THE INDIAN LAW REPORTS
(CUTTACK SERIES, MONTHLY)

Containing Judgments of the High Court of Orissa and some important decisions of the Supreme Court of India.

Mode of Citation
2020 (I) I L R - CUT.

APRIL - 2020

Pages : 625 to 800

Edited By

BIKRAM KISHORE NAYAK, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

Published by : High Court of Orissa.
At/PO-Chandini Chowk, Cuttack-753002
Printed at - Odisha Government Press, Madhupatna, Cuttack-10

Annual Subscription : ₹ 300/-

ORISSA HIGH COURT, CUTTACK

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(From 27.04.2020)

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(Acting Chief Justice from 05.01.2020 to26.04.2020)

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2020 (I) ILR-Cut…… 749

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not been subjected to any adverse remarks during his past service and also agitated the issue of non-communication of the entry made in the ACR by the authority – Authority on the other hand stated that the entire selection process was transparent and full proof and there was no scope left for anybody to make any objection on the selection process – Petitioner secured less mark and not selected – Original records show two important aspects have been given a raw deal by the authority that is (i) the non-communication of the insertion of entry in the ACR (ii) the non-communication about his non-selection – Effect of – Held, the communication of entries in the annual confidential report of a public servant warrants a civil consequence and may adversely affect his chance of promotion or other service related benefits – Hence, such non-communication is arbitrary and violative of Article 14 of the Constitution – Every entry in the "Service Book" whether it is fair, poor, average, good or very good marks need to be communicated to the concerned employee within a reasonable period which brings about the desired level of transparency in the selection/promotion process – Admittedly, in the present case, the petitioner had no adverse remarks or any negative record, hence he deserves to secure a decent marks in "Record of Service" which have been wrongly denied to him leading to poor score in the C.C.R. – The Railway authority has also failed to intimate him about his entry in ACR. In fact, he would have got an opportunity to rectify or upgrade the score, if it is not satisfactory – Direction to consider the promotion of the petitioner retrospectively with all consequential benefits within two months from the presentation of this order.

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2020 (I) ILR - CUT- 625 (S.C)

R. BANUMATHI, J, S. ABDUL NAZEER, J & A.S. BOPANNA, J.

CIVIL APPEAL NOS. 1912-1913 OF 2020

(Arising out of SLP (CIVIL) Nos. 2704-2705 of 2019)

MANGAYAKARASI ……..Appellant(s)

.Vs.

M. YUVARAJ ……..Respondent(s)

HINDU MARRIAGE ACT, 1955 – Section 13 read with section 9 – Provisions under – Husband filed petition seeking divorce – Wife filed for restitution of conjugal rights – Petition by husband dismissed – First appeal by husband dismissed – Second appeal in High court allowed by dissolving the marriage on the basis of the ground not pleaded before the trial court and on the basis of framing of a wrong question of law – Special leave petition – The question arose as to whether litigating for a long period and staying separately for a long time can be a ground for dissolution of marriage? – Held, No – Reasons indicated.

"On the position of law enunciated it would not be necessary to advert in detail inasmuch as the decision to dissolve the marriage apart from the grounds available, will have to be taken on case to case basis and there cannot be a strait jacket formula. This Court can in any event exercise the power under Article 142 of the Constitution of India in appropriate cases. However, in the instant facts, having given our thoughtful consideration to that aspect we notice that the parties hail from a conservative background where divorce is considered a taboo and further they have a female child born on 03.01.2007 who is presently aged about 13 years. In a matter where the differences between the parties are not of such magnitude and is in the nature of the usual wear and tear of marital life, the future of the child and her marital prospects are also to be kept in view, and in such circumstance the dissolution of marriage merely because they have been litigating and they have been residing separately for quite some time would not be justified in the present facts, more particularly when the restitution of conjugal rights was also considered simultaneously." *(Para 16)*

Case Laws Relied on and Referred to :-

1. (2006) 4 SCC 558 : Naveen Kohli .Vs. Neelu Kohli.
2. (2007) 2 SCC 220 : Sanghamitra Ghosh Vs. Kajal Kumar Ghosh.
3. (2007) 4 SCC 511 : Samar Ghosh Vs. Jaya Ghosh.

For Appellant : Naresh Kumar
For Respondent : Mr. Vijaya Kumar

JUDGMENT Date of Judgment : 03.03.2020

A.S. BOPANNA, J.

Leave granted.

2. The appellant is before this Court assailing the judgment dated 20.07.2018 passed by the High Court of Judicature at Madras in CMSA Nos.23 & 24 of 2016. The appellant is the wife of the respondent. Since the rank of parties was different in the various proceedings as both the parties had initiated proceedings against each other, for the sake of convenience and clarity the appellant herein would be referred to as 'wife' and the respondent herein would be referred to as 'husband' wherever the context so admits.

3. The husband initiated the petition under Section 13 of the Hindu Marriage Act seeking dissolution of the marriage. The wife on the other hand initiated the petition under Section 9 of the Hindu Marriage Act seeking restitution of conjugal rights. The respective petitions registered as H.M.O.P No.13/2010 (old No.532/2007) and H.M.O.P No.27/2008 were clubbed and the learned Subordinate Judge, Pollachi by the judgment dated 26.11.2010 dismissed the petition filed by the husband and allowed the petition filed by the wife. The husband claiming to be aggrieved by the said judgment preferred the appeals in CMA No.90/2011 and 71/2011 before the Additional District & Sessions Judge, Coimbatore, namely, the First Appellate Court. The First Appellate Court having considered the matter, dismissed the appeals filed by the husband. The husband, therefore, filed the Second Appeal under Section 100 of the Code of Civil Procedure before the High Court of Judicature at Madras in CMSA Nos.23 & 24 of 2016. The High Court has through the impugned judgment dated 20.07.2018 allowed the appeals, set aside the order for restitution of conjugal rights and dissolved the marriage between the parties herein. It is in that light the Appellant-wife is before this Court in these appeals.

4. The undisputed position is that the marriage of the parties was solemnised on 08.04.2005 which in fact was after the parties had fallen in love with each other. As per the averments, the wife is elder to the husband by six to seven years. The parties also have a female child born on 03.01.2007. During the subsistence of the marriage certain differences cropped up between the parties. The husband alleged that the wife was of quarrelsome character and used filthy language in the presence of relatives and friends and also that she had gone to the college where the husband was employed and had used bad language in the presence of the students which had caused insult to him. The husband, therefore, claiming that he belongs to a respectable family and cannot tolerate such behaviour of the wife got issued a legal notice dated 07.12.2006 which was not responded to by the wife. The husband therefore filed a petition under Section 13 of Hindu Marriage Act in

H.M.O.P No.65/2007 seeking dissolution of marriage. The husband contends that the wife appeared before the Trial Court and on the assurances put forth by her of leading a normal married life the petition was not pressed further. The husband alleges that merely about five days thereafter the wife went to the college and abused him and also left the marital home on 12.04.2007. In that background on the very allegations which had been made in the first instance, the petition seeking dissolution of marriage in H.M.O.P No.13/2010 (old No.532/2007) was filed.

5. The wife who appeared and filed objection statement disputed the allegations of the husband. The factual aspects with regard to the qualification of the husband at the time of the marriage and his employment were also disputed. It was contended by her that after marriage they resided together at Sathiyamangalam up to the year 2005 and thereafter at Saravanampatti till December, 2006. It was contended that the distance between the hometown of the parents of the husband and the said places referred to is more than 120 kms and travelling the said distance was difficult. Hence the allegation of insulting them is not true. Subsequently when the relationship between the husband and his parents were cordial and were living together, it is claimed that the wife had behaved well with the relatives and the visitors. Hence the allegation about her rude behaviour is disputed. In respect of the legal notice issued by the husband on 07.12.2006 it is contended that during the pregnancy, the husband told her that his parents are insisting on issuing the legal notice and the husband did not mean what had been indicated therein. Within about 25 days thereafter the wife had delivered a female child and even in respect of the earlier petition in H.M.O.P No.65/2007 she was made to appear and submit about her readiness to live with him which she had done unsuspectingly. The said case was also stated to be instigated by his parents. In that light, the wife had denied the allegations and sought for dismissal of the petition.

6. In the petition filed by the wife under Section 9 of the Hindu Marriage Act seeking for restitution of conjugal rights she had referred to the manner in which the marriage has taken place and had indicated that they are living separately without valid reasons and, therefore, sought for the relief. The husband having appeared filed the objection statement referring to the parties belonging to different communities as also the age difference. The further averments made in the petition were denied. The husband also referred to the complaint filed by the wife before the Negamam Police Station in Crime No.401/2007 in which the husband was arrested by the

police and was in judicial custody for seven days. In that light, it was contended that the marriage between the parties had broken down to a point of no return, hence sought for dismissal of the petition.

7. The Trial Court framed the issues based on the rival contentions. The husband examined himself and the witnesses as PW1 to PW4 and exhibited the documents A1 to A5, while the wife examined herself and the witnesses as RW1 to RW3 and exhibited the documents as R1 to R3. The Trial Court after referring to the evidence tendered, has dismissed the petition. While doing so the Trial Court had referred in detail to the evidence that had been tendered and in that light insofar as the allegations, the Trial Court was of the opinion that the husband has not examined any witnesses to prove that after 15 months of the marriage the quarrel started between them and that he had to shift about seven houses due to quarrelling nature of the wife with the neighbours. It was further observed that from the witnesses who have been examined, the evidence do not relate to the allegation that the wife had abused the husband in front of the students and the coworkers. In that light, the Trial Court noticed that the allegation made by the husband as PW1 and the relatives who were examined as witnesses (PW2 and PW3) had alleged that the wife had lived a luxurious life at her parent's house. In that light, the Trial Court taking into consideration the manner in which the marriage between the parties had taken place and also taking note that a female child was born from the wedlock on 03.01.2007 had formed the opinion that the petition seeking divorce had been filed at the instigation of the parents of the husband and there was no real cause for granting the divorce.

8. The First Appellate Court while considering the appeals filed by the husband had taken note of the evidence which had been referred to before the Trial Court and in that light having re-appreciated the matter had upheld the judgment of the Trial Court.

9. In the Second Appeal filed before the High Court, it raised the following substantial questions of law for consideration:

> "1. Whether the courts below are correct and justified in failure to dissolve the marriage of the appellant and respondent on the ground of mental cruelty (when particularly the alleged complaint dated 24.11.2007 for dowry harassment lodged by the respondent against the appellant and her in-laws and the consequent arrest by the police would unquestionably constitutes cruelty as postulated in section 13(1)(ia) of the Hindu Marriage Act?

2. Whether the judgments of the courts below in dismissing the petition for divorce overlooking the subsequent event regarding the lodging of false criminal complaint by the respondent-wife for dowry harassment against the appellant and her in- laws are sustainable in law?

3. Whether the judgment of the courts below are correct and justified when particularly the criminal prosecution initiated in C.C.No.149 of 2008 on the file of the Judicial Magistrate No.2, Pollachi for dowry harassment is ended in Honorary acquittal?

4. Whether the judgment of the courts below are perverse?"

10. It is in that background, the High Court had arrived at the conclusion that the criminal case filed by the wife, which was proceeded in C.C. No.149/2008 alleging that the husband had demanded dowry and in the said proceedings when the allegation is found to be false for want of evidence the same would be an act of inflicting mental cruelty as contemplated under Section13(1)(ia) of the Hindu Marriage Act and in that light had allowed the appeal.

11. Heard Mr. S. Nandakumar, learned counsel for the appellant-wife, Mr. B. Ragunath, learned counsel for the respondent-husband and perused the appeals papers.

12. In the light of the contentions put forth by the learned counsel, a perusal of the papers would disclose that the petition for dissolution of marriage instituted by the husband was on the allegation that the behaviour of the wife was intemperate as she was quarrelsome with the neighbours, friends and with the visitors. It was alleged that she had also gone over to the place of employment of the husband and demeaned him in the presence of the students and other coworkers. In respect of the said allegations, the Trial Court having taken note of the evidence tendered through PW1 to PW4 had arrived at the conclusion that the said evidence was insufficient to prove the allegations which were made in the petition. A bare perusal of the judgment passed by the Trial Court would indicate that the evidence available on record has been referred to extensively and a conclusion has been reached. The First Appellate Court has also referred to the said evidence, re-appreciated the same and has arrived at its conclusion. In such circumstance, in a proceeding of the present nature where the Trial Court has referred to the evidence and the First Appellate Court being the last Court for re-appreciation of the evidence has undertaken the said exercise and had arrived at a concurrent decision on the matter, the position of law is well settled that

neither the High Court in the limited scope available to it in a Second Appeal under Section 100 of the Civil Procedure Code is entitled to re-appreciate the evidence nor this Court in the instant appeals is required to do so.

13. It is in that view, we have not once again referred to the evidence which was tendered before the Trial Court which had accordingly been appreciated by the Trial Court. In such situation the High Court had the limited scope for interference based on the substantial question of law. The substantial questions of law framed by the High Court has been extracted and noted in the course of this judgment. At the outset, the very perusal of the questions framed would disclose that the questions raised does not qualify as substantial questions of law when the manner in which the parties had proceeded before the Trial Court is noticed. The questions framed in fact provides scope for re-appreciation of the evidence and not as substantial questions of law. As noticed, in the instant facts the husband filed a petition at the first instance, seeking dissolution of marriage in H.M.O.P No.65/2007 and the same was predicated on the allegation about the wife using filthy language in the presence of the relatives and friends and also using such language in the presence of the students of the husband. It is in that light, the husband alleged cruelty and sought for dissolution of marriage on that ground. It is no doubt true that the said petition which was initially filed was not pressed though the contentions of the parties in that regard is at variance, inasmuch as the husband contends that the petition was not pressed as the wife had assured of appropriate behaviour henceforth, while the wife contends that the said proceedings had been initiated at the instigation of his parents and had accordingly not been pressed thereafter.

14. Be that as it may, though the subsequent petition was filed by the husband in H.M.O.P No.13/2010 which was originally numbered as H.M.O.P No.532/2007, the same was also filed on the same set of allegations. Further at that point in time the wife had also filed a petition under Section 9 of the Hindu Marriage Act. In that background, though subsequently in the proceedings before the Trial Court a reference is made to the criminal proceedings, as on the date when the cause of action had arisen for the husband who initiated the proceedings seeking dissolution of the marriage, the criminal case filed against him was not the basis whereby a ground was raised of causing mental cruelty by filing such criminal complaint. If that be the position, a situation which was not the basis for initiating the petition for dissolution of marriage and when that was also not an issue before the Trial

Court so as to tender evidence and a decision be taken, the High Court was not justified in raising the same as a substantial question of law and arriving at its conclusion in that regard. A perusal of the judgment of the High Court indicates that there is no reference whatsoever with regard to the evidence based on which the dissolution of marriage had been sought, which had been declined by the Trial Court and the First Appellate Court and whether such consideration had raised any substantial question of law. But the entire consideration has been by placing reliance on the judgment which was rendered in the criminal proceedings and had granted the dissolution of the marriage. The tenor of the substantial questions of law as framed in the instant case and decision taken on that basis if approved, it would lead to a situation that in every case if a criminal case is filed by one of the parties to the marriage and the acquittal therein would have to be automatically treated as a ground for granting divorce which will be against the statutory provision.

15. It cannot be in doubt that in an appropriate case the unsubstantiated allegation of dowry demand or such other allegation has been made and the husband and his family members are exposed to criminal litigation and ultimately if it is found that such allegation is unwarranted and without basis and if that act of the wife itself forms the basis for the husband to allege that mental cruelty has been inflicted on him, certainly, in such circumstance if a petition for dissolution of marriage is filed on that ground and evidence is tendered before the original court to allege mental cruelty it could well be appreciated for the purpose of dissolving the marriage on that ground. However, in the present facts as already indicated, the situation is not so. Though a criminal complaint had been lodged by the wife and husband has been acquitted in the said proceedings the basis on which the husband had approached the Trial Court is not of alleging mental cruelty in that regard but with regard to her intemperate behaviour regarding which both the courts below on appreciation of the evidence had arrived at the conclusion that the same was not proved. In that background, if the judgment of the High Court is taken into consideration, we are of the opinion that the High Court was not justified in its conclusion.

16. The learned counsel for the respondent however, contended that ever since the year 2007 the parties have been litigating and were living separately. In that situation it is contended that the marriage is irretrievably broken down and, therefore, the dissolution as granted by the High Court is to be sustained. The learned counsel has relied on the decisions in the case of

Naveen Kohli vs. Neelu Kohli (2006) 4 SCC 558, in the case of ***Sanghamitra Ghosh vs. Kajal Kumar Ghosh*** (2007) 2 SCC 220 and in the case of ***Samar Ghosh vs. Jaya Ghosh*** (2007) 4 SCC 511 to contend that in cases where there has been a long period of continuous separation and the marriage becomes a fiction it would be appropriate to dissolve such marriage. On the position of law enunciated it would not be necessary to advert in detail inasmuch as the decision to dissolve the marriage apart from the grounds available, will have to be taken on case to case basis and there cannot be a strait jacket formula. This Court can in any event exercise the power under Article 142 of the Constitution of India in appropriate cases. However, in the instant facts, having given our thoughtful consideration to that aspect we notice that the parties hail from a conservative background where divorce is considered a taboo and further they have a female child born on 03.01.2007 who is presently aged about 13 years. In a matter where the differences between the parties are not of such magnitude and is in the nature of the usual wear and tear of marital life, the future of the child and her marital prospects are also to be kept in view, and in such circumstance the dissolution of marriage merely because they have been litigating and they have been residing separately for quite some time would not be justified in the present facts, more particularly when the restitution of conjugal rights was also considered simultaneously.

17. In that view, having arrived at the conclusion that the very nature of the substantial questions of law framed by the High Court is not justified and the conclusion reached is also not sustainable, the judgment of the High Court is liable to be set aside.

18. In the result, the judgment dated 20.07.2018 passed in CMSA Nos.23 & 24 of 2016 is set aside. The judgment dated 26.11.2010 passed in H.M.O.P Nos.13/2010 and H.M.O.P No.27/2008 and affirmed in CMA No.90/2011 and CMA No.71/2011 are restored. The Appeals are accordingly allowed with no order as to costs.

19. Pending applications if any, shall also stand disposed of.

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2020 (I) ILR - CUT- 633 (S.C)

ARUN MISHRA, J, INDIRA BANERJEE, J, VINEET SARAN, J, M. R. SHAH, J & S. RAVINDRA BHAT, J.

CIVIL APPEAL NO.10941-10942 OF 2013 (WITH BATCHES)

NEW INDIA ASSURANCE CO. LTD. .....Appellant(s)

.Vs.

HILLI MULTIPURPOSE COLD STORAGE PVT. LTD. ……..Respondent(s)

CONSUMER PROTECTION ACT, 1986 – Section 13 – Provisions regarding grant of time for filing of response – Reference to Constitution Bench – The reference made to Constitution bench relates to the grant of time for filing of response to a complaint under the provisions of the Consumer Protection Act, 1986 – The first question referred is as to whether Section 13(2)(a) of the Consumer Protection Act, which provides for the respondent/opposite party filing its response to the complaint within 30 days or such extended period, not exceeding 15 days, should be read as mandatory or directory; whether the District Forum has power to extend the time for filing the response beyond the period of 15 days, in addition to 30 days – The second question which is referred is as to what would be the commencing point of limitation of 30 days stipulated under the aforesaid section – The Constitution bench after considering the question in detail answered the following:

"To conclude, we hold that our answer to the first question is that the District Forum has no power to extend the time for filing the response to the complaint beyond the period of 15 days in addition to 30 days as is envisaged under section 13 of the C.P Act; and the answer to the second question is that the commencing point of limitation of 30 days under Section 13 of the C.P Act would be from the date of receipt of the notice accompanied with the complaint by the opposite party, and not mere receipt of the notice of the complaint."

Case Laws Relied on and Referred to :-

1. (1976) 2 SCC 953 : Lachmi Narain Vs. Union of India.
2. AIR 1962 SC 113=(1962) 2 SCR 880 : Bhikraj Jaipurai Vs. Union of India.
3. (2004) 11 SCC 472 : Fairgrowth Investments Ltd. Vs. Custodian.
4. (2013) 11 SCC 451 : Rohitash Kumar Vs. Om Prakash Sharma.
5. (2013) 10 SCC 765 : Popat Bahiru Govardhane Vs. Special Land Acquisition Officer.
6. (2003) 5 SCC 413 : Laxminarayan R. Bhattad Vs. State of Maharashtra.
7. (2003) 3 SCC 541 : P.M. Latha Vs. State of Kerala.
8. (2003) 2 SCC 577 : Nasiruddin Vs. Sita Ram Agarwal
9. (2003) 1 SCC 123 : E. Palanisamy Vs. Palanisamy

10. (2003) 9 SCC 393 : India House Vs. Kishan N. Lalwani.
11. (2019) 12 SCC 210 : SCG Contracts (India) Private Limited Vs. K.S. Chamankar Infrastructure Private Limited
12. Civil Appeal No.433 of 2020 : Desh Raj Vs. Balkishan decided on 20.01.2020.
13. (2004) 11 SCC 472 : Fairgrowth Investments Ltd. Vs. Custodian.
14. (2002) 6 SCC 33 : Topline Shoes Ltd. Vs. Corporation Bank.
15. (2002) 6 SCC 635 : Dr. J. J. Merchant Vs. Shrinath Chaturvedi.
16. Topline Shoes (supra) : Kailash Vs. Nanhku (2005) 4 SCC 480
17. (2005) 6 SCC 344 : Salem Advocate Bar Association Vs. Union of India.
18. (2015) 16 SCC 22 : Dr. J. J. Merchant (supra) and NIA Vs. Hilli Multipurpose Cold Storage.
19. (2007) 9 SCC 466 : Nahar Enterprises Vs. Hyderabad Allwyn Ltd.
20. (2005) 4 SCC 239 : Union of India Vs. Tecco Trichy Engineers & Contractors.

For Appellant (s) : M/s. Manjeet Chawla.
For Respondent(s) : Mr. Sarla Chandra

JUDGMENT Date of Judgment : 04.03.2020

VINEET SARAN, J.

Leave granted.

2. The reference made to this Constitution Bench relates to the grant of time for filing response to a complaint under the provisions of the Consumer Protection Act, 1986 (for short 'the Act'). The **first question** referred is as to whether Section 13(2) (a) of the Consumer Protection Act, which provides for the respondent/opposite party filing its response to the complaint within 30 days or such extended period, not exceeding 15 days, should be read as mandatory or directory; i.e., whether the District Forum has power to extend the time for filing the response beyond the period of 15 days, in addition to 30 days. The **second question** which is referred is as to what would be the commencing point of limitation of 30 days stipulated under the aforesaid Section.

3. The first question was referred by a two judge Bench of this Court vide an Order dated 11.02.2016 passed in *Civil Appeal No(s).10831084 of 2016,* ***M/s Bhasin Infotech and Infrastructure Pvt. Ltd. versus M/s Grand Venezia Buyers Association (Reg),*** the relevant portion of which is as under:

> *"There is an apparent conflict between the decisions of this Court in Topline Shoes Limited vs. Corporation Bank [(2002) 6 SCC 33], Kailash Vs. Nankhu [(2005) 4 SCC 480], Salem Advocate Bar Association Vs. Union of India [(2005) 6 SCC 344] on the one hand and J.J. Merchant & Ors. Vs. Shrinath Chaturvedi [(2002)*

6 SCC 635 and NIA Vs. Hilli Multipurpose Cold Storage [2014 AIOL 4615] on the other in so far as the power of the Courts to extend time for filing of written statement/reply to a complaint is concerned. The earlier mentioned line of decisions take the view that the relevant provisions including those of Order 8 Rule 1 of the Civil Procedure Code, 1908 are directory in nature and the Courts concerned have the power to extend time for filing the written statement. The second line of decisions which are also of coordinate Benches however takes a contrary view and hold that when it comes to power of the Consumer For a to extend the time for filing a reply there is no such power.

Since the question that falls for determination here often arises before the Consumer Fora and Commissions all over the country it will be more appropriate if the conflict is resolved by an authoritative judgment. Further since the conflict is between Benches comprising three Judges we deem it fit to refer these appeals to a five Judge Bench to resolve the conflict once and for all. While we do so we are mindful of the fact that in the ordinary course a two Judge Bench ought to make a reference to a three Judge Bench in the first place but in the facts and circumstances of the case and keeping in view the fact that the conflict is between coordinate Benches comprising three Judges a reference to three Judges may not suffice."

4. The other question has been referred by another Division Bench of this Court by an Order dated 18.01.2017 passed in this very appeal being *Civil Appeal No(s).1094110942 of 2013,* ***NIA Vs. Hilli Multipurpose Cold Storage Pvt. Ltd****,* the relevant portion of the judgment is as under:

".....what is the commencing point of the limitation of 30 days stipulated in Section 13 of the Act is required to be decided authoritatively. The declaration made in JJ Merchant's case that the said period is to be reckoned from the date of the receipt of the notice by the opposite party or complaint under the Act requires in our humble opinion, a more critical analysis."

5. We have heard the learned Counsel for the parties at length and have carefully gone through the records.

6. In the Statement of Objects and Reasons of the Consumer Protection Act, in paragraph 4, it has been specifically provided that the Consumer Protection Act is "*To provide speedy and simple redressal to consumer disputes, a quasi-judicial machinery is sought to be set up at the district, State and Central levels.....".* The Preamble of the Consumer Protection Act also mentions that the Act is *"to provide for better protection of the interests of the consumers"*. The nomenclature of this Act also goes to show that it is for the benefit or protection of the consumer. From the above, it is evident that the Consumer Protection Act has been enacted to provide for expeditious disposal of consumer disputes and that, it is for the protection and benefit of the consumer.

7. Before we proceed to analyse and determine the questions referred, we may, for ready reference, reproduce the relevant provisions of the Consumer Protection Act and its Regulations.

> ***"Section 13. Procedure on admission of complaint. –***
>
> ***(1)*** *The District Forum shall, on admission of a complaint, if it relates to any goods,*
>
> *(a) refer a copy of the admitted complaint, within twenty-one days from the date of its admission to the opposite party mentioned in the complaint directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum.*
>
> *(b).....*
> *(c).....*
> *(d).....*
> *(e).....*
> *(f).....*
> *(g).....*
>
> ***(2)*** *The District Forum shall, if the complaints admitted by it under section 12 relates to goods in respect of which the procedure specified in subsection (1) cannot be followed, or if the complaint relates to any services,*
>
> ***(a) refer a copy of such complaint to the opposite party directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum;***
>
> *(b) where the opposite party, on receipt of a copy of the complaint, referred to him under clause (a) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum, the District Forum shall proceed to settle consumer dispute,*
>
> *(i) on the basis of evidence brought to its notice by the complainant and the opposite party, where the opposite party denies or disputes the allegations contained in the complaint, or*
>
> *(ii) ex-parte on the basis of evidence brought to its notice by the complainant where the opposite party omits or fails to take any action to represent his case within the time given by the Forum;*
>
> *(c) where the complainant fails to appear on the date of hearing before the District Forum, the District Forum may either dismiss the complaint for default or decide it on merits.*
>
> ***(3) No proceedings complying with the procedure laid down in subsections (1) and (2) shall be called in question in any court on the ground that the principles of natural justice have not been complied with.***
>
> [1]***[(3A) Every complaint shall be heard as expeditiously as possible and endeavour shall be made to decide the complaint within a period of three months from the***

1. Ins. by Act 62 of 2002, sec. 9 (w.e.f. 15.3.2003).

date of receipt of notice by opposite party where the complaint does not require analysis or testing of commodities and within five months, if it requires analysis or testing of commodities:

Provided that no adjournment shall be ordinarily granted by the District Forum unless sufficient cause is shown and the reasons for grant of adjournment have been recorded in writing by the Forum:

Provided further that the District Forum shall make such orders as to the costs occasioned by the adjournment as may be provided in the regulations made under this Act.

Provided also that in the event of a complaint being disposed of after the period so specified, the District Forum shall record in writing, the reasons for the same at the time of disposing of the said complaint.]

[2]*[**(3B)** Where during the pendency of any proceeding before the District Forum, it appears to it necessary, it may pass such interim order as is just and proper in the facts and circumstances of the case.]*

***(4)** For the purposes of this section, the District Forum shall have the same powers as are vested in a civil court under Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:—*

(i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;

(ii) the discovery and production of any document or other material object producible as evidence;

(iii) the reception of evidence on affidavits;

(iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;

(v) issuing of any commission for the examination of any witness, And

(vi) any other matter which may be prescribed.

5…….
6…….
7…….

***Section 15. Appeal.** — Any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the State Commission within a period of thirty days from the date of the order, in such form and manner as may be prescribed:*

Provided that the State Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period;

2. Ins. by Act 62 of 2002, Sec. 9 (w.e.f. 15.3.2003).

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the District Forum, shall be entertained by the State Commission unless the appellant has deposited in the prescribed manner fifty per cent. Of that amount or twenty-five thousand rupees, whichever is less."

***Section19. Appeals.**—Any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of section 17 may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed:*

Provided that the National Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period:

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the State Commission, shall be entertained by the National Commission unless the appellant has deposited in the prescribed manner fifty per cent. Of the amount or rupees thirty-five thousand, whichever is less.

***Section24A.Limitation period. (1)** The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.*

(2) Notwithstanding anything contained in subsection (1), a complaint may be entertained after the period specified in subsection (1), if the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period:

Provided that no such complaint shall be entertained unless the National Commission, the State Commission or the District Forum, as the case may be, records its reasons for condoning such delay." (emphasis supplied)

Relevant Provisions of the **Consumer Protection Regulations, 2005** are reproduced below:

***"Reg.10. Issue of notice** .(1) Whenever the Consumer Forum directs the issuance of a notice in respect of a complaint, appeal or revision petition, as the case may be, to the opposite party (ies)/respondent(s),*

ordinarily such notice shall be issued for a period of 30 days and depending upon the circumstances of each case even for less than 30 days.

***(2)** When there is a question of raising presumption of service, 30 days notice shall be required.*

***(3)** Whenever notices are sought to be effected by a courier service, it shall be ascertained that the courier is of repute.*
***(4)** Whenever appointing the courier for the purpose of effecting service, security deposit may also be taken.*

(5) Along with the notice, copies of the complaint, memorandum of grounds of appeal, petitions as the case may be and other documents filed shall be served upon the opposite party(ies)/respondent(s).

(6) After the opposite party or respondent has put in appearance, no application or document shall be received by the Registrar unless it bears an endorsement that a copy thereof has been served upon the other side."

Reg.14. Limitation.

