause notice to the petitioner with regard to proposed penalty of removal from service in terms of regulation 39(1)(f) of LIC of India (Staff) Regulation, 1960 The petitioner submitted his show cause praying for quashing of charges leveled against him and to declare the enquiry report as null and void. The opposite party no.2 vide order dated 11.06.2012 held the petitioner guilty of the charges and imposed the penalty of removal from service vide Annexure-8. Being aggrieved by the order of the Disciplinary authority the petitioner has submitted his appeal before the Zonal Manager and the appellate authority rejected the appeal vide Annexure-10. Aggrieved by the rejection of the appeal, the petitioner submitted memorial before the Chairman, which has been rejected vide Annexure-12 to the writ application. Being aggrieved by the order of the Disciplinary Authority, appellate authority as well as the rejection of the memorial passed by the Chairman, LIC of India, opposite party No.4, the petitioner having no alternative and efficacious remedy has been constrained to challenge the aforesaid order under Articles 226 and 227 of the Constitution of India.

3. Mr.S.S.Das, learned senior counsel for the petitioner has strenuously urged that the entire departmental proceedings has been conducted in a very perfunctory manner, since the petitioner was not afforded with sufficient opportunity to adduce evidence on his behalf. Further, the Enquiry Officer did not examine the policy holders before coming to the conclusion of malfeasance or misfeasance on the part of the petitioner. Therefore, the argument advanced by the learned counsel for the petitioner is that the enquiry officer came to the conclusion only on surmises and conjectures without going deep into the allegations. Learned senior counsel further submits that had the enquiry officer examined the letter of the policy holders then it would have thrown much light on the veracity of the allegation. Therefore, non-examination of policy holders has vitiated the entire proceedings. The learned senior counsel further submits that on perusal of the

enquiry report, it would reveal that the Corporation did not cite any witness though in the charge sheet vide Annexure-B a provisional list of witnesses was given. In the absence of either oral or material evidences the allegation with regard to collection of cash from policy holders and instead depositing the cash he deposited the premium from his own account and the factum of cash collection has not been proved to the hilt in the report of the enquiry officer.

So far as second subsequent charge sheet is concerned, the said charge sheet could not be proved. The learned senior counsel for the petitioner further submits that the enquiry report does not exactly reveal his dishonesty or lack of faithfulness nor does it reveal any pecuniary loss caused to the Corporation whereby the ingredients of Regulations 21 and 24 could come into play. Learned senior counsel further submits that it is the usual practice because of the personal relationship of the policy holders with the agents or employees of the Corporation to collect cash and subsequently the same is deposited and sometime the agent deposits on behalf of the policy holders in advance in order to save the policy. Therefore, the petitioner should not have been inflicted with the punishment of removal from service. Learned senior counsel further submits that the order inflicting the penalty by opposite party no.2 does not confirm the Regulation 1960 nor there is any foundational fact to fasten the guilt on the petitioner for cash collection and with regard to deposit of the premium from his personal account which is evident from the documents of the policy holders produced by the petitioner during enquiry. The learned counsel further submits that in spite of the order dated 16.01.2019 passed by this Court for submission of an affidavit with regard to procedure envisaged by the Life Insurance Corporation with regard to deposit of premium collected from the policy holders, the opposite parties produced the account of the manual for Finance and Accounts department of LIC other than that opposite party no.2 has not submitted any provision to indicate or substantiate the allegations. Regarding the modalities of deposit of premium learned senior counsel further submits that penalty under Regulation 39 can be inflicted on an employee who committed breach of Regulation of the Corporation or displays negligence, inefficiency or indolence or the employee knowingly detrimental to the Corporation. In the case in hand, there is no breach of Regulation of the Corporation, nor there is any negligence or indolence on the part of the petitioner. On the contrary, the petitioner paid the premium amount from own account for the policy holder. In the process only the Corporation stood to gain without facing any loss. The

last plank of argument of the learned senior counsel is that had there been any pecuniary loss caused to the Corporation, the same could have recovered under Regulation 39(C) of the penalties instead of resorting to infliction of major punishment of removal from services. In support of his contention learned senior counsel has referred to the decision reported in 2000 Vol.10 SCC 280 (Assistant General Manager, SBI-vrs.-Thomas Jose and Another) (2016) 6 Supreme Court Cases 303 (Delhi Police and others-vrs.-Sat Narayan Kaushik), 2017 Vol I OLR 825 (Sanatan Jena –vrs.-CESU and others), 2017 (1) OLR 834 (Cuttack Municipal Corporation –vrs.State of Odisha and others), AIR 1987 S.C. 2386 (Ranjit Thakur-vrs.Union of India and others), AIR 1983 Supreme Court 454 (Bhagat Ram-vrs.State of Himachal Pradesh and others), 1992 (II) OLR (ATC) 26 (Hare Krushna Muduli-vrs.-Collector, Cuttack and another), 1986 (1) OLR 631, (Sakuntala Garabadu and others-vrs.-State of Orissa and others)

4. Controverting the averments made in the writ petition, counter affidavit has been filed by opposite party Nos. 1 to 4 wherein it has been stated in paragraph-9 that the petitioner was an employee of LIC. He was a cashier in Cuttack Branch Office-I till 30.01.2009. He was promoted to Higher Grade Assistant and posted in Paradip BO. An internal audit at Cuttack Branch Office-I received various irregularities in cash transaction and fraudulent cheque transaction. The preliminary departmental investigation reveals that the petitioner had adopted wrong practice because of his advantageous position as cashier at Cuttack Branch Office. The petitioner had allegedly received cash from policy holder/agent but recorded the said collection as cheque transaction and issued cheques from his own savings bank account of Union Bank of India, Cuttack. His personal cheques used for these purpose are Ch.No.052117,119640, 52115, 119629, 52114,52106 and 119630. The Disciplinary authority observed that the petitioner violated the rules and regulation under LIC of India (Staff) Regulation 1960 and had embezzled corporation money for his personal gain and failed to maintain absolute integrity and devotion to his duties (Regulation-21) and also failed to serve the Corporation honestly and faithfully (Regulation-24). The Disciplinary Authority, Opp.Party No.2 issued the charge sheet dated 08.12.2009 to the petitioner directing him to give in writing regarding admission or denial of the charges and in the event of denying the charges, a statement of denial together with the provisional list of documents and witnesses to defend his case within 15 days from the date of charge sheet and at paragraph-12 it has been stated that the alleged written

statement of the policy holder, his alleged relations have no evidentiary value as the authors/relations did not come forward to depose in his favour corroborating the same. He did not produce the said witness at Paradip BO on 15.04.2010, he also failed to produce the witnesses in the proceeding held at Cuttack on 20.04.2010 on his request. The enquiry officer afforded reasonable opportunity to produce defence witness. The enquiry officer had provided adequate opportunity to charge sheeted employee to present his witness in defence which he failed to do and countersigned the minutes on 20.04.2010. The enquiry was completed in time and the enquiry officer submitted his report in due time. It is stated that there is no justification for his depositing of premium/loan through personal cheques of the cashier. The deposit of cheques for premium/loan for others except his own dependent family members from his own account is not allowed to the policy holders as per rules of the corporation. It is more objectionable if such an act is performed by a cashier and is punishable as per Staff Regulation 1960. The enquiry report further shows that the money has been tendered in cash, thereafter personal cheques have been deposited by the cashier.

Mr.Samantaray, learned counsel for the opposite parties apart from reiterating the submissions made in the counter affidavit by drawing the attention of this Court to charge sheet has vehemently submitted that on perusal of the charge sheet, it would reveal that the allegation of temporary misappropriation is tell tale. The learned counsel further submits that a cursory glance of Annexure-II to the charge sheet would reveal at sl.no.2 the date of collection was 21.01.2009 and the same was debited on 06.05.2009. Similarly there has been undue delay between the date of collection and date of debit. Therefore, the charges were very much grave and basing on the enquiry report the disciplinary authority has passed the order of punishment commensurate with the proved guilt of the petitioner. Learned counsel for the opposite parties further submits that the petitioner being a Cashier in Cuttack branch he was promoted to Higher Grade Assistant and posted at Paradip branch office and an internal audit at Cuttack branch Office-I revealed various irregularities in cash transaction and fraudulent cheque transaction. The preliminary departmental investigation reveals that the petitioner adopted wrong practice because of his advantageous position as cashier at Cuttack Branch. The petitioner failed to maintain absolute integrity and devotion to duty and failed to serve the Corporation honestly and faithfully. So far as the contention of the learned counsel for the petitioner that written statement of the policy holder have no evidentiary value as the author/relation

to come forward to depose in favour of the petitioner. There is any due compliance of the natural justice despite opportunity afforded to the petitioner. He failed to produce the witnesses. Therefore, there is absolutely no procedural irregularities from the date of initiation of the proceeding till its culmination. Learned counsel for the opposite parties with regard to quantum of punishment submitted that the petitioner due to his deliberate act of depositing cheque of his own during the period from March,2008 to April, 2009 towards premium/loan repayment/3rd parties on several occasions against the Rules of the Corporation and late receipt of the credit amount of embezzlement of policy holder corporation money. Since the disciplinary proceeding is not based on no evidence, no interference is warranted by this Court under Article 226 of the Constitution of India. With regard to quantum of punishment, learned counsel for the opposite parties submits that it is commensurate with the gravity of misconduct when there is temporary misappropriation. The petitioner being cashier received the cash did not deposit the same and later issued cheques from his own account which was cleared long after and some cheques were dishonoured.