(1) *Subject to the provisions of sections 15, 19 and 24A, the period of limitation in the following matters shall be as follows:*

(i) Revision Petition shall be filed within 90 days from the date of the order or the date of receipt of the order as the case may be;

(ii) Application for setting aside the ex parte order under section 22A or dismissal of the complaint in default shall be maintainable if filed within thirty days from the date of the order or date of receipt of the order, as the case may be;

(iii) An application for review under subsection (2) of section 22 shall be filed to the National Commission within 30 days from the date of the order or receipt of the order, as the case may be;

(iv) The period of limitation for filing any application for which no period of limitation has been specified in the Act, the rules of these regulations shall be thirty days from the date of the cause of action or the date of knowledge.

(2) Subject to the provisions of the Act, the Consumer Forum may condone the delay in filing an application or a petition referred to in sub- regulation (1) if valid and sufficient reasons to its satisfaction are given.

Reg.26. Miscellaneous.

(1) *In all proceedings before the Consumer Forum, endeavour shall be made by the parties and their counsel to avoid the use of provisions of Code of Civil Procedure, 1908 (5 of 1908):*

Provided that the provisions of the Code of Civil Procedure, 1908 may be applied which have been referred to in the Act or in the rules made thereunder.

(2)……..
(3)……..
(4)……..
(5)……..
(6)……..” *(emphasis supplied)*

Question No. 1: **Whether the District Forum has power to extend the time for filing of response to the complaint beyond the period of 15 days, in addition to 30 days, as envisaged under Section 13(2)(a) of the Consumer Protection Act?**

8. A bare reading of Section 13(2)(a) of the Act makes it clear that the copy of the complaint which is to be sent to the opposite party, is to be with the direction to give his version of (or response to) the case (or complaint) within a period of 30 days. It further provides that such period of 30 days can be extended by the District Forum, but not beyond 15 days.

9. Sub-Section 2(b)(i) of Section 13 of the Act provides for a complaint to be decided on the basis of the response by the opposite party and the evidence of the complainant and the opposite party, where allegations contained in the complaint are denied or disputed by the opposite party. Sub-Section 2(b)(ii) of Section 13 of the Act provides that where no response is filed by the opposite party, the complaint may be decided *ex-parte* on the basis of evidence brought forth by the complainant.

10. Sub-Section 2(c) of Section 13 of the Consumer Protection Act further provides that where the complainant fails to appear on the date of hearing before the District Forum, the District Forum may either dismiss the complaint for default or decide it on merits. The aforesaid provision *[sub-Section 2(c)]* was inserted by Act 62 of 2002, w.e.f. 15.03.2003. Similarly, Section (3A) of Section 13 of the Consumer Protection Act, which was also inserted by Act 62 of 2002, provides for deciding every complaint as expeditiously as possible and endeavour shall be made to decide the complaint within a period of three months from the receipt of notice by the opposite party, and within five months, if the complaint requires analysis or testing of commodities. It also provides that no adjournment shall ordinarily be granted by the District Forum, and if the same is to be granted, costs may be imposed, and further that reasons be recorded if the complaint is disposed of after the time so provided.

11. From the above, it is clear that as mentioned in the Statement of Objects and Reasons of the Consumer Protection Act, the District Forum is to provide speedy disposal of consumer disputes. The same has been further reiterated by the legislature by insertion of Section 13(2)(c) and 13(3A) by Act 62 of 2002.

12. Section 13 of the Consumer Protection Act clearly contemplates where time can be extended by the District Forum, and where it is not to be extended. Like, under subsection (3A) of Section 13, despite the best efforts of the District Forum, in situations where the complaint cannot be decided within the period specified therein, the same can be decided beyond the

specified period for reasons to be recorded in writing by the District Forum at the time of disposing of the complaint. Meaning thereby that the same would not be mandatory, but only directory. The phrase "*endeavour shall be made",* makes the intention of the legislature evident that the District Forum is to make every effort to decide the case expeditiously within time, but the same can also be decided beyond the said period, but for reasons to be recorded.

13. On the contrary, sub-Section (2)(a) of Section 13 of the Consumer Protection Act provides for the opposite party to give his response *'within a period of 30 days or such extended period not exceeding 15 days as may be granted by the District Forum'*. The intention of the legislature seems to be very clear that the opposite party would get the time of 30 days, and in addition another 15 days at the discretion of the Forum to file its response. No further discretion of granting time beyond 45 days is intended under the Act.

The question of natural justice is dealt with by the legislature in sub-section (3) of Section 13 of the Consumer Protection Act, which clearly provides that "*No proceedings complying with the procedure laid down in the sub-Section (1) and (2) shall be called in question in any court on the ground that the principles of natural justice have not been complied with."* The legislature was conscious that the complaint would result in being decided *ex-parte,* or without the response of the opposite party, if not filed within such time as provided under the Consumer Protection Act, and in such a case, the opposite party will not be allowed to take the plea that he was not given sufficient time or that principles of natural justice were not complied with. Any other interpretation would defeat the very purpose of sub-Section (3) of Section 13 of the Consumer Protection Act.

14. The maximum period of 45 days, as provided under the Consumer Protection Act, would not mean that the complainant has a right to always avail such maximum period of 45 days to file its response. Regulation 10 of the Consumer Protection Regulations, 2005 clearly provides that ordinarily such notice to the opposite party to file its response shall be issued for a period of 30 days, but the same can be even less than 30 days, depending upon the circumstances of each case.

15. Now, reverting back to the provisions of the Consumer Protection Act to consider as to whether the provision of sub-Section 2(a) of Section 13 granting a maximum period of 15 days in addition to 30 days has to be read

as mandatory or not, we may also consider the other provisions of the Consumer Protection Act where the legislature intended to allow extension of period of limitation.

Section 15 of the Consumer Protection Act provides for filing of an appeal from the order of the District Forum to the State Commission within a period of 30 days. However, it leaves a discretion with the State Commission to entertain an appeal filed after the expiry of the said period of 30 days, if it is satisfied that there was sufficient cause for not filing it within the stipulated period. Similarly, discretion for filing an appeal before the National Commission beyond the period of 30 days has also been provided under Section 19 of the Consumer Protection Act.

Section 24A provides for the limitation period of 2 years for filing the complaint. However, sub-Section (2) of Section 24A gives a discretion to entertain a complaint even after the period of 2 years, if there is a satisfactory cause for not filing the complaint within such period, which has to be recorded in writing.

16. Regulation 14 of the Consumer Protection Regulations, 2005 also deals with limitation. In addition, the same provides for limitation while dealing with appeals (under Section 15 and 19) and complaint (under Section 24A). Sub-Regulation (2) of Regulation 14 provides for condonation of delay for sufficient reasons to be recorded.

17. The legislature in its wisdom has provided for filing of complaint or appeals beyond the period specified under the relevant provisions of the Act and Regulations, if there is sufficient cause given by the party, which has to be to the satisfaction of the concerned authority. No such discretion has been provided for under Section 13(2)(a) of the Consumer Protection Act for filing a response to the complaint beyond the extended period of 45 days (30 days plus 15 days). Had the legislature not wanted to make such provision mandatory but only directory, the provision for further extension of the period for filing the response beyond 45 days would have been provided, as has been provided for in the cases of filing of complaint and appeals. To carve out an exception in a specific provision of the statute is not within the jurisdiction of the Courts, and if it is so done, it would amount to legislating or inserting a provision into the statute, which is not permissible.

By specifically enacting a provision under sub-Section (3) of Section 13, with a specific clarification that violation of the principles of natural justice shall not be called in question where the procedure prescribed under sub-Sections (1) and (2) of Section 13 of the Consumer Protection Act has been followed or complied with, the intention of the legislature is clear that mere denial of further extension of time for filing the response (by the opposite party) would not amount to denial or violation of the principles of natural justice. This provision of Section 13(3) reinforces the time limit specified in Section 13(2)(a) of the Act.

18. This Court in the case of ***Lachmi Narain vs Union of India*** *(1976) 2 SCC 953* has held that *"if the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language in a negative form is per se indicative of the interest that the provision is to be mandatory"*. Further, hardship cannot be a ground for changing the mandatory nature of the statute, as has been held by this Court in ***Bhikraj Jaipurai vs Union of India*** *AIR 1962 SC 113=(1962) 2 SCR 880* and ***Fairgrowth Investments Ltd. Vs Custodian*** *(2004) 11 SCC 472*. Hardship cannot thus be a ground to interpret the provision so as to enlarge the time, where the statute provides for a specific time, which, in our opinion, has to be complied in letter and spirit.

This Court, in the case of ***Rohitash Kumar vs Om Prakash Sharma*** *(2013) 11 SCC 451* has, in paragraph 23, held as under:

> *"23. There may be a statutory provision, which causes great hardship or inconvenience to either the party concerned, or to an individual, but the Court has no choice but to enforce it in full rigor It is a well settled principle of interpretation that hardship or inconvenience caused, cannot be used as a basis to alter the meaning of the language employed by the legislature, if such meaning is clear upon a bare perusal of the statute. If the language is plain and hence allows only one meaning, the same has to be given effect to, even if it causes hardship or possible injustice."*

While concluding, it was observed *"that the hardship caused to an individual, cannot be a ground for not giving effective and grammatical meaning to every word of the provision, if the language used therein, is unequivocal."*

Further, it has been held by this Court in the case of ***Popat Bahiru Govardhane vs Special Land Acquisition Officer*** *(2013) 10 SCC 765* that the law of limitation may harshly affect a particular party but it has to be applied with all its vigour when the statute so prescribes and that the Court

has no power to extend the period of limitation on equitable grounds, even if the statutory provision may cause hardship or inconvenience to a particular party.

19. The contention of the learned Counsel for the respondent is that by not leaving a discretion with the District Forum for extending the period of limitation for filing the response before it by the opposite party, grave injustice would be caused as there could be circumstances beyond the control of the opposite party because of which the opposite party may not be able to file the response within the period of 30 days or the extended period of 15 days. In our view, if the law so provides, the same has to be strictly complied, so as to achieve the object of the statute. It is well settled that law prevails over equity, as equity can only supplement the law, and not supplant it.

This Court, in the case of ***Laxminarayan R. Bhattad vs State of Maharashtra*** *(2003) 5 SCC 413,* has observed that *"when there is a conflict between law and equity the former shall prevail."* In ***P.M. Latha vs State of Kerala*** *(2003) 3 SCC 541*, this Court held that *"Equity and law are twin brothers and law should be applied and interpreted equitably, but equity cannot override written or settled law."* In ***Nasiruddin vs Sita Ram Agarwal*** *(2003) 2 SCC 577,* this Court observed that *"in a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom."* In ***E. Palanisamy vs Palanisamy*** *(2003) 1 SCC 123,* it was held that *"Equitable considerations have no place where the statute contained express provisions."* Further, in ***India House vs Kishan N. Lalwani*** *(2003) 9 SCC 393,* this Court held that *"The period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from by equitable considerations."*

It is thus settled law that where the provision of the Act is clear and unambiguous, it has no scope for any interpretation on equitable ground.

20. It is true that *'justice hurried is justice buried'*. But in the same breath it is also said that *'justice delayed is justice denied'*. The legislature has chosen the latter, and for a good reason. It goes with the objective sought to be achieved by the Consumer Protection Act, which is to provide speedy justice to the consumer. It is not that sufficient time to file a response to the complaint has been denied to the opposite party. It is just that discretion of extension of time beyond 15 days (after the 30 days period) has been

curtailed and consequences for the same have been provided under Section 13(2)(b)(ii) of the Consumer Protection Act. It may be that in some cases the opposite party could face hardship because of such provision, yet for achieving the object of the Act, which is speedy and simple redressal of consumer disputes, hardship which may be caused to a party has to be ignored.

21. It has been further contended that the language of Section 13(2) of the Consumer Protection Act is *pari materia* to Order VIII Rule 1 of the Code of Civil Procedure, 1908 (for short 'the Code') and if time can be extended for filing of written submission in a suit under the aforesaid provision of the Code, the same would apply to the filing of response to complaint under the Consumer Protection Act as well, and hence the provision of Section 13(2)(a) of the Consumer Protection Act would be directory and not mandatory.

In this regard, what is noteworthy is that Regulation 26 of the Consumer Protection Regulation, 2005, clearly mandates that endeavour is to be made to avoid the use of the provisions of the Code except for such provisions, which have been referred to in the Consumer Protection Act and the Regulations framed thereunder, which is provided for in respect of specific matters enumerated in Section 13(4) of the Consumer Protection Act. It is pertinent to note that non-filing of written statement under Order VIII Rule 1 of the Code is not followed by any consequence of such non-filing within the time so provided in the Code.

Now, while considering the relevant provisions of the Code, it is noteworthy that Order VIII Rule 1 read with Order VIII Rule 10 prescribes that the maximum period of 120 days provided under Order VIII Rule 1 is actually not meant to be mandatory, but only directory. Order VIII Rule 10 mandates that where written statement is not filed within the time provided under Order VIII Rule 1 *"the court shall pronounce the judgment against him, or make such order in relation to the suit as it thinks fit"*. A harmonious construction of these provisions is clearly indicative of the fact that the discretion is left with the Court to grant time beyond the maximum period of 120 days, which may be in exceptional cases. On the other hand, sub-section (2)(b)(ii) of Section 13 of the Consumer Protection Act clearly provides for the consequence of the complaint to be proceeded *ex-parte* against the opposite party, if the opposite party omits or fails to represent his case within the time given.

It may further be noted that in Order VIII Rule 10 of the Code, for suits filed under the Commercial Courts Act, 2015, a proviso has been inserted for *'commercial disputes of a specified value'* (vide Act 4 of 2016 w.r.e.f. 23.10.2015), which reads as under:

> *"Provided further that no Court shall make an Order to extend the time provided under Rule 1 of this Order for filing the written statement"*

From the above, it is clear that for commercial suits, time for filing written statement provided under Order VIII Rule 1 is meant to be mandatory, but not so for ordinary civil suits. Similarly, in our considered view, for cases under the Consumer Protection Act also, the time provided under Section 13(2)(a) of the Act has to be read as mandatory, and not directory.

Once consequences are provided for not filing the response to the complaint within the time specified, and it is further provided that proceedings complying with the procedure laid down under sub Section (1) and (2) of Section 13 of the Consumer Protection Act shall not be called in question in any Court on the ground that the principles of natural justice have not been complied with, the intention of the legislature is absolutely clear that the provision of sub-section 2(a) of Section 13 of the Act in specifying the time limit for filing the response to the complaint is mandatory, and not directory.

22. After noticing that there were delays in deciding the complaints by the District Forum, the legislature inserted sub-Section (3A) of Section 13 of the Consumer Protection Act providing for a time limit for deciding the complaints. From this it is amply clear that the intention of the legislature was, and has always been, for expeditious disposal of the complaints. By providing for extension of time for disposal of the cases filed, for reasons to be recorded, the legislature has provided for a discretion to the Forum that wherever necessary, the extension of the time can be provided for, and where such further extension is not to be granted *[as in the case of Section 13(2)(a)]*, the legislature has consciously not provided for the same, so as to achieve the object of the Act.

23. In ***SCG Contracts (India) Private Limited vs K.S. Chamankar Infrastructure Private Limited*** *(2019) 12 SCC 210,* this Court, was dealing with a case relating to the filing of written statement under the Code, in

respect of a case under the Commercial Courts Act, 2015. After noticing the amendments brought in Order V Rule 1, Order VIII Rule 1 and Order VIII Rule 10 of the Code with regard to *'commercial disputes of specified value'* under the Commercial Courts Act, 2015 by way of insertion of the Provisos in the aforesaid provisions, this Court held that *"….the clear, definite and mandatory provisions of Order V read with Order VIII Rule 1 and 10 cannot be circumvented by recourse to the inherent power under Section 151 to do the opposite of what is stated therein".* It was, thus, held that there was no scope for enlarging the time for filing of written statement beyond the period of 120 days in commercial suits, as the provision with regard to such suits would be mandatory, and not directory. The said judgment has been affirmed by a Bench of three Judges in ***Desh Raj vs Balkishan*** *decided on 20.01.2020 in Civil Appeal No.433 of 2020.*

24. In ***Fairgrowth Investments Ltd. Vs Custodian*** *(2004) 11 SCC 472*, this Court was dealing with the provisions of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992, and the question was whether the Special Court has power to condone the delay in filing the petition under Section 4(2) of the said Act. While holding, that the said provision would be mandatory, it was held in paragraph 13 as under:

> *"13. It is not for the courts to determine whether the period of 30 days is too short to take into account the various misfortunes that may be faced by otified persons who wish to file objections under Section 4(2) of the Act nor can the section be held to be directory because of such alleged inadequacy of time."*

Then, after considering the decisions of this Court in ***Topline Shoes Ltd. vs. Corporation Bank*** *(2002) 6 SCC 33* and ***Dr. J. J. Merchant vs. Shrinath Chaturvedi*** *(2002) 6 SCC 635*, this Court held that *"the period for filing an objection in Section 4(2) in the Act is a mandatory provision given the language of the Section and having regard to the objects sought to be served by the Act."*

25. Certain other cases, which have been referred to by the learned Counsel for the parties, have, in our considered opinion, no direct bearing on the facts and issue involved in the present case relating to the Consumer Protection Act, and thus, the same are not being dealt with and considered here.

26. We may now deal with the decisions rendered by this Court, which have been referred to in the Reference Order.

27. Division Bench of this Court has referred this Question, after observing that there is an apparent conflict between the decisions of this Court in ***Topline Shoes*** *(supra)****; Kailash Vs. Nanhku*** *(2005) 4 SCC 480* and ***Salem Advocate Bar Association vs. Union of India*** *(2005) 6 SCC 344* on the one hand; *and* ***Dr. J. J. Merchant*** *(supra) and* ***NIA vs. Hilli Multipurpose Cold Storage*** *(2015) 16 SCC 22,* on the other hand.

28. In ***Topline Shoes*** *(supra),* a Division Bench of this Court, while dealing with the provisions of Section 13(2)(a) of the Consumer Protection Act, has held that the said provision would be directory and not mandatory. While holding so, the Bench relied on the principles of natural justice, and also that no consequence of non-filing of the response to the complaint within 45 days is provided for in the Consumer Protection Act.

In paragraph 8 of the said judgment, this Court held:

> *"It is for the Forum or the Commission to consider all facts and circumstances along with the provisions of the Act providing timeframe to file reply, as a guideline and then to exercise its discretion as best as it may serve the ends of justice and achieve the object of speedy disposal of such cases keeping in mind the principles of natural justice as well". (emphasis supplied)*

It is true that in Clause 4 of the Statement of Objects and Reasons of the Consumer Protection Act, the legislature provided that *"quasi–judicial bodies will observe the principles of natural justice",* however, the same is to be observed generally, and not where the same is specifically excluded. In the said judgment, subsection (3) of Section 13 has neither been referred, nor taken note of. The same mandates that no proceedings complying with the procedure laid down in sub-Sections (1) and (2) of Section 13 shall be called in question in any Court on the ground that the principles of natural justice have not been complied with. From this it is evident that while considering the provisions of Section 13(2)(a) of the Consumer Protection Act, the law mandates that the principles of natural justice cannot be said to be violated by adopting the said procedure and that the time of 30 days plus 15 days provided for filing the response to the complaint would be sufficient and final.

In case of ***Topline Shoes*** *(supra),* this Court was also of the view that in the Consumer Protection Act, *"no consequence is provided in case the time granted to file reply exceeds the total period of 45 days".* While observing so, the Bench did not take into account the provisions of Section

13(2)(b)(ii) of the Consumer Protection Act, which provides that where the opposite party fails to file response to the complaint within the specified time provided in Clause (a), "*the District Forum shall proceed to settle the consumer dispute…… on the basis of evidence brought to its notice by the complainant……..".* After the said judgment, by Amendment Act 62 of 2002 (w.e.f. 15.03.2003), the legislature has provided that the District Forum shall proceed to settle the consumer dispute *"exparte on the basis of the evidence"*. The word "*ex parte*" has been added by the Amending Act. As we have observed herein above, the consequence of not filing the response to the complaint within the stipulated time is thus clearly provided for in the aforesaid subSection, which has not been noticed by the Bench while deciding the aforesaid case.

29. In the case of ***Kailash vs. Nanhku*** *(supra)*, this Court was dealing with an election trial under the Representation of People Act, 1951, and while considering the provision under Order VIII Rule 1 of the Code, it held the same to be directory, and not mandatory. While holding so, the Court was of the view that *"the consequences flowing from nonextension of time are not specifically provided"* in the Code. The decision in the said case has no bearing on the question under consideration, as the present reference before us is under the Consumer Protection Act, where, as we have already observed, consequences are specifically provided for.

In passing, in paragraph 35 of the said judgment, the Bench referred to the case of ***Topline Shoes*** (supra), where the provision of Section 13 of the Consumer Protection Act was considered to be directory, and not mandatory. In our view, the same would not have the effect of affirming the decision of ***Topline Shoes*** *(supra)* since the Court, in the aforesaid case, was dealing with the provisions of the Code and not the specific provisions of Consumer Protection Act.

We are thus of the opinion that ***Kailash vs Nanhku*** *(supra)* has not overruled the decision in ***Dr. J. J. Merchant*** *(supra)* with regard to the provision of the Consumer Protection Act.

30. Again, in the case of ***Salem Advocates Bar Association*** *(supra),* this Court was dealing with a case under Order VIII Rule 1 of the Code and in paragraph 20, it has been held as under:

> ***"20****…….The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having*

regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules of procedure are the handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice."

Thereafter, the Court proceeded to refer to the provisions of Order VIII Rule 1, along with Order VIII Rule 10 of the Code. On a harmonious construction of the said provision, it held that the provisions of Order VIII Rule 1 of the Code would be directory, and not mandatory. Relevant paragraph 21 of the said judgment is below:

"21. *In construing this provision, support can also be had from Order 8 Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the court, the court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to the suit as it thinks fit. In the context of the provision, despite use of the word "shall", the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if the written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 Order 8, the court in its discretion would have the power to allow the defendant to file written statement even after expiry of the period of 90 days provided in Order 8 Rule 1. There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to "make such order in relation to the suit as it thinks fit". Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory".*

As such in our view, the said judgment would hold the field with regard to Order VIII Rule 1 of the Code and would not be applicable to cases dealing with the provisions of Section 13(2) of the Consumer Protection Act, or such other enactment wherein a provision akin to Section 13(2) is there and the consequences are also provided.

31.` The case of ***Dr. J. J. Merchant*** *(supra)* is one relating to the provisions of the Consumer Protection Act, and has been decided by a Bench of three Judges of this Court (which is after the decision in the case of ***Topline Shoes*** *(supra)* was rendered). In this case it has been held that the

time limit prescribed for filing the response to the complaint under the Consumer Protection Act, as provided under Section 13(2)(a), is to be strictly adhered to, i.e. the same is mandatory, and not directory. In paragraph 13 of the said judgment, it has been held that:

> *"For having speedy trial, this legislative mandate of not giving more than 45 days in submitting the written statement or the version of the case is required to be adhered to. If this is not adhered to, the legislative mandate of disposing of the cases within three or five months would be defeated.*

In the said case of ***Dr. J. J. Merchant*** *(supra)*, while holding that the time limit prescribed would be mandatory and thus be required to be strictly adhered to, this Court also considered the Statement of Objects and Reasons of the Consumer Protection (Amendment) Bill, 2002 (which was subsequently enacted as Act 62 of 2002 and has come in force w.e.f. 15.03.2003). The salient features of the same was *"to provide simple, inexpensive and speedy justice to the consumers……"* and that *"the disposal of cases is to be faster"* and after noticing that *"several bottlenecks and shortcomings have also come to light in the implementation of various provisions of the Act"* and with a view to achieve quicker disposal of consumer complaints, certain amendments were made in the Act, which included *"(iii) prescribing the period within which complaints are to be admitted, notices are to be issued to opposite party and complaints are to be decided"*. With this object in mind, in sub-Section (2)(b)(ii) of Section 13, the opening sentence *"on the basis of evidence"* has been substituted by *"ex parte on the basis of evidence"*. By this amendment, consequences of not filing the response to the complaint within the specified limit of 45 days was to be that the District Forum shall procced to settle the consumer dispute *ex parte* on the basis of evidence brought to its notice by the complainant, where the opposite party omits or fails to take action to represent his case within time. For achieving the objective of quick disposal of complaints, the Court noticed that sub-Section (3A) of Section 13 was inserted, providing that the complaint should be heard as expeditiously as possible and that endeavour should be made to normally decide the complaint within 3 months, and within 5 months where analysis or testing of commodities was required. The Provisos to the said sub-section required that no adjournment should be ordinarily granted and if granted, it should be for sufficient cause to be recorded in writing and on imposition of cost, and if the complaint could not be decided within the specified period, reasons for the same were to be recorded at the time of disposing of the complaint.

It was after observing so, and considering aforesaid amendments, this Court held that the time limit of 30 plus 15 days in filing the response to the complaint, be mandatory and strictly adhered to.

32. The decision of another Bench of three Judges in ***NIA vs Hilli Multipurpose Coldstorage*** *(supra),* which has been considered in the referring order was passed by a bench of two Judges in the same case, after noticing a conflict of views in the cases of ***Dr. J. J. Merchant*** *(supra)* and ***Kailash vs Nanhku*** *(supra).*

After considering the provisions of the Code and Consumer Protection Act, the reference was answered *"that the law laid down by a three Judge Bench of this Court in* ***Dr. J. J. Merchant*** *(supra) should prevail"*. In coming to this conclusion, the following was observed in paragraphs 25 and 26 of the said judgment:

> *"25. We are, therefore, of the view that the judgment delivered in J.J. Merchant holds the field and therefore, we reiterate the view that the District Forum can grant a further period of 15 days to the opposite party for filing his version or reply and not beyond that.*
>
> *26. There is one more reason to follow the law laid down in J.J. Merchant. J.J. Merchant was decided in 2002, whereas Kailash was decided in 2005. As per law laid down by this Court, while dealing Kailash, this Court ought to have respected the view expressed in J.J. Merchant as the judgment delivered in J.J. Merchant was earlier in point of time. The aforesaid legal position cannot be ignored by us and therefore, we are of the opinion that the view expressed in J.J. Merchant should be followed."*

33. Although, after the above decision, no further reference was required to be made, but still we have proceeded to answer the question referred to this Constitution Bench and are of the considered opinion that the view expressed by this Court in the case of ***Dr. J. J. Merchant*** *(supra)* is the correct view.

Question No. 2: **What would be the commencing point of limitation of 30 days under Section 13 of the Consumer Protection Act, 1986?**

34. The question for determination is whether the limitation under Section 13 of the Consumer Protection Act for filing the response by the opposite party to the complaint would commence from the date of receipt of the notice of the complaint by the opposite party, or the receipt of notice accompanied by a copy of the complaint.

35. In paragraph 12 of the judgment dated 04.12.2015, of three Judge Bench of this Court, in this very case of ***NIA vs. Hilli Multipurpose Cold Storage*** *(supra),* while referring to the commencing point of limitation of 30 days under Section 13(2) of the Consumer Protection Act, it has been held that *"The whole issue centres round the period within which the opponent has to give his version to the District Forum in pursuance of a complaint, which is admitted under Section 12 of the Act. Upon receipt of a complaint by the District Forum, if the complaint is admitted under Section 12 of the Act, a copy of the complaint is to be served upon the opposite party and as per the provisions of Section 13 of the Act, the opposite party has to give his version of the case within a period of 30 days from the date of receipt of the copy of the complaint."*

36. However, another two judge Bench of this Court, by an Order dated 18.01.2017 passed in this very Appeal being *Civil Appeal No(s).1094110942 of 2013,* ***NIA Vs. Hilli Multipurpose Cold Storage***, has expressed the view that the declaration made in ***Dr. J. J. Merchant's case*** to the effect that the said period is to be reckoned from the date of receipt of notice by the opposite party or complaint under the Act, requires a more critical analysis. The bench thus opined that *"what is the commencing point of the limitation of 30 days stipulated in Section 13 of the Act is required to be decided authoritatively"*. It is thus that this question has been placed before us for an authoritative decision.

37. For deciding this question, we may first analyse the relevant provisions of the Consumer Protection Act and the Regulations framed thereunder. Sub-Sections (2)(a) and (2)(b) of Section13 of the Consumer Protection Act specify that it is the copy of the complaint which is to given to the opposite party directing him to give his version of the case within a period of 30 days or such extended period, not exceeding 15 days. As such, from the aforesaid provision itself, it is clear that it is the copy of the admitted complaint which is to be served, after which the period to file the response would commence.

Further, Regulation 10 of the Consumer Protection Regulations, 2005 also specifies the procedure of issuing notice, which should be accompanied by copy of the complaint. Regulation 10(5) clearly mentions that "*along with the notice, copies of the complaint, memorandum of grounds of appeal, petitions as the case may be and other documents filed shall be served upon the opposite party(ies)/respondent(s)"*. The same would also make it clear

that it is on service of a copy of the complaint that the period of limitation for filing the response by the opposite party shall commence.

38. Even in the Code of Civil Procedure, Order VIII Rule 1 prescribes that the written statement shall be filed by the defendant within 30 days from the receipt of the "summons".

"Summons" has been defined in Order V Rule 1 of the Code and Rule 2 provides that *"Every summon shall be accompanied by a copy of the plaint."* While considering the aforesaid provisions, a two judge Bench of this Court in the case of ***Nahar Enterprises vs Hyderabad Allwyn Ltd.*** (2007) 9 SCC 466 has, in paragraph 8, 9 and 10, held as under:

> ***(8)*** *The learned counsel appears to be correct. When a summons is sent calling upon a defendant to appear in the court and file his written statement, it is obligatory on the part of the court to send a copy of the plaint and other documents appended thereto, in terms of Order 5 Rule 2 CPC.*
>
> ***(9)*** *Order 5 Rule 2 CPC reads as under: "2. Copy of plaint annexed to summons. – Every summon shall be accompanied by a copy of the plaint."*
>
> ***(10)*** *The learned Judge did not address itself the question as to how a defendant, in absence of a copy of the plaint and other documents, would be able to file his written statement……..……..."*

39. Even in Arbitration and Conciliation Act, 1996, sub-Section (5) of Section 31 provides that *"after the arbitral award is made, a signed copy shall be delivered to each party"*. An application for setting aside the arbitral award is to be made under Section 34 of the said Act. The delivery of the award sets in motion the limitation for challenging the award under Section 34 of the said Act. While interpreting the nature and scope of Section 31(5) of the said Act, a three Judge Bench of this Court in ***Union of India vs Tecco Trichy Engineers & Contractors,*** *(2005) 4 SCC 239,* has, in paragraph 6, held as under:

> ***(6)*** *Form and contents of the arbitral award are provided by Section 31 of the Act. The arbitral award drawn up in the manner prescribed by Section 31 of the Act has to be signed and dated. According to subsection (5), "after the arbitral award is made, a signed copy shall be delivered to each party". The term "party" is defined by clause (h) of Section 2 of the Act as meaning "a party to an arbitration agreement". The definition is to be read as given unless the context otherwise requires. Under subsection (3) of Section 34 the limitation of 3 months commences from the date on which "the party making that application" had received the arbitral award. ……"*

From the above, what we notice is that wherever limitation is provided, either for filing response/written statement or filing an appeal, it is the copy of the plaint or the order/award which is to be served on the party concerned after which alone would commence the period of limitation.