In order to buttress his submission, learned counsel for the opposite parties has referred to (2015) 2 SCC 341 Diwan Singh –vrs. LICI & others paragraph-7,8,9,10 and 11. By referring to the aforesaid decision learned counsel for the opposite parties submits that when there is temporary embezzlement there should be no sympathy of this Court loss of confidence is a primary factor nor the amount, (2013) Vo.10 SCC 106. Deputy Commissioner, Kendriya Vidyalaya vrs.J.Hussain, paragraph-7,8,9,10 and 11, AIR 2008 SC 2594 State Bank of India & others-vrs. S.N.Goyal, para-28, (2005) 2 SCC 481 BHEL-vrs.-M.Chandrasekhar, para-19,20,21 and 22., Vol.83 (1997) LT 533 Disciplinary Authority-vrs.N.B.Pattnaik, para-7,8 and 9, W.P.(C) No.7848 of 2009 – Abhiram Samal-vrs.-Indian Bank and others para- 4,13, 14, 16, 18, 21 and 22.

Before adverting to the rivalised submission, it would be relevant to quote Regulation-21,24 and 39(1) and penalties specified under Regulation 31(1) (a)(2)(g) of Regulation 19.

> 21. **Handling of Money Orders Received.**
>
> 1. Arrangements shall be made with the Post Office for receiving Money Orders by cheque instead of by cash. Only in such places, where arrangements for receiving by cheque could not be arranged the amount may be received in cash through the postman.

2. A separate money order received register shall be maintained for recording the Money Orders received by the concerned office by cash or by cheque (as the case may be) on daily basis.

3. The Postman will be asked to approach the duly authorized supervisory official of the O.S. Dept and to deliver to the latter the Inward Money Order Forms. Entries in the Money Orders Received Register shall be made in the presence of the said official.

4. The serial number of each entry in the register shall be written on the Money Order coupon as well as on the acknowledgement meant for the party. Wherever the address of the party is not mentioned in the Money Order coupon meant for the office, the person who is inwarding the same in the Money Orders Received Register, shall also clearly write the name and address of the remitter in the coupon as well as in the Register.

5. The concerned Supervisory Official of O.S. Dept. shall initial the register after checking the entries therein with the Money Orders and shall also sign the Money Orders by affixing a Rubber Stamp bearing the name of the Office of L.I.C. under his signature with date.

6. The Money Order Received Register and the signed Money Order Forms will be handed over to the cashier, at the time when the postman calls on the cashier and hands over the cash or cheque (as the case may be) in exchange for the Money Oder acknowledgements. The cashier shall account for the payment received in the relevant Cash Books and shall mark the date of accounting and the Cash Book reference against each individual item in the Money Order received register. The cashier shall also sign against the entries in the Money Order Received Register in token of having received the proceeds of the Money Orders and having duly accounted the same.

7. The concerned supervisory official of Accounts Dept. shall race the entries from the Money Orders received Register into the relevant Cash Books, to verify that all the Money Orders received have been duly accounted for by the Cashier. The said supervisory official shall sign the Money Order Received Register sheet in token of his having verified the accounting entries.

8. All other controls exercised over the Register remittances Received Register shall also be applicable to the Money Orders Received Register.

9. In case Money Oder/s is/are received in cash/cheque after the close of Cash Hours, a note shall be taken of the same in the Daily Cash Balance Book.

10. Money Orders returned undelivered shall also be entered in the M.O. Received Register. Payment effected by Money Order in respect of Policy Loan which is retuned undelivered by the Postal Authorities shall be credited to Policy Loan Account through “Loan Repayment and Loan Interest” Cash Book with a remark “ Money Order Returned”. Payments effected by Money Order in respect of any other item shall be credited to “Money Order Undelivered Account (Account Code No.1122) through the Miscellaneous Collections Cash Book.

24. **Cheque Collection Box**:

1. A Cheque Collection Box shall be installed in every branch Office near the cash counter in a prominent place which is easily accessible to the policy holders to enable them to drop the cheque towards premiums…etc. The Cheque Collector Box should be locked and the key kept by a supervisory official in the Office Services Department.

2. The box should be opened daily by the O.S. Dept. on all the working days in the morning in the presence of Head of the Accounts Department and all the cheques deposited therein should be cleared and counted and total number of cheques should be noted down by both Accounts Dept., as well as O.S. Dept. and thereafter taken for entering in Remittances Received Register to be maintained by the Inward Mail Section of the Office Services Department. These cheques should be entered in the R.R. Register as a separate lot. Thereafter, the cheques should be handed over to the cashier/Senior Assistant for accounting the same. A cross reference should be made to the original count of cheques taken so as to ensure that all cheques have been duly entered in the R.R. Register.

3. The officer-in-charge of the Branch/Divisional Office/Zonal Office has to issue an office order authorizing the officials to open the cheque collection box and also the names of the officials in whose presence the box should be opened and count the cheque.

39(1) **Encashment of Cheques from Imprest Cash**

1. Officers-in-charge of offices of the Corporation have the discretion to permit encashment of cheques by permanent employees from Imprest Cash. The Cashier shall not encash cheques without the written sanction of the Officer-in-charge of the office or person/s authorized by him in that behalf in writing. Such authorized persons should preferably be not below the rank of A.A.O.

5. After hearing the learned counsel for the petitioner at length and on perusal of the documents on records, there is no pecuniary loss caused to LIC nor the policy holders have alleged any negligence, malfeasance or misfeasance on the part of the petitioner. Therefore the Regulation 39 has been improperly invoked to inflict by extreme punishment of removal from services. Therefore, the punishment inflicted appears to be grossly disproportionate to the proven charges.

The short question which falls for determination is as to whether the punishment inflicted on the petitioner is proportionate to the alleged charge. In order to fortify his claim, the learned counsel for the petitioner has referred to ***(1995) 6 SCC 157 : Ram Kishan v. Union of India (UOI) & Others; (2015) 2 SCC 410: Collector Singh v. L.M.L. Limited; (2007) 7 SCC 257: Union of India and others v. S.S. Ahluwalia; 2017 (II) OLR 60: Arjun***

Charan Sahoo v. State of Odisha and others & 2010(I) OLR 742: Sudarsan Giri v. Union of India and others.

6. On perusal of the pleadings, counter affidavit and the procedure adopted by the Disciplinary Authority, there is no scope to interfere with regard to procedural aspects of the Disciplinary Proceeding, but so far as infliction of punishment of dismissal from services appears to be a grossly disproportionate considering the proved charges.

It is no more res integra that this Court under Article 226 of the Constitution of India can interfere with the punishment only if it finds same to be shockingly disproportionate to the charges found to be proved. In such a case, the court is to remit the matter to the Disciplinary Authority for reconsideration of the quantum of punishment.

7. On culling out the decision of the Hon'ble Apex Court, High Court under Article 226 of the Constitution of India, indisputably it cannot pass order regarding quantum of punishment unless there is existence of sufficient reasons so as to shock the conscience of the Court. So far as the quantum of punishment is concerned, the Hon'ble apex Court in Union of India & others –vrs.-S.S.Ahuluwalia (2007) 7 SCC at page 257 has been pleased to hold that if the conscience of the Court is shocked as to disproportionate or inappropriateness of the punishment imposed it can remand the matter back for fresh consideration to the Disciplinary Authority concerned.

The Hon'ble apex Court in another judgment rendered in **Iswar Chandra Jaiswal –vrs.-Union of India and others, (2014) 2 SCC 748** in paragraph-5 has been pleased to held as follows:

"It is now well settled that it is open to the Court, in all circumstances, to consider whether the punishment imposed on the delinquent workman or officer, as the case may be, is commensurate with the Articles of Charge leveled against him. There is a deluge of decisions on this question and we do not propose to travel beyond **Union of India v.S.S.Ahulwalia (2007) 7 SCC 257** in which this Court had held that if the conscience of the Court is shocked as to the severity or inappropriateness of the punishment imposed, it can remand the matter back for fresh consideration to the Disciplinary Authority concerned. In that case, the punishment that had been imposed was the deduction of 10% from the pension for a period of one year. The High Court had set aside that order. In

those premises, this Court did not think it expedient to remand the matter back to the Disciplinary Authority and instead approved the decision of the High Court."

In Union of India vs. P.Gunasekaran, the Hon'ble Apex Court in Paragraph-20 has held as follows:

"Equally, it was not open to the High Court, in exercise of its jurisdiction under Articles 226/277 of the Constitution of India, to go into the proportionality of punishment so long as the punishment does not shock the conscience of the Court. In the instant case, the disciplinary authority has come to the conclusion that the respondent lacked integrity. No doubt, there are no measurable standards as to what is integrity in service jurisprudence but certainly there are indicators for such assessment. Integrity according to Oxford dictionary is "moral uprightness; honesty". It takes in its sweep, probity, innocence, trustfulness, openness, sincerity, blamelessness, immaculacy, rectitude, uprightness, virtuousness, righteousness, goodness, clearness, decency, honour, reputation, nobility, irreproachability, purity, respectability, genuineness, moral excellence etc. In short, it depicts sterling character with firm adherence to a code of moral values."

In view of the aforesaid factual aspects and applying the ratio of the judgment of the Hon'ble Apex Court (supra), this Court is of the considered view that in order to subserve the interest of justice the impugned order of removal from service dated 11,06.2012 passed by the Disciplinary authority being confirmed by the order dated 13.12.2012 of appellate authority and the order dated 10.07.2013 passed by the Chairman, Central Office, opposite party No.4 are quashed and set aside. The matter is remitted to the disciplinary authority to pass orders on the quantum of punishment commensurate with the proved charges within a period of eight weeks from the date of receipt/communication of the order. Resultantly, the writ petition stands allowed.

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2020 (I) ILR - CUT- 599

K.R. MOHAPATRA, J.

W.P.(C) NO. 24689 OF 2019

SUBHADRA NANDA & ANR. ……..Petitioners

.Vs.

SUB-COLLECTOR-CUM-SUB-DIVISIONAL MAGISTRATE, PURI & ANR. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order condoning the delay of more than 12 years in filing a Mutation appeal – Plea that there being no alternative remedy to challenge such order writ jurisdiction should be exercised – Sections 32, 34, and 35 of the Survey and Settlement Act pleaded – Held, when the remedy under Section 32 of the Act is available to the petitioners and Member, Board of Revenue is competent to take cognizance and adjudicate upon the legality and propriety of the impugned order, this Court should not exercise its extra ordinary jurisdiction conferred under Article 226 of the Constitution of India, more particularly, when the power conferred on the Member, Board of Revenue under Section 32 of the Act is more efficacious.

(Paras 9 to 10.1)

Case Laws Relied on and Referred to :-

1. 2010 (II) OLR 773 : Manorama Mohanty .Vs. State of Orissa & Ors.
2. 2008 (II) OLR 377 : Narayan Behera .Vs. Member Board of Revenue, Cuttack and three Ors.

For Petitioners : M/s. Mr. Biplab Mohanty, T.K. Pattanayak, A. Patnaik, S. Patnaik, B.S. Rayaguru.

For Opp.Parties : Mr. B.R. Behera, Addl. Standing Counsel.

ORDER Heard and Disposed of on 14.01.2020

K.R. MOHAPATRA, J.

Heard Mr. Patnaik, learned counsel for the petitioners and Mr. B.R. Behera, learned Additional Standing Counsel for the State-opposite party no.1.

2. This writ petition has been filed assailing the order dated 05.12.2019 (Annexure-5) passed by the Sub-Collector, Puri in Mutation Appeal No.51 of 2019, whereby he condoned the delay of more than 12 years in filing the said appeal.

3. On the last occasion, this Court suggested learned counsel for the petitioners to avail the alternative remedy available to the petitioners under

Section 32 of the Orissa Survey and Settlement Act, 1958 (for short, 'the Act') for redressal of their grievances. Mr. Patnaik, however, sought for time to address the Court on the said issue. Accordingly, the matter is listed today.

4. Mr. Patnaik, learned counsel for the petitioners submits that on an application filed under Rule 34 of the Orissa Survey and Settlement Rules, 1962 (for short, 'the Rules'), the case land pertaining to Khatian No.583, Mouza- Puri Sahar, Unit-8, Baseli Sahi under Puri Tahasil (for short, 'the case land') was directed to be recorded in the name of the petitioners in Mutation Case No.7324 of 2006 vide order dated 05.01.2008 passed by Tahasildar, Puri and accordingly, R.O.R. was corrected in their name.

4.1 Subsequently, after a lapse of more than 12 years, the opposite party No.2 filed an appeal under Rule 42 of the Rules in Mutation Appeal No.51 of 2019 before the Sub-Collector, Puri assailing the order passed in Mutation Case No.7324 of 2006. Since there was a delay of more than 12 years in filing the appeal, a petition under Section 5 of the Limitation Act was also filed for condonation of delay along with memorandum of appeal.

5. Upon hearing learned counsel for the parties, the impugned order has been passed on 05.12.2019.

6. Mr. Patnaik, learned counsel for the petitioners further submits that the application was considered in a very mechanical manner and no reason has been assigned for condonation of an inordinate delay of more than 12 years. Since the petitioners have no other remedy available to them to challenge the said order, they have filed this writ petition. He further draws attention of this Court to Section 32 of the Act and paragraph-111 of the Mutation Manual. For ready reference, the same are reproduced hereunder:

> ***Section 32 of the Act;***
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> *"32. The Board of Revenue may call for the revise record of any proceeding before '[any officer] from whose decision no appeal lies if such Officer appears to have exercised a jurisdiction not vested in him by law or to have failed to exercise a jurisdiction so vested or while acting in the exercise of his jurisdiction to have contravened some express provision of law affecting the decision on the merits where such contravention has produced a serious miscarriage of justice and the Board of Revenue, after hearing the parties if they attend shall pass' such order as it seems fit."*
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> *xxx xxx xxx xxx*

Paragraph –111 of Mutation Manual;

"111. Under Sec. 32 of the Act, the Board of Revenue have powers, with or without petition, to call for and revise any proceedings before any Officer from whose decision no appeal lies. The fact that the Board of Revenue have been vested with this power of revision of any proceedings at any time does not mean that any party to a mutation proceeding can, as a matter of course, move the Board for changing an order passed by a subordinate authority. The statutory rule does not provide for a second appeal or revision after the first appeal and in the absence of such a specific provision the general powers conferred by Sec. 32 cannot be invoked to utilise the Board of Revenue as a Court of second appeal. Powers of control and supervision by the superior authority are discretionary and the authorities exercising such powers are not ordinarily disposed to interfere except in the following classes of cases, namely:

(a) where a subordinate officer has improperly refused to exercise a jurisdiction vested in him, or

(b) where such officer in the exercise of the jurisdiction has failed in his duty or has contravened some express provision of law affecting the decision on the merits, and where such contravention has produced a serious miscarriage of justice, or

(c) generally where it is necessary for the purpose of preventing gross abuse or gross injustice."

6.1 He has also relied upon Paragraphs-9 and 10 of the decision of this Court in the case of ***Manorama Mohanty –v- State of Orissa and others***, reported in 2010 (II) OLR 773, which are reproduced hereunder:

"9. With regard to the question as to whether sections 5 and 14 of the Limitation Act can be applied to a Mutation Appeal, it appears that in sections 34 and 35 of the Orissa Survey and Settlement Act*, 1958, it is provided as follows:-*

"34. Limitation of applications - Subject to the provisions of the next following section, every appeal presented and application made after the period of limitation specified therefore shall be dismissed although limitation has not been set up as a defence".

"35. Application of the Indian Limitation Act, 1908- Subject to the provisions of this Act, the provisions of the Indian Limitation Act *9 of 1908, except* Sections 6, 7, 8,9, 19 *and* 20*shall apply to all appeals and applications mentioned in* Section 34*."*

It is, therefore, clear that sections 5 *and* 14 *of the Limitation Act have application to a Mutation Appeal. The grounds stated in the condonation application by the Collector in the Mutation Appeal were that the delay has occurred due to wrong filing of the case before the Board of Revenue by way of revision and, therefore, the period of pendency of the said revision should be excluded from computing the limitation period under* section 14 *of the Limitation Act. Sub-section (1) of* section 14 *of the Limitation Act prescribes as follows:*

"14. Exclusion of time of proceeding bona fide in court without jurisdiction. - (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first 3instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction other cause of a like nature, is unable to entertain it.

(2) & (3) xx xx xx"

10. From the above provisions, it is clear that it is only the period for which the revision was pending before the Board of Revenue can be excluded, while computing the period of limitation for filing the appeal, if the said revision was wrongly filed within 30 days of the date of the order challenged in the said revision, as the period of limitation prescribed for filing an appeal is 30 days from the date of the order appealed against. But, then, the said revision having been filed about 5 years after the date of the order passed in the Mutation Case, the said period of five years prior to filing of the revision was required to be explained by the Collector in the appeal, which was not done. Even after the order was passed by the Board of Revenue giving liberty to the Collector to file the appeal, the Collector waited for two years to file such appeal. These aspects not being taken into account by the appellate authority - opp. party no.4 and no reason having been assigned whatsoever, while holding that the delay in filing the appeal has been condoned and he having passed no specific order condoning the delay, he should have dismissed the appeal as barred by time. Even on merit, the appellate authority has mis-directed itself by committing an error of record in holding that the order passed in Mutation Appeal No. 8 of 1983 was set aside by the revisional authority."

6.2. Referring to Section 32 of the Act, learned counsel for the petitioners submits that since the impugned order was passed in the appeal itself, remedy under Section 32 of the Act will not be available to them, as it is a *suo motu* power of the Member, Board of Revenue, Odisha, Cuttack to initiate such proceeding. He further submits that paragraph-111 of Orissa Mutation Manual makes it clear that the remedy available under Section 32 of the Act cannot be availed in a routine manner and if such a revision is entertained, it would amount to entertaining a Second appeal in the guise of revision, which is not permissible. In that view of the matter, he submits that the writ petition should be entertained on merit.