40. Now reverting to the provisions of the Consumer Protection Act, a conjoint reading of Clauses (a) and (b) of sub-Section (2) of Section 13 would make the position absolutely clear that the commencing point of limitation of 30 days, under the aforesaid provisions, would be from the date of receipt of notice accompanied by a copy of the complaint, and not merely receipt of the notice, as the response has to be given, within the stipulated time, to the averments made in the complaint and unless a copy of the complaint is served on the opposite party, he would not be in a position to furnish its reply. Thus, mere service of notice, without service of the copy of the complaint, would not suffice and cannot be the commencing point of 30 days under the aforesaid Section of the Act. We may, however, clarify that the objection of not having received a copy of the complaint along with the notice should be raised on the first date itself and not thereafter, otherwise if permitted to be raised at any point later would defeat the very purpose of the Act, which is to provide simple and speedy redressal of consumer disputes.

41. To conclude, we hold that our **answer to the first question** is that the District Forum has no power to extend the time for filing the response to the complaint beyond the period of 15 days in addition to 30 days as is envisaged under Section 13 of the Consumer Protection Act; and the **answer to the second question** is that the commencing point of limitation of 30 days under Section 13 of the Consumer Protection Act would be from the date of receipt of the notice accompanied with the complaint by the opposite party, and not mere receipt of the notice of the complaint. This Judgment to operate prospectively. The referred questions are answered accordingly.

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2020 (I) ILR - CUT- 655

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

W.P.(C) NO. 4423 OF 2005

OCL INDIA LIMITED & ANR. .....Petitioners

.Vs.

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

FINANCE ACT, 1994 read with Service Tax Rules 1994 – Writ petition – Challenge is made to the constitutional validity of the provision of sub-Clause (iv) of Rule 2 (1) (d) of Service Tax Rules, 1994 – Petitioner is a Company – Plea that Article 265 of the Constitution of India lays down that no tax shall be levied or collected except by authority of law – Plea considered – Held, as under.

"Taking into consideration the submissions made by learned counsel for the parties and in view of the law laid down in Laghu Udyog Bharati as well as Indian National Shipowners Association (supra), we are of the considered view that all taxable services are defined in Section 65 of the Finance Act which include only three types of services namely, any service provided to an investor by a stock-broker, to a subscriber by telegraph authority and to a policy holder by a insurer carrying on general insurance business. Section 68 of the Act requires every person providing the taxable service to collect service tax at the specified rate. Section 69 of the Act provides that registration of a person responsible for collecting service tax. Sub-section 2 of Section 5 of the Act indicates that it was the provider of the service, who is responsible for collecting the tax and obliged to get itself registered. Thus, on a conspectus of Section 65, 66, 68 and 69 of the Act make it abundantly clear that no tax for rendering service can be collected from the recipient of service. Therefore, the rule empowering the authorities to collect service tax from the recipient of services cannot be held to be valid and in conformity with law. Accordingly, the same is liable to be set aside.Thus, we hold that Rule 2 (1)(d)(iv) of Service Tax Rules, 1994 is ultra vires the provisions of the Act and the Constitution and is accordingly declared bad in law. Consequently, the show-cause notice under Annexure-3 cannot stand scrutiny of law. Accordingly, the same is set aside."

(Paras 9 and 10)

Case Laws Relied on and Referred to :-

1. (1999) 6 SCC 418 : Laghu Udyog Bharati & Anr. Vs. Union of India & Ors.
2. [2009] 21 VST 60 (Bom) : Indian National Shipowners Association & Anr Vs. Union of India & Ors.

For Petitioners : Mr. A. K. Parija, Sr. Adv.
A.K. Kanungo, D.K. Das,P.K. Dash, B.C. Mohanty, P.P. Mohanty & S. P. Sarangi

For Opp. Parties : Mr. G. Mukherji, Mr. J.K. Mishra, Sr. Standing Counsel, & Mr. A.P. Das, Jr. Standing Counsel

JUDGMENT Date of Judgment : Heard and Decided on 30.01.2019

K.S. JHAVERI, C.J.

This writ application has been filed assailing the constitutional validity of the provision of sub-Clause (iv) of Rule 2 (1)(d) of Service Tax Rules, 1994, which has been inserted with effect from 16.8.2002 by virtue of Notification No. 12/2002-Service Tax, dated 01.8.2002. The petitioners

further pray for a direction to set aside the notice to show cause No.C.No.IV(9)/2/S.Tax/RKL-II/04/151 dated 10.01.2005, issued by the Assistant Commissioner, Central Excise & Customs, Rourkela-II Division, Rourkela-opposite party no.3, pursuant to such notification.

2. The facts, in a nutshell, necessary for adjudication of this case are that petitioner no.1 is a Company incorporated under the Companies Act and carries on its business in producing cement. With effect from February 1994, the Service Tax was brought into the statute book for the first time through Finance Bill, 1994-95. Subsequently, vide notification dated 02.7.1997 of the Central Government (Annexure-1) 'Consulting Engineering' services was brought under the purview of service tax. Again by virtue of Section 68 of the Finance Act 1994, confers power on the Central Government to notify the taxable services. Accordingly, the Central Government in exercise of the power under sub-sections (1) and (2) of Section 94 of the Finance Act, 1994 made the Rules by amending the Service Tax Rules 1994. By virtue of impugned notification dated 01.08.2002, sub-Clause (iv) to Rule 2 (1)(d) of Service Tax Rules, 1994 brought into the statute book. For ready reference, the same is reproduced hereunder:

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

…

New Delhi, dated the 1st August, 2002
10 Sravana 1924 (Saka)

NOTIFICATION
No.12/2002-SERVICE TAX

G.S.R. (E)- In exercise of the powers conferred by sub-section (1) read with sub-section (2) of section 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules further to amend the Service Tax Rules, 1994, except as respects things done or omitted to be done before such amendment, namely:-

1. (1)These rules may be called the Service Tax Amendment Rules, 2002.
(2) They shall come into force on the 16th day of August 2002.

2. In the Service Tax Rules, 1994, (hereinafter referred to as the said rules) in rule 2, in sub-rule (1), in clause (d).

(a) in sub-clause (iii), after the words "general insurance business", the words "or the life insurance business, as the case may be," shall be inserted;

(b) after sub-clause (iii), the following clause shall be inserted, namely;-

"(iv) in relation to any taxable service provided by a person who is a non-resident or is from outside India, does not have any office in India, the person receiving taxable service in India."

3. In rule 4 of the said rules, in sub-rule (1), the third proviso shall be omitted:

4. In rule 6 of the said rules:-

(i) in sub-rule (1), the second proviso shall be omitted:
(ii) after sub-rule (2), the following sub-rule shall be inserted, namely:-

"(2A) For the purpose this rule, if the assessee deposits the service tax by cheque, the date of presentation of cheque to the bank designated by the Central Board of Excise and Customs for this purpose shall be deemed to be the date on which service tax has been paid subject to realization of that cheque."

3. Show-cause notice impugned herein came to be issued against the petitioners (Annexure-3) in exercise of the aforesaid amended provision, because the petitioner-Company placed an order with M/s. Loesche GmbH of Germany for supply of one standard Cement Vertical Roller Mills (hereinafter referred to as CVRM-III) during the year 2002-03 to 2004-05 and it was supplied to the petitioner-Company for which the petitioner-Company paid a sum of Rs.5,63,60,645/-. The said standard engineering plans, drawings and technical documents supplied by M/s. Loesche GmbH were exported by them and imported into India by the petitioner-Company through foreign post/courier services and cleared by following due formalities. Accordingly, four invoices were raised on 22.10.2003 by the overseas supplier namely, M/s. Loesche GmbH of Germany on the petitioner-Company. On 28.8.2004 audit objection was raised by the audit party of the Commissioner, Central Excise & Customs, Bhubaneswar-opposite party no.2, alleging that the petitioner-Company is liable for service tax in respect of the value of the said engineering plans, drawings and designs imported by it from M/s. Loesche GmbH of Germany for rendering services under the heading of 'Consulting engineering Service'. As such, the petitioner-Company is liable to pay the service tax under the impugned notification dated 01.08.2002. Accordingly, show-cause notice under Annexure-3 was issued.

4. Assailing the same, this writ application has been filed.

5. In course of the argument, learned counsel for the petitioner-Company verily relied upon the judgment of the Hon'ble Supreme Court in the case of ***Laghu Udyog Bharati and another v. Union of India and others,*** (1999) 6 Supreme Court Cases 418. The relevant paragraphs of the said judgment which are placed reliance by learned counsel for the petitioner-Company is reproduced hereunder:

*"**7.** A perusal of these provisions relating to the machinery of the levy and collection of service tax clearly shows that any action which is required to be taken is qua the assessee, namely, the person responsible for collecting the service tax which includes his agents.*

***8.** Section 66, which is a charging section provides that the charge of tax at the rate of 5% is on the value of the taxable services which are provided to any person by the persons responsible for collecting the service tax. Insofar as the clearing agents and the transporters are concerned, Section 66 has to be read with Section 65(41) (d), (j) and (m), according to which the taxable service is what, in the case of clearing and forwarding agents is rendered to his client and in the case of goods transporter is rendered to its customer. The "person responsible for collecting the service tax", referred to in Section 66, has to be read with Section 65(28) which defines this expression to mean the person who is required to collect the service tax or to pay the same. It is clear from the reading of these provisions that according to the Finance Act the charge of tax is on the person who is responsible for collecting the service tax. It is he, who by virtue of the provisions of Section 65(5) is regarded as assessee. He is the person who provides the service.*

***9.** Section 68(1-A) is a special provision which has been inserted by the Finance Act, 1997. According to Section 68(1) "every person who was providing the taxable service is the one who is required to collect the service tax at the rate specified in Section 66." With respect to the taxable services referred in Items (g to r) of clause (41) of Section 65, Section 68(1-A) provides that the service tax for such service shall be collected from such person and in such manner as may be prescribed and to such person all the provisions shall apply as if he is the Person responsible for collecting the service tax in relation to such service. As we read Section 68 it does not in any way seek to alter or change the charge of service tax levied under Section 66, which is on the person responsible for collecting the service tax. It also does not to our mind, in any way, amend any of the clauses of Section 65 which contains the definitions of different expressions. All that Section 68(1-A) enables to be done is that with regard to the assessees or the persons who are responsible for collecting the service tax, the individual or the officer concerned can be identified and it is that person who would be a person responsible for collecting the service tax. In other words this provision, namely, Section 68(1-A) cannot be so interpreted as to make a person an assessee even though he may not be responsible for collecting the service tax. The service tax is levied by reason of the services which are offered. The imposition is on the person rendering the service. Of course, it may be an indirect tax; it may be possible that the same is passed on to the customer but as far as the levy and assessment are concerned it is the person rendering the service who alone can be regarded as an assessee and not the customer. This is the only way in which the provisions can be read harmoniously.*

***10.** By amending the definition of "person responsible for collecting of service tax" in the impugned rules with regard to services provided by the clearing and forwarding agents and the goods transport operator a person responsible is said to be the client or the customer of the clearing and forwarding agents and the goods transporter. In relation to the services provided by others and referred to in sub-*

rule (i) to (xi) and (xiii) to (xvi) of Rule 2(d), the definition of the person responsible is in consonance with the definition of that expression occurring in Section 65 of the Act. However, with regard to the service rendered by clearing and forwarding agents and the goods transport operator the definitions contained in Rule 2(d)(xii) and (xvii), which seek to make the customers or the clients as the assessee, are clearly in conflict with Sections 65 and 66 of the Act.

11. *Section 68(1-A) cannot, to our mind, regard a customer or a client of the clearing and forwarding agent or of the goods transport operator being treated as an assessee who will become liable to file a return and be subjected to the levy of service tax and if he does not file the return, would render himself to penalty and other proceedings. In this connection we may refer to Sections 70 and 71 which read as under :*

"70. Person responsible for collecting service tax to famish prescribed return-(1) Every person responsible for collecting the service tax shall furnish or cause to be furnished to the Central Excise Officer in the prescribed form and verified in the prescribed manner, a quarterly return, within fifteen days of the end of the preceding quarter, showing –

(a) the aggregate of payments received in respect of the value of taxable services;

(b) the amount of service tax collected;

(c) the amount of service tax paid to the credit of the Central Government; and

(d) such other particulars as may be prescribed;

(2) In the case of any person who, in the opinion of the Central Excise Officer, is responsible for collecting service tax under this Chapter but who has not furnished a return under sub-section (1), the Central Excise Officer may, before the expiry of the quarter in which the return is to be furnished, issue a notice to such person and serve it upon him, requiring him to furnish within thirty days from the date of service of the notice the return in the prescribed form and verified in the prescribed manner setting forth the prescribed particulars.

(3) Any person responsible for collecting the service tax who has not furnished the return within the time allowed under sub-section (1) or sub- section (2) or having furnished a return under sub-section (1) or sub- section (2), discovers any omission or wrong statement therein, may furnish a return or a revised return, as the case may be, at any time before the assessment is made.

71. Assessment.-(1) For the purposes of making an assessment under this Chapter, the Central Excise Officer may serve on any person, who has furnished a return under section 70 or upon whom a notice has been served under sub-section (2) of Section 70 (whether a return has been furnished or not), a notice requiring him on a date therein to be specified , to produce or cause to be produced such accounts or documents or other evidence as the Central Excise Officer may require for the purposes of this Chapter and may, from time to time, serve further notices requiring the production of such further accounts or documents or other evidence as he may require.

> *(2) The Central Excise Officer, after considering such accounts documents or other evidence, if any, as he has obtained under sub-section (1) and after taking into account any relevant material which he has gathered, shall, by an order in writing, assess the value of taxable service and the amount of service tax payable on the basis of such assessment."*
>
> ***12.*** *These sections clearly show that the return which has to be filed pertains to the payment which are received by the person rendering the service in respect of the value of the taxable services. Surely, this is a type of information which cannot, under any circumstances, be supplied by the customer. Moreover the operative part of sub-section (1) of Section 70 clearly stipulates that it is a person responsible for collecting the service tax who is to furnish the return. By rules which are framed, the person who is receiving the services cannot be made responsible for filing the return and paying the tax. Such a position is certainly not contemplated by the Act."*

6. He further relied upon the decision of the Bombay High Court in ***Indian National Shipowners Association and another v. Union of India and others,*** [2009] 21 VST 60 (Bom) and submitted that the tax which was sought to be levied cannot be collected from the recipient of those services, who is based in India. The service tax makes the person, who is providing the service, liable to pay. As such the Rules, more particularly Rule 2 (1)(d)(iv) of Service Tax Rules, 1994 (for short "the 1994 Rules") cannot be held to be in conformity with the provisions of the Act and the Constitution of India. For ready reference relevant portion of the decision in the case of *Indian National Shipowners Association* (supra) is reproduced hereunder:

> ***21****. Reliance is placed on the provisions of rule 2(1)(d)(iv) quoted above for justifying the levy of service tax for the period from August 16, 2002. Perusal of the above quoted rule 2(1)(d)(iv) shows that by that provision a person liable for paying service tax was defined to mean in relation to any taxable service provided by a person who is a non-resident or is from outside India to a person in India receiving taxable service. Apart from the fact that this rule is contrary to the provisions of Section 68 and other provisions of the Act, under this provision the recipient of the service became liable for paying service tax provided the service was received in India. The entire case of the petitioners is in relation to the service received by the vessels and ships owned by the members of the petitioner-association outside India. Therefore, it cannot be said that on the basis of rule 2(1)(d)(iv), service tax can be levied on the members of the petitioners-association. It is further to be seen here that Section 64 gives powers to the Central Government to make rules for carrying out the provisions of the Chapter. The Chapter relates to taxing the services which are provided, the taxing on the value of the service and it is only the person who is providing the service can be regarded as an assessee. The rules therefore, cannot be so framed as not to carry out the purpose of the Chapter and cannot be in conflict with the provisions of Chapter V of the Act. In other words, as the Act makes the person who is providing the service liable, the*

provisions in the Rules cannot be made so as to make the recipient of the service liable. It is, thus, clear that the provisions of rule 2(1)(d)(iv) are clearly invalid.

22. *So far as reliance placed on the notification dated December 31, 2004 for justifying levy of service tax from the members of the petitioners-association is concerned, that notification has been issued under sub-section (2) of Section 68 of the Act. Sub-section (2) of Section 68 reads as under:*

68(2) Notwithstanding anything contained in sub-section (1), in respect of any taxable service notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in Section 66 and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

23. *The above provision authorises the Central Government to notify the taxable service, in relation to which the rules can be framed, in relation to such service. By the notification dated December 31, 2004, any taxable service provided by a person who is a non-resident or is from outside India is notified. If rule 2(1)(d)(iv) is taken to be rule framed pursuant to this provision, then a person who receives taxable service in India from a person who is non-resident or is from outside India becomes taxable and not service rendered outside India by a person who is non-resident or is from outside India. Therefore, levy of service tax from the members of the petitioners-association from February 1, 2005 cannot be justified.*

24. *Then reliance is placed on Explanation which is added below Section 65(105). That Explanation was added by the Finance Act, 2005 with effect from June 16, 2005. That Explanation reads as under:*

Explanation - For the removal of doubts, it is hereby declared that where any service provided or to be provided by a person, who has established a business or has a fixed establishment from which the service is provided or to be provided, or has his permanent address or usual place of residence, in a country other than India and such service is received or to be received by a person who has his place of business, fixed establishment, permanent address or, as the case may be, usual place of residence, in India, such service shall be deemed to be taxable service for the purposes of this clause.

25. *By this Explanation services provided by a non-resident outside India to a person residing in India has been declared to be taxable service. Therefore, though the services provided to the members of the petitioners-association outside India becomes taxable service, the charge of the tax continues to be on the provider of service as per the scheme of the Act, and because of the Explanation also the respondents do not get authority of law to levy service tax in relation to the services rendered to the vessels and ships of the members of the petitioners-association outside India.*

> ***26.*** *It appears that a similar provision in the rules was made applicable by the Government in relation to the clearing agents by making customers of the clearing agent liable for levy of the service tax. That question has been decided by the Supreme Court by its judgment in the case of Laghu Udyog Bharati (supra) and the Supreme Court has clearly laid down that the imposition of the service tax is on the persons rendering the services and by making a provision in the Rules, levy of tax cannot be shifted to the recipients of the services and the rule framed, which brought about this situation, has been declared by the Supreme Court to be invalid. The law laid down by the Supreme Court in its judgment in Laghu Udyog (supra) is squarely applicable to rule 2(1)(d)(iv), which is relied on in this case. It appears that it is first time when the Act was amended and Section 66A was inserted by the Finance Act, 2006 with effect from April 18, 2006, the respondents got legal authority to levy service tax on the recipients of the taxable service. Now, because of the enactment of section 66A, a person who is resident in India or a business in India becomes liable to be levied service tax when he/it receives service outside India from a person who is non-resident or is from outside India. Before enactment of section 66A it is apparent that there was no authority vested by law in the respondents to levy service tax on a person who is resident in India, but who receives services outside India. In that case till section 66A was enacted a person liable was the one who rendered the services. In other words, it is only after enactment of section 66A that taxable services received from abroad by a person belonging to India are taxed in the hands of the Indian residents. In such cases, the Indian recipient of the taxable services is deemed to be a service provider. Before enactment of section 66A, there was no such provision in the Act and therefore, the respondents had no authority to levy service tax on the members of the petitioners-association.*
>
> ***27.*** *In the result, therefore, the petition succeeds and is allowed. Respondents are restrained from levying service tax from the members of the petitioners-association for the period from March 1, 2002 till April 17, 2006, in relation to the services received by the vessels and ships of the members of the petitioners-association outside India, from persons who are non-residents of India and are from outside India.*
>
> ***28.*** *Rule made absolute accordingly. No order as to costs.*

7. Article 265 of the Constitution of India lays down that no tax shall be levied or collected except by authority of law. As such, the impugned notification and amendment is *ultra vires* the Constitution and is liable to be set aside.

8. Learned counsel appearing for the Central Government contended that Section 68 of the Finance Act empowers the Government to make rules for effective implementation of the provisions of the Act. As such, Rule 2 (1)(d)(iv) of the 1994 Rules was incorporated in the statute book. As the service provider carries on its business outside in India, no service tax can be

collected from it. Accordingly, the provisions have been made to collect the same from the recipient of service which cannot be held to be *ultra vires.*

9. Taking into consideration the submissions made by learned counsel for the parties and in view of the law laid down in *Laghu Udyog Bharati as well as Indian National Shipowners Association* (supra), we are of the considered view that all taxable services are defined in Section 65 of the Finance Act which include only three types of services namely, any service provided to an investor by a stock-broker, to a subscriber by telegraph authority and to a policy holder by a insurer carrying on general insurance business. Section 68 of the Act requires every person providing the taxable service to collect service tax at the specified rate. Section 69 of the Act provides that registration of a person responsible for collecting service tax. Sub-section 2 of Section 5 of the Act indicates that it was the provider of the service, who is responsible for collecting the tax and obliged to get itself registered. Thus, on a conspectus of Section 65, 66, 68 and 69 of the Act make it abundantly clear that no tax for rendering service can be collected from the recipient of service.

10. Therefore, the rule empowering the authorities to collect service tax from the recipient of services cannot be held to be valid and in conformity with law. Accordingly, the same is liable to be set aside.

11. Thus, we hold that Rule 2 (1)(d)(iv) of Service Tax Rules, 1994 is *ultra vires* the provisions of the Act and the Constitution and is accordingly declared bad in law. Consequently, the show-cause notice under Annexure-3 cannot stand scrutiny of law. Accordingly, the same is set aside. The writ application is allowed to the extent stated above. No order as to cost.

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2020 (I) ILR - CUT- 664

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

W.A. NO. 208 OF 2008

URMILA SHAH .....Appellant

.Vs.

PRESIDING OFFICER,
INDUSTRIAL TRIBUNAL & ORS. .....Respondents

THE SECRETARY, SUNDARGARH CENTRAL CO-OPERATIVE BANK LTD.
.Vs.
SATRUGHAN PANI RVWPET NO. 57 OF 2010

THE SECRETARY, SUNDARGARH CENTRAL CO-OPERATIVE BANK LTD.
Vs
ARJUN CHARAN SAHOO RVWPET NO. 58 OF 2010

THE SECRETARY, SUNDARGARH CENTRAL CO-OPERATIVE BANK LTD.
.Vs.
LUPTANJALI SAMANTRAY RVWPET NO. 59 OF 2010

THE SECRETARY, SUNDARGARH CENTRAL CO-OPERATIVE BANK LTD.
.Vs.
SAROJ KUMAR SARANGI RVWPET NO. 60 OF 200

THE SECRETARY, SUNDARGARH CENTRAL CO-OPERATIVE BANK LTD.
.Vs.
DAMODAR BEHERA RVWPETNO.61OF2010

THE SECRETARY, SUNDARGARH CENTRAL CO-OPERATIVE BANK LTD.
.Vs.
ARUPANANDA PARIDA RVWPET NO. 62 OF 2010

THE SECRETARY, SUNDARGARH CENTRAL CO-OPERATIVE BANK LTD.
.Vs.
ABANI KUMAR PANIGRAHI RVWPET NO. 63 OF 2010

THE SECRETARY, SUNDARGARH CENTRAL CO-OPERATIVE BANK LTD.
.Vs.
LALITA BAG R VWPET NO. 64 OF 2010

THE SECRETARY, SUNDARGARH CENTRAL CO-OPERATIVE BANK LTD.
Vs.
SAILENDRA KUMAR ROUT RVWPET NO. 65 OF 2010

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Disposal – Duty of the judge – Single Judge after narrating the facts of the case, the findings in the impugned order and the contentions raised on behalf of the respective parties, abruptly came to the conclusion that there is no impropriety or illegality in the order – No reason indicated – Effect of – Held, it is very easy to dispose of a case for the sake of disposal mentioning therein that there is no illegality or infirmity in the impugned order/judgment but when a party raises some vital points challenging the impugned order/judgment, it is the duty of a Judge to discuss such points and assign reasons for its acceptance or otherwise. (Para 20)

(B) LABOUR SERVICE – Some persons were engaged on daily wage basis by the Bank and they worked there continuously for more than two hundred forty days in a calendar year and their wages were revised from time to time – Even though the engagement were not in accordance with the Rules but they were rightly treated as workmen by the Tribunal, who had put in more than two hundred forty days work in one calendar year – Retrenchment without following the provisions of section 25-F of the I.D. Act – Held, illegal, however the direction for reinstatement in service cannot be upheld – Reasons indicated.

"In view of the principle laid down by the Hon'ble Supreme Court, we are in agreement with the view expressed by the learned Single Judge in W.P.(C) No.1194 of 2003 that the opposite parties in the review petitions (similar is the case of the appellant in the writ appeal) were engaged on daily wage basis by the Bank and they worked there continuously for more than two hundred forty days in a calendar year and their wages were revised from time to time. The same was also the view of the Tribunal. We are also in agreement with the view expressed by the learned Single Judge that even though the engagement of the opposite parties in the review petitions (which is also the case of appellant in the writ appeal) were not in accordance with the 1984 Rules but they were rightly treated as workmen by the Tribunal, who had put in more than two hundred forty days work in one calendar year. We are also in agreement with the view expressed by the learned Single Judge that provisions of section 25-F of the I.D. Act have not been followed by the employer for the retrenchment of the workmen. However, we are not inclined to the view expressed by the learned Single Judge that the opposite parties in the review petitions be reinstated in service. The Hon'ble Supreme Court in the case of ***Asst. Engineer, Rajasthan Dev. Corp. & Another -Vrs.- Gitam Singh reported in (2013) 5 Supreme Court Cases 136*** *has 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.*

In view of the ratio laid down in the aforesaid decisions and in the peculiar facts and circumstances of the case, the direction of reinstatement in service to the opposite parties in the review petitions is not sustainable in the eye of law. However, taking into account the length of service of each of the opposite parties under the Bank, the length of period they faced litigation in different forums, the litigation costs incurred by them, their sufferings and the fact that we are not in favour of their reinstatement, we are of the humble view that the amount of compensation of Rs.50,000/- (rupees fifty thousand) as has been fixed by the learned Single Judge in W.P.(C) No.1194 of 2003 appears to be just, proper and reasonable." (Para 23)

Case Laws Relied on and Referred to :-

1. A.I.R. 1976 S.C. 1111 : State Bank of India .Vs. N. Sundara Money.
2. (2006) 4 SCC 1 : Secretary, State of Karnataka .Vs. Umadevi.
3. JT 2007 (5) SC 611 : U.P. Power Corporation Ltd. .Vs. Bijli Mazdoor Sangh.
4. (2008) 1 SCC 798 : Nagendra Chandra .Vs. State of Jharkhand.
5. 1999(II) OLR 236 : State of Orissa .Vs. Hari Beher.
6. 2003(I) OLR 178 : Muralidhar Sahu .Vs. State of Orissa.
7. 2008 (11) SC 467 : Official Liquidator .Vs. Dayanand JT.
8. A.I.R. 2001 S.C. 672 : Vikramaditya Pandey .Vs. Industrial Tribunal.
9. (2015) 5 SCC 786 : Durgapur Casual Workers Union .Vs. Food Corporation of India.
10. (2009) 8 SCC 556 : Maharashtra State Road Transport Corporation .Vs. Casteribe Rajya Parivahan Karmchari Sanghatana.
11. 2019(I) OLR 485 : General Secretary, North Orissa Workers Union .Vs. The Superintendent, Prospecting Division.
12. (1979) 2 SCC 80 : Hindustan Tin Works Pvt. Ltd. .Vs. Employees.

13. A.I.R. 1981 SC 422 : Surendra Kumar Verma .Vs. The Central Government Industrial Tribunal.
14. 2013 AIR SCW 5330 : Deepali Gundu Surwase .Vs. Kranti Junior Adhyapak Mahavidyalaya.
15. A.I.R. 2007 S.C. 1363 : Union of India .Vs. Jai Prakash Singh.
16. (1998) 2 SCC 242 : Hindustan Times Ltd. .Vs. Union of India.
17. (1986) 3 SCC 696 : Arun .Vs. Addl. Inspector General of Police.
18. (2010) 3 SCC 732 : Secretary and Curator .Vs. Howrah Ganatantrik Nagrik Samity.
19. (2009) 3 SCC 258 : Ram Phal .Vs. State of Haryana.
20. (2008) 5 SCC 539 : Director, Horticulture Punjab .Vs. Jagjivan Parshad.
21. (2010) 9 SCC 486 : Maya Devi .Vs. Raj Kumari Batra.
22. 2003(I) OLR 178 : Muralidhar Sahu .Vs. State of Orissa.
23. (2013) 5 SCC 136 : Asst. Engineer, Rajasthan Dev. Corp. & Another .Vs. Gitam Singh.
24. (2007) 1 SCC 575 : State of M.P. and others .Vs. Lalit Kumar Verma.
25. (2007) 9 SCC 25 353 : Uttaranchal Forest Development Corporation .Vs. M.C. Joshi.
26. (2008) 5 SCC 75 : Sita Ram and others .Vs. Motilal Nehru Farmers Training Institute.
27. (2008) 4 SCC 261 : Ghaziabad Development Authority .Vs. Ashok Kumar.
28. (2009) 15 SCC 327 : Jagbir Singh .Vs. Haryana State. Agriculture Marketing Board and anr.
29. (Supp.I) OLR 556 : The aforesaid view has also been reiterated. by this Court in the case of Executive Engineer, Badanala Irrigation Division, Kenduguda .Vs.Ratnakar Sahoo & Anr.
30. (2018) 12 SCC 298 : District Development Officer -.Vs. Satish Kantilal Amrelia.

For Appellant : Mr. J.R. Dash (in the writ appeal)
For Petitioners : Mr. Sukumar Ghose (in all review petitions)
For Opp. Party : Mr. K.K. Mohapatra (in all review petitions)

JUDGMENT Date of Judgment: 29.01.2020

S. K. SAHOO, J.

In the writ appeal vide W.A. No.208 of 2008, the appellant Urmila Shah has challenged the impugned order dated 19.06.2008 passed by the learned Single Judge of this Court in W.P.(C) No.298 of 2003 in dismissing the writ petition and thereby confirming the award dated 23.10.2002 passed by the learned Presiding Officer, Industrial Tribunal, Rourkela in I.D. Case No.12 of 2001.