7. Mr. Behera, learned Additional Standing Counsel submits that the *suo motu* power under Section 32 of the Act, can be exercised on filing of an application by the person aggrieved. He further submits that since no remedy of appeal is available against the impugned order dated 05.12.2019, in such an exigency, power under Section 32 of the Act can be exercised as the

grievance of the petitioners squarely falls under the said provision. In that view of the matter, the petitioners having an alternative remedy of Revision under Section 32 of the Act before the Board of Revenue, which is more efficacious, the writ petition should not be entertained.

8. Having heard learned counsel for the parties and on perusal of the provisions cited above, it is crystal clear that entertaining an application for condonation of delay, the impugned order dated 05.12.2019 has been passed in Mutation Appeal No. 51 of 2019. By virtue of the impugned order, no final adjudication of the appeal has been made. The appeal is still pending for adjudication. Thus, exercising power in a revision under Section 32 of the Act, 1958 will not amount to entertaining a second appeal, as submitted by Mr. Patnaik.

9. Further, the power conferred under Section 32 of the Act does not limit the jurisdiction of the Member, Board of Revenue, Odisha, Cuttack in any manner to initiate a revision by himself only. Paragraph -111 of the Mutation Manual makes it abundantly clear that the power under Section 32 of the Act can be exercised '*with or without an application*'. True it is that the provisions contained in Mutation Manual cannot over ride provisions of the Act or Rules. It is a compilation of detailed instructions to implement the provisions contained in the Act and Rules. It is more in the nature of administrative instructions for smooth and effective implementation of the provisions of the Act and Rules. Filing of an application before the Board of Revenue, Odisha, Cuttack to invoke power under Section 32 of the Act, 1958 is only an information of the illegalities or irregularities committed by the authorities subordinate to Member, Board of Revenue in a proceeding under the Act. The Member, Board of Revenue can take cognizance of the same in order to exercise power under Section 32 of the Act. Thus, Section 32 of the Act does not in any way denude the Member, Board of Revenue of his power to accept an application with a prayer to initiate a proceeding under Section 32 of the Act.

10. The above view is impliedly approved in the case of ***Narayan Behera -v- Member Board of Revenue, Cuttack and three others***, reported in 2008 (II) OLR 377. Moreover, the decision cited by the learned counsel for the petitioners makes it clear that the Appellate Authority has the power under Sections 34 and 35 of the Act to entertain an application under Sections 5 and 14 of the Limitation Act to condone the delay in filing the appeal.

10.1 When the remedy under Section 32 of the Act is available to the petitioners and Member, Board of Revenue is competent to take cognizance and adjudicate upon the legality and propriety of the impugned order, i.e., order dated 05.12.2019, this Court should not exercise its extra ordinary jurisdiction conferred under Article 226 of the Constitution of India, more particularly, when the power conferred on the Member, Board of Revenue under Section 32 of the Act is more efficacious.

13. In that view of the matter, I am not inclined to entertain the writ petition. Accordingly, the same is disposed of with an observation that the petitioners, if so advised, may move the Member, Board of Revenue, Odisha, Cuttack to initiate a proceeding under Section 32 of the Act and adjudicate the same.

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2020 (I) ILR - CUT- 604

DR. D.P. CHOUDHURY, J.

CRLA NO. 165 OF 2011

DURYODHAN SAHOO .....Appellant

.Vs.

REPUBLIC OF INDIA .....Respondent

(A) PREVENTION OF CORRUPTION ACT, 1988 – Section 7 and Section 13(2) read with Section 13(1)(d) – Offence under – Conviction – Whether mere recovery of the amount paid by way of illegal gratification would be enough to prove the charge ? – Held, No.

"With due regard to the aforesaid catena of decisions of the Hon'ble Supreme Court, it is clear that for proving the offence under Section 7 and 13(1)(d) read with Section 13 (2) of the Act, the demand of illegal gratification or bribe is sine qua non to prove the charge under the said provisions of law. Mere recovery of the amount paid by way of illegal gratification would not be enough to prove the charge or mere acceptance of any amount allegedly by way of illegal gratification de hors the proof of demand, ip so facto could not constitute the offence under Section 7 and 13(1)(d) read with Section 13(2) of the Act. Not only this but the evidence on the demand and acceptance of the illegal gratification must be proved beyond all shadow of doubts. It is not enough, but the plea of the defence must be also scrutinized by the Court to find out whether the plea has been substantiated by the evidence of preponderance of probability. No doubt, the evidence of the complainant in a trap case is like an evidence of accomplice which requires corroboration."

(Para 23)

(B) CRIMINAL APPEAL – Conviction under the penal provisions of the P.C. Act, 1988 – Appeal – Duty of the appellate court – Indicated.

"It will not be out of place to mention that this being a criminal appeal, the appellate Court has to go to the details of fact and law involved in this appeal. Re-appreciation of evidence by the appellate Court must be done with a touch stone of the appreciation of the evidence under law to find out whether the finding of the learned trial Court is appropriate and proper. The appellate court should assess the evidence on record independently".

Case Laws Relied on and Referred to :-

1. (2015) 15 SCC 629: T.K.Ramesh Kumar -V- State through Police Inspector, Bangalore.
2. (2009) 6 SCC 444 : State of Punjab -V- Sohan Singh.
3. AIR 2017 SC 3382 : Mukhtiar Singh (since deceased) through his L.R. -V- State of Punjab.
4. AIR 2015 SC 3549 : P.Satyanarayana Murthy -V- District Inspector of Police & Anr.
5. (2009) 6 SCC 587 : A.Subair -V- State of Kerala.
6. 2014 (I) OLR (SC) 1014 : B.Jayaraj -V- State of Andhra Pradesh.
7. (2009) 6 SCC 444 : State of Punjab -V- Sohan Singh.
8. AIR 2011 SC 404 : State of Himachal Pradesh -V- Nishant Sareen.
9. (2005) 32 OCR (SC) 869 : Union of India through Inspector, CBI -V- Purnandu Biswas.
10. (2015) 15 SCC 629 : T.K.Ramesh Kumar -V- State.
11. B. 2014 (1) OLR (SC) 1014 : Jayaraj -V- State of A.P.
12. (2009) 6 SCC 587 : A.Subair -V- State of Kerala.
13. AIR 2015 SC 3549 : P.Satyanarayana Murty -V- District Inspector of Police & Anr.
14. AIR 2017 SC 3382 : Mukhtiar Singh (since deceased) through his L.R -V- State of Punjab.

For Appellant : Mr. B.Dasmohapatra and B.K.Bhole
For Respondent : Mr. A.K.Bose, Assistant Solicitor General

JUDGMENT Date of Hearing:03.04.2018 : Date of Judgment:19.06.2018

DR.D.P.CHOUDHURY, J.

The appellant, in the captioned appeal, assails the judgment of conviction and sentence passed under Section 7 of the Prevention of Corruption Act, 1988 (hereinafter called as 'the Act') to undergo rigorous imprisonment for six months and to pay a fine of Rs.1000/- (rupees one thousand) in default to undergo rigorous imprisonment for one month more and under Section 13(2) read with Section 13(1)(d) of the Act to undergo rigorous imprisonment for one year and to pay a fine of Rs.5000/- (rupees five thousand) in default rigorous imprisonment for three months more by the learned Special Judge (CBI), Bhubaneswar in TR No.16 of 2007. Both the sentences were directed to run concurrently.

2. The infiltrated factual matrix leading to the case of the prosecution is that the appellant was working as Senior Manager in Town Services Department of Rourkela Steel Plan (in short 'RSP'). There were unauthorized occupants in Laxmi Market near Ispat General Hospital, Rourkela adjacent to the boundary of Nehru Maidan. The RSP Authorities removed all the unauthorized occupants from that area and prepared a list of such occupants for the purpose of allotment of space at Laxmi Market and accordingly a census list of 218 shop owners has been prepared. The complainant (Pabitra Mohan Sahoo) has got a betel shop on the roadside of Laxmi Market but his name does not find place in the list prepared for allotment of shop at Laxmi Market for which he made repeated representations to the RSP Authorities but it was not successful.

3. It is alleged inter alia that the complainant had approached the appellant, who is allegedly looking after the allotment of space and the appellant demanded a bribe of Rs.5000/- (rupees five thousand) as illegal gratification for the allotment of space to the complainant. Then the complainant lodged complaint before the Central Bureau of Investigation (CBI) and accordingly a plan to trap the appellant was made. On 22.11.2006, the complainant took ten numbers of five hundred rupee G.C. Notes after being discussed with the trap party. As per the instruction of the trap party, the complainant along with one official witness went in a motorcycle to the office of the appellant. The witness stood near the door and the complainant went inside. The appellant allegedly demanded the money and ten numbers of currency notes of 500 rupee, being mixed with the phenolphthalein power in the office of the CBI earlier, was handed over by the complainant to the appellant, who counted and kept the same on the table. Thereafter, the complainant came outside and gave pre-fix signal to the CBI officials, who have followed the complainant. Inspector of Police, CBI along with other official witnesses entered the room of the appellant where they caught-hold the right hand of the petitioner. The petitioner fumbled and could not give any answer. After observing all formalities of trapping, the appellant was asked to dip his right hand fingers first in the solution prepared and when he dipped his fingers, the solution changed to pink colour. Thereafter, the post-trap memorandum was prepared. The Investigating Officer made search of the office of the appellant and seized certain documents. After completion of the investigation, all the investigation papers were placed before the Executive Director of Personnel and Administration, RSP, who after, application of his mind, sanctioned for prosecution of the appellant.