I.D. Case No.12 of 2001

2. In pursuant to the provision under section 10(1)(d) read with section 12(4) of the Industrial Disputes Act, 1947 (hereafter 'I.D. Act'), the

appropriate Government referred the following dispute vide letter No.8096/L.E dated 07.06.2001 for a decision:

> "Whether the termination of services of the workman Urmila Shah working as Accounts Assistant at Mahila Branch, Basanti Colony, Rourkela of the Bank by the Secretary, Sundargarh Dist. Central Coop. Bank Ltd, Sundargarh with effect from 28.07.2000 is legal and/or justified? If not, to what relief the workman Urmila Shah is entitled?"

On the basis of such reference, I.D. Case No.12 of 2001 was initiated before the learned Presiding Officer, Industrial Tribunal, Rourkela. The Secretary and Branch Manager of Sundargarh District Central Cooperative Bank (hereafter 'the Bank') were the 1st parties and appellant Urmila Shah was the 2nd party in the said proceeding. It is the case of the appellant-2nd party that she was selected as Account Assistant and joined the Bank on 02.04.1997 and continued there as such till 27.07.2000 when her services from the Bank were terminated. The Bank employed her in the post without regularizing her service which continued till her retrenchment. The appellant used to work sincerely and diligently and to the full satisfaction of the authority. She discharged her duties which were assigned to her. In spite of giving her full remuneration as per banking rules, she was being paid Rs.80/- per day and without following the due procedure under section 25-F of the I.D. Act, her services were terminated. She prayed for reinstatement in the Bank, payment of her back wages with compensation and all other consequential service benefits.

It is the case of the 1st parties Bank that the services of the appellant were not under regular establishment and she was working as a casual worker on daily wage basis. She was not selected as per the Staff Service Rules of the Bank rather she was engaged by the Branch Manager of the Bank without following due procedure prescribed for recruitment of regular employees. It is the further case of the 1st party Bank that the Branch Manager appointed the appellant in the Bank in a concealed, clandestine and illegal manner for which there was a special audit in the Bank and the amount paid to the appellant was to be recovered from the concerned Branch Manager.

3. The learned Tribunal in I.D. Case No.12 of 2002 framed the following issues for determination:-

(i) Whether the 2nd party workman was in continuous employment for more than one year under the 1st party management?

(ii) Whether the termination of service of 2nd party workman by the 1st party management w.e.f. 28.07.2000 is legal and/or justified?

(iii) If not, to what relief the 2nd party is entitled?

(iv) Whether the reference is maintainable?

4. While answering the issue no.(i), the learned Tribunal in its award dated 23.10.2002 held that the appellant was engaged in the services of the Bank on daily wage basis and worked there continuously for more than two hundred and forty days and the rate of her daily wage was enhanced from time to time. While answering the issue no.(ii), the learned Tribunal held that the appointment of the appellant was void ab-initio and illegal in view of the fact that the authority was not competent under Staff Service Rules to appoint her in the Bank. The then Branch Manager made the illegal appointment for which she was placed under orders of suspension and facing a departmental proceeding as per charge sheet submitted against her. While answering issue no.(iii), the learned Tribunal held that it would be justified and equitable to award compensation at the rate of wages for fifteen days on completion of every 240 days when the appellant had worked in the Bank at the existing and prevalent scale of Rs.80/- a day. While answering issue no.(iv), the learned Tribunal held that the dispute is within the jurisdiction of the Tribunal for adjudication and therefore, the reference is maintainable.

5. The appellant challenged the award dated 23.10.2002 of the learned Tribunal before this Court in W.P.(C) No.298 of 2003 which was disposed of as per order dated 19.06.2008 by the learned Single Judge wherein after narrating the fact of the case, the finding of the learned Tribunal, the contentions raised by the respective parties, it was held as follows:-

> "Considering the submission of the parties and the principles of law laid down by the Apex Court as referred to above and keeping in view the findings of the learned Labour Court (inadvertently mentioned in place of Industrial Tribunal) as given in the impugned award and the reasons assigned in support of the same, no impropriety or illegality can be said to have been committed by the learned Labour Court (again inadvertently mentioned in place of Industrial Tribunal) in passing the impugned award so as to warrant any interference by this Court."

Accordingly, while dismissing the writ petition, the learned Single Judge observed that it is open to the petitioner (appellant) to file a representation before the Management for her appointment, which may be considered in accordance with law.

RVWPET No. 57 of 2010

6. RVWPET No. 57 of 2010 arises out of W.P.(C) No.1139 of 2003 filed by the opposite party Satrughana Pani challenging the order dated 14.11.2002 passed by the Presiding Officer, Industrial Tribunal, Rourkela in Industrial Dispute Case No.11 of 2001. In the said I.D. Case, the facts are similar to the aforesaid I.D. Case No.12 of 2002. The following reference was made by the appropriate Government in its letter no.8086 dated 07.06.2001:

> "Whether the termination of services of the workman Sri Satrughna Pani working as Accounts Assistant at Fertiliser Branch, Fertiliser Town, Rourkela-7 of the Bank by the Secretary, Sundargarh District Central Cooperative Bank Ltd., Sundargarh with effect from 28.07.2000 is legal and/or justified? If not, to what relief the workman Sri Pani is entitled?"

Similar issues were framed like the aforesaid I.D. Case No.12 of 2002 and similar observations were made that the opposite party Satrughana Pani even though worked in the Bank from 01.03.1997 to 27.07.2000 as Accounts Assistant on daily wage basis but he had not undergone the procedure of appointment and his appointment was void ab-initio and illegal in view of the Staff Service Rules and accordingly, it was held that Sri Pani would get compensation at the rate of wages for fifteen days on completion of every two hundred forty days at the existing and prevalent scale of Rs.80/- a day.

RVWPET No. 58 of 2010

7. RVWPET No. 58 of 2010 arises out of W.P.(C) No.1194 of 2003 filed by the opposite party Arjuna Chandra Sahoo challenging the order dated 14.11.2002 passed by the Presiding Officer, Industrial Tribunal, Rourkela in Industrial Dispute Case No.23 of 2001. In the said I.D. Case, the facts are similar to the aforesaid I.D. Case No.12 of 2002. The following reference was made by the appropriate Government in its letter no.8864 dated 22.06.2001:

> "Whether the termination of services of the workman Sri Arjun Charan Sahoo working as peon at Fertiliser Branch, Rourkela of the Bank by the Secretary, Sundargarh District Central Cooperative Bank Ltd., Sundargarh w.e.f. 28.07.2000 is legal and/or justified? If not, to what relief the workman Sri Sahoo is entitled?"

Similar issues were framed like the aforesaid I.D. Case No.12 of 2002 and similar observations were made that the opposite party Arjun Charan Sahoo even though worked in the Bank from 01.10.1995 to 27.07.2000 as

peon on daily wage basis but he had not undergone the procedure of appointment and his appointment was void ab-initio and illegal in view of the Staff Service Rules and accordingly, it was held that Sri Sahoo would get compensation at the rate of wages for fifteen days on completion of every two hundred forty days at the existing and prevalent scale of Rs.80/- a day.

RVWPET No. 59 of 2010

8. RVWPET No. 59 of 2010 arises out of W.P.(C) No.1406 of 2003 filed by the opposite party Luptanjali Samantaray challenging the order dated 23.10.2002 passed by the Presiding Officer, Industrial Tribunal, Rourkela in Industrial Dispute Case No.20 of 2001. In the said I.D. Case, the facts are similar to the aforesaid I.D. Case No.12 of 2002. The following reference was made by the appropriate Government in its letter no.8383/LE dated 13.06.2001:

> "Whether the termination of services of the workman Luptanjali Samantaray working as Accounts Assistant at Mahila Branch, Basanti Colony, Rourkela of the Bank by the Secretary, Sundargarh District Central Cooperative Bank Ltd., Sundargarh w.e.f. 28.07.2000 is legal and/or justified? If not, to what relief the workman Smt. Samantaray is entitled?"

Similar issues were framed like the aforesaid I.D. Case No.12 of 2002 and similar observations were made that the opposite party Luptanjali Samantaray even though worked in the Bank from 07.03.1997 to 27.07.2000 as Accounts Assistant on daily wage basis but she had not undergone the procedure of appointment and her appointment was void ab-initio and illegal in view of the Staff Service Rules and accordingly, it was held that Smt. Samantaray would get compensation at the rate of wages for fifteen days on completion of every two hundred forty days at the existing and prevalent scale of Rs.80/- a day.

RVWPET No. 60 of 2010

9. RVWPET No. 60 of 2010 arises out of W.P.(C) No.6952 of 2003 filed by the opposite party Saroj Kumar Sarangi challenging the order dated 13.03.2003 passed by the Presiding Officer, Industrial Tribunal, Rourkela in Industrial Dispute Case No.10 of 2001. In the said I.D. Case, the facts are similar to the aforesaid I.D. Case No.12 of 2002. The following reference was made by the appropriate Government in its memo no.8009(6) dated 06.06.2001:

> "Whether the termination of services of Sri Saroj Kumar Sarangi working as Accounts Assistant at Rourkela Branch of the Bank by the Secretary, Sundargarh District Central Cooperative Bank Ltd., Sundargarh w.e.f. 28.07.2000 is legal and/or justified? If not, to what relief the workman Sri Sarangi is entitled?"

Similar issues were framed like the aforesaid I.D. Case No.12 of 2002 and similar observations were made that the opposite party Saroj Kumar Sarangi even though worked in the Bank from 02.02.1997 to 28.07.2000 as Accounts Assistant on daily wage basis but he had not undergone the procedure of appointment and his appointment was void ab-initio and illegal in view of the Staff Service Rules and accordingly, it was held that Sri Sarangi would get compensation at the rate of wages for fifteen days on completion of every two hundred forty days at the existing and prevalent scale of Rs.80/- a day.

RVWPET No. 61 of 2010

10. RVWPET No. 61 of 2010 arises out of W.P.(C) No.6953 of 2003 filed by the opposite party Damodar Behera challenging the order dated 13.03.2003 passed by the Presiding Officer, Industrial Tribunal, Rourkela in Industrial Dispute Case No.15 of 2001. In the said I.D. Case, the facts are similar to the aforesaid I.D. Case No.12 of 2002. The following reference was made by the appropriate Government in its memo no.8277(6) dated 18.06.2001:

> "Whether the termination of services of Sri Damodar Behera working as Accounts Assistant at Rourkela Branch of the Bank by the Secretary, Sundargarh District Central Cooperative Bank Ltd., Sundargarh w.e.f. 28.07.2000 is legal and/or justified? If not, to what relief the workman Sri Behera is entitled?"

Similar issues were framed like the aforesaid I.D. Case No.12 of 2002 and similar observations were made that the opposite party Damodar Behera even though worked in the Bank from 02.02.1997 to 27.07.2000 as Accounts Assistant on daily wage basis but he had not undergone the procedure of appointment and his appointment was void ab-initio and illegal in view of the Staff Service Rules and accordingly, it was held that Sri Behera would get compensation at the rate of wages for fifteen days on completion of every two hundred forty days at the existing and prevalent scale of Rs.80/- a day.

RVWPET No. 62 of 2010

11. RVWPET No. 62 of 2010 arises out of W.P.(C) No.6954 of 2003 filed by the opposite party Arupananda Parida challenging the order dated

13.03.2003 passed by the Presiding Officer, Industrial Tribunal, Rourkela in Industrial Dispute Case No.14 of 2001. In the said I.D. Case, the facts are similar to the aforesaid I.D. Case No.12 of 2002. The following reference was made by the appropriate Government in its memo no.8292(6) dated 12.06.2001:

> "Whether the termination of services of workman Sri Arupananda Parida working as Accounts Assistant at Rourkela Branch of the Bank by the Secretary, Sundargarh District Central Cooperative Bank Ltd., Sundargarh w.e.f. 28.07.2000 is legal and/or justified? If not, to what relief the workman Sri Parida is entitled?"

Similar issues were framed like the aforesaid I.D. Case No.12 of 2002 and similar observations were made that the opposite party Arupananda Parida even though worked in the Bank from 02.02.1997 to 28.07.2000 as Accounts Assistant on daily wage basis but he had not undergone the procedure of appointment and his appointment was void ab-initio and illegal in view of the Staff Service Rules and accordingly, it was held that Sri Parida would get compensation at the rate of wages for fifteen days on completion of every two hundred forty days at the existing and prevalent scale of Rs.80/- a day.

RVWPET No. 63 of 2010

12. RVWPET No. 63 of 2010 arises out of W.P.(C) No.7009 of 2003 filed by the opposite party Abani Kumar Panigrahi challenging the order dated 13.03.2003 passed by the Presiding Officer, Industrial Tribunal, Rourkela in Industrial Dispute Case No.16 of 2001. In the said I.D. Case, the facts are similar to the aforesaid I.D. Case No.12 of 2002. The following reference was made by the appropriate Government in its memo no.8282(6) dated 12.06.2001:

> "Whether the termination of services of the workman Sri Abani Kumar Panigrahi working as Accounts Assistant at Rourkela Branch of the Bank by the Secretary, Sundargarh District Central Cooperative Bank Ltd., Sundargarh w.e.f. 28.07.2000 is legal and/or justified? If not, to what relief the workman Sri Panigrahi is entitled?"

Similar issues were framed like the aforesaid I.D. Case No.12 of 2002 and similar observations were made that the opposite party Abani Kumar Panigrahi even though worked in the Bank from 01.02.1994 to 28.07.2000 as Accounts Assistant on daily wage basis but he had not undergone the procedure of appointment and his appointment was void ab-initio and illegal in view of the Staff Service Rules and accordingly, it was held that Sri

Panigrahi would get compensation at the rate of wages for fifteen days on completion of every two hundred forty days at the existing and prevalent scale of Rs.80/- a day.

RVWPET No. 64 of 2010

13. RVWPET No. 64 of 2010 arises out of W.P.(C) No.7010 of 2003 filed by the opposite party Lalita Bag challenging the order dated 13.03.2003 passed by the Presiding Officer, Industrial Tribunal, Rourkela in Industrial Dispute Case No.4 of 2001. In the said I.D. Case, the facts are similar to the aforesaid I.D. Case No.12 of 2002. The following reference was made by the appropriate Government in its memo no.9788/LE dated 06.06.2001:

> "Whether the termination of services of the workman Lalita Bag, working as peon at Mahila Branch, Basanti Colony, Rourkela-2 of the Bank by the Secretary, Sundargarh District Central Cooperative Bank Ltd., Sundargarh w.e.f. 28.07.2000 is legal and/or justified? If not, to what relief the workman Lalita Bag is entitled?"

Similar issues were framed like the aforesaid I.D. Case No.12 of 2002 and similar observations were made that the opposite party Lalita Bag even though worked in the Bank from 01.02.1997 to 28.07.2000 as peon on daily wage basis but she had not undergone the procedure of appointment and her appointment was void ab-initio and illegal in view of the Staff Service Rules and accordingly, it was held that Lalita Bag would get compensation at the rate of wages for fifteen days on completion of every two hundred forty days at the existing and prevalent scale of Rs.80/- a day.

RVWPET No. 65 of 2010

14. RVWPET No. 65 of 2010 arises out of W.P.(C) No.13041 of 2003 filed by the opposite party Sailendra Kumar Rout challenging the order dated 29.09.2003 passed by the Presiding Officer, Industrial Tribunal, Rourkela in Industrial Dispute Case No.17 of 2001. In the said I.D. Case, the facts are similar to the aforesaid I.D. Case No.12 of 2002. The following reference was made by the appropriate Government in its memo no.8287(6)/LE dated 12.06.2001:

> "Whether the termination of services of the workman Sri Sailendra Kumar Rout working as Accounts Assistant at Rourkela Branch of the Bank by the Secretary, Sundargarh District Central Cooperative Bank Ltd., Sundargarh w.e.f. 28.07.2000 is legal and/or justified? If not, to what relief the workman Sri Rout is entitled?"

Similar issues were framed like the aforesaid I.D. Case No.12 of 2002 and similar observations were made that the opposite party Sailendra Kumar

Rout even though worked in the Bank from 01.03.1993 to 27.07.2000 as Accounts Assistant on daily wage basis but he had not undergone the procedure of appointment and his appointment was void ab-initio and illegal in view of the Staff Service Rules and accordingly, it was held that Sri Rout would get compensation at the rate of wages for fifteen days on completion of every two hundred forty days at the existing and prevalent scale of Rs.80/- a day.

15. In W.P.(C) No.1194 of 2003 filed by Arjuna Chandra Sahoo (opposite party in RVWPET No. 58 Of 2010), this Court vide judgment and order dated 10.03.2010 held that the moot question is that even accepting that the engagement of Sri Sahoo was not in accordance with the Central Co-operative Banks Staff Service Rules, 1984 (hereafter '1984 Rules') but since it was found that he was a *workman* who had rendered continuous service of two hundred forty days in one calendar year, whether there was necessity for compliance of section 25-F of the I.D. Act. Considering Rule 58 of the 1984 Rules, it was held that the said rule would go to show that none of the rules prescribed thereunder shall operate in derogation of any law applicable and Sri Sahoo having been found to be a workman by the Tribunal, who had put in more than two hundred forty days work in one calendar year, cannot be deprived of his rights under the I.D. Act. Applying the ratio laid down by the Hon'ble Supreme Court in the case of **State Bank of India -Vrs.- N. Sundara Money reported in A.I.R. 1976 S.C. 1111,** it was held that the conclusion arrived at by the Tribunal is fallacious and the provisions under section 25-F of the I.D. Act have been utterly violated by the employer entitling the workman Sri Sahoo to an order of reinstatement as the retrenchment was found to be illegal. Considering the question of back wages, it was held by this Court that since Sri Sahoo was retrenched w.e.f. 28.07.2000 and nine years had already passed, he was not entitled to get full back wages but for a compensation of Rs.50,000/- (rupees fifty thousand). Accordingly, the award passed by the learned Tribunal was set aside and direction was given to the Bank to reinstate Sri Sahoo in service and to pay a compensation of Rs.50,000/- (rupees fifty thousand), in lieu of back wages.

In other writ petitions i.e. W.P.(C) No.1139 of 2003, W.P.(C) No.1406 of 2003, W.P.(C) No.6952 of 2003, W.P.(C) No.6953 of 2003, W.P.(C) No.6954 of 2003, W.P.(C) No.7009 of 2003, W.P.(C) No.7010 of 2003 and W.P.(C) No.13041 of 2003, it was held as per the orders passed on the same day, i.e. on 10.03.2010 in each case that since the facts of the case

are similar to the facts involved in W.P.(C) No.1194 of 2003 and the findings arrived at in the impugned award are also similar to the award impugned in the said writ petition, which was allowed as per judgment passed, no different view could be taken and accordingly, in each case the respective award was set aside and it was directed that the petitioner in the respective writ petitions be reinstated in service and a sum of Rs.50,000/- (rupees fifty thousand) shall be paid to him as compensation in lieu of back wages.

16. Review Petitions Nos.58, 57, 59, 60, 61, 62, 63, 64 and 65 of 2010 were filed by the Secretary, Sundargarh Central Cooperative Bank Ltd. for review of the judgment and order dated 10.03.2010 of this Court passed in W.P.(C) No.1194 of 2003 as well as the orders passed on the same day i.e. on 10.03.2010 in W.P.(C) Nos.1139, 1406, 6952, 6953, 6954, 7009, 7010 and 13041 of 2003 respectively which were disposed of in accordance with the judgment passed in W.P.(C) No.1194 of 2003.

The learned Single Judge of this Court heard all the review petitions analogously and since on the similar set of facts, another learned Single Judge had disposed of W.P.(C) No.298 of 2003 by dismissing the writ petition filed by the workman and confirming the award passed by the learned Industrial Tribunal and thereby had taken a different view; differing from the opinion expressed by the other learned Single Judge while disposing of W.P.(C) No.298 of 2003, as per order dated 12.07.2013, it was directed to place all the matters before the Hon'ble the Chief Justice for passing appropriate order for placing the matters before an appropriate Division Bench under the proviso to Rule 1 of Chapter-III of the Rules of the High Court of Orissa, 1948 to resolve the issues.

Submissions:-

17. Mr. J.R. Dash, the learned counsel for the appellant Urmila Shah in W.A. No. 208 of 2008 while challenging the impugned order dated 19.06.2008 passed by the learned Single Judge in W.P.(C) No.298 of 2003 contended that the learned Tribunal erroneously held that the provision under section 25-F of the I.D. Act is applicable only to regular employment whereas the definition of 'workman' as per the said Act does not prescribe any such kind of distinction in any manner. It was further submitted that while answering to issue no.(iv), the learned Tribunal held that the appellant was a workman under the I.D. Act and therefore, the finding that the provision under section 25-F of the I.D. Act is not applicable particularly

when the appellant was continuing in service since 02.04.1997 till 27.07.2000 is erroneous both in fact and law. It is further contended that the learned Tribunal should have confined its adjudication to the points referred and issues framed and should not have travelled beyond the scope of reference by interpreting the mode of appointment of the appellant in absence of such issues and that to without affording opportunity to the appellant in that regard. It is contended that the learned Tribunal had made out a third case by exceeding the scope of reference and its jurisdiction which is arbitrary and without jurisdiction and therefore, liable to be set aside. It is further contended that the finding of the learned Tribunal that the appointment of the appellant was made in a concealed, clandestine and illegal manner is not acceptable inasmuch as the wages paid to the appellant was intimated to the higher authorities by the Branch Manager every month and expenditure was duly passed by the Management committee meetings and annual general body meetings of the Bank. It is further contended that when no issue was framed as to whether the appointment of the appellant was void ab-initio, no finding in that respect by the learned Tribunal is sustainable. It is contended that the appellant was simply a workman employed in the Bank for which it was not necessary to issue an appointment order and since admittedly the management has not followed/complied the provisions under the I.D. Act while terminating the services of the appellant, the same should be set aside. While concluding his argument, it is contended that the learned Single Judge has not deliberated upon the contentions raised by the learned counsel for the appellant and after noting down the contentions raised by the respective counsel, simply held that there is no impropriety or illegality committed by the learned Tribunal while passing the award, without assigning any reason as to why the submission made on behalf of the appellant's counsel are not acceptable.

18. Mr. Sukumar Ghose, learned counsel appearing for the Bank on the other hand, supported the order dated 19.06.2008 of the learned Single Judge in W.P.(C) No.298 of 2003 in respect of appellant Urmila Shah (appellant in W.A. No. 208 of 2008) and opposed the order dated 10.03.2010 passed in W.P.(C) No.1194 of 2003 filed by Arjuna Chandra Sahoo (opposite party in RVWPET No. 58 Of 2010) and the other connected writ petitions and contended that any appointment made in violation of the recruitment rules would be violative of Articles 14 and 16 of the Constitution of India rendering the same as nullity and since the initial appointment of each of the persons working on daily wage basis was illegal and contrary to the

procedure prescribed for recruitment of employee and there was no master and servant relationship existing between the concerned parties, they cannot claim any benefit under law. It is further contended that the view taken by the learned Single Judge in W.P.(C) No.298 of 2003 is a reasonable one and it is quite justified. It was argued that since a co-ordinate Bench had already disposed of the identical matter in W.P.(C) No.298 of 2003 in the case of appellant Urmila Shah, the same should have been considered while disposing of the batch of writ petitions filed by other workmen in the identical facts. It was further argued that in the peculiar scenario, the retrenched workmen can neither claim reinstatement nor regularization or any benefit arising out of the same and therefore, the direction for reinstatement in service and for payment of compensation of Rs.50,000/- (rupees fifty thousand) was not proper and justified and the same should be set aside. He relied upon the decisions of the Hon'ble Supreme Court in the cases of **Secretary, State of Karnataka -Vrs.- Umadevi reported in (2006) 4 Supreme Court Cases 1, U.P. Power Corporation Ltd. -Vrs.- Bijli Mazdoor Sangh reported in JT 2007 (5) SC 611 and Nagendra Chandra -Vrs.- State of Jharkhand reported in (2008) 1 Supreme Court Cases 798.**

19. Mr. K.K. Mohapatra, learned counsel appearing for the opposite parties in the review petitions, on the other hand, placed reliance on two decisions of this Court in the case of **State of Orissa -Vrs.- Hari Behera reported in 1999(II) Orissa Law Reviews 236** and **Muralidhar Sahu -Vrs.- State of Orissa reported in 2003(I) Orissa Law Reviews 178** and argued that the decision rendered in W.P.(C) No.298 of 2003 cannot be treated as precedent inasmuch as the learned Single Judge has not taken into consideration relevant provision like Rule 58 of 1984 Rules which saves the rights and privileges under any other law and there is no discussion whether section 25-F of the I.D. Act has got any application or not and no reasons have been assigned therein for confirming the award of the Tribunal. The learned counsel supported the view taken by the learned Single Judge in W.P.(C) No.1194 of 2003 and contended that it is a well-reasoned judgment and argued that all the review petitions should be dismissed. He placed reliance in the cases of **Official Liquidator -Vrs.- Dayanand reported in JT 2008 (11) Supreme Court 467, Vikramaditya Pandey -Vrs.- Industrial Tribunal reported in A.I.R. 2001 S.C. 672, Durgapur Casual Workers Union -Vrs.- Food Corporation of India reported in (2015) 5 Supreme Court Cases 786, Maharashtra State Road Transport Corporation -Vrs.-**

Casteribe Rajya Parivahan Karmchari Sanghatana reported in (2009) 8 Supreme Court Cases 556, General Secretary, North Orissa Workers Union -Vrs.- The Superintendent, Prospecting Division reported in 2019(I) Orissa Law Reviews 485, Hindustan Tin Works Pvt. Ltd. -Vrs.- Employees reported in (1979) 2 Supreme Court Cases 80 , Surendra Kumar Verma -Vrs.- The Central Government Industrial Tribunal reported in A.I.R. 1981 Supreme Court 422 and **Deepali Gundu Surwase -Vrs.- Kranti Junior Adhyapak Mahavidyalaya reported in 2013 AIR SCW 5330**.

Analysis of the submissions

20. The crucial point for consideration is whether on the self-same set of facts, a complete different view was permissible to be taken by the learned Single Judge of this Court in W.P.(C) No.1194 of 2003 vide order dated 10.03.2010 ignoring the earlier view taken by another learned Single Judge in W.P.(C) No.298 of 2003 vide order dated 19.06.2008.

Coming to the order dated 19.06.2008 passed in W.P.(C) No.298 of 2003, it appears that the learned Single Judge after narrating the facts of the case, the findings of the learned Tribunal, the contentions raised on behalf of the respective parties, abruptly came to the conclusion that there is no impropriety or illegality in the order of the learned Labour Court (inadvertently mentioned in place of Industrial Tribunal) in passing the impugned award so as to warrant any interference and while dismissing the writ petition, it was observed that it is open to the petitioner (appellant in W.A. No.208 of 2008) to file a representation before the Management for her appointment, which may be considered in accordance with law. In other words, no reasons have been assigned as to why the contentions raised by the counsel for the petitioner have no merit and the same is not acceptable and why the view taken by the Tribunal is acceptable. It is very easy to dispose of a case for the sake of disposal mentioning therein that there is no illegality or infirmity in the impugned order/judgment but when a party raises some vital points challenging the impugned order/judgment, it is the duty of a Judge to discuss such points and assign reasons for its acceptance or otherwise.

In the case of **Union of India -Vrs.- Jai Prakash Singh reported in A.I.R. 2007 S.C. 1363**, the Hon'ble Supreme Court held that reasons introduce clarity in an order. Reasons are live links between the minds of the decision taker to the controversy in question and the decision or conclusion

arrived at. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the 'inscrutable face of the sphinx', it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The 'inscrutable face of a sphinx' is ordinarily incongruous with a judicial or quasi-judicial performance. The Hon'ble Court further held that the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court's judgment not sustainable.

In the case of **Hindustan Times Ltd. -Vrs.- Union of India reported in (1998) 2 Supreme Court Cases 242**, the need to give reasons has been held to arise out of the need to minimize chances of arbitrariness and introduce clarity. In the case of **Arun -Vrs.- Addl. Inspector General of Police reported in (1986) 3 Supreme Court Cases 696**, the recording of reasons in support of the order passed by the High Court has been held to inspire public confidence in administration of justice and help the Apex Court to dispose of appeals filed against such orders. In the case of **Secretary and Curator -Vrs.- Howrah Ganatantrik Nagrik Samity reported in (2010) 3 Supreme Court Cases 732**, reasons were held to be the heartbeat of every conclusion, apart from being an essential feature of the principles of natural justice, that ensure transparency and fairness in the decision making process. In the case of **Ram Phal -Vrs.- State of Haryana reported in (2009) 3 Supreme Court Cases 258**, giving of satisfactory reasons was held to be a requirement arising out of an ordinary man's sense of justice and a healthy discipline for all those who exercise power over others. In the case of **Director, Horticulture Punjab -Vrs.- Jagjivan Parshad reported in (2008) 5 Supreme Court Cases 539**, the recording of reasons was held to be indicative of application of mind specially when the order is amenable to further avenues of challenge. In the case of **Maya Devi -Vrs.- Raj Kumari Batra reported in (2010) 9 Supreme Court Cases 486**, it is held that recording of reasons in cases where the order is subject to further appeal is very important from yet another angle. An appellate Court or the authority

ought to have the advantage of examining the reasons that prevailed with the Court or the authority making the order. Conversely, absence of reasons in an appealable order deprives the appellate Court or the authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own. An appellate Court or authority may in a given case decline to undertake any such exercise and remit the matter back to the lower Court or authority for a fresh and reasoned order. That, however, is not an inflexible rule, for an appellate Court may notwithstanding the absence of reasons in support of the order under appeal before it examine the matter on merits and finally decide the same at the appellate stage. Whether or not the appellate Court should remit the matter is discretionary with the appellate Court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. Remands are usually avoided if the appellate Court is of the view that it will prolong the litigation.

As rightly contended by the learned counsel for the appellant in the writ appeal and learned counsel for the opposite parties in the review petitions that the learned Single Judge in its order dated 19.06.2008 passed in W.P.(C) No.298 of 2003 has not taken into consideration relevant provision like Rule 58 of 1984 Rules as well as applicability of section 25-F of the I.D. Act to the persons who were engaged in the services of the Bank. Rule 58 of 1984 Rules deals with rights and privileges under any other law. It prescribes that nothing contained in the Staff Service Rules shall operate in derogation of any law, applicable or to the prejudice for any right under a registered agreement, settlement, or award for the time being in force or in future or contract of service, if any, as per general law applicable to the members of the staff. Therefore, none of the rules prescribed under the 1984 Rules shall operate in derogation of any law applicable. Not in derogation of another law or laws means that the legislature intends that such an enactment shall co-exist along with the other Acts or in other words, it is clearly not the intention of the legislature, in such a case, to annul or detract from the provisions of other laws.

In the case of **State of Orissa -Vrs.- Hari Behera reported in 1999 (II) Orissa Law Reviews 236**, this Court held that if earlier decision has not taken note of some of the relevant provision of law, the decision being per incuriam, the same is not binding and the views expressed therein cannot be

followed. In the case of **Muralidhar Sahu -Vrs.- State of Orissa reported in 2003(I) Orissa Law Reviews 178**, a Divisional Bench of this Court held that a decision which is not express and is not founded on reason has got no precedential value and has got no binding effect.

Salmond on Jurisprudence (12th edition) observed as follows:

> "A precedent is not destroyed merely because it was badly argued, inadequately considered, and fallaciously reasoned. Thus a rather arbitrary line has to be drawn between total absence of argument on a particular point, which vitiates the precedent, and inadequate argument, which is a ground for impugning the precedent only if it is absolutely binding and indistinguishable...

The Hon'ble Supreme Court in the case of **Official Liquidator** (supra) has held that predictability and certainty is an important hallmark of judicial jurisprudence and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the Courts at the grassroot will not be able to decide as to which of the judgment lay down is the correct law and which one should be followed. Discipline is sine qua non for effective and efficient functioning of the judicial system.

In view of such settled position of law, when in the order dated 19.06.2008 passed in W.P.(C) No.298 of 2003, there is total absence of discussion on Rule 58 of 1984 Rules as well as applicability of section 25-F of the I.D. Act and no law has been laid down therein and it is also not a reasoned order, in our humble view, such an order cannot have any precedent value and it is to be treated as having been rendered 'per incuriam' which literally means 'carelessness' and in practice, it means 'per ignoratium'.

Moreover, none of the parties has brought to the notice of the Court during the argument of W.P.(C) No.1194 of 2003 that identical matter in W.P.(C) No.298 of 2003 has been disposed of vide order dated 19.06.2008 by another learned Single Judge. Therefore, when such an issue was raised for the first time during hearing of the review petitions, the learned Single Judge rightly directed to place all the matters before the Hon'ble the Chief Justice for passing appropriate order for placing the matters before an appropriate Division Bench.

21. It is not in dispute that the appellant in the writ appeal and the opposite parties in the review petitions were engaged in the services of the Bank on daily wage basis and worked under the management of the Bank

continuously for more than two hundred forty days in twelve calendar months and they were retrenched from service with effect from 28.07.2000. They were paid annual bonus and arrears of revised wages. It is not the case of the Bank that there were no vacancies in the Bank at the relevant point of time in the posts in which they were working. Therefore, we are of the view that the learned Tribunal rightly came to the conclusion that appellant in the writ appeal and the opposite parties in the review petitions were engaged in the services of the Bank on daily wage basis and worked there continuously for more than two hundred forty days in a calendar year and their daily wages were enhanced from time to time.

Rule 4 of the 1984 Rules classifies the employees of the Bank as permanent, temporary, probationer and officiating and Rule 5 prescribes categories of posts in the Bank and Rule 6 prescribes the appointing authority for different posts. It is not in dispute that there was an order of ban imposed by the Government of Odisha for appointment to any kind of posts of the Bank. The Branch Manager was not the appointing authority for any of the posts of the Bank. Therefore, it can be said that the engagement of the appellant in the writ appeal and the opposite parties in the review petitions were not in accordance with the 1984 Rules.

The learned Single Judge in W.P.(C) No.1194 of 2003 discussed the question as to whether there was necessity for compliance of section 25-F of the Industrial Disputes Act once it is found that the petitioner was a workman who had rendered continuous service for two hundred forty days in one calendar year before termination of his services, even if his engagement was not in accordance with 1984 Rules. The learned Single Judge took into account the ratio laid down by the Hon'ble Supreme Court in the case of **Vikramaditya Pandey** (supra) wherein it is held as follows:-

> "6.....The only issue before the High Court was whether the appellant was entitled to reinstatement in service with back wages, once the termination of his services had been held to be illegal and more so when the same was not challenged. Ordinarily, once the termination of service of an employee is held to be wrongful or illegal, the normal relief of reinstatement with full back wages shall be available to an employee; it is open to the employer to specifically plead and establish that there were special circumstances which warranted either non-reinstatement or non-payment of back wages. In this case we do not find any such pleading of special circumstances either before the Tribunal or before the High Court...
>
> xxx xxx xxx xxx

> By plain reading of the said Regulation, it is clear that in case of inconsistency between the Regulations and the provisions of the Industrial Disputes Act, 1947, the State Act, the Workmen Compensation Act, 1923 and any other labour laws for the time being in force, if applicable to any co-operative society or class of co-operative societies, to that extent Regulations shall be deemed to be inoperative. In other words, the inconsistent provisions contained in the Regulations shall be inoperative, not the provisions of the other statutes mentioned in the Regulation 103. The Tribunal in this regard correctly understood the Regulation but wrongly refused the relief on the ground that no reinstatement can be ordered on a regular employment in view of the provisions contained in the said Regulation. But the High Court read the Regulation otherwise and plainly misunderstood it in saying that if there is any inconsistency between the Regulations and the Industrial Disputes Act, 1947 and other labour laws for the time being in force, the Regulations will prevail and the Industrial Disputes Act, 1947 and other labour laws shall be deemed to be inoperative. This misreading and wrong approach of the High Court resulted in wrong conclusion. In the view it took as to Regulation 103, the High Court proceeded to state that even if there was retrenchment in view of Regulation 5 of the Regulations, the Labour Court was not competent to direct reinstatement of the appellant who was not recruited in terms of Regulation 5 because the Labour Court had to act within the ambit of law having regard to the Regulations by which the workman was governed. In this view, the High Court declined relief to the appellant which in our view cannot be sustained. The Tribunal felt difficulty in ordering reinstatement as the appellant was not a regular employee. The appellant ought to have been ordered to be reinstated in service once it was found that his services were illegally terminated in the post he was holding including its nature. Thus in our opinion both the Tribunal as well as the High Court were not right and justified on facts and in law in refusing the relief of reinstatement of the appellant in service with back wages. But, however, having regard to the facts and circumstances of the case and taking note of the fact that the order of termination dates back to 19.7.1985 we think it just and appropriate in the interest of justice to grant back wages only to the extent of 50%."

The learned Single Judge in W.P.(C) No.1194 of 2003 further discussed the provision under Rule 58 of 1984 Rules and held that a plain interpretation of the Rule would go to show that none of the rules prescribed thereunder shall operate in derogation of any law applicable. It was further held that the petitioner having been found to be a workman by the Tribunal, who has put in more than two hundred forty days work in one calendar year, cannot be deprived of his rights under the I.D. Act. The learned Single Judge then took into account the observation of the Tribunal that the petitioner was retrenched from service and such findings were not challenged by the management and have become final. The learned Single Judge then discussed the ratio laid down by the Hon'ble Supreme Court in the case of **N. Sundara Money** (supra) wherein the respondent N. Sundara Money was appointed off

and on, by the State Bank of India and it is held that if the workman swims into the harbor of section 25-F, he cannot be retrenched without payment, at the time of retrenchment, compensation computed as prescribed therein read with section 25-B (2). A breakdown of section 2(oo) unmistakably expands the semantics of retrenchment. Termination for any reasons whatsoever are the keywords. Whatever be the reason, every termination spells retrenchment. To protect the weak against the strong, the policy of comprehensive definition has been effectuated. Termination embraces not merely the act of termination by the employer, but the fact of termination howsoever produced. Retrenchment means 'to end, conclude, cease'. The Hon'ble Supreme Court ultimately held that the respondent shall be put back where he left off, but his new salary will be what he would draw were he to be appointed in the same post denovo. The learned Single Judge applying the ratio laid down in the case of **N. Sundara Money** (supra), further held that the conclusions arrived at by the Tribunal are fallacious and the provisions of section 25-F of the I.D. Act have been utterly violated by the employer entitling the petitioner-workman to one order of reinstatement as the retrenchment is found to be illegal.

Therefore, we are of the view that the learned Single Judge in W.P.(C) No.1194 of 2003 has passed a reasoned order discussing the contentions raised by the respective parties, the legal points and also how the conclusions arrived at by the Tribunal are fallacious.

22. The learned counsel for the Review Petitioners mainly contended that any appointment made in violation of the recruitment rules would be violative of Articles 14 and 16 of the Constitution of India rendering the same as nullity and the appointments of the opposite parties being void ab initio, there exists no relationship of master and servant between the review petitioners Bank and the opposite parties and that the provision under section 25-F of the I.D. Act does not come into play.

We have already held that the engagement of the appellant in the writ appeal and the opposite parties in the review petitions were not in accordance with the 1984 Rules. In the case of **Umadevi** (supra) placed by the learned counsel for the Review Petitioners, the observations of the Constitution Bench of the Hon'ble Supreme Court are as follows:-

> "33.....By and large, what emerges is that regular recruitment should be insisted upon, only in a contingency can an adhoc appointment be made in a permanent

vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularization.

xxx xxx xxx xxx

43.....Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to one end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to one end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules.

xxx xxx xxx xxx

45.....In order words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the serves of the State.

xxx xxx xxx xxx

47.....Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees.

48.....No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled."

The learned counsel for the Review Petitioners further placed reliance in the case of **Nagendra Chandra** (supra) wherein the Hon'ble Supreme Court held that if an appointment is made in infraction of the recruitment

rules, the same would be violative of Articles 14 and 16 of the Constitution and being nullity would be liable to be cancelled.

The learned counsel for the Review Petitioners in support of his contentions that the principle laid down in the case of **Umadevi** (supra) is also equally applicable to industrial adjudication, placed reliance in the case of **U.P. Power Corporation Ltd.** (supra), wherein it is held as follows:-

> "5. It is true as contended by learned Counsel for the respondent that the question as regards the effect of the Industrial Adjudicators' powers was not directly in issue in **Umadevi**'s case (supra). But the foundational logic in **Umadevi**'s case (supra) is based on Article 14 of the Constitution of India, 1950 (in short the 'Constitution'). Though the Industrial Adjudicator can vary the terms of the contract of the employment, it cannot do something which is violative of Article 14. If the case is one which is covered by the concept of regularization, same cannot be viewed differently."

23. Now the vital point for consideration is that since the engagement of the appellant in the writ appeal as well as the opposite parties in the review petitions were not in accordance with the 1984 Rules but they were found to have been engaged on daily wage basis and treated as workmen by the Tribunal, who had put in more than two hundred forty days work in one calendar year and provisions of section 25-F of the I.D. Act have not been followed for their retrenchment, whether any relief can be granted to them.

At this stage, it would be profitable to discuss the principles enunciated in the citations placed by the learned counsel for the opposite parties in the review petitions. In the case of **Durgapur Casual Workers Union** (supra), it is held as follows:-

> "12.....The Industrial Disputes Act is applicable to all the industries as defined under the Act, whether the government undertaking or private industry. If any unfair labour practice is committed by any industrial establishment, whether government undertaking or private undertaking, pursuant to reference made by the appropriate Government, the Labour Court/Tribunal will decide the question of unfair labour practice.
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> XXX XXX XXX XXX
>
> 20. The effect of the Constitution Bench decision in **Umadevi** (supra), in case of unfair labour practice was considered by this Court in case of **Maharashtra SRTC -Vrs.- Casteribe Rajya Parivahan Karmchari Sanghatana reported in (2009) 8 SCC 556**. In the said case, this Court held that Umadevi's case has not overridden powers of the Industrial and Labour Courts in passing appropriate order, once unfair labour practice on the part of the employer is established. This Court observed and held as follows:

"34. It is true that **Dharwad District PWD Literate Daily Wages Employees' Assn. -Vrs.- State of Karnataka : (1990) 2 SCC 396** arising out of industrial adjudication has been considered in **State of Karnataka -Vrs.- Umadevi : (2006) 4 SCC 1** and that decision has been held to be not laying down the correct law but a careful and complete reading of the decision in **Umadevi** leaves no manner of doubt that what this Court was concerned with in **Umadevi** was the exercise of power by the High Courts under Article 226 and this Court under Article 32 of the Constitution of India in the matters of public employment where the employees have been engaged as contractual, temporary or casual workers not based on proper selection as recognised by the rules or procedure and yet orders of their regularization and conferring them status of permanency have been passed.

35. **Umadevi** is an authoritative pronouncement for the proposition that the Supreme Court (Article 32) and the High Courts (Article 226) should not issue directions of absorption, regularization or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees unless the recruitment itself was made regularly in terms of the constitutional scheme.

36. **Umadevi** does not denude the Industrial and Labour Courts of their statutory power under section 30 read with section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. **Umadevi** cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established."

In the case of **Casteribe Rajya P. Karmchari Sanghatana** (supra), it is held as follows:-

"45. The question now remains to be seen is whether the recruitment of these workers is in conformity with Standing Order 503 and, if not, what is its effect? No doubt, Standing Order 503 prescribes the procedure for recruitment of Class IV employees of the Corporation which is to the effect that such posts shall be filled up after receiving the recommendations from the Service Selection Board and this exercise does not seem to have been done but Standing Orders cannot be elevated to the statutory rules. These are not statutory in nature.

46. We find merit in the submission of Mr. Shekhar Naphade, learned Senior Counsel for the employees that Standing Orders are contractual in nature and do not have a statutory force and breach of Standing Orders by the Corporation is itself an unfair labour practice. The employees concerned having been exploited by the Corporation for years together by engaging them on piece-rate basis, it is too late in the day for them to urge that procedure laid down in Standing Order 503 having not been followed, these employees could not be given status and privileges of permanency. The argument of the Corporation, if accepted, would tantamount to putting premium on their unlawful act of engaging in unfair labour practice.

47. It was strenuously urged by the learned Senior Counsel for the Corporation that the Industrial Court having found that the Corporation indulged in unfair labour practice in employing the complainants as casuals on piece rate basis, the only direction that could have been given to the Corporation was to cease and desist from indulging in such unfair labour practice and no direction of according permanency to these employees could have been given. We are afraid, the argument ignores and overlooks the specific power given to the Industrial/Labour Court under Section 30(1)(b) to take affirmative action against the erring employer which as noticed above is of wide amplitude and comprehends within its fold a direction to the employer to accord permanency to the employees affected by such unfair labour practice."

In case of **General Secretary, North Orissa Workers Union** (supra), it is held as follows:-

"10.....Adverting to the factual aspect, it is the case of the petitioner that the workmen were continuously working in different projects at different places. Appointment orders were proved on behalf of the workmen to indicate that artificial breaks were given. There is no dispute that the burden of proof is on the petitioner to show that the workmen had worked for two hundred and forty days in preceding twelve months prior to their alleged retrenchment. The burden can be discharged by adducing cogent evidence, both oral and documentary. If the workman discharges his burden that he had worked for two hundred and forty days in preceding twelve months period prior to his termination without following section 25F of 1947 Act, the termination would be illegal. In case of **R.M. Yellatty -Vrs.- Assistant Executive Engineer reported in (2006) 1 Supreme Court Cases 106**, it is held that in case of termination of service of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt of proof of payment. In most cases, the workman can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. In case of Director, Fisheries Terminal Division (supra), it is held the workman would have difficulty in having access to all the official documents, muster rolls etc. in connection with his service. When the workman has come forward and deposed, the burden of proof shifts to the employer to prove that he did not complete two hundred and forty days of service in the requisite period to constitute continuous service.....At the time of their disengagement, even when they had continuous service for such period, they were not given any notice or pay in lieu of notice as well as retrenchment compensation. Thus, mandatory precondition of retrenchment in paying the aforesaid dues in accordance with section 25F of the 1947 Act was not complied with. That is sufficient to render the termination as illegal. Therefore, we are of the view that the observation of the learned Tribunal that the work was contractual in nature and it was not continuous and therefore, the benefits under section 25F is not applicable, is perverse and contrary to the evidence on record."

In the case of **Hindustan Tin works Pvt. Ltd.** (supra), it is held as follows:-

"9.....Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages...."

In the case of **Surendra Kumar Verma** (supra), it is held as follows:-

"6.....Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the Court to make appropriate consequential orders. The Court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The Court may deny the relief of award of full back wages where that would place an impossible burden on the employer....."

In the case of **P Gundu Surwase** (supra), it is held as follows:-

"33.....(v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Articles 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the

> employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages."

In view of the principle laid down by the Hon'ble Supreme Court, we are in agreement with the view expressed by the learned Single Judge in W.P.(C) No.1194 of 2003 that the opposite parties in the review petitions (similar is the case of the appellant in the writ appeal) were engaged on daily wage basis by the Bank and they worked there continuously for more than two hundred forty days in a calendar year and their wages were revised from time to time. The same was also the view of the Tribunal. We are also in agreement with the view expressed by the learned Single Judge that even though the engagement of the opposite parties in the review petitions (which is also the case of appellant in the writ appeal) were not in accordance with the 1984 Rules but they were rightly treated as workmen by the Tribunal, who had put in more than two hundred forty days work in one calendar year. We are also in agreement with the view expressed by the learned Single Judge that provisions of section 25-F of the I.D. Act have not been followed by the employer for the retrenchment of the workmen. However, we are not inclined to the view expressed by the learned Single Judge that the opposite parties in the review petitions be reinstated in service. The Hon'ble Supreme Court in the case of **Asst. Engineer, Rajasthan Dev. Corp. & Another -Vrs.- Gitam Singh reported in (2013) 5 Supreme Court Cases 136** has 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.

In view of the ratio laid down in the aforesaid decisions and in the peculiar facts and circumstances of the case, the direction of reinstatement in service to the opposite parties in the review petitions is not sustainable in the eye of law. However, taking into account the length of service of each of the opposite parties under the Bank, the length of period they faced litigation in different forums, the litigation costs incurred by them, their sufferings and the fact that we are not in favour of their reinstatement, we are of the humble view that the amount of compensation of Rs.50,000/- (rupees fifty thousand) as has been fixed by the learned Single Judge in W.P.(C) No.1194 of 2003 appears to be just, proper and reasonable.

Conclusion:-

24. In view of the foregoing discussions, we allow the writ appeal vide W.A. No.208 of 2008 filed by appellant Urmila Shah and set aside the order

dated 19.06.2008 passed in W.P.(C) No.298 of 2003 but while not inclined to grant reinstatement in service to the appellant, the view taken by the learned Presiding Officer, Industrial Tribunal, Rourkela in I.D. Case No.12 of 2001 in the award dated 23.10.2002 directing payment of compensation at the rate of wages for fifteen days on completion of every two hundred forty days at the existing and prevalent scale of Rs.80/- per day is substituted with a direction to the respondent Bank to pay compensation of Rs.50,000/- (rupees fifty thousand) to the appellant in full and final satisfaction of the dispute. We also dismiss all the review petitions i.e. RVWPET Nos.57, 58, 59, 60, 61, 62, 63, 64 and 65 of 2010 but while upholding the view taken by the learned Single Judge in W.P.(C) No.1194 of 2003 and other connected writ petitions in the judgment and order dated 10.03.2010 regarding payment of compensation of Rs. 50,000/- (rupees fifty thousand) to the each of the respective petitioners in lieu of back wages, we set aside that part of the order regarding their reinstatement in the service of the Bank. The Bank shall pay the compensation amount within a period of three months from today. Accordingly, the writ appeal and the review petitions are disposed of. No costs.

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2020 (I) ILR - CUT- 694

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

W.P.(C) NO. 1564 OF 2020

SHIVSANKAR MOHANTY (IN PERSON) ..... Petitioner

.Vs.

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

COMMISSIONS OF INQUIRY ACT, 1952 – Section 3(4) – Provisions under – Public Interest Litigation seeking direction to the State of Odisha to follow the procedure of law in accordance with the provisions of section 3(4) of the Commissions of Inquiry Act, 1952 in laying the inquiry report of Hon'ble Justice (retd.) C.R. Pal Commission before the Legislature of the State of Odisha – Plea that such report is having public importance and as such cannot be kept pending for years together – The question arose as to whether the provision of the Act is mandatory and whether the court can issue mandamus? – Held, No, – Reasons indicated.

"In view of the foregoing discussion, we are of the view that no direction by way of writ of mandamus can be issued to the opp. party no.1 for laying the report submitted by Hon'ble Justice (retd.) C.R. Pal Commission before the Legislature of State of Odisha in terms of section 3(4) of 1952 Act. The provision is not mandatory."

Case Laws Relied on and Referred to :-

1. 1999 SC 3460 : Fazalur Rehman Vs. State of U.P A.I.R.
2. 2009 (I) OLR 133 : Utkal Christian Council Vs. State of Orissa.
3. A.I.R. 1958 S.C. 538 : Shri Ram Krishna Dalmia Vs. Justice S.R. Tendolkar.
4. A.I.R. 2001 SC 2637 : T.T. Antony Vs. State of Kerala.
5. A.I.R. 1961 S.C. 1480 : Sainik Motors Vs. State of Rajasthan.
6. A.I.R. 1961 S.C. 751 : State of U.PVs. Babu Ram Upadhya.
7. (2003) 2 SCC 577 : Nasiruddin Vs. Sita Ram Agarwal.
8. A.I.R. 1987 Andra Pradesh 53 : Vs. Narayana Roa Vs. State of Andra Pradesh.
9. (2015) 3 Gujarat Law Reporter 2749 : Suresh Rupsankar Mehta Vs. State of Gujarat

For Petitioner : In person
For Opp. Parties : Mr. Mruganka Sekhar Sahoo, Addl. Govt. Adv.

ORDER Date of Hearing & Order: 10.02.2020

BY THE BENCH

The petitioner Shivsankar Mohanty has filed this writ petition by way of a Public Interest Litigation seeking direction to the opp. party no.1 State of Odisha represented through its Principal Secretary, Home Department to follow the procedure of law in accordance with the provisions of section 3(4) of the Commissions of Inquiry Act, 1952 (hereafter '1952 Act') in laying the inquiry report of Hon'ble Justice (retd.) C.R. Pal Commission before the Legislature of the State of Odisha.

It is the case of the petitioner that the Government of Odisha on 11.03.2008 appointed Hon'ble Justice (retd.) C.R. Pal as the single member Commission to look into feasibility and desirability of Orissa High Court Bench outside its location at Cuttack. On 31.05.2014 Hon'ble Justice Pal submitted his report to the Government. It is the case of the petitioner that in view of the public importance in the matter, the State Government without examining the report expeditiously and without taking any action promptly kept the report pending for years together. It is the further case of the petitioner that he made an application under the Right to Information Act, 2005 to the Public Information Officer (PIO) of the opp. party no.3 i.e. Special Secretary, Law Dept., Government of Odisha on the inquiry report of Hon'ble Justice Pal Commission but he was supplied with information, inter

alia, that since the report had not been laid before the Legislative Assembly, it is to be treated as exempted category of information and cannot be supplied unless a final decision is taken. It is the further case of the petitioner that in view of section 3(4) of the 1952 Act, the Government shall cause the inquiry report to be laid before the Legislature of the State together with a memorandum of action taken thereon, within a period of six months of the submission of the report by the Commission to the Government. The petitioner in person argued the matter and reiterated the averments taken in the writ petition and placed reliance in the case of **Fazalur Rehman -Vrs.- State of U.P reported in A.I.R. 1999 Supreme Court 3460**.

Mr. Mruganka Sekhar Sahoo, learned Addl. Govt. Advocate appearing for the opposite parties on the other hand submitted that the section 3(4) of 1952 Act is not mandatory and therefore, reliefs sought for by the petitioner cannot be entertained.

Section 3 of the 1952 Act deals with the appointment of the commission. The Commission of Inquiry is appointed for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification. The power of the Commission under the 1952 Act is only to make a recommendation in respect of the matter referred to it after having investigation/inquiry and the said report cannot be termed as 'judgment' nor there is any usurpation of judicial functions. (Ref:- **Utkal Christian Council -Vrs.- State of Orissa, 2009 (I) Orissa Law Reviews 133**).

Section 3(4) of the 1952 Act read as follows:-

> "**3(4)**. The appropriate Government shall cause to be laid before (each House of Parliament or, as the case may be, the Legislature of the State), the report, if any, of the Commission on the inquiry made by the Commission under subsection (1) together with a memorandum of the action taken thereon, within a period of six months of the submission of the report by the Commission to the appropriate Government."

On a plain reading of section 3(4) of 1952 Act, it indicates that after an inquiry report is submitted by the Commission, the Government shall cause such report to be laid in each House of the Parliament or, before the Legislature of the State, as the case may be within a period of six months from the date of submission of the report by the Commission along with the memorandum of action taken on such report. The question for consideration is whether in view of the use of word 'shall', it is imperative on the part of

the Government to place such report before the House of Parliament or the Legislature of the State, as the case may be or it is to be construed as merely directory.

In the case of **Fazalur Rehman** (supra), it is held that when in a matter of 'definite public importance', a Commission of Inquiry is appointed under the 1952 Act, the State Government should examine the report expeditiously and decide what action, if any, is required to be taken on that report promptly. To keep a report pending for years together does no credit to anybody. Reports of Commissions of Inquiry should not be allowed to gather dust for years together as it reflects adversely on the utility of such commissions and would affect the credibility of the entire exercise.

In the present writ petition, there is no prayer that the State Government should examine the report submitted by Hon'ble Justice (retd.) C.R. Pal expeditiously and decide what action, if any is required to be taken on the report. The prayer on the other hand is for laying the inquiry report before the Legislature of the State of Odisha.

In the case of **Shri Ram Krishna Dalmia -Vrs.- Justice S.R. Tendolkar reported in A.I.R. 1958 S.C. 538**, a Constitution Bench of the Hon'ble Supreme Court while considering the constitutional validity of the 1952 Act indicated that the Commission is merely to investigate, record its findings and make its recommendation which are not enforceable *proprio vigore* and that the inquiry or report cannot be looked upon as judicial inquiry in the sense of its being an exercise of judicial function properly so called. The recommendations of the Commission of Inquiry are of great importance to the Government in order to enable it to make up its mind as to what legislative or administrative measures should be adopted to eradicate the evil found or to implement the beneficial objects it has in view.

In the case of **T.T. Antony -Vrs.- State of Kerala reported in A.I.R. 2001 Supreme Court 2637**, it is held that the report and finding of the Commission of Inquiry are meant for information of the Government. The acceptance of the report of the Commission by the Government would only suggest that being bound by the Rule of Law and having duty to act fairly it has endorsed to act upon it.

It is not in dispute that in section 3(4) of the 1952 Act, the word 'shall' has been used before the words 'caused to be laid' before each House

of Parliament or, as the case may be, the Legislature of the State. In case of **Sainik Motors -Vrs.- State of Rajasthan reported in A.I.R. 1961 S.C. 1480**, it is held that the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the context or the intention otherwise demands. In the case of **State of U.P. -Vrs.- Babu Ram Upadhya reported in A.I.R. 1961 S.C. 751**, it is held that when a statute uses the word 'shall', prima facie it is mandatory but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. In the case of **Nasiruddin -Vrs.- Sita Ram Agarwal reported in (2003) 2 Supreme Court Cases 577**, it is held that the word 'shall' is ordinarily imperative in nature. If an act is required to be performed a private person within a specified time, the same would ordinarily be mandatory but when a public functionary is required to perform a public function within a time-frame, the same will be held to be directory unless the consequence therefor are specified.

It is the settled position of law that whether a duty under a statute is obligatory, mandatory or directory has to be ascertained from the scheme of the statute, nature of the duty imposed and thus use of 'shall', 'must' or 'may' are not always conclusive factors. Where a statute imposes a public duty and lays down the manner in which and the time within which the duty shall be performed, injustice or inconvenience resulting from a rigid adherence to the statutory prescription may be a relevant factor in holding such prescriptions only directory. (**Principles of Statutory interpretation, Justice G.P. Singh, 8th Edition (2002), Page 326**).

In the case of **V. Narayana Roa -Vrs.- State of Andra Pradesh reported in A.I.R. 1987 Andra Pradesh 53**, a Full Bench considered the question whether sub-section (4) section 3 of 1952 Act is mandatory or directory and it is held that the provision is not mandatory. It is further held that there is no other provision in the Act which provides for the consequence that flows from the non-observance of the requirements of subsection (4). Evidently, this section was conceived as a check upon the Government inaction, or deliberate suppression of the report before the Parliament/Legislative Assembly along with the memorandum of action taken by it thereon. It was further held that if it is held non-pressing of the report or non-observance of the time limit prescribed in the sub-section results in rendering the very report void, and that, on that account, the Government is precluded from taking any action on the basis of such report,

it would amount to placing a premium upon the delay or default on the part of the Government and would not serve the purpose of the sub-section. It is one thing to say that on account of the lapse of time, the report has lost its relevance or validity in a given case or that the relevant circumstances have undergone such a qualitative change that the report is no longer relevant, or of any use, and quite a different thing to say that the report is render void after the period of six months on the ground of noncompliance with the said sub-section. In case of non-observance of the said sub-section, it is always open to any member of the Parliament/Legislature, or any opposition party/group to question as to why the report of the Commission is not placed before the House, and also regarding the action taken by the Government on such report.

In the case of **Suresh Rupsankar Mehta -Vrs.- State of Gujarat reported in (2015) 3 Gujarat Law Reporter 2749**, a Division Bench of Gujarat High Court also held that it is not mandatory for the Chief Minister or the Governor to place the report of Justice M.B. Shah Commission of Inquiry before the House of Legislative Assembly.

In view of the foregoing discussion, we are of the view that no direction by way of writ of mandamus can be issued to the opp. party no.1 for laying the report submitted by Hon'ble Justice (retd.) C.R. Pal Commission before the Legislature of State of Odisha in terms of section 3(4) of 1952 Act. The provision is not mandatory. Accordingly, the writ petition being devoid of merits stands dismissed.

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2020 (I) ILR - CUT- 699

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

JCRLA NO. 32 OF 2012

HIRANYA KUMAR BEHERA @ MITU .....Appellant

.Vs.

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Fair trial – Offence under Section 302 of Indian Penal Code – Conviction – Doctor has stated that weapon of offence was not sent to him for examination and there was a possibility that deceased might have lived if timely medical attention was given to him – Chemical report of the weapon of offence not obtained – Enmity between the accused and deceased pleaded – Evidence do not

appear clinching – Trial found to have been done with haste ignoring the basic principle to ensure fair trial – The learned Sessions Judge, as record reveals adjourned the case for chemical examination report but subsequently without taking any steps framed charge, examined witnesses and completed trial recording conviction – Held, the enmity as a double aged weapon assumes importance – As the conviction is based upon the sole eye witnesses and her evidence is found to be not credible enough due to prior enmity and contradiction with medical evidence, the accused is entitled to be given benefit of doubt.

Case Laws Relied on and Referred to :-

1. AIR 2009 SC 2298 : Mahtab Singh & Anr Vs. State of U.P
2. 2019 (4) SCC 522 : Digamber Vaishnav & Anr Vs. State of Chhattisgarh

For Appellant : Mr. Himansu Bhusa Dash
For Respondent : Mrs. Saswata, A.G.A.

JUDGMENT Date of Hearing & Judgment :13.02.2020

DR. A. K. MISHRA, J.