Thereafter, the charge-sheet has been submitted upon which the learned Special Judge (CBI), Bhubaneswar took cognizance of the offence under Sections 7 and 13(2) read with 13(1)(d) of the Act vide order dated 7.5.2007.

4. The plea of the appellant as revealed from the statement recorded under Section 313 of the Code and the suggestions made to the prosecution witnesses that he has been falsely implicated in this case. His specific plea is that he was thrust upon to receive the money which he has thrown on the floor and CBI officials directed him to collect the same after which the same was seized by the CBI. His further specific plea is that he has never demanded any money from the complainant as illegal gratification. He pleaded innocence.

5. Learned trial Court framed the charge against the present appellant, which is as under:

"T.R.No.16 of 2007
CHARGE WITH TWO HEADS

I, Sri S.K.Mishra, M.Com. LL.B., Special Judge (C.B.I.) Bhubaneswar hereby charge you:-

1. Duryodhan Sahoo
as follows:-

That, you on or about the 22nd day of November, 2006 at R.S.P. Rourkela being a public servant working as Sr.Manager in Town Services Department of RSP demanded and accepted a sum of Rs.5000/- from the complainant Pabitra Mohan Sahoo as a gratification other than legal remuneration for allotment of a space in favour of the complainant at Laxmi Market and thereby committed an offence punishable u/s 7 of the P.C.Act, 1988 and within my cognizance.

That, you on or about the same date and place being a public servant working as Senior Manager, in Town Services Department of R.S.P., Rourkela by corrupt and illegal means and/or by otherwise abusing your official position as such public servant obtained for yourself pecuniary advantage to the tune of Rs.5000/- from the complainant Pabitra Mohan Sahoo to allot a space at Laxmi Market, Rourkela and thereby committed an offence punishable U/s 13(2) r/w Sec. 13(1)(d) of the P.C.Act, 1988 and within my cognizance.

And I hereby direct that you be tried by this Court on the said charges.

Dated the 18th day of 2007

Sd/-Special Judge (CBI),
Bhubaneswar."

6. The prosecution has examined as many as thirteen witnesses to prove the charge levelled against the appellant and the defence, in order to discharge the onus, has examined four witnesses. After evaluating the evidence of prosecution and defence, learned trial Judge found the appellant guilty under Sections 7 and 13(2) read with Section 13(1)(d) of the Act and passed the order of conviction and sentence, as above.

7. SUBMISSIONS

Mr.Dasmohapatra, learned counsel for the appellant submitted that there is no evidence of dealing with allotment of space by the appellant. There is no document exhibited by the appellant to show that the appellant has the authority to allot the space but the evidence is led to show that the D.G.M of the company is the competent authority to allot the space and the appellant in no way connected with allotment of the said space in question. Learned trial Court has erred in law to opine that the appellant had accepted or demanded bribe of Rs.5000/- towards allotment of space at Laxmi Market and the same was not his legal remuneration.

8. Mr.Dasmohapatra, learned counsel for the appellant submitted that the adverse inference should be drawn for non-examination of the material witness, i.e. charge-sheet witness no.8. The evidence of P.W.11, who is the complainant in this case, should not be accepted as a gospel truth to prove the case of the prosecution. According to him, the statement of P.W.11 has got lot of contradictions and conjectures. The evidence of the complainant (P.W.11) shows that on 14.11.2006, he visited the appellant, who told him to spend some money for getting a space and when he replied that he had no money, the appellant asked him to get out. Again on 20.11.2006, P.W.11 contacted the appellant, who asked him to pay Rs.5000/- (rupees five thousand) in his office on 22.11.2006. But, the complainant has never stated in his complaint that on 14.11.2006 the appellant has demanded any amount of money. So, the evidence of P.W.11 should be assessed with pinch of salt.

9. It is further submitted by Mr.Dasmohapatra, learned counsel for appellant that there is no evidence to show that the applications of the complainant were processed by the appellant or that the same were pending with the appellant on the date of allegation or that the appellant had any authority to allot the space to the complainant for which question of demand or acceptance of the same is far from truth. In this regard, he relied on the decision of the Hon'ble Supreme Court in the case of ***T.K.Ramesh Kumar –***

V- State through Police Inspector, Bangalore; (2015) 15 SCC 629. According to him, when the prosecution witnesses have not proved that the appellant has no any role to play in the matter, the demand of gratification is out of bound. In support of this submission, he relied on the decision of the Hon'ble Supreme Court in the case of ***State of Punjab –V- Sohan Singh; (2009) 6 SCC 444.***

10. Learned counsel for the appellant contended that the overhearing witness (P.W.3) has contradicted the evidence of P.W.11 because P.W.11 has stated that after entering into the room, the appellant enquired about demanded money and the complainant handed over the tainted currency notes to him whereas P.W.3 stated that by seeing the complainant, the appellant asked for the money and the complainant handed over the same to him, who accepted in his right hand. Thus, the demand of money by the appellant has not been established by consistent evidence of P.Ws.3 and 11.

11. It has been further submitted by Mr.Dasmohapatra, learned counsel for the appellant that the evidence with regard to the trap is also bleak for which the acceptance of money by the appellant is far from truth. The trap party members, namely, Sri D.K.Kabi, P.K.Dalai, who caught-hold the hand of the appellant and had taken the hand wash as per the post trap memorandum (Ext.6) but Sri P.K.Dalai, has not been examined by the IO during investigation. Only Inspector of Police (P.W.12) and P.W.13 have been examined to prove the trap incidence. Even the post-trap memorandum not contained the signature of the appellant. In such situation, the evidence of trap cannot be said to have been proved by the cogent evidence. On the other hand, it appears from the cross-examination of P.W.3 that the currency notes were scattered on the floor and the appellant was asked to collect the same, which rather proves the plea of defence to the effect that he was forced the acceptance of money to which he pushed away and the currency notes fell on the floor. Thus, the evidence of acceptance of bribe or the illegal gratification is not proved by cogent, clear and consistent evidence.

12. It has been further contended by Mr.Dasmohapatra, learned counsel for the appellant that P.W.9, who is the sanctioning authority, has no power to accord sanction. There is no evidence of P.W.9 to show that after being satisfied with the material, he sanctioned for prosecution. There is no record to show that P.W.9 has been entrusted to accord sanction for prosecution. When there is totally non-application of mind by appropriate sanctioning authority, the case of the prosecution is bound to fail. In support of this

submission, he relied on the decision in the case of ***T.K.Ramesh Kumar (Supra).***

13. Mr.Dasmohapatra, learned counsel for the appellant submitted that the plea of defence has been well proved by the defence witnesses as well as and by the evidence of prosecution witnesses. The defence has proved through D.Ws.1, 2, 3 and 4 that two persons have caught-hold the hand of the appellant at corridor and dragged him into office room, which also finds corroboration from the cross-examination of P.W.2. If at all the appellant had accepted the bribe in his room, the question of going outside the room and dragging him into the office room has created suspicion over the case of the prosecution. Apart from this, learned trial Court has failed to evaluate the evidence of hostile witness (P.W.10). On the other hand, learned trial Court has not evaluated the evidence of witnesses available on record properly and has landed to a wrong conclusion that the appellant is guilty of the offences alleged against him. So, he prayed to set aside the judgment of conviction and sentence passed against the appellant. He relied on the decisions reported ***Mukhtiar Singh (since deceased) through his L.R. –V- State of Punjab; AIR 2017 SC 3382, P.Satyanarayana Murthy –V- District Inspector of Police and another; AIR 2015 SC 3549, A.Subair –V- State of Kerala; (2009) 6 SCC 587, B.Jayaraj –V- State of Andhra Pradesh; 2014 (I) OLR (SC) 1014, State of Punjab –V- Sohan Singh; (2009) 6 SCC 444, State of Himachal Pradesh –V- Nishant Sareen; AIR 2011 SC 404, Union of India through Inspector, CBI –V- Purnandu Biswas; (2005) 32 OCR (SC) 869*** and ***T.K.Ramesh Kumar –V- State; (2015) 15 SCC 629.***

14. Mr.A.K.Bose, learned Assistant Solicitor General for the Republic of India submitted that there are evidence of demand of gratification by the appellant because the statements of P.Ws.1, 2 and 3 would go to show that the appellant was dealing with the files of allotment of shop rooms and the same has not been decided in any manner. Not only their evidence proved that the appellant demanded money on 14.11.2006 but also categorically demanded Rs.5000/- on 20.11.2006 as illegal gratification. If on 22.11.2006, the appellant did not disclose the amount of money but categorically asked whether the complainant brought the money or not. It certainly points out the intention of the appellant to demand gratification. So, the demand of illegal gratification being sine qua non to constitute offence under the Act is proved by the prosecution.

15. Mr.Bose, learned Assistant Solicitor General further submitted there is consistent and clear evidence of P.Ws.3, 11 and 12 to the effect that they have prepared the pre-trap memorandum with the same number of currency notes and after making the trap of the appellant, they recovered the currency notes of same number and there is no contradiction to that effect in the evidence of these witnesses. Thus, the recovery of tainted notes from the appellant is well proved by the prosecution. Learned trial Court has made five points to determine whether the prosecution has discharged the onus prima facie to show that under Section 20 of the Act, the presumption will be against the appellant. All these points have been satisfactorily answered by the learned trial Court. On the other hand, the appellant has not rebutted the presumption. So, the conclusion arrived by the learned trial Court cannot be said to be erroneous. On the other hand, since the prosecution has well proved the demand and acceptance of illegal gratification, the conviction made for the offences is proper and illegal. He also submitted that the judgment of conviction and sentence passed by the trail Judge cannot said to be erroneous. Hence, he supported the same.

DISCUSSIONS

16. Since the appellant has been convicted under Section 7 and 13(2) read with Section 13(1)(d) of the Act, the same provisions are necessary to be quoted:

> *"7.* ***Public servant taking gratification other than legal remuneration in respect of an official act:-***
>
> *Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favor or disfavor to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.*
>
> *Explanations.-(a) "Expecting to be a public servant." If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.*

(b) "Gratification." The word "gratification" is not restricted to pecuniary gratifications or to gratifications estimable in money.

(c) "Legal remuneration." The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government or the organization, which he serves, to accept.

(d) "A motive or reward for doing." A person who receives a gratification as a motive or reward for doing what he does not intend or is not in a position to do, or has not done, comes within this expression.

(e) Where a public servant induces a person erroneously to believe that his influence with the Government has obtained a title for that person and thus induces that person to give the public servant, money or any other gratification as a reward for this service, the public servant has committed an offence under this section.

XX XX XX XX
13(1)-A public servant is said to commit the offence of criminal misconduct,-

xx xx xx xx

d) if he,—
(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

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

xx xx xx xx

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

17. The aforesaid provisions are clear enough to show that the demand of illegal gratification must be proved so that the other ingredients are to follow.

18. It is reported in the case of ***Union of India (UOI) through Inspector, CBI –V- Purnandu Biswas (Supra)*** where Their Lordships, at paragraphs-35 and 36, have observed in the following manner:

"35. The learned Additional Solicitor General submitted that onus of proof was upon the Respondent to explain as to how he came in possession of the amount. Section 20 the Prevention of Corruption Act, 1988 reads as under:

"20. Presumption where public servant accepts gratification other than legal remuneration.⁄ (1) Where, in any trial of an offence punishable under section 7 or

section 11 or clause (a) or clause (b) or sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable under section 12 or under clause (b) of section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn."

36. In this case demand of illegal gratification by the Respondent has not been proved. Furthermore, Section 20 of the Act is not attracted as the Respondent had been charged for commission of an offence under Section 13(1)(d) read with Section 13(2) of the Act."

19. It is reported in the case of ***B.Jayaraj –V- State of A.P; 2014 (1) OLR (SC) 1014*** where Their Lordships, at paragraph-7, have observed in the following manner:

"7. In so far as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration reference may be made to the decision in ***C.M. Sharma Vs. State of A.P.: (2010) 15 SCC 1*** and ***C.M. Girish Babu Vs. C.B.I; (2009) 3 SCC 779."***

20. It is reported in the case of ***A.Subair –V- State of Kerala; (2009) 6 SCC 587*** where Their Lordships, at paragraphs-30 and 31, have observed in the following manner:

"30……..Mere recovery of currency notes (Rs. 20 and Rs.5) denomination, in the facts of the present case, by itself cannot be held to be proper or sufficient proof of the demand and acceptance of bribe.

31.When the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence. It is true that the judgments of the courts below are rendered concurrently but having considered the matter thoughtfully, we find that the High Court as well as the Special Judge committed manifest errors on account of unwarranted inferences. The evidence on record in this case is not sufficient to bring home the guilt of the appellant. The appellant is entitled to the benefit of doubt."

21. It is reported in the case of ***P.Satyanarayana Murty –V- District Inspector of Police and another; AIR 2015 SC 3549*** where Their Lordships, at paragraphs-20, 21, 22 and 25, have observed in the following manner:

*"20. In a recent enunciation by this Court to discern the imperative pre-requisites of Sections 7 and 13 of the Act, it has been underlined in **B. Jayaraj (AIR 2014 SC (Supp) 1837 (supra)** in unequivocal terms, that mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence under Sections 7 as well as 13(1)(d)(i)&(ii) of the Act. It has been propounded that in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand, thus, has been held to be an indispensable essentiality and of permeating mandate for an offence under Sections 7 and 13 of the Act. Qua Section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under Section 7 and not to those under Section 13(1)(d)(i)&(ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under Section 20 of the Act would also not arise.*

21. The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i)&(ii) of the Act and in absence thereof, unmistakably the charge therefor, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act.

22. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under Sections 7 or 13 of the Act would not entail his conviction thereunder.

Xx xx xx xx

*25. In reiteration of the golden principle which runs through the web of administration of justice in criminal cases, this Court in **Sujit Biswas vs. State of Assam** **(2013) 12 SCC 406** had held that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture. It was held, that the Court must ensure that miscarriage of justice is avoided and if in the facts and circumstances, two views are plausible, then the benefit of doubt must be given to the accused."*

22. It is reported in the case of ***Mukhtiar Singh (since deceased) through his L.R –V- State of Punjab; AIR 2017 SC 3382*** where Their Lordships, at paragraphs-15 and 25, have observed in the following manner:

> *"15. In **P. Satyanarayana Murthy (supra),** this Court took note of its verdict in **B. Jayaraj vs. State of A.P.** underlining that mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence under Section 7 as well as Section 13(1)(d)(i) and (ii) of the Act. It was recounted as well that in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. Not only the proof of demand thus was held to be an indispensable essentiality and an inflexible statutory mandate for an offence under Sections 7 and 13 of the Act, it was held as well qua Section 20 of the Act, that any presumption thereunder would arise only on such proof of demand. This Court thus in **P. Satyanarayana Murthy (supra)** on a survey of its earlier decisions on the pre-requisites of Sections 7 and 13 and the proof thereof summed up its conclusions as hereunder:*
>
> *"23. The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i) and (ii) of the Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under Sections 7 and 13 of the Act would not entail his conviction thereunder."*
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> Xx xx xx xx
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> *25. It would thus be patent from the materials on record that the evidence with regard to the demand of illegal gratification either of Rs.3,000/- which had been paid or of Rs.2,000/- as made on the day of trap operation is wholly inadequate to comply with the pre-requisites to constitute the ingredients of the offence with which the original accused had been charged. Not only the date or time of first demand/payment is not forthcoming and the allegation to that effect is rather omnibus, vague and sweeping, even the person in whose presence Rs.3,000/- at the first instance is alleged to have been paid i.e. Santosh Singh Lamberdar, has neither been produced in the investigation nor at the trial. In other words, the bald allegation of the complainant with regard to the demand and payment of Rs.3,000/- as well as the demand of Rs.2,000/- has remained uncorroborated. Further to reiterate, his statement to this effect lacks in material facts and particulars and per se cannot form the foundation of a decisive conclusion that such demand in fact had been made by the original accused. Viewed in this perspective, the statement of complainant and the Inspector Satpal, the shadow witness in isolation that the original accused had enquired as to whether money had been brought or not, can by no means constitute demand as enjoined in law as an ingredient of the offence levelled against the original accused. Such a stray query ipso facto in absence of any other cogent and persuasive evidence on record 18 cannot amount to a demand to be a constituent of the offence under Section 7 or 13 of the Act."*

23. With due regard to the aforesaid catena of decisions of the Hon'ble Supreme Court, it is clear that for proving the offence under Section 7 and 13(1)(d) read with Section 13 (2) of the Act, the demand of illegal gratification or bribe is sine qua non to prove the charge under the said provisions of law. Mere recovery of the amount paid by way of illegal

gratification would not be enough to prove the charge or mere acceptance of any amount allegedly by way of illegal gratification de hors the proof of demand, ip so facto could not constitute the offence under Section 7 and 13(1)(d) read with Section 13(2) of the Act. Not only this but the evidence on the demand and acceptance of the illegal gratification must be proved beyond all shadow of doubts. It is not enough, but the plea of the defence must be also scrutinized by the Court to find out whether the plea has been substantiated by the evidence of preponderance of probability. No doubt, the evidence of the complainant in a trap case is like an evidence of accomplice which requires corroboration.

24. Keeping in mind all these above principles, let me find out whether the prosecution has been able to prove the charge against the present appellant.