In this appeal U/s.383 Cr.P.C. the appellant has assailed his conviction U/s.302 IPC and sentence to undergo life imprisonment and to pay fine of Rs.10000/- in default R.I for two years passed in judgment dated 30.06.2011 in S.T. Case No.303 of 2009 by learned Sessions Judge, Keonjhar.

2. The prosecution case, in short, is that on 11.9.2009 at about 11.30 P.M. in Village Jamuda while the Sideo Munda was sleeping on a cot on the Verandha accused out of previous enmity dealt axe blows causing injuries on his neck and severance of his right index finger, as a result he succumbed to his injuries. On next day morning the nephew of deceased – P.W.1 lodged FIR at 7:00 A.M. which was registered as Harichandanpur P.S. Case No.63 of 2009 and investigation commenced. Inquest was made vide Exhibit-4. Postmortem was conducted by Doctor-P.W.8. The accused was arrested and gave recovery of the seized weapon of offence Axe (M.O-I) from paddy field. The Investigating Officer (P.W.10) got the said weapon of offence and other seized articles forwarded for chemical examination vide Exhibit-13. After completion of investigation charge-sheet was submitted. The SDJM, Keonjar committed the case to the Court of Session. Accused faced trial for the offence under section 302 IPC.

The plea of defence is denial simpliciter and false implication.

The prosecution examined 11 witnesses in all, defence examined none. P.W.1 is the nephew of deceased who lodged FIR (Exhibit-1).

P.W.2 and 9 are the sons of deceased, P.w.3 is the widow of the deceased, P.W.4 is a witness to the leading to the discovery of weapon P.W.5 and 6 are post occurrence witness. P.W.7 is a witness to the inquest, P.W.8 is the Doctor and P.W.10 is a witness to the seizure of the blood stained shirt of the accused. P.W.11 is the Investigating Officer. Exhibt-1 to Ehbit-13 are marked on behalf of the prosecution. The chemical examination report is not exhibited.

2-A. On verification of order sheet of the Sessions Judge, and also of the record it is found that there is no order passed as to marking of any article as M.O.-I. No such list for material object is available. Despite such, in the judgment a list of M.O.-I has been appended which is contrary to Rule-97 and Rule-108 of the General Rules and Circular Orders (Criminal) Vol.-I.

2-B. Learned Trial Judge has recorded that the death of the deceased is homicidal in nature. The testimony of P.W.9 one of the sons of deceased has contained embellishment and thus unreliable. He relied upon the testimony of P.W.3, the sole eye witness and recovery of the weapon of offence and convicted the accused under section 302 of IPC and passed sentence as stated above.

3. Learned counsel Mr. Himanshu Bhushan Dash for the appellant would contend that the sole eye witness-P.W.3 is not believable because it contradicts the medical evidence wherein the severance of finger is not found by the Doctor-P.W.8. Further, when the widow had seen the attack and identified the culprit due to lantern, the son P.W.2 could not have seen such assault as he wake up from another room hearing hulla of mother. The Investigating Officer has released the lantern in zima and not produced the seized weapon with chemical examination report. He further submits that the factum of recovery of weapon is not believable as the seized axe is not found to be a weapon of offence in absence of chemical examination report. According to him enmity being a double edged weapon, the character of evidence should be clear, cogent and unimpeachable in nature and for want of the same, accused should be given benefit of doubt. He relies upon the decisions reported in ***AIR 2009 SC 2298 ; Mahtab Singh*** and ***another Vrs.***

State of U.P and ***2019 (4) SCC 522 Digamber Vaishnav and another Vs. State of Chhattisgarh.***

Learned Additional Government Advocate Mrs. Saswata Pattnaik supported the conviction and sentence on the ground stated in the judgment. She further states that for the fault of Investigating Officer, the accused should not be given benefit of doubt.

4. We carefully perused the evidence and materials on record. The death of deceased is homicidal in nature, it is proved by P.W.8 – Doctor who conducted postmortem on 12.9.2009 vide Exhibit-5. He found three cut injuries, one on the front of the throat, second on the back of the neck and third one on the mandible. No other injury was found. Doctor has stated that weapon of offence was not sent to him for examination and there was a possibility that deceased might have lived if timely medical attention was given to him. It appears that death of the deceased as per prosecution on 11.9.2009 at night was homicidal in nature but the severance of right index finger was not found. We affirm the findings of the learned Trial Court.

5. P.W.9, as observed by learned Trial Court, is found to be unreliable and we do not disapprove such findings.

5-A. The FIR Exhibit-1 was lodged on 12.2.2009 at 7:00 A.M.. P.Ws.2 and 3, the son and wife of deceased, testified that the deceased was sleeping on the Varrendha. P.W.3 was sleeping along with her four sons in a room while another son Jayram(P.W.2) and his wife were sleeping in another room. Both of them stated that at about 11:00 P.M the incident took place. But P.W.3 stated that she found the accused assaulting the deceased by an axe to the neck and right index finger of her husband and her right index finger was severed and then she shouted and called for help. Thereafter villagers came and P.W.1 was also informed. She also stated that a lantern was burning near the spot. For the translation of the testimonies of the witnesses as she spoke in “Ho” language, a translator was engaged by the Court. P.W.2, the son, has stated that hearing the shout of her mother he wake up and found the accused running away. The right index finger of the father was fully severed. Thereafter, he and her mother cried loudly and others came to the spot. Both of them have admitted that prior to one moth of this incident the deceased had protested the felling of a Sal tree by accused for which there was a village meeting and accused had grudge for that. In cross examination, P.W.2 has admitted that he was sleeping in a separate room with his wife. The

evidence does not appear clenching because the four sons who were sleeping with mother had not seen the accused and the other son who had slept inside a separate room with his wife and had come outside hearing shout could able to see accused running away. P.W.1 deposed that he heard the incident from Pranta Prasad Gagarai who came to him and disclosed about the incident where-after he went to the spot and on next day morning he lodged FIR Exhibit-1. But P.W.2 stated that Pranta informed the incident to Krushna P.W.1 over Mobile Phone. P.W.3 claims to have seen the actual assault due to burning of lantern light. Her son P.W.2 has corroborated her to the extent that he had seen the severance of right index finger. The evidence of both with regard to severance of index finger runs contrary to the medical evidence of P.W.8 and postmortem report Exhibit-5. This circumstance affecting credibility of the eye witness is magnified when the weapon of offence and chemical examination report are not proved.

6. No reason is found as to why the Trial Court did not obtain the chemical examination report. In absence of such adjunct, it cannot be said that the seized axe was the weapon of offence.

6-A. The trial is found to have been done with haste ignoring the basic principle to ensure fair trial. The learned Sessions Judge, as record reveals on 16.2.2010 adjourned the case for chemical examination report but subsequently without taking any steps framed charge, examined witnesses and completed trial recording conviction. As stated above, the judgment is found to have contained M.O.-I list contrary to any such proof. Fact remains that Court expedited the process at the expenses of the basic elements of fairness and the opportunity to the accused.

Hon'ble Supreme Court in the judgment of Anokhilal Vrs. State of M.P. decided on 18.12.2019 (2019 SCC Online SC 1637)finding that the trial Court had not waited for FSL & DNA report; observed that :-

> "18. Expeditious disposal is undoubtedly required in criminal matters and that would naturally be part of guarantee of fair trial. However, the attempts to expedite the process should not be at the expense of the basic elements of fairness and the opportunity to the accused, on which postulates, the entire criminal administration of justice is founded. Pursuit for expeditious disposal, the cause of justice must never be allowed to suffer or be sacrificed. What is paramount is the cause of justice and keeping the basic ingredients which secure that as a core idea and ideal, the process may be expedited, but fast tracking of process must never ever result in burying the cause of justice."

7. In the above backdrop, the enmity as a double adged weapon assumes importance. The probability that P.W.3 might have implicated the accused for such prior enmity is not ruled out.

8. As the conviction is based upon the sole eye witnesses P.W.3 and her evidence is found to be not credible enough due to prior enmity and contradiction with medical evidence, the accused is entitled to be given benefit of doubt.

9. In the result, the appeal is allowed. The conviction of appellant under section 302 of IPC and the sentence passed in S.T. Case No.303 of 2009 by learned Sessions Judge, Keonjhar is set aside and the appellant be set at liberty forth with from the jail, if he is not required in any other case. LCR be returned immediately.

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2020 (I) ILR - CUT- 704

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

JCRLA NO.14 0F 2005

RANKANIDHI DAKUA ……Appellant

.Vs.

STATE OF ODISHA ……...Respondent

CRIMINAL TRIAL – Offence under Section 302 of Indian penal Code – Conviction – No eye witnesses to the occurrence and the prosecution relied heavily on evidence like extra judicial confession made by the accused and leading to discovery of the weapon of offence – Most of the prosecution witnesses did not support the prosecution case – Circumstances show, extra judicial confession was not made voluntarily and without any coercion – It is apparent from the record that a large number of villagers were present at the village Mandap and all of them asked the appellant about the incident for which he stated about the killing of his wife on the direction of the deity – The second piece of evidence is the seizure of the weapon of offence by the prosecution from the spot – It is apparent that though human blood was found on the Tangia i.e. M.O.I, the blood grouping has not been made – No blood stained were found on the wearing apparels of the appellant – Hence the conviction cannot be maintained.

For Appellant : M/s.S.K.Das-1, S.Samal, B.Ray, M.B.Das & D Mohanty
For Respondent : Addl. Standing Counsel.

JUDGMENT Date of Judgment: 13.2.2020

S.K.MISHRA, J.

In this appeal, the sole appellant-Rankanidhi Dakua has challenged the judgment and order of conviction dated 16.10.2004 for the offence under Section 302 of the I.P.C. (hereinafter referred to as "I.P.C." for brevity) passed by the learned Addl. Sessions Judge, Bhanjanagar in S.C. Case 16/2003[S.C. No.124/2003 (G.D.C.)]. He has been sentenced to undergo imprisonment for life and to pay a fine of Rs.1,000/- (rupees one thousand) in default to undergo further rigorous imprisonment for six months.

2. The case of the prosecution can be stated briefly as follows:

The informant, Dinabandhu Pradhan, who is examined in this case as P.W.2 is a permanent resident of village Paitagan and so also the accused of this case. Chandradhwaja Dakua, P.W.4, is the elder brother of the accused and he used to reside at village Benakunda, but on the occasion of Astraprahari Namo Jangya he had come to village Paitagan and resided in the house of his mother. The mother of Chandradhwaja and sister of Chandradhwaja were residing in one house and accused was residing in another house but both the houses are almost all adjacent. It is alleged that on 16.11.2002 the accused and his wife Bhagyalata had been to village Mujagado but in the said village quarrel ensued between the accused and his wife and Mochi Dakua who is a relative of the accused intervened and brought the accused and his wife and left them at village Paitagan and the wife of the accused was residing with the mother of the accused. At about 8.00 P.M. of 19.11.2002 P.W.4 appeared at village Dando and in presence of the villagers disclosed that his brother, namely, accused Rankanidhi had caused the death of said Bhagyalata by assaulting her by means of tangia.

3. Thereafter, the informant and some of his villagers proceeded to the ancestral house of Chandradhwaja Dakua where the mother of Chandradhwaja, sister of Chandradhwaja and wife of Chandradhwaja were there. The informant and his companions found Bhagyalata was lying dead with injury on her head and other parts of her body and there was severe bleeding from the injuries. Being asked by the informant and some of his villagers the accused disclosed and made extra-judicial confession that he

killed his wife. When the accused was asked by the informant and his companions the reason for which he killed his wife the accused replied "MAANKO HUKUM HELA ENU MARILI". The matter was reported to the gram Rakhi Devaraj Naik and the Grama Rakhi guarded the place of murder on the night including the informant till the morning on receipt of telephonic message of the informant the I.I.C. of Bhanjanagar P.S. Directed the S.I. of Police, P.W.14, to proceed to village Nuagam to ascertain the truth of the telephonic message and thereafter P.W.14 proceeded to village Paitagan and reached there at about 10 A.M. P.W.2 presented a written report to P.W.14 regarding the occurrence. As the report revealed a cognizable case under Section 302 of the I.P.C., P.W.14 treated the said report as F.I.R. and took up preliminary investigation and had sent the original report to Bhanjanagar P.S. for registration of the case. Subsequently Bhanjanagar P.S. Case No.234/2002 was registered and P.W.14 was directed to proceed with the investigation of the case.

4. During investigation, P.W.14 examined the informant and other witnesses, visited the spot and prepared spot map, conducted inquest over the dead body of the deceased, prepared the dead body challan and had sent the dead body to S.D. Hospital, Bhanjanagar for post mortem examination. The I.O. also seized the sample soil, blood stained soil, blood stained cloth piece and some sample cloth pieces in presence of witnesses and prepared the seizure list. The I.O. also seized one tangia on production by accused and prepared seizure list in presence of witnesses vide Ext.4 and M.O.I is the said tangia. The I.O. also seized the wearing apparels of the accused namely one yellow coloured Dhoti, one napkin vide M.Os.II and III and those were seized under a seizure list namely Ext.5. The wearing saree of the deceased stained with blood was seized by the I.O. after the post mortem examination of the deceased and the I.O. prepared the seizure list Ext.8 and M.O.IV is the said saree of the deceased. The I.O. sent the exhibits to State F.S.L., Rasulgarh for examination through S.D.J.M., Bhanjanagar vide forwarding letter of the S.D.J.M., ext.17. The I.O. received the P.M. report. Thereafter, the I.O. took up investigation, examined the accused and some other witnesses and after taking all usual and necessary steps for investigation he placed the charge sheet against the accused under section 302 of the I.P.C.

5. The defence took the plea of simple denial.

6. Admittedly, in this case there are no eye witnesses to the occurrence and the prosecution relied heavily on evidence like extra judicial confession

made by the accused and the leading to discovery of the weapon of offence. No witnesses were examined on behalf of the defence to prove its case.

7. In order to prove its case the prosecution has examined as many as fourteen witnesses. P.Ws.4, 8, 10, 11 and 12 did not support the case for which they were declared hostile by the prosecution and were cross examined by the prosecution. The prosecution mainly relied upon the evidence of P.W.2, Dinabandhu Pradhan and P.W.5, Sribachha Gouda before whom the appellant allegedly made extra judicial confession acknowledging his guilt that he killed his wife. The prosecution has also placed reliance on certain circumstantial evidence namely seizure of blood stained Tangia which was seized on production by the prosecution. The post mortem report and the failure of the appellant to justify his plea of alibi as a last link in the chain. Learned Addl. Sessions Judge has relied upon all these three aforesaid materials for evidence and come to the conclusion that the prosecution has prove its case beyond all reasonable doubt.

8. The first important piece of evidence is that the alleged extra judicial confession by the appellant before the villagers. P.W.2, Dinabandhu Pradhan, has stated in examination- in-chief that on 19.11.2002 at 8 P.M. the occurrence took place. The younger brother of the accused Rankanidhi Dakua came and told them that his brother Rankanidhi Dakua killed his wife Bhagyalata Dakua. Then the villagers called Rankanidhi and enquired from him as to why he killed his wife. He said that it is by the order of the Deity, he killed her. Then they saw the dead body of the deceased and police was informed. P.W.5, Sribachha Gouda, similarly stated that he was present in the village Mandap where Chandradhwaja came and told them that his brother Rankanidhi killed his wife Bhagyalata. Hence, they called Ranka near the village Mandap where he confessed before them to have killed his wife. Thereafter, the police was informed over phone.

9. We are of the opinion that the extra judicial confession cannot be believed in this case. Because it is not made voluntarily without any coercion. It is apparent from the record that a large number of villagers were present at the village Mandap and all of them asked the appellant about the incident for which he stated about the killing of his wife on the direction of the deity. Moreover, the exact words used by the appellant making the extra judicial confession has not been reproduced before the Court only in a general manner both the witnesses stated that the appellant killed his wife because of the order the deity. Moreover, there are so many other persons present in

that meeting where the appellant allegedly made the extra judicial confession, but none of the other prosecution witnesses has supported the case of the prosecution. So in such a view of the fact, the reliance placed by the learned Addl. Sessions Judge on the extra judicial confession of the appellant has caused prejudiced to the defence and should not be relied upon by this appellate Court to uphold the conviction.

10. The second piece of evidence which is forthcoming in this case is in the seizure of the weapon of offence seized by the prosecution from the spot. It is apparent that though human blood was found on the Tangia i.e. M.O.I, the blood grouping has not been made. No blood stained were found on the wearing apparels of the appellant. So on a total consideration of the matter, we are of the opinion that the circumstance of finding blood in the weapon of offence and the wearing apparels of the deceased is of no consequence in the peculiar facts of the case.

11. The last circumstances relied upon by the learned Addl. Seasons Judge is that the appellant has taken the plea of alibi and failed to establish the same which provides the last link in the chain. In our opinion when the other two circumstances have been disbelieved by the Court, such failure of establishing the plea of alibi will not help the prosecution case in any way.

12. Keeping in view the aforesaid consideration, we are of the opinion that the appeal is meritorious one and the same should be allowed. Hence, the appeal is allowed. The judgment of conviction and order of sentence passed by the learned Sessions Judge in S.T. No.16/2003 is hereby set aside.

13. In the result, the JCRLA is allowed. The appellant be set at liberty if his detention is not required in any other case.

14. L.C.R. be returned to the lower court immediately.

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2020 (I) ILR - CUT- 708

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

W.P.(C) NO. 17670 OF 2018

M/S. PARIDA CONSTRUCTIONS .....Petitioner

.Vs.

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

CONSTITUTION OF INDIA , 1950 – Articles 226 and 227 – Tender matter – Writ petition challenging the decision of the tender Committee declaring the tender of the petitioner to be disqualified – Plea that the tender was initially declared qualified and subsequently with malafide intention it was declared disqualified – State's reply is that a mistake was committed while evaluating the technical bid and basing upon such mistake, consequential process was undertaken up to financial bid and subsequently the mistake in technical evaluation was detected by the Tender Evaluation Committee which rejected the tender as the tender was found to have not fulfilled the eligibility criteria – Rejection, whether can be interfered with? – Held, no, if a mistake with regard to eligibility is detected subsequently, it cannot be said that the mistake is beyond correction – No malafide can be attributed in the case at hand because the document containing annual turnover (ATO) filed by the petitioner itself makes the petitioner ineligible for participation.

Case Laws Relied on and Referred to :-

1. (2018) 5 SCC 462 : Municipal Corporation, Ujjain & Anr. Vs. BVG India Ltd. & Ors.

For Petitioner : M/s. Prasanna Kumar Parhi, B.K.Pardhi, J.Mohanty, & D.Gochhayat.

For Opp.Parties. : Mr. P.P.Mohanty, Addl. Govt. Adv.
M/s. S.K.Pattnaik & M.Chinmayee,
M/s.Satyabrata Mohanty, S.Moapatra, A.K.Jena,
P.K.Das & R.C.Behera.

JUDGMENT Date of Hearing: 07.02.2020 : Date of Judgment:03.03.2020

DR. A.K.MISHRA, J.

A detailed tender call notice was invited on 06.07.2018 under National Competitive Bidding Through e-procurement for construction of HL Bridge Lune-Karandia near Dihabalarampur on Tikanpur-Dalanta Stand works by opposite party No.2. The date and time of opening of the tender (Technical bid) was 10.08.2018 at 11.00A.M. One of the eligibility conditions as per Detailed Tender Call Notice (in short "DTCN") vide Clause- 2.1(5) was that the intending tender should have the total financial turn over in respect of the Civil Engineering Works of an amount not less than the amount put to tender (as in Col.3 of the Table) during any 3 (three) financial years taken together of the last proceeding five financial years (starting from 2013-14 to 2017-18 excluding the current financial year). The financial turn over certificate for Civil Engineering Works was required to be submitted from the Charted Accountant showing clearly the financial turn over financial year wise. It was also stipulated vide Clause 2.1 that the

tenderer not fulfilling the eligibility criteria could submit the tender on his own risk, as the tender would summarily be rejected.

The petitioner, a super class contractor, submitted his bid application Online with documents including Annual Turn Over certificate from Charted Accountant. The approximate cost was Rs.45,70,54,874/-.

It is the case of the petitioner that on 17.09.2018 opposite party Nos. 2 and 3 evaluated the technical bid and found the petitioner qualified and accordingly, he was informed in the official Website on 18.09.2018. Financial bid was opened on 19.09.2018 and petitioner's firm was found to have quoted the lowest amount amongst four bidders. But on 11.10.2018 opposite party No.3 intimated that tender had been rejected during Technical evaluation by the duly constituted committee for the reason 'Disqualified' vide Annexure-1.

Averring that the act of opposite party Nos. 2 and 3 in disqualifying the petitioner after finding him qualified in the Technical bid is illegal and violative of statutory provision of law, the prayer is made in this writ petition to quash Annexure-1 the letter dated 11.10.2018 disqualifying the petitioner and Detailed Tender Call Notice (in short DTCN) vide Annexure-3 and also allow the petitioner to execute the work.

2. Opposite parties No.1, 2 and 4, the State and State Authorities, in their counter affidavit have submitted that the petitioner was not eligible for having not met the total financial turnover required under Clause 2.1(5) of General Instructions to Tenderers and by mistake he was found eligible which was rectified after receiving a complaint from opposite party No.5 and such bonafide mistake was communicated without any malafide.

3. Opposite party No.5 (Intervener), one of the bidders filed counter affidavit stating therein that petitioner was not eligible due to inadequate Annual Turnover (in short "ATO") as furnished by him.

4. The petitioner has filed rejoinder quoting the details of the annual turnover submitted by him in the tender documents. The document is Annexure-C/4.

5. Learned senior counsel for the petitioner Mr. P.K.Parhi submitted that once the petitioner-tenderer is found to be qualified and notified as such and his financial bid is found to be the lowest one amongst four others, the rejection of his bid subsequently as disqualified

is nothing but malafide and same having been done without giving opportunity of hearing to the petitioner, the bid inviting tender is liable to be quashed.

5-A. Mr. P.P.Mohanty, learned Additional Government Advocate submitted that disqualified tenderer cannot be allowed to be qualified for the bonafide mistake committed in course of verification of technical bid. He further submitted that the ATO certificate submitted by the petitioner as tender document which is the basis of disqualification cannot be said to have been wrongly calculated or considered by the Tender Committee subsequently. Learned counsel for opposite party No.5 submitted that the work cannot be entrusted to a disqualified ineligible tenderer.

6. The estimated cost of the work was Rs.45,70,54,874/- as per the DTCN. A tenderer for participation is required to show the total financial year turnover in respect of Civil Engineering works of an amount not less than the above amount during the three financial years. In course of hearing learned senior counsel Mr. Parhi does not dispute the ATO document filed by the petitioner vide Annexure-C/4. The amount year wise furnished therein if calculated in any manner would not meet the eligibility requirement as far as ATO is concerned. This being the factual position, we have to accept that a mistake was committed while evaluating the technical bid and basing upon such mistake, consequential process was undertaken upto financial bid. It is only on 11.10.2018 mistake in technical evaluation was detected by the Tender Evaluation Committee who rejected the tender of the petitioner as DTCN had stipulation of a clause with regard to eligibility criteria that tender can be summarily rejected if the tenderer is found to have not fulfilled the eligibility criteria. If a mistake with regard to eligibility is detected subsequently, it cannot be said that the mistake is beyond correction. No malafide can be attributed in the case at hand because the document containing ATO filed by the petitioner itself makes the petitioner ineligible for participation.

7. Unless it is found that a decision making process or the decision taken by the authority bristles with malafide, arbitrariness or perversity, the writ court shall not interfere with the decision of the tender accepting authority. In the case of **Municipal Corporation, Ujjain & Anr. Vs. BVG India Limited and Ors;** reported in (2018) 5 SCC 462, the Hon'ble Supreme Court has enumerated the scope of judicial review with regard to technical bid in the following words:-

"50. Thus, the questions to be decided in this appeal are answered as follows:-

(a) Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualification of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

(b) A bidder who submits a bid expressly declaring that it is submitting the same independently and without any partners, consortium or joint venture, cannot rely upon the technical qualifications of any 3rd Party for its qualification.

(c) It is not open to the Court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of malafides, intention to favour someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the Court ordinarily should exercise judicial restraint."

8. For the aforesaid reasons, this Court is of the view that disqualification of petitioner in the aforesaid tender bid does not suffer from any arbitrary, perverse or malafide action of opposite party Nos. 1, 2 and 3 and the petitioner is not entitled to any relief on judicial review of the tender in question.

9. In the result, the writ petition stands dismissed. There shall be no orders as to costs. The connected I.A. also stands dismissed.

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2020 (I) ILR - CUT- 712

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

W.P.(C) NO. 24164 OF 2019 & W.P.(C) NO. 4114 OF 2020

M/S. NOBLE PHARMACARE LTD., CUTTACK …….Petitioner

.Vs.

STATE OF ODISHA & ANR. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Tender matter – Challenge is made to the issuance of a corrigendum notice excluding a eligibility criteria – Plea that such an action in the midst of the tender process not proper and excludes the petitioner from participating in the tender – State's plea is that it has issued the corrigendum by exercising the power of another clause of the tender itself – Power of the State questioned – Held, certainly in our considered opinion, we cannot direct the opposite parties to insert an eligibility clause which is otherwise taken away in exercise of their power under Clause No. 6.15 of the tender document for the larger

public interest – The right exercised by the authority is right – No interference in exercise of the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India is called for.

Case Laws Relied on and Referred to :-

1. 2006 (Supp.-II) OLR 955: M/s. Lingaraj Pipes Pvt. Ltd. Vs. Sales Tax Officer, Bhubaneswar II Circle & Ors.
2. 2017 (I) OLR 629 : Sampad Samal Vrs. State of Odisha & Ors
3. AIR 1993 SC 1601 : Food Corporation of India Vs. M/s. Kamadhenu Cattle Feed Industries.
4. (2000) 5 SCC 287 : Monarch Infrastructure Pvt. Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation & Ors.
5. (2016) 14 SCC 172: State of Jharkhand and Others Vs. CWE-Some Consortium.
6. (1994) 6 SCC 651 : Tata Cellular Vs. Union of India.

For Petitioner : Mr. Surya Prasad Mishra, Sr. Adv.
For Opp. Parties : M/s. Janmejaya Katikia & Prabhu Prasad Mohanty.

ORDER Date of Order 03.03.2020

This common order is passed as the parties in both the writ petitions are same and the pith of the petitioner's prayer is to quash a corrigendum notice No. 12797/OSMC/I-63/2019 dated 7.11.2019 on which issuance by the tender inviting authority, the petitioner is deprived of fair participation not only in the first tender bid dated 30.08.2019, but also subsequent re-tender on 20.01.2020.

Heard Mr. Surya Prasad Mishra, learned Senior Advocate for the petitioner, Mr. Janmejaya Katikia, learned counsel for opposite party No.1 and Mr. Prabhu Prasad Mohanty, learned counsel for opposite party No.2.

2. The facts essential for disposal of the writ petitions are thus:-

The petitioner is a registered local MSME (Micro, Small and Medium Enterprises) unit manufacturing sterilized Hypodermic syringes and other medical devices. The registration certification has been issued by opposite party No.2.

2-A. The Government of Odisha in MSME Department had declared "Odisha Procurement Preference Policy for Micro & Small Enterprises" under Section 11 of the Micro, Small and Medium Enterprises Development Act, 2006. The said policy was notified in the Odisha Gazette on 10.06.2015 and was approved by the State Cabinet on 30.5.2015. Inter-alia it was provided therein that the State Government Departments and other Agencies

should set an annual goal of procurement of products produced and services rendered by Micro and Small Enterprises (in short 'MSE') so as to achieve procurement of minimum twenty percent (20%) of the value of their requirement and there should not be any minimum turnover requirement for MSE in participating in public procurement process under the policy. Opposite party No.1, Odisha State Medical Corporation Limited (In short 'OSMCL'), floated an e-Tender for supply of drugs, medical consumables and surgical suture items. In observing such policy, opposite party No.1 had kept one condition vide Clause No. 5.2.5 that the local MSE units registered with respective DICs, Khadi, Village, Cottage and Handicraft Industries, OSIC and MSIC within the State of Odisha were allowed to participate in 8(eight) nos. of items as mentioned at Section-IV with minimum turnover of 35 lakhs in any one financial year during the last 3(three) financial years and the local MSE Units of Odisha should have quantity reservation of 20% of the tender/procurement quantity of the above mentioned 8 nos. of items specified in Section –IV, if they agree to supply the items matching with L1 approved rate.

2-B. The last date of submission of tender bid was 30.08.2019. As per stipulation pre-bid meeting was held on 6.09.2019. The representative of the petitioner had participated therein. On 29.10.2019 a corrigendum was issued rescheduling the last date for technical bid to 18.11.2019. The petitioner had submitted his bid on 30.10.2019 in respect of items of work under serial No.80 (Disposable Syringe 2cc, SO2001) and serial No. 81(Disposable Syringe 5cc, SO2002). On 7.11.2019 the pre-condition with regard to 35 lakhs turnover and reservation of 20% tender quantity as stipulated under Clause No. 5.2.5 of the tender document was excluded by issuance of corrigendum vide Annxure-14.

2-C. The case of the petitioner is that such exclusion is contrary to the Odisha Procurement Preference Policy for Micro and Small Enterprises and is intended only to exclude the present petitioner, who is otherwise entitled to the preference under MSME Policy of the State Government. His representation was not considered. In the technical bid, vide communication dated 16.12.2019 his bid has been rejected on the ground of "Less turnover as per Clause No.5.2.5."

2-D. The prayer of the petitioner in W.P.(C) No.24164 of 2019 is to quash the corrigendum dated 7.11.2019 vide Annexure-14 and also the decision of

the Tender Evaluation Committee dated 16.12.2019 in rejecting the bid of the petitioner. In W.P.(C) No. 4114 of 2020 the re-tender for those two items dated 20.1.2020 is sought to be quashed on the ground that issuance of corrigendum is contrary to Government MSME policy.

3. Opposite party No.1 filed counter affidavit and additional counter affidavit stating that the State being not a party, the writ is not maintainable. It was stipulated in the tender document Clause No. 6.15 that at any time prior to the deadline for submission of bid, the tender inviting authority may, for any reason, modify the bid document by amendment and publish it in e-tender portal and OSMCL Website, and accordingly the corrigendum was issued to which petitioner cannot take legal exception. Both the disposable syringe items are very essential for day-to-day management of the hospital. The requirement of 2cc disposable syringe for the entire State was 2.82 crores and 5cc disposable syringe was 3.17 crores for the financial year 2019-2020 and for that it was decided that the company having strong financial background and good past performance could ensure timely supply of quality items for the benefits of the patients and for that it was decided to keep those two items under Rs.2 crores turnover category for which corrigendum was issued and petitioner was found not qualified. Further it is stated that as the petitioner was supplying items of inferior quality, his firm was de-recognized by the Director of Health and Services, Odisha, vide order No.421 dated 19.3.2016 for a period of two years and complaint was received from different health institutions of the State that the injection syringes supplied by the petitioner were not of standard quality. A question was raised in the floor of the Assembly on 11.07.2014 and answer was given by the-then Health Minister. A decision was taken to cancel all the orders of the petitioner's company and to procure only auto lock/auto disable syringes.

3-A. Petitioner filed a rejoinder stating that period of de-reorganization has already been completed by 19.03.2018 and W.P.(C) No. 5737 of 2016 is pending challenging the same. The performance of the petitioner's firm has been examined by different authorities and is certified to be upto standard for supply. It is also stated that issuance of corrigendum is against the legitimate expectation of the petitioner who is a MSME Unit.

4. In course of hearing Mr. S.P. Mishra, learned Senior Advocate for the petitioner has relied upon the decision reported in 2006 (Supp.-II) OLR 955: **M/s. Lingaraj Pipes Pvt. Ltd. Vrs. Sales Tax Officer, Bhubaneswar II Circle & Others**, to contend that issuance of corrigendum to make the

petitioner ineligible is unfair, unreasonable and arbitrary and thereby violative of Article 14 of the Constitution of India. He further relied upon the decision reported in 2017 (I) OLR 629: **Sampad Samal Vrs. State of Odisha and others**, to urge that issuance of corrigendum for cancellation of tender without any proper and adequate ground cannot be justified in law. Further he relied upon a decision reported in AIR 1993 SC 1601: **Food Corporation of India Vrs. M/s. Kamadhenu Cattle Feed Industries**, and submitted that in contractual sphere the State and all its instrumentalities have to conform to Article14 of the Constitution of which non-arbitrariness is a significant facet. Lastly he placed reliance upon a decision reported in (2000) 5 SCC 287: **Monarch Infrastructure Pvt. Ltd. Vrs. Commissioner, Ulhasnagar Municipal Corporation And Others**, and submitted that if a term of the tender is deleted after the players entered into the arena it is like changing the rules of the game after it has begun.

5. Mr. Katikia, learned counsel for opposite party No.1 and Mr. Mohanty, learned counsel for opposite party No.2 have categorically submitted that when the track record of the petitioner's firm is not satisfactory and dangerous to the patients all over the State, the exercise of the power as per Clause No. 6.15 of the tender document by the authority in taking away conditions of the tender cannot be said arbitrary or change of rule after game is started. Further they have relied upon a decision reported in (2016) 14 SCC 172: **State of Jharkhand and Others Vrs. CWE-Some Consortium** to contend that there is no obligation on the part of tender inviting authority to accept any of the tenders or even the lowest tender.

6. Keeping the rival contentions in view, we carefully perused the materials on record and the cited judgments. In the case at hand, before the date of opening of the tender bid, corrigendum was issued. The result of corrigendum is that the petitioner became ineligible for the concession which he was availing as a MSME Unit. Prior to that, the petitioner's firm was derecognized though said two years period has been elapsed in the meantime.

6-A. Mr. Mishra, learned Senior Advocate for the petitioner submitted that by issuing corrigendum the authority has intentionally made the petitioner ineligible and thereby the policy to promote MSME Unit of the State Government is not honoured and the legitimate expectation of the petitioner for survival in the startup market is jeopardized. In view of Clause No. 6.15 of the tender document, it cannot be said that the authority had no right to

modify the bid document by amendment. The effect of such corrigendum is sought to be questioned on the touch stone of the State policy to promote MSME Unit. There is no dispute that the firm of the petitioner was derecognized for two years. Two items for which corrigendum was issued are injection syringes. The health of the patients in the State is involved therein. The requirement aspect and ability to meet any such exigency are certainly the guiding factors to fix the eligibility norm of the bidder. An ineligible bidder cannot expect right to participation in a tender process. An expectation is legitimate if it is otherwise bonafide and legal. This is the reasonable differentia found in the case in hand where the past of petitioner's firm is painted with de-recognition for two years in respect of supply of injection syringes in which larger interest of the society is deeply involved.

7. In the case of **Tata Cellular Vrs. Union of India**, reported in (1994) 6 SCC 651, it is stated by the Hon'ble Apex Court that:-

> "70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. *Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State.* The right to refuse the lowest or any other tender is always available to the Government. But the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

The above decision is reiterated in the case of **CWE-Soma Consortium** (supra) by the Hon'ble Apex Court, wherein it is stated that in the case of tender there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender.

8. Certainly in our considered opinion, we cannot direct the opposite parties to insert an eligibility clause which is otherwise taken away in exercise of their power under Clause No. 6.15 of the tender document for the larger public interest. The right exercised by the authority is right. No interference in exercise of the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India is called for.

9. In the wake of above, W.P.(C) 24164 of 2019 stands dismissed. All the interlocutory applications filed in this writ petition consequently stand dismissed.

In view of our finding not to quash the corrigendum dated 7.11.2019 in W.P.(C) No.24164 of 2019, the present W.P.(C) No. 4114 of 2020 challenging the re-tender dated 20.1.2020 for two items cannot be said illegal. The W.P.(C) No. 4114 of 2020 also stands dismissed. Interlocutory applications filed, if any, in this writ petition also stand dismissed.

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2020 (I) ILR - CUT- 718

C.R. DASH, J & S.K. PANIGRAHI, J.

W.P.(C) NO. 2487 OF 2019

RABINDRA KUMAR MOHANTY ……Petitioner

.Vs.

THE REGISTRAR, INCOME TAX APPELLATE TRIBUNAL, CUTTACK BENCH ……Opp. Party

INCOME TAX ACT, 1961 – Section 254(1) read with Rule 24 of the Income Tax (Appellate Tribunal Rules, 1963 – Provisions under – Hearing of appeal – The question arose as to whether the Income Tax Appellate Tribunal has the power to dismiss the appeal for want of prosecution? – Held, No – Reasons explained.

"On the conjoint reading of the aforesaid provisions, we find that the Act enjoins upon the Tribunal to pass order on the appeal as it thinks fit after giving both the parties an opportunity of being heard. It does not give any power to the Tribunal to dismiss the appeal for default or for want of prosecution in case the Petitioner is not present when the appeal is taken up for hearing." *(Para 6)*

Case Laws Relied on and Referred to :-

1. 1969 (1) SCC 591: The Commissioner of Income-Tax, Madras Vs. S.Chenniappa Mudaliar, Madurai.
2. 2014 (16) SCC 360 : Balaji Steels Re-rolling Mills Vs.CCE.
3. 2013 SCC online BOM 1385: (2013) 359 ITR 271) Bharat Petroleum Corporation Ltd. Vs ITAT, Mumbai.
4. (1966) 61 ITR 50 (MP) : CIT Vs.H S Akodia.
5. (1950) 18 ITR 928 (All) : M X De Nornha & Sons Vs.CIT.
6. (1960) 38 ITR 1 (Pun) : Mangat Ram KuthaliaVs.CIT.
7. 2019 (365) ELT 301 (Mad.) : Ganesh Vs. CCE, Salem-I, Madras High Court.
8. W.P. No. 8126 of 2018 : N.S. Mohan Vs.The ITAT & Anr.
9. (1982) 51 STC 381 : State of Tamil Nadu Vs. Arulmurugan & Co.
10. (1966) 18 STC 17 (SC) : State of Orissa Vs. Babu Lal Chappolia.
11. (1972) 83 ITR 453 (SC) : CAGIT Vs. V N Narayan.
12. (1973) 88 ITR 366 (Mad.): S N Swarnnamal Vs. CED.

For Petitioner : M/s. Rudra Prasad Kar, A.N.Ray & N.Panda
For Opp. party : M/s. T.K.Satapathy

JUDGMENT Date of Hearing: 13.02.2020 : Date of Judgment: 18.03.2020

S.K.PANIGRAHI, J.

The petitioner is an Individual engaged in the business of arrangement of trucks for transportation of materials of different parties. The Assessing Officer, vide assessment order dated 30.06.2014, added Rs. 72,23,004/- towards undisclosed transportation receipt and Rs. 2,23,885/- in the shape of TDS towards excess of assets over liabilities to the total income of the petitioner for the Assessment Year 2009-10. Being aggrieved, the petitioner approached the Commissioner of Income Tax (Appeals) – 2, Bhubaneswar, which vide its order dated 22.2.2016 in I.T. Appeal No.0288/2015-16, partly allowed the appeal of the petitioner herein i.e. it conformed the addition of the undisclosed transportation receipt of Rs. 72,23,004/- to the income while waived of the addition of Rs.2,23,885 in the shape of TDS towards excess of assets over liabilities. Being aggrieved by the order dated 22.02.2016 of the CIT (A)–2, Bhubaneswar, the petitioner approached the Income Tax Appellate Tribunal (hereinafter called "the Tribunal"), Cuttack Bench, Cuttack vide ITA No. 300/CTK/2016 for the assessment year 2009-10. The Ld. Tribunal issued notice for hearing on 06.07.2017 and on the said date, the authorised representative of the petitioner filed an adjournment application and the case was placed for hearing on 30.08.2017 accordingly. However, on 30.08.2017 neither the petitioner nor his authorised representative or his counsel were present. The Tribunal, therefore, dismissed the appeal for want of prosecution. The petitioner preferred an appeal by way of filing W.P.(C) No.2487 of 2019 before this Court even though no restoration application was filed before the Ld. Tribunal.

2. The principal question of law which arises for consideration in the present appeal, as to whether the Income Tax Appellate Tribunal has the power to dismiss the appeal for want of prosecution or not.

3. Heard Mr. R.P. Kar, learned counsel for the petitioner and Mr. T.K. Satapathy, learned counsel for the opposite party.

4. Learned counsel for the petitioner submitted that even if the petitioner was not present before the Tribunal when the appeal was taken up for hearing, it could not have been dismissed for want of prosecution as Section 254 (1) of the Income Tax Act, 1961 (for short, "the Act") enjoins

upon the Tribunal to pass such orders thereon as it thinks fit after giving an opportunity of being heard to both the parties. Thus, there is no power vested in the Tribunal to dismiss the appeal for want of prosecution even if the appellant therein has not appeared when the appeal was taken up for hearing.

> "Section 254(1) of the Income Tax Act, 1961 –Provides that "the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit."

5. Learned counsel for the petitioner further submitted that Rule 24 of the 1963 Rules does not give power to the Ld. Tribunal to dismiss the appeal for want of prosecution. The said Rule articulates that, where, on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorised representative when the appeal is called on for hearing, the Tribunal may dispose of the appeal on merits after hearing the respondent.

> "**Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963** – Provides that "where, on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorised representative when the appeal is called on for hearing, the Tribunal may dispose of the appeal on merits after hearing the respondent:
>
> Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance, when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex-parte order and restoring the appeal."

6. On the conjoint reading of the aforesaid provisions, we find that the Act enjoins upon the Tribunal to pass order on the appeal as it thinks fit after giving both the parties an opportunity of being heard. It does not give any power to the Tribunal to dismiss the appeal for default or for want of prosecution in case the Petitioner is not present when the appeal is taken up for hearing.

7. The Supreme Court of India had confronted with such a question in ***The Commissioner of Income-Tax, Madras vs. S. Chenniappa Mudaliar, Madurai 1969 (1) SCC 591,*** wherein it considered the provisions of Section 33 of the erstwhile Income-tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 which gave power to the Tribunal to dismiss the appeal for want of prosecution. For ready reference, Section 33(4) of the Income Tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 are reproduced below:-

> "Section 33 (4) of the Income Tax Act, 1922 "33(4). The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."
>
> Rule 24 of the Appellate Tribunal Rules, 1946 - " Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may dismiss the appeal for default or may hear it ex-parte."

In the said case the High Court of Madras held that under Section 33 (4), the Tribunal was bound to dispose of the appeal on merits, whether the Petitioner was present or not. The language of Section 33(4) and in particular the use of the word "thereon" signifies that the Tribunal has to go into the correctness or otherwise of the points decided by the departmental authorities in the light of the submissions made by the appellant. This can only be done by giving a decision on the merits on questions of fact and law and not by merely disposing of the appeal on the ground that the party concerned had failed to appear. The position becomes quite simple when it is pointed that the assessee or the CIT, if aggrieved by the orders of the Appellate Tribunal, can have resort only to the provisions of Section 66. So far as the questions of fact are concerned the decision of the Tribunal is final and reference can be sought to the High Court only on questions of law. The High Court exercises purely advisory jurisdiction and has no appellate or revisional powers. The advisory jurisdiction can be exercised on a proper reference being made and that cannot be done unless the Tribunal itself has passed proper order under Section 33(4). It follows from all this that the Appellate Tribunal is bound to give a proper decision on questions of fact as well as law which can only be done if the appeal is disposed of on the merits and not dismissed owing to the absence of the appellant. This position of law was affirmed by the Apex Court.

8. The said principle was also affirmed by the Supreme Court in ***Balaji Steels Re-rolling Mills v. CCE [2014 (16) SCC 360]*** and similar line of judgments rendered by different High Courts, like - ***Bharat Petroleum Corporation Limited Vs ITAT, Mumbai [2013 SCC online BOM 1385: (2013) 359 ITR 271); CIT v. H S Akodia [(1966) 61 ITR 50 (MP)]; M X De Nornha & Sons v. CIT [(1950) 18 ITR 928 (All)]; Mangat Ram Kuthalia v. CIT [(1960) 38 ITR 1 (Pun)]; Ganesh Vs. CCE, Salem-I, Madras High Court [2019 (365) ELT 301 (Mad.)]; N.S. Mohan v. The ITAT & Anr in W.P. No. 8126 of 2018***.

9. In yet another land mark judgment rendered by the Full Bench of Madras High Court in ***State of Tamil Nadu v. Arulmurugan & Co., [(1982) 51 STC 381]*** wherein it was held that the appellate authorities perform precisely the same functions as the assessing authority. The said Bench expressed the view that a tax appeal is a rehearing of the entire assessment and it cannot be equated to adversary proceedings in appeal in civil cases. In fact, the assessing authority is not the taxpayer's "opponent". Procedurally speaking, in a tax appeal, the appellate authority is very much committed to the assessment process. Similar views have been taken by the Supreme Court in line of cases like ***State of Orissa v. Babu Lal Chappolia [(1966) 18 STC 17 (SC)], CAGIT v. V N Narayan [(1972) 83 ITR 453 (SC)], S N Swarnnamal v. CED [(1973) 88 ITR 366 (Mad.)]***.

10. Article 265 of the Constitution mandates that no tax can be collected except by authority of law. Appellate proceedings are also laws in strict sense of the term, which are required to be followed before tax can legally be collected. Similarly, the provisions of law are required to be followed even if the tax payer does not participate in the proceedings. No assessing authority can refuse to assess the tax fairly and legally, merely because the tax payer is not participating in the proceeding. Hence, dismissal of appeals by ITAT for non-persecution is wholly illegal and unjustified.

11. If we see this issue through the prism of the Principles of natural justice, an appellate authority is required to afford an opportunity to be heard to the appellant. It has been held in plethora of cases that "right to natural justice" is a personal right, either a person can waive it or a person may not avail it. Merely because a person is not availing his right of natural justice, it cannot be a ground of refusal to perform statutory duty of deciding appeal by the Tribunal.

12. Applying the principles laid down in the aforesaid cases to the facts of the present case, we are of the considered opinion that the Tribunal could not have dismissed the appeal filed by the appellant for want of prosecution and it ought to have decided the appeal on merits even if the appellant or its counsel was not present when the appeal was taken up for hearing.

13. In view of the above analysis, the Rules and the provisions of the Act would pave way for the Tribunal to reconsider its decision. The writ petition is allowed and we direct the Tribunal to restore the appeal and decide the appeal on merit after giving both the parties an opportunity of being heard. The writ petition is accordingly disposed of. No order as to cost.

2020 (I) ILR - CUT- 723

C. R. DASH, J & S. K. PANIGRAHI, J.

CRIMINAL APPEAL NO. 484 OF 2010

SANTHA CHARAN PATTNAIK .....Appellant

Vs

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Offence U/s.302 & 376 of IPC – Rape of minor girl child – Prosecution case based on circumstantial evidence – Last seen theory not established – Allegation of forcible sexual intercourse – Causing profuse bleeding from the private part of the deceased – But in chemical examination report no blood or semen found on the wearing apparel of the Appellant – Medical examination report – No injuries found on the private part of the accused/Appellant – Held, there is nothing on record to find the appellant guilty.

"There being penetration, as found from the medical evidence and especially the Post-Mortem Report in respect of the deceased and there being no injury to the private part of the Appellant except slight redness on his meatus, which has been explained by him (Appellant) and there being no blood and no semen found on his underwear though there was profuse bleeding from the vagina of the girl (deceased) at the time of ravishment, as found from evidence, we are of the view that there is nothing on record to find the Appellant guilty".

(Para-31)

Case Laws Relied on and Referred to :-

1. (2019) 4 SCC 522 : Digamber Vaishnav & Anr. Vs. State of Chhattisgarh.
2. (2012) 10 SCC 451 : Alagupandi Vs. State of Tamilnadu.

For Appellant : Mr. Devashis Panda & Mr.Sudipto Panda.
For Respondent : Mrs. Saswata Pattnaik, AGA.

JUDGMENT Date of Judgment : 21.04.2020

C.R. DASH, J.

Convict is the Appellant. He was convicted for the offences under Sections 302/376, I.P.C. and was sentenced to suffer imprisonment for life and R.I. for seven years with fine of Rs.10,000/- (ten thousand), in default, to suffer further R.I. for two years respectively with a direction for both the sentences to run concurrently. Hence this Appeal.

2. It happened on 30.09.2008. The spot is the Government Prakalpa (Project) U.P. School at village Nimina under Polasara Police Station in the district of Ganjam. A girl student of Class-VII of that school, aged about 12 years, was seen lying unconscious in the Girls' Urinal by two girl students, namely Kumari Tapaswini Sahu (P.W.7) and Kumari Nandini Behera (P.W.16) when they had gone there to attend the call of nature. They found marks of injuries on her face and neck. It was about 11.30 A.M. then. Both of them immediately rushed to the Headmaster (P.W.10) of the school to report about the

incident. There was hue and cry in the school. The body of the girl was brought to the school verandah for first aid nursing.

Some students of the school informed the matter in the house of the victim girl, before Smt. Sanjukta Sahu (P.W.8), the mother of the victim girl. The girl's father namely Biranchi Narayan Sahu (P.W.1), who had gone to the house of one Lingaraj Sahu (P.W.29) to work as a Mason, also got information about the incident and rushed to the school along with said Lingaraj Sahu (P.W.29) and his son Mrutyunjay Sahu (P.W.2). By that time some villagers had already arrived at the spot. All of them decided to take the girl to the hospital, but later on they decided to take the body of the girl to her house. Ram Chandra Sahu (P.W.4), who is agnatic brother of P.W.1, put the unconscious body of the girl on his shoulder and took her to her house followed by the villagers and other teachers of the school.

In her house, her mother (P.W.8) when lifted the frock worn by the girl, found her panty to be stained with profuse bleeding. The villagers present there also felt that there was no life in the body of the girl. Again they brought the body of the girl to the school verandah. By that time some more villagers had already gathered at the spot (school). They manhandled the male teachers of the school present on that day, namely the Appellant – Santha Charan Pattnaik, Headmaster Biswanath Gouda (P.W.10) and Asst. Teacher Durga Prasad Sahu (P.W.11). As the Headmaster (P.W.10) had already telephoned the B.D.O., Polasara, police arrived at the spot in the afternoon. Police team rescued the teachers from the hands of the villagers.

P.W.1, the father of the deceased lodged F.I.R. suspecting the Assistant Teacher Durga Prasad Sahu (P.W.11) to be the perpetrator of the crime, as said Durga Prasad Sahu had passed lewd comments with sexual overtures against the deceased girl six months back.

The Police took up investigation immediately, visited the spot, examined some witnesses and took all the male teachers of the school to the Police Station along with them for interrogation.

On 03.10.2008, between 8.00 P.M. to 10.00 P.M. the Appellant is alleged to have confessed his guilt before the Police while he was in the Hazat of the Police, in presence of some witnesses. Accordingly investigation was taken up with the Appellant to be the main culprit and perpetrator of the crime. The Appellant along with two other male teachers, i.e. P.Ws.10 and 11 were sent for medical examination, the dead body was challaned to the M.K.C.G. Medical College & Hospital, Berhampur for Post-Mortem. Different incriminating seizures were made and witnesses were

examined in course of the investigation. On completion of investigation, charge-sheet was filed against the Appellant under Sections 376/302, I.P.C. citing the Assistant Teacher Durga Prasad Sahu as a witness, though F.I.R. was lodged originally against him.

3. In the trial, the accused pleaded not guilty to the charges and claimed to be tried.

4. The prosecution, in support of the charges against the accused-appellant, examined as many as 35 witnesses and executed a host of documents.

5. The defence, though took the plea of denial, adduced no evidence in substantiation of its plea.

6. Learned Trial Court, in its judgment, has made mention about P.W.1 – father of the deceased, P.W.8 – mother of the deceased and has discussed the evidence of P.W.9, P.W.25, P.W.13 and P.W.33 relating to the circumstances brought on record in evidence.

7. Learned Trial Court has relied on the following circumstances in order to bring the charges to home against the appellant :–

(I) The Appellant was last seen together with the deceased (deposed to by P.W.9)

(II) The Appellant had put on his underwear ('Chadi') on reverse side (deposed to by P.W.25) ;

(III) The medical evidence regarding examination of the Appellant (Ext.17) (as deposed to by P.W.13) ; And

The Post-Mortem Report (Ext.29) (as deposed to by P.W.33).

8. On discussion of the evidence on record, learned Trial Court, in paragraph-12 of the Judgment, found thus :-

> "*It is striking to note that, a cumulative reading of the evidence of P.W.9 together with the medical evidence and non-explanation of the injuries on the person of the deceased, I am constrained to hold that the prosecution has consistently established the guilt of the accused, which is inconsistent with his innocence.*"

9. Before proceeding to discuss the contentions raised in the Appeal, we feel apposite to examine the Post-Mortem Report so far as the cause of death of the deceased is concerned. Dr. Jyotin Kumar Das (P.W.33), Professor & H.O.D. in the Department of Forensic Medicine and Toxicology, M.K.C.G. Medical College, Berhampur had conducted the Post-Mortem. We feel

persuaded to refer to the internal injuries only. P.W.33, on internal examination of the body of the deceased, found the following injuries :-

> *(i) The skin and subcutaneous tissues of neck and adjacent upper chest corresponding to external injuries No.(3) and (5) were found contused with extravasations of blood. The underlying soft tissues of the neck were found crushed and bruised with extensive extravasations. Fracture separation of the sternum (transverse) was made out on the upper part. The soft tissues and the muscles covering the larynx and trachea were found crushed and lacerated with contusion and extravasations in the sub-mucosal layer of upper respiratory tract.*
>
> *(ii) Right side pleural cavity contained about 500 Mls. of free fluid blood with fracture of multiple ribs (3^{rd} to 6^{th}) along the right anterior axillary line with contusion and laceration of corresponding inter-costal muscles, punctured laceration in the pleural. The corresponding right lungs reveal contusions and three numbers of punctured lacerations corresponding to fractured ribs. The pericardial cavity contained about 300 Mls. of fluid blood with a punctured laceration over right ventricle of heart close to right aetrio ventricular junction.*
>
> *(iii) The abdominal cavity contained about 500 Mls. of free fluid blood with areas of contusion on the wall of small intestine with a rupture laceration 2 cm x 2 cm on the ileum portion of small intestine through which faecal matters had come out.*
>
> *(iv) The undersurface of the scalp at right postero-parietal area of head was found contused with extravasations. The skull and meninges were found intact with thin sub-dural haemorrhage spreading over postero parieto occipital area mostly to the left.*
>
> *(v) Vulvo vaginal smears and vaginal swabs were taken and preserved for laboratory examination. Vaginal fluid was soaked into a gauge piece and made air dried and handed over to police in a sealed and labeled paper envelope for further examination at R.F.S.L. / S.F.S.L. along with nail-clippings and sample blood of the deceased.*

The aforesaid Post-Mortem examination was held by P.W.33 being assisted by Dr. Kiran Kumar Patnaik (P.W.13) and one Dr. S.N. Mohanty. In their opinion, all the aforesaid injuries were ante-mortem in nature, caused by hard and blunt trauma and are consistent with violence and struggle. Injuries to genital organ were consistent with forcible sex act. The injuries on the neck and chin could have been caused by forceful compression by hand (manual strangulation). In their opinion, death was caused due to complications arising out of the aforesaid multiple injuries. Further they opined that the injuries on neck and chest were sufficient enough, in ordinary course of nature, to cause death.

From the aforesaid discussion, it is clear that, whoever be the predator had dealt with the victim lustfully, mercilessly and very violently in committing the crime. The mode and manner of assault coupled with the act of ravishment shows that he (the predator) had come with a definite and specific intention to deal with the victim (deceased) in the manner he dealt with.

10. Another aspect of the case on which we want to throw light is, whereabouts of the deceased in the school, till her dead body was found in the Girls Urinal.

P.W.8, mother of the deceased has testified that, at about 9.30 A.M. the deceased had left for school along with her friend Krishna Sahu (P.W.24), who is also a student of Class-VII. According to Krishna Sahu (P.W.24), the deceased and she along with others were being taught by a private tutor namely Aswini Kumar Sahu (P.W.3). She and the deceased returned from tuition on that day at about 9.00 A.M. On that day the deceased asked her (P.W.24) to come early, as she wants to go to school early. Accordingly, Krishna Sahu (P.W.24) came to the house of the deceased early and both of them proceeded to the school together. Krishna Sahu (P.W.24) did not see the deceased thereafter either in the prayer class of the school or in the classroom after the prayer class was over. P.W.24 searched for the deceased, but did not find her.

Tapaswini Sahu (P.W.7) has testified that, she had not seen the deceased in the prayer class, and at the time of Roll-call also she was found absent in the class. P.W.7 and P.W.24, both have testified that the books of the deceased were there in the classroom.

Nandini Behera (P.W.16) has also testified that, she had not found the deceased in the school on that day and she had last seen the deceased at 9.00 A.M. when they had left their tuition for home.

P.W.9 – Pradeep Kumar Sahu in his cross-examination has also testified that he had not seen the deceased either in the prayer class or her going to the classroom after the prayer class was over.

Bharata Sahu (P.W.22), the Monitor of Class-VII, has also testified that when he arrived in the school, he did not find the deceased there. He had seen the deceased proceeding towards her house from the school at about 9.30 A.M. on the date of occurrence and thereafter till her dead body was brought to the verandah of the school, he had not seen her.

Sagar Sahu (P.W.23), a student of Class-V, in his cross-examination has also testified that he had not seen the deceased in the school on the date of occurrence.

P.W.8 – the mother of the deceased has not testified that, after leaving the house with Krishna Sahu (P.W.24) the deceased had returned to the house from the school for any purpose.

P.W. 10 – Biswanath Gouda, the Headmaster of the school was the Class Teacher of Class-VII at the relevant time. During the relevant time there were four male teachers including the Headmaster (P.W.10) himself and one female teacher in the school. The male teachers were namely the Headmaster Biswanath Gouda (P.W.10), Durga Prasad Sahu (P.W.11), the Appellant – Santha Charan Pattnaik and one Bibhuti Bhusan Panigrahi (not examined). Bibhuti Bhusan Panigrahi was absent from the school on the date of occurrence and the Appellant was oldest among all the teachers. He (Appellant) was to retire from service on attaining the age of superannuation on 30.06.2009. Bibhuti Bhusan Panigrahi was the Class Teacher of Class-VI, Durga Prasad Sahu – P.W.11 was the Class Teacher of Class-V, Appellant – Santha Charan Pattnaik was Class Teacher of Class –IV and Mamata Kumari Sahu (P.W.5) was the Class Teacher of Classes – I, II, & III. All the three classes, i.e. Class – I, II & III were being held in one room of the school at the relevant time.

P.W.10 – the Headmaster of the school has further testified that, the deceased was absent at the time of Roll-call, for which he put a 'dot' mark against her name (Roll No.4) in the Attendance Register. In paragraph-9 of his cross-examination P.W.10 has further testified that, when as per the query of the S.I. of Schools after the incident he told that the deceased was absent at the time of Roll-call, the villagers present there had forced him to show that the deceased was present in the class, but he did not succumb to their pressure.

11. From the aforesaid evidence of witnesses, it is clearly established that the whereabouts of the deceased was not known to anybody after she reached the school along with her friend Krishna Sahu (P.W.24). There is nothing on record to show that the deceased had returned to the house and came late. Except P.W.9 none has testified that they saw the deceased in the school till her dead body was recovered from the Girls' Urinal.

12. According to the Medical Officer – P.W.33, the deceased might have died around 12 hours from the time of holding Post-Mortem Examination. Post-Mortem examination was held at 10.00 P.M. on 30.09.2008 by virtue of the special order of the Collector, Ganjam in view of the sensitivity attached to the case. In his cross-examination, P.W.33 has candidly testified thus :-

> *"... We cannot exactly pin-point as to when exactly the deceased died and our opinion is variable by 3 hours by either side. When we have opined that the deceased might have died around 12 hours from the time of our holding the Post*

Mortem Examination, there is a possibility that death might have caused between 7 A.M. to 1 P.M. on 30.09.2008. From our observations death of the deceased might have occurred while she was being ravished or soon thereafter…"

13. According to the prosecution case, the dead body was detected in the Girls' Urinal between 11.15 to 11.30 A.M. P.W.4, who took the dead body of the deceased on his shoulder to the house of the deceased, has testified that there was profuse bleeding from the vagina and when he lifted her to his shoulder, blood drops fell on the ground. P.W.8 – the mother of the deceased testified that when she lifted her daughter's (deceased) frock, she found profuse bleeding from the vagina of the deceased. But, strangely the I.O. during investigation has found blood mark on the spot only, i.e. at the Girls' Urinal of the school. He has not found blood marks either on the verandah of the school or in the house of the deceased or in the spot near the school verandah or on the way from the school to the house of the deceased. Such a fact shows that there has been profuse bleeding after the occurrence, but the bleeding may not continue for long after the death occurs. From the fact that blood soaked with clothes was collected and seized from the Girls' Urinal only, it is to be held that by the time the dead body of the deceased was brought to the verandah of the school, the bleeding had already been stopped.

From such discussion, we are of the view that it is difficult to opine and conclude when death of the deceased occurred. If the dead body was detected soon after the incident and she was immediately brought to the verandah of the school and she was immediately again taken to the house of the deceased, according to us, there would have been a great possibility of bleeding from vagina of the deceased and also possibility of presence of blood marks in other places, as discussed supra. But, no witness, who had seen the dead body on the verandah of the school, have whispered a word about the factum of ravishment or oozing of fresh blood from the vagina of the deceased, except P.W.4, which has also been negatived by the evidence of the I.O., who has not found any blood mark in the verandah of the school or around it and the surrounding circumstances as discussed supra.

In view of such fact, we are constrained to conclude that the death of the deceased might have occurred sometime after she reached school, but it was much prior to detection of the dead body in the Girls' Urinal at about 11.15 to 11.30 A.M.

14. Another aspect of the prosecution case is the confessional statement of the Appellant before Police. The confessional statement was recorded at

about 8.00 P.M. on 03.10.2008. By that time the Appellant was in Hazat of the Police, P.W.9 – Pradeep Kumar Sahu had already been examined on 02.10.2008 and Post-Mortem Report had already been received by the I.O. on 01.10.2008. Strangely and surprisingly, the confessional statement recorded by the Police is in complete sync with the prosecution story in verbatim. But rightly such confessional statement has been eschewed by the learned Trial Court being hit by Section 25 of the Evidence Act.

15. Coming to the contentious issues raised by learned counsels for the parties, admittedly the case is based entirely on circumstantial evidence. It is also an admitted fact that, Pradeep Kumar Sahu (P.W.9), on whose evidence the prosecution leans heavily to prove the circumstance of *"last seen together",* is a child witness.

16. The essentials of circumstantial evidence stand well established by precedents and we do not consider it necessary to reiterate the same and burden the order unnecessarily. Suffice it to outline the three cardinal elements of circumstantial evidence, which are necessary to sustain the conviction :-

(i) *The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established ;*

(ii) *those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused ;*

(iii) *the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that, within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.*

17. So far as evidence of a child witness is concerned, probative effect and policy behind proving such evidence also stands well established by authoritative precedents. Hon'ble Supreme Court, in the case of **Digamber Vaishnav and Another *Vrs.* State of Chhattisgarh, (2019) 4 SCC 522,** in paragraphs 21 and 23 have discussed about the extent of dependence on the testimony of a child witness. In paragraph-21 of the said judgment, Hon'ble Supreme Court has held thus :-

> *"21. The case of the prosecution is mainly dependent on the testimony of Chandni, the child witness, who was examined as P.W.8. Section 118 of the Evidence Act governs competence of the persons to testify which also includes a child witness. Evidence of the child witness and its credibility could depend upon the facts and circumstances of each case. There is no rule of practice that, in every case the evidence of a child*

> *witness has to be corroborated by other evidence before a conviction can be allowed to stand, but as a prudence, the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Only precaution which the court has to bear in mind while assessing the evidence of a child witness* ***is that witness must be a reliable one.*** (Emphasis supplied by us)

In paragraph-23 of the judgment, Hon'ble Supreme Court has relied on the case of **Alagupandi *Vrs.* State of Tamilnadu, (2012) 10 SCC 451,** wherein Their Lordships have emphasized the need to accept the testimony of a child with caution after substantial corroboration before acting upon it. In the case of **Alagupandi** (supra), in paragraph-36 of the judgment it was held thus :-

> *"36. It is a settled principle of law that a child witness can be a competent witness* ***provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence.*** *The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, the evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that* ***the witness must be a reliable one and his/her demeanour must be like any other competent witness and that there exists no likelihood of being tutored.*** *There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand, but as a rule of prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable."* (Emphasis supplied by us)

18. P.W.9, who is a child of about 12 years old, is the only witness, who is testified to have seen the Appellant near the deceased just before the occurrence. We have to find out whether P.W.9 is reliable and whether there exists no likelihood of his being tutored.

P.W.9 is a student of Class-VI. He has testified that, after the prayer class was over he proceeded to classroom and the Headmaster (P.W.10) took attendance in the class. Around 11 A.M. with permission of the Monitor of the class (not examined) and the Headmaster (P.W.10) he proceeded towards the urinal. While he was proceeding to the urinal, he found the Appellant on the verandah putting on one colour towel ("Ranga Gamuchha") on his head and holding a cane. While approaching the urinal he found the deceased standing in between the vacant place of Classroom No.I and Classroom No.IV, and at that time the Appellant, who was standing, stared at the deceased. When he returned after answering the call of nature, he found the deceased crying and when he asked the reason of her crying, the deceased asked him to go away. When he informed the Appellant that the deceased

was crying, the Appellant told him not to bother about that and go to his class. When, as per the instruction of the Appellant he was proceeding to his class, he looked back and found the Appellant proceeding towards the deceased. Ten to fifteen minutes thereafter he (P.W.9) heard hue and cry in the school that the deceased was lying dead in the Girls' Urinal.

In his cross-examination P.W.9 has testified that, he arrived in the school after 10 A.M. and prayer class was held in between 10.10 to 10.20 A.M. He further testified that, when he proceeded to the Headmaster (P.W.10) to seek his permission for attending call of nature, the Headmaster was present in the office room. When he was proceeding to the urinal, Bibhuti Bhusan Panigrahi was teaching to the students in Class-IV and the Appellant was standing near Class-V. The deceased was standing in front of the room where students of Class – I to III were reading. Again he has testified that, while he was returning from the urinal, the Appellant was still standing near the classroom of Class-V.

19. P.W.6 – Reena Subudhi was a part-time teacher in the school since 2008. She had discontinued the job after joining of Mamata Kumari Sahu (P.W.5). At about 10.40 A.M. on the date of occurrence she (P.W.6) had come to the school to meet the Headmaster (P.W.10) for settlement of her pending salary bills. As the Headmaster (P.W.10) was taking attendance of Class-V, she waited for him.

The Headmaster (P.W.1) has testified that, while coming out of Class-V after taking Roll Call, he saw Reena Subudhi (P.W.6), he went with her to his office room, had discussion with her about her Absentee Statement, etc. and then he proceeded to Class-VII. Nandini Behera (P.W.16), who had gone to toilet with his permission, came and reported to the effect that the deceased was lying in the girls' urinal and she was not responding.

20. From the aforesaid evidence on record, it is found that, P.W.9 is lying, because,

(i) Though Bibhuti Bhusan Panigrahi, Class Teacher of Class-VI was absent on that date, as testified by the Headmaster (P.W.10) and as found from the Attendance Register of the Teachers (Ext.11), it was a lie on the part of P.W.9 to testify that Bibhuti Bhusan Panigrahi was taking class in Class-IV when he (P.W.9) was going to the urinal.

(ii) Reena Subudhi (P.W.6) was all along with the Headmaster (P.W.10) after P.W.10 returned from Class-V, and they both were discussing in the office room about the Absentee Statement, etc. of P.W.6. P.W.9 has testified to have taken permission from the Headmaster (P.W.10) for going to the urinal while he was in the office. P.W.9 has

not testified about presence of Reena Subudhi (P.W.6) in the office, though she was present with the Headmaster in the office till the Headmaster proceeded towards Class-VII after discussion with Reena Subudhi (P.W.6), who was admittedly present in the school and helped in bringing the body of the deceased to the verandah of the school.

(iii) In the additional evidence of the Headmaster (P.W.10) recorded on 16.01.2020 by this Court, P.W.10 is testified to have put a 'dot' mark against the name of P.W.9 in the Attendance Register of Class-VI (Ext.9), as at the time of Roll Call he was absent.

21. In his evidence P.W.10 very lucidly has testified that, after the prayer class was over, he proceeded to his office-room and signed the Attendance Register meant for the Teachers. The Appellant also arrived in his office after the prayer class was over and he (P.W.10) proceeded to Class-VII to take the attendance of students and the Appellant proceeded to Class-IV, of which he was the Class Teacher. After Roll Call in Class-VII, he (P.W.10) proceeded to Class-VI for taking attendance, as Bibhuti Bhusan Panigrahi – the Class Teacher of Class-VI was on leave on that day. After taking Roll Call in Class-VI, he proceeded to Class-V, as Durga Prasad Sahu (P.W.11) – the Class Teacher of Class-V had sent information to come to the school little late on that day. Then P.W.10 has specified the time as to what happened at what time on the date of occurrence. According to P.W.10, school time is from 10.00 A.M. to 4.00 P.M. Prayer class was held at 10.30 A.M., which was over by 10 minutes. He proceeded to take attendance in Class-VII at 10.40 A.M., then he proceeded to take attendance in Class-VI at 10.50 A.M. and then he proceeded to take attendance in Class-V at 11.00 A.M. P.W.10 has further specifically testified that, while he was taking attendance in Class-V, the Appellant was present in Class-IV. Durga Prasad Sahu (P.W.11) has also testified that, when he arrived in the school at 11.00 A.M., he found the Headmaster (P.W.10) coming from Class-V, of which he (P.W.11) was the Class Teacher. From the aforesaid evidence, it is clear that –

(a) At 11.00 A.M. the Headmaster (P.W.10), Reena Subudhi (P.W.6) and Durga Prasad Sahu (P.W.11) were there in the premises of the school in between the area from the office of the Headmaster which is one building and classroom of Class-V which is in another building intervened by a vacant space *[reference may be made to the Spot Map prepared by the I.O. (Ext.34)]*. While P.W.10 was coming out from Class-V, Reena Subudhi (P.W.6) was waiting for the Headmaster (P.W.10) and Durga Prasad Sahu (P.W.11) was coming to Class-V. At that time the Appellant was teaching in Class-IV. If P.W.9 had come to class on that day, he must have come to class after 10.50 A.M., because the Headmaster (P.W.10) has put a 'dot' mark against his Roll Number while taking attendance of Class-VI, as he (P.W.9) was found to be absent in class. Though P.W.6, P.W.10 and P.W.11 had their movement in the school premises precisely at 11 A.M., they have not seen P.W.9 coming towards urinal of the school.

(b) The Headmaster (P.W.10), as in case of Nandini Behere (P.W.16), has testified that she (P.W.16) had taken his permission to go to attend call of nature, has not testified or whispered a word that P.W.9 had ever come to him to seek permission to go to attend call of nature. Reena Subudhi (P.W.6), who was in the office of P.W.10 on the date of occurrence, has also not whispered a word about coming of P.W.9 to the office of the Headmaster or to the school premises.

All the aforesaid aspects, if taken cumulatively, drive us not to believe P.W.9 as a truthful witness. Further, immediately after P.W.9 left the company of the Appellant and the deceased, as testified by him, in a split second the dead body of the deceased was recovered from the urinal of the school, and the time of death as testified by P.W.9 does not inspire confidence in view of our discussion in paragraph-13 (supra).

22. Another curious fact is that, the I.O. (P.W.35) on 01.10.2008 had made the spot visit and he prepared the Spot Map during that visit, vide Ext.34. In paragraph-11 of his Cross-Examination, P.W.35 has testified thus :-

"....Though some witnesses stated during investigation about the places and locations within the school premises about the presence of the deceased, the accused and P.W.9 immediately before the incident, I have not shown in the spot map those locations....."

P.W.9 was examined on 02.10.2008 by the I.O. (P.W.35), as testified by him, though it is different in the evidence of P.W.9. However, there is nothing on record to find out whether the statement of P.W.9, a vital witness, was sent to the Court while forwarding the Appellant to the Court on 04.10.2008 in compliance of Section 167(1), Cr.P.C. From the aforesaid evidence it is clear that, during the spot visit by P.W.35 on 01.10.2008, either P.W.9 had already disclosed the incident before the villagers who told P.W.35 to show his location in the Spot Map or P.W.9 had already been set up to be tutored for the purpose of the case, as he was an accomplished opera artist and had won prizes for his performance. It is the settled position of law that, when two views are possible from a given fact, the view favourable to the defence should be preferred.

23. Learned Additional Government Advocate relies heavily on the evidence of Abhaya Behera (P.W.27) as a cogent corroborative piece of evidence to the evidence of P.W.9.

From the evidence on record, we find that the prosecution has examined Bipra Pradhan (P.W.21) and Abhaya Behera (P.W.27) to corroborate evidence of P.W.9. Bipra Pradhan (P.W.21) is the cook, who prepares Mid-day Meals in the school. He has turned hostile completely.

P.W.27, a student of Class-IV, aged about 10 years, has testified that, "*one month back the appellant was teaching mathematics in our class. He (Appellant) gave us the sum to work out and cautioned them not to haul in the class, and so saying he left the class to answer the call of nature. And later on we heard about the death of the deceased."* In the cross-examination, P.W.27 has testified that, "*Appellant returned back to their class to check the task which he had given to us."*

From the evidence of P.W.27 it is not clear at what time Appellant had gone to attend the call of nature. From his evidence it is however clear that, the Appellant returned to class in normal state of mind and started checking the sum he had given the students to work out. Such a mental state is not expected of an ordinary person after committing a ghastly crime. Further, in view of the infirmity as discussed supra in the evidence of P.W.9, we do not feel inclined to accept the evidence of P.W.27 as a corroborative piece of evidence.

The evidence of the Monitor of Class-VI, whose permission P.W.9 is testified to have taken for going to attend the call of nature, would have been a good piece of corroborative evidence, but the Monitor of Class-VI has not at all been examined, though Monitor of Class-VII has been examined as P.W.22.

24. Taking into consideration the evidence obtained on record in their entirety and not in a compartmentalized manner as done by learned Trial Court in case of evidence of P.W.9, we are constrained to hold that P.W.9 cannot be believed to have seen the Appellant near the deceased just before the occurrence.

25. The second circumstance pressed by the prosecution is that, on personal search of the Appellant it was found that he (Appellant) had put on his underwear ('chadi') on the reverse side. The witnesses to this incident are Ladu Kishore Pradhan (P.W.20), Biranchi Pradhan (P.W.25), Rajendra Sahu (P.W.26), Bijay Kumar Pradhan (P.W.28), Balakrushna Sahu (P.W.31) and the I.O. (P.W.35). Learned Trial Court, on this circumstance, has relied on the evidence of P.W.25 alone. P.W.28 has turned hostile on this aspect. Ladu Kishore Pradhan (P.W.20) has testified that, suspecting involvement of the Teachers in the occurrence, the infuriated villagers undressed the Teachers in front of all and it was found that the Appellant was wearing his underwear ('chadi') on the reverse side. On his cross-examination, P.W.20

has testified that he was not examined by Police and for the first time he is deposing such fact before the Court. Biranchi Pradhan (P.W.25), who is a co-villager and Secretary of the Panchayat, has testified that the villagers did not allow the Teachers to go with the Police; they squatted blocking the road, they demanded search of the person and wearing apparels of the teachers, and when the Appellant gave search of his wearing apparels, it was found that he (Appellant) had put on the underwear ('chadi') on the reverse side; when they asked the accused – Appellant as to why he has put on the 'chadi' on the reverse side, the accused replied that since hurriedly he came to the school, by mistake he put on the 'chadi' on the reverse side. It is further testified by him (P.W.25) that, that 'chadi' of the Appellant had deep brownish colour stains in it. In paragraph-3 of his cross-examination, P.W.25 has testified thus –

> *"……After arrival of the Sub-Collector, Chatrapur and Addl. S.P., Chatrapur, the wearing dresses of the three teachers, who had been confined in the Class Room were taken. From our village three persons also accompanied the Sub-Collector and Addl. S.P. when personal search of the three teachers were taken. I did not go inside the room when search of the wearing apparels of the Headmaster, Durga Prasad Sahu and Santha Charan Patnaik (Appellant), the three teachers were taken, and I heard that Santha Charan Pattnaik had put on the 'chadi' on the reverse side and some stains on his 'chadi' , which I had not seen myself……"*

Rajendra Sahu (P.W.26) has testified that, when Police arrived, the angry mob demanded that search of the wearing apparels of the teachers be taken up. (He doesn't state about presence of the Sub-Collector and Addl. S.P., Chatrapur). When that demand was made, the Headmaster (P.W.10) and Durga Prasad Sahu (P.W.11) publicly opened their clothing. When search of the clothes of Santha Charan Patnaik (Appellant) was taken up, it was found that the 'Ganji' and 'Chadi' were blood-stained. He (Appellant) had worn the 'Chadi' on the reverse side. In his cross-examination, P.W.26 has testified that the teachers were undressed in a class-room, they voluntarily removed their shirt / pant, but they did not remove their underwear.

The I.O. (P.W.35) has testified that, he conducted personal search of the three suspected persons on the demand of the villagers. On such search, he found stains like that of blood on the banian and 'chadi' of Santha Charan Patnaik (Appellant). So, he seized the banian and 'chadi' of the accused, vide Ext.25.

None of the witnesses namely P.W.20, P.W.26 and P.W.31 has testified that any of them had gone inside the room where personal search and checking of dress of the teachers including the Appellant was taken.

From the evidence of the aforesaid witnesses, it is found that the I.O. (P.W.35) though took personal search of the three teachers, he is silent about the fact that the Appellant had put on the 'chadi' on the reverse side. P.W.25, on whose sole evidence the learned Trial Court has placed reliance so far as this circumstance is concerned, in his cross-examination has specifically testified that he had no personal knowledge about the search taken inside a room in presence of the Sub-Collector, Chatrapur and Addl. S.P., Chatrapur. His evidence is totally hearsay. Other witnesses, who have testified about the personal search of the teachers, contradict each other on vital aspect. Silence of the I.O. on this aspect is most vital.

In view of such fact, we are constrained to disbelieve the evidence tendered by the prosecution to prove this circumstance too.

26. Another aspect is, injury on the body of the Appellant. This needs no discussion in view of the admitted fact at the Bar that, after the incident, as testified by majority of witnesses, all the three teachers were assaulted by the villagers and blood patches have been found in the Chemical Examination Report (Ext.39) on the vest of the Appellant, on the full shirts of Biswanath Gouda (P.W.10) and Durga Prasad Sahu (P.W.11).

27. So far as Chemical Examination Report (Ext.39) in respect of the underwear ('chadi') of the Appellant is concerned, no blood or no semen was found in the said C.E. Report (Ext.39). On Benzidine Test conducted by P.W.13 however, so far as his (Appellant's) shirt, vest and underwear are concerned, the test, according to P.W.13, came out to be positive. However, the Chemical Examination Report, which is the outcome of a more surer test, negatived presence of blood on the shirt and underwear of the Appellant. Some patches of blood on his vest, which is of human origin of B+ group, have been found in the Chemical Examination Report (Ext.39) and P.W.13 in paragraph-2 of his examination-in-chief has specifically testified that the Blood Group of the Appellant is B+.

Further, so far as Benzidine Test is concerned, no question has been asked to the Appellant in his examination under Section 313, Cr.P.C., and for that reason such a fact cannot be taken into consideration to find the Appellant guilty.

28. Another feature of the evidence of P.W.13 is that, on examining the private part of the Appellant, namely his penis, the glance penis appeared to be slightly reddish adjoining urethral meatus and there was no other injury except superficial redness around meatus could be detected on the penis of the Appellant-accused. In his cross-examination, P.W.13 testified that, if a person suffers from acute urethritis, there would be redness around the urethral meatus. By the terminology "urethritis" means inflammation of the urethra because of some infection. The superficial redness around the meatus could be seen in acute urethritis. In answer to question No.21, in his statement under Section 313, Cr.P.C., the Appellant has replied that he was suffering from itching of his urethra since some days and for that reason there was redness on the meatus.

29. Another aspect, on which learned Trial Court has leaned heavily in finding the Appellant guilty, is non-explanation of the injuries on the dead body of the deceased by the Appellant. On this aspect, suffice it to say on our part is that, in view of the nature of evidence obtained on record, onus of proof under Section 106 of the Evidence Act never shifts to the defence to explain the injuries on the dead body of the deceased.

30. If we see the evidence of P.W.13 in conjunction with the evidence of P.W.33 – who conducted the Post-Mortem Examination, it would be seen that P.W.33 has specifically testified that, in case of forcible sexual intercourse with a minor girl, there is every likelihood of presence of injuries on the private part of the perpetrator of the crime, namely frenum, glans-penis and prepuce.

31. There being penetration, as found from the medical evidence and especially the Post-Mortem Report in respect of the deceased and there being no injury to the private part of the Appellant except slight redness on his meatus, which has been explained by him (Appellant) and there being no blood and no semen found on his underwear though there was profuse bleeding from the vagina of the girl (deceased) at the time of ravishment, as found from evidence, we are of the view that there is nothing on record to find the Appellant guilty.

32. Accordingly, we set aside the impugned Judgment of conviction recorded under Section 376/302, I.P.C. against the Appellant and sentences recorded thereunder, and we acquit the Appellant of the charges. If the Appellant is in custody, he be released forthwith. However, if the Appellant

is continuing on interim bail after expiry of the interim bail period in view of intervening Lock-down for COVID-19, the interim bail is regularized by extending the same till today and the Appellant be discharged of the bail bond on his appearance before the Trial Court.

33. The CRLA is accordingly allowed.

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2020 (I) ILR - CUT- 739

DR. B.R.SARANGI, J & S.K. PANIGRAHI, J.

W.P.(C) NO. 6536 OF 2014

DEVI PRASAD PANDA .....Petitioner

Vs.

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

SERVICE LAW – Compassionate appointment on rehabilitation ground – Father of the petitioner died while in service – Petitioner though was eligible for appointment on compassionate ground in the post of Postal Assistant but was forced to accept the post of Gramin Dak Sevak to save his family from distress – Subsequently he claimed the post of PA/SA as similarly situated persons were provided with the benefit – Claim rejected on the ground that he has already accepted the post of GDS – OA filed – Rejected – Writ petition – Held, the petitioner is also entitled for the same benefit – Reasons explained.

"Having regard to the submissions made by the parties, this Court is of the considered opinion that action of the opp. parties clearly smacks discrimination against the petitioner, since many of the similarly situated persons have been appointed in PA/SA cadre in the Postal Department. Since the Department denied him to absorb in PA/SA cadre, he was constrained to accept GDS to support his distress family after the untimely death of his father. The petitioner, time and again, ventilated his grievance through representations to the authority seeking his absorption as PA/SA. The petitioner is eligible from all counts for appointment of PA/SA cadre which have been approved for so many similarly situated persons. Hence, precluding the petitioner from similar opportunity of appointment would be against the canon of equal opportunity in the matter of appointment and is hit by Article 16 (1) and (2) of the Constitution of India. The State action cannot be discriminatory. Hence, the findings of the Tribunal is bereft of proper appreciation of law and improper understanding of facts. Even though the case of compassionate appointment cannot be said to be a case of positive discrimination in terms of Article-14 of the Constitution of India, but in the instant case, the question of parity

is writ large and the petitioner's claim on parity with similarly situated persons is not un-warranted. The alleged discrimination by the authority in a negative manner is illegal which has escaped the attention of the Tribunal. In view of the above discussion, this Court is of the view that the petitioner's case is a fit case for appointment in PA/SA cadre or any other regular Departmental post similar to this post against which so-many similarly situated persons have been appointed."

(Paras 9 to 13)

Case Laws Relied on and Referred to :-

1. (2016) 15 SCC 747 : Jivanlal Vs. Pravin Krishna, Principal Secretary & Ors.

For Petitioner : M/s.Gopal Krishna Behera & D.R. Mishra,
For Opp. Parties : Mr. D.R.Swain Central Govt. Counsel

JUDGMENT Date of Hearing: 17.02.2020 : Date of Judgment:17.03.2020

S.K. PANIGRAHI, J.

In this writ petition, the petitioner has challenged the validity and legality of the order dated 05.02.2014 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.821 of 2011.

2. The factual conspectus of the matter revolves around denial of compassionate appointment/absorption in PA/SA Cadre or any other regular Departmental posts to the petitioner despite the fact that some other similarly situated persons have been considered for appointment. The father of the petitioner late Mochinath Panda was serving as Ex-Mail Overseer in the office of Assistant Superintendent of Post Office, Bhanjanagar who died of Cancer on 26.01.1998 at the age of 51 leaving behind the dependant widow, the petitioner, one married daughter and two minor sons and two daughters. The widow of the deceased-employee approached opp. party No.3, i.e., the Superintendent of Post Offices, Aska Division, Aska for compassionate appointment of her elder son/petitioner. After due verification of the documents and getting satisfied in every respect, the CRC vide Office Memorandum dated 13.9.1999 approved the compassionate appointment of the petitioner relaxing the normal recruitment rules for appointment of Postal Assistant/SA.

3. Despite the willingness of the petitioner and approval by the authority, he was not given appointment in any other Ministry instead the Department, willy nilly, directed him to be absorbed in the post of Gramin Dak Sevak (GDS) on 21.08.2001. The said offer was subject to the condition that once he accepts G.D.S. post, he cannot claim for appointment of any special consideration against the Departmental vacancies. Accordingly, the

petitioner, unwillingly, submitted his willingness on 04.09.2001 but later on 06.09.2001, he withdrew the same reiterating his request for appointment against PA/SA or in any other Ministry.

4. Even after his serious plight for getting appointment against PA/SA or any other Ministry, but due to the acute finance difficulties of the family, he was constrained to take up the post of Gramin Dak Sevak on 27.12.2002. Accordingly, the petitioner was appointed as GDS at Golia Brach Post Office under Buguda Sub-post office with effect from 01.08.2003. Later, he was transferred to Dhumuchhai Branch Post Office on 07.04.2008 and he continued as such.

5. Learned counsel for the petitioner submits that several persons who are similarly placed like the petitioner have been appointed in PA/SA Cadre in different Divisions which was duly approved by the CRC. The petitioner kept on representing before the authority for absorption in PA/SA, like those of similarly placed persons who have been given such appointment by the Department. But the petitioner was discriminated illegally.

6. Having failed in all counts, the petitioner approached to the Central Administrative Tribunal vide O.A. No.30 of 2011 which was disposed of vide order dated 01.07.2011 with a direction to the opp. party No.3, the Superintendent of Post Offices, Aska to consider his case in consultation with the opp. party No.1/Chief Post Master General, Odisha Circle and do the needful within a period of two months. The petitioner accordingly approached the opp. party No.3 but his application was turned down on the sole ground that due to non-existence of vacancies, he could not be appointed against the PA/SA Cadre.

7. It is also stated by the opp. party Nos.1 and 3 that as the petitioner has accepted the GDS with a condition that he will not claim absorption in any regular Departmental post, hence his case is different from the other similarly situated persons. The petitioner, being aggrieved by the order of rejection dated 6.9.2011 passed by the authority, once again approached the Tribunal vide OA No.821 of 2011. While the matter stood thus, one similarly placed person like the petitioner, named, Manoranjan Pradhan was absorbed in PA/SA Cadre.

8. Having heard learned counsel for the parties and considering the entire facts and circumstances, the Tribunal held that due to the indigent condition of the applicant's family, the CRC recommended his case but due

to non-availability of vacancies in regular Departmental Cadre, the authority has taken care to provide him employment and he willingly accepted to be absorbed in GDS post. It was further submitted by the opp. parties that after long lapse of time, the claim of the petitioner against the very undertaking provided by him at the time of appointment citing the example of other similarly situated employee cannot be accepted to unsettle the settled position and accordingly the O.A. was dismissed. The Apex Court in ***Jivanlal v. Pravin Krishna, Principal Secretary and others (2016) 15 SCC 747*** held that ".....there cann't be any pick and choose policy, it would certainly lead to corruption".

9. Having regard to the submissions made by the parties, this Court is of the considered opinion that action of the opp. parties clearly smacks discrimination against the petitioner, since many of the similarly situated persons have been appointed in PA/SA cadre in the Postal Department. Since the Department denied him to absorb in PA/SA cadre, he was constrained to accept GDS to support his distress family after the untimely death of his father. The petitioner, time and again, ventilated his grievance through representations to the authority seeking his absorption as PA/SA. The petitioner is eligible from all counts for appointment of PA/SA cadre which have been approved for so many similarly situated persons. Hence, precluding the petitioner from similar opportunity of appointment would be against the canon of equal opportunity in the matter of appointment and is hit by Article 16 (1) and (2) of the Constitution of India.

10. The State action cannot be discriminatory. Hence, the findings of the Tribunal is bereft of proper appreciation of law and improper understanding of facts. Even though the case of compassionate appointment cannot be said to be a case of positive discrimination in terms of Article-14 of the Constitution of India, but in the instant case, the question of parity is writ large and the petitioner's claim on parity with similarly situated persons is not un-warranted. The alleged discrimination by the authority in a negative manner is illegal which has escaped the attention of the Tribunal.

11. In a similar case, this Court vide order dated 28.09.2012 has passed an order in W.P. (C) No.12969 of 2004, wherein it has been stated that:

> "xxx xxx xxx
>
> If there was no post in the P.A. Cadre, it is not known as to how Sri Umesh Chandra Pattnaik could be appointed in P.A. Cadre at a later date. Moreover, merely because the present petitioner-Manoranjan Pradhan expressed his willingness to work as GDS on the ground that no post is available in P.A. cadre, he cannot be discriminated.

We, therefore, disposed of this Misc. Case directing the opposite parties to consider the claim of the present petitioner-Manoranjan Pradhan for appointment against P.A. Cadre as has been done in the case of Umesh Chandra Pattnaik. This exercise shall be completed within three months from the date of production of certified copy of this order by the petitioner."

12. In view of the above discussion, this Court is of the view that the petitioner's case is a fit case for appointment in PA/SA cadre or any other regular Departmental post similar to this post against whic so-many similarly situated persons have been appointed.

13. Accordingly, this Court sets aside the order dated 05.02.2014 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.821 of 2011 and the opp. parties are directed to appoint the petitioner in PA/SA cadre or any other regular posts inside the Civil Services of Union within two months from today. The writ petition is, accordingly, disposed of. No order as to cost.

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2020 (I) ILR - CUT- 743

DR. B.R.SARANGI, J & S.K. PANIGRAHI, J.

W.P.(C) NO. 5260 OF 2009

PUSPAK RANJAN NAYAK .....Petitioner

.Vs.

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

SERVICE LAW – Promotion – Selection test conducted for the formation of Group-B Panel (AENs) against 70% for departmental promotion quota vacancies in Railways – Petitioner not selected – Plea that some of the candidates, juniors to him, were empanelled for promotion, but the petitioner was illegally excluded from the list even though he had no adverse remark – Further plea that he has also not been subjected to any adverse remarks during his past service and also agitated the issue of non-communication of the entry made in the ACR by the authority – Authority on the other hand stated that the entire selection process was transparent and full proof and there was no scope left for anybody to make any objection on the selection process – Petitioner secured less mark and not selected – Original records show two important aspects have been given a raw deal by the authority that is (i) the non-communication of the insertion of entry in the ACR (ii) the non-communication about his non-selection – Effect of

– Held, the communication of entries in the annual confidential report of a public servant warrants a civil consequence and may adversely affect his chance of promotion or other service related benefits – Hence, such non-communication is arbitrary and violative of Article 14 of the Constitution – Every entry in the "Service Book" whether it is fair, poor, average, good or very good marks need to be communicated to the concerned employee within a reasonable period which brings about the desired level of transparency in the selection/promotion process – Admittedly, in the present case, the petitioner had no adverse remarks or any negative record, hence he deserves