25. It will not be out of place to mention that this being a criminal appeal, the appellate Court has to go to the details of fact and law involved in this appeal. Re-appreciation of evidence by the appellate Court must be done with a touch stone of the appreciation of the evidence under law to find out whether the finding of the learned trial Court is appropriate and proper. The appellate court should assess the evidence on record independently.

26. In this case, P.W.11 is the informant or complainant, who has alleged about demand of illegal gratification before the CBI. It is revealed from his evidence that the Town Service Department of Rourkela under RSP was allotting space to the shop owners at Laxmi Market by making a census after conducting a drive for removal of the unauthorized occupants. The applications were invited in 2005 and a census list was published allotting space but the name of the informant does not find place in the census although he had a betel shop but on the date of survey, he was not present being to the hospital. He had made several applications to the Deputy General Manager and also requested the present appellant, who being the Senior Manager, was dealing with the file.

27. The appellant demanded Rs.5000/- to consider his application on 20.11.2006 and told him to make payment after two days, i.e., 22.11.2006. Since he was not willing to pay, he reported the matter before the CBI Office at Rourkela vide Ext.12. Then he was asked to come on 22.11.2006 at about 9.00 am with an amount of Rs.5000/-. His evidence shows that he was asked to go with shadow witness-Kanduri Ch. Rout (P.W.3) and the CBI officials

would follow him after getting signal from the informant. He entered into the room of the appellant but P.W.3 remained near the door of the room of the appellant. The appellant enquired about the demanded money and he handed over the tainted currency notes to him. Then, he came out and gave signal. The CBI staff rushed to the room and caughthold the hands of the appellant where the appellant was holding the tainted currency notes in his hand and the hand wash of the appellant was taken separately and tested in solution resulting change of colour to pink because of the currency notes mixed with phenolphthalein power. He was cross-examined in detail.

28. During cross-examination, P.W.11 admitted that he came to know about the census one day prior to the date of census and on the very day of census, he could not know as he was in hospital. But, he has not mentioned as to why he has gone to hospital. After 10 to 12 days of preparation of census, he came to know from shop-owners about preparation of such a list and tokens were issued to those person, who are having their names in the list but he was not issued with such token. He made application on 1.6.2006 about political interference in deleting his name from the census list. He has proved the application but he has not met the DGM personally. When his shop was demolished and a fresh census lit was published where his name does not find place, it is not clear as to why he was running to the appellant for allotment of space. It is true that P.W.11 must have some anxiety in the mind, lest he should approach the appellant for consideration of his application because he has no shop. But the fact remains that when he has been evicted by demolition of his shop room and there is fresh census where his name does not find place, his several application to the DGM for consideration of his application even after publication of census, the approach of P.W.11 to the appellant on several occasions for consideration of the application does not seem to be probable one to prove the gravamen of the charge of demand.

29. In paragraph-4 of his cross-examination, P.W.11 has admitted that as per his instruction and dictation, one typist scribed the FIR (Ext.12) and he signed on it. He has not stated that it has been readover and explained to him. The signature of the typist is also absent on the FIR and there is no certificate to show that after going through the same or the contents of the same were readover and explained to the informant, he signed the same. The necessary formality under Section 67 of the Indian Evidence Act to prove a document is lacking. Had it been written by the complainant himself, such formality was not required. However, he admitted in cross-examination that he has

mentioned in the FIR that on 14.11.2006, the appellant demanded the bribe. But, he had not made any allegation against the appellant since 14.11.2006 about demand of such money. It shows doubt over his testimony as to why he remained silent by waiting till 20.11.2006. It is further found from his evidence that on 14.11.2006 when he expressed inability to pay any illegal gratification, the appellant abused him and told him to get out of his room. When the appellant has asked him to get out, it is not necessary for the complainant to go again on 20.11.2006 to approach the appellant. Even if the statement of P.W.11 is considered as to demand of bribe on 20.11.2006, it does not spell out that on 20.11.2006, the appellant demanded an amount of Rs.5000/- to consider for allotment of space at Laxmi Market. Although such fact is stated in the FIR vide Ext.12, but the FIR is not the substantive evidence. But the evidence adduced in the Court is substantive evidence. The prosecutor should have at least led the evidence as to why the appellant demanded Rs.5000/- although the application for allotment of space is always made to the DGM. Not only this but also the evidence of P.W.11 is totally lacking as to demand of Rs.5000/- to grant space at Laxmi Market inasmuch as his evidence only shows that on entering to the room of the appellant on 22.11.2006, the appellant enquired about the demanded money and he handed over the same to him.

30. At paragraph-5 of the cross-examination, P.W.11 has categorically stated that on the day of detection, he has not requested for allotment of any space at Laxmi Market. Mere enquiry about the money without specifying the amount and the reasons for such demand would not put an accurate evidence of demand as per the decision of the Hon'ble Supreme Court in the case of ***P.Satyanarayana Murthy –V- The District Inspector of Police and others (Supra)***.

31. The evidence of P.W.11 so far as receipt of illegal gratification is concerned, he has denied the suggestion of the defence that he thrusted the tainted currency notes into the hands of the appellant and immediately he left the office room and the appellant chased to catch hold of him and since the appellant did not accept the currency notes, he kept the same on the corner of the table and that the currency notes fell to the ground and that when the appellant was coming outside, CBI staff caught hold of him and took him inside the office room and that the tainted notes were lying scattered on the ground and the CBI staff asked the appellant to collect the notes from the ground. Thus, the defence is stated to have suggested its plea to the

informant. In cross-examination, P.W.11 admitted to have not entered his name in any register while going to the office of the appellant on that day or any other dates. If at all he was going to offer the bribe, he should have at least kept his proof of entry of his name in the entry register. Thus, the evidence of P.W.11 being not clear, cogent and consistent about demand of illegal gratification and acceptance of the demanded money by the appellant, the same requires corroboration.

32. The evidence of P.W.3, a shadow witness, is also relevant. It is revealed from his evidence that he came to know from the Inspector and P.W.11 that the appellant demanded Rs.5000/- to allot space at Laxmi Market. As per the instruction of CBI official, he went with P.W.11 in a motorcycle and P.W.11 entered into the room of the appellant but he stood near the door screen. The conversation between the appellant and the complainant was audible to him. By seeing the complainant, the appellant asked for money and then the complainant handed over the money to the appellant, who accepted the same in his right hand and counted the same in two hands. Then, the complainant came out and gave signal by combing his head. Thereafter, others including him entered into the room. While the CBI official challenged the appellant, he fumbled and the Inspector caught hold both the wrists of the appellant and the hands were washed separately, which turned to pink colour. In cross-examination, he admitted that he stood for half an hour near the door and P.W.11 was inside the room for half an hour. In cross-examination, he further admitted that he has not heard any hullah inside the room. Thus, the statement of P.W.3 is not clear enough to show that the appellant demanded Rs.5000/- for consideration of his application for allotment of space at Laxmi Market. Also his evidence does not disclose to have witnessed about handing over of the money and acceptance of the same by the appellant from P.W.11 as he was outside the room. So, the evidence of P.W.3 does not corroborate the evidence of P.W.11 so far as demand of illegal gratification and acceptance of the money by the appellant from P.W.11 is concerned.

33. The evidence of P.W.2, who is another witness to have accompanied the CBI staff shows that on being called by the Inspector of CBI, he had attended his office. The Inspector informed him that the appellant was demanding Rs.5000/- to allot a space at Laxmi Market to P.W.11 and they intend to trap him. After going through the complaint of P.W.11, he agreed to became a member of the raiding party. It is revealed from his evidence that

they followed P.W.3 and P.W.11 in a Car and P.W.11 entered into the office of the appellant but P.W.3 remained outside the room. At 12.10, P.W.11 came out and gave signal after which they entered into the room No.16 and found the appellant was holding the tainted money and seeing them, he kept the amount on the table. When the Inspector challenged him, he became nervous and failed to give any answer. Thereafter, the Inspector caught hold of the wrist of the appellant. Both hands of the appellant were washed separately after which the solution turned to pink. He stated to have signed on the post trap memorandum vide Ext.6/1.

34. In cross-examination, P.W.2 admitted that the room was not visible from the place where he was standing and he had not seen handing over of money and other transactions between P.W.11 and the appellant. The room of the appellant was a air-conditioned room and having a door closure. In cross-examination, he has further stated that the money was lying scattered on the floor and the appellant was asked to pick up the notes. If at all the money was kept by the appellant on the table after being enquired by the Inspector, why the money was scattered on the floor. On the other hand, suggestion of the defence that P.W.11 forcibly entered into the room of the appellant and thrusted the money with the appellant who chased him to outside the room and the appellant has never demanded or received any money is denial by him. On the other hand, the plea of the defence that P.W.11 thrusted the money to the appellant which he did not receive and money was scattered on the floor which he was asked to pick up is somewhat real from the cross-examination of P.W.2.

35. The evidence of P.W.12 is also relevant to note as he is the trapping IO of the case. It is revealed from his evidence that the informant and the accompanied witness entered into the room of the appellant by walk. After getting signal from P.W.11, they all rushed into the office chamber of the appellant and thereafter, he disclosed the identity of the trap party members. He challenged the appellant to have demanded and accepted Rs.5000/- for allotment of a space in favour of P.W.11 at Laxmi Market, but the appellant fumbled. The appellant has kept the currency notes on the table, which he was holding. Hand wash of the appellant was taken separately and tested in solution resulting change of colour to pink. Samples were preserved and tainted notes were seized. Then the post trap memorandum was prepared vide Ext.6. But, there is no seizure list showing seizure of the tainted notes from the possession of the appellant. From his cross-examination, it is revealed

that he has received the complaint on 21.11.2006 but the case was registered on 22.11.2006 at 9.00 am and after receiving telephonic instruction, he arranged for trapping. The question does not arise as to he has received telephonic instruction or not but the fact remains that when in the evening on 21.11.2006, he got the FIR but registered on 22.11.2006 at 9.00 am and at the same time, he got telephonic conversation. A doubt arises in the mind as to fairness of the trap. However, in further cross-examination, he admitted that he has not enquired about the demand of bribe on 14.11.2006 from the informant and delay in approaching him. Moreover, his evidence shows that P.W.3 entered into the room along with P.W.11 but the evidence of P.W.3 and P.W.11 are clear to show that P.W.3 was remained outside the room. If at all P.W.12 is the trapping IO, how there will be so much contradictions as to the presence of P.W.3 on the point of detection or trap. From his cross-examination, it is also clear that while he entered into the room, no outsider was present in that room. He denied the suggestion of the defence to the effect that the appellant was chasing the informant and shouting that the informant was trying to give him money, that they caught hold the appellant and then took him to his office room and found that the money was scattered on the floor where the appellant was forced to lift the currency notes and after lifting the same, hand of the appellant was washed and tested.

36. Not only this but also the evidence of P.W.12 is very crucial. At paragraph-4 of his cross-examination, he has stated that he has not enquired relating to the claim of the informant that he had applied for allotment of a shed at Laxmi Market. Being the principal IO, the cause of demand of bribe or illegal gratification, being the genesis of the crime, should have been enquired by him to trap the appellant. However, the evidence of P.W.12 is equally not clear and cogent to lay the claim of fair investigation. The trap for acceptance of money without any investigation on demand will not make out a case of acceptance of illegal gratification or gravamen of the charge leveled against the appellant.

37. It is revealed from the evidence of P.W.6, who has undergone training to examine chemicals, that he has received the material object for examination and gave his opinion vide Ext.10. But in cross-examination, he admitted that the material objects do not have a seals of forwarding authority and there was no signature of any person on the paper. His evidence is contradicting the evidence of P.W.12 because he has stated that after preparation M.Os.I, II, III and IV, the same were sealed and signature of the witnesses were obtained. Absence of such seal over the M.Os, raised also a doubt in the mind as to the fairness of the investigation including preparation of material object. It must be made clear that fair trial includes the fair investigation.

38. P.W.1 was working as Junior Manager, Town Service Department of RSP. According to him, the census work was conducted vide Ext.1/1 and accordingly tokens were issued to 218 shop owners for identification and application forms were issued on submission of token for rehabilitation. He has stated that 195 persons applied for allotment of space out of which 189 persons were allotted space after they deposited the fees. In cross-examination, he admitted that name of the informant was not there in the census list. He, however, admitted that 15.6.2006 was the cut-off date for issue of application and 5.5.2006 was the previous cut-off date for receiving the application. Thus, it is clear that neither the appellant was the competent authority to allot space nor the name of the complainant was in the list of the census so that the demand of bribe would be made by the appellant from the informant. It is true that the informant has made applications one after another addressing the DGM vide Ext.3 series and the same was endorsed by DGM to AGM and then to the appellant after which it goes to P.W.1 but he stated that the application was not put before him. In cross-examination, he admitted that the applications, marked to him by his officers, were also marked to his juniors as per the procedure and note-sheet was maintained in Ext.3. So, the evidence of P.W.1 is not clear whether his office has put up the file to him or not but it has been marked to him. Frailty in conduct does not ip so facto show the intention. However, when there is no competency of the appellant to allot the space, the name of complainant is not there in the list and there is no proof that he has applied by purchasing application form at the cost of Rs.200/- as per the case of the prosecution, the nucleus of the crime to demand bribe remains far from the truth.

39. Similarly, the evidence of P.W.4, who was working in the same Department of the appellant, reveals that there is a register maintained vide Ext.2 under which list has been prepared vide Ext.1/1. The applications of other person except the listed persons are not valid. Since the list does not contain the name of the informant, the approach of the informant to the appellant for allotment of space near Laxmi Market is shrouded with doubts and conjectures.

40. It is revealed from the cross-examination of P.W.5 that on 22.11.2006, he heard from Mr.B.K.Rout that some people caught hold the appellant and he went there and saw that the appellant was at the corridor. Two persons were holding his hand and then the appellant was taken to his room. He accompanied the CBI inside the room along with the appellant. Thus, in the cross-examination, the plea of the defence that the appellant was thrusted with the tainted money and he chased the informant but the CBI official caught hold his hand and dragged him to his room is well ventilated from the cross-examination of the prosecution. The defence is always required to prove its plea either

through cross-examination to the witnesses of the prosecution or by adducing defence witnesses.

41. P.W.7 is a shopkeeper of Laxmi Market. He gave his ignorance about the informant. He has been cross-examined by the prosecution and during cross-examination by the prosecution, he stated to have not stated before the IO that the betel shop of the informant adjoins to his shop and the informant approached the Town Planning Authority on several occasions to settle him at Laxmi Market. In cross-examination by the defence, he stated that he has a cabin at Nehru Maidan and his shop was in between the shop of Siba Das and Narendra Bag. On the other hand, his evidence does not show about existence of the shop of the informant in Nehru Madian. Even if he is hostile to the prosecution, his evidence being taken into consideration as a whole, only shows that he has got a shop at Nehru Maidan but existence of shop of the informant is not proved by him. Similarly, the evidence of P.W.8 reveals that on the date of census, he was present. He expressed his ignorance about the informant. In cross-examination by the prosecution, he denied to have stated before the I.O. that the complainant has a betel shop at Nehru Maidan and on 20.04.2005, he was absent in his shop and due to his absence, his name was not there in the list for which the informant approached the Town Service Department for allotment of a space. In cross-examination by the defence, he stated that he has applied in the prescribed form by purchase the same at the cost of Rs.200/-. He was removed from Nehru Maidan and provided a space at Laxmi Market. His evidence, if read as a whole, does not disclose about presence of any shop of the informant in Nehru Maidan. Rather, his evidence is clear to show that Town Service Department has issued the application on payment of Rs.200/- and he is one of the beneficiary of that system.

42. From the evidence of P.W.10, who was working as Senior Land Officer, RSP, Rourkela and involved in preparation of the census list, it reveals that he proved the census list vide Ext.1/1. According to him, the list does not contain the name of the informant. Rather, he denied about any complaint of the complainant before him about non-inclusion of his name in the census list.

43. In view of the discussion made hereinabove, it appears that the prosecution has not proved the charge by clear, cogent and consistent evidence about the existence of the shop of the informant at Nehru Maidan and it was demolished so as to lay a claim for allotment of space at Laxmi Market. It is clear that the name of the informant was not there for which he has made application to the DGM time and again. It is reiterated that when the purpose of demand of illegal gratification or the nucleus of the crime is not proved, the

question of demand of bribe remains as secondary issue. It is patent from the evidence, as discussed above, that demand of bribe of Rs.5000/- has not been cogent, consistent and clear evidence. The acceptance of bribe is equally has not been proved with positive and tangible evidence. Even if Sections 4 and 20 of the Act are taking into consideration, the presumption would be available if the fact of demand and acceptance are proved beyond all shadow of doubts.

44. Even if the presumption under the provision of Sections 4 and 20 of the Act are considered, the plea of the defence should also to be taken into consideration. As discussed above, the defence has brought out through cross-examination of the prosecution witnesses that he was forcibly thrusted with the money by the appellant and when he chased the appellant, the CBI staff caught hold of him and money was thrown on the floor and it was collected by the appellant on being asked by the CBI staff. This part of evidence is also proved by the D.Ws.1, 2, 3 and 4 who are also officials of RSP because their evidence would go to show that after having heard about hullah in the corridor, they went to the spot and found the CBI staff were catching both hands of the appellant and taking him to his chamber and the money was scattered on the floor and the appellant was asked to collect the same. Thus, the defence has also proved the plea by preponderance of probability.

45. In view of the fact and legal position, as discussed above, applying the decisions of the Hon'bel Supreme Court in the above referred cases, learned trial Court is found to have never travelled to the assessment of the evidence of all witnesses with proper perspective. Thus, the finding of the learned trial Court is hardly to be agreed with.

46. When demand and acceptance of money is not proved and the plea of the defence is otherwise proved, the ingredients of Section 7 and 13 of the Act remained far from proof. Hence, the judgment of conviction and sentence dated 9.3.2011 passed by the learned Special Judge (C.B.I.), Bhubaneswar in TR No.16 of 2007 is set aside. The appellant is found not guilty under Section 7 and 13(2) read with Section 13(1)(d) of the Act and acquitted of said charges and accordingly, he is discharged from the bail bond. The CRLA is allowed accordingly.

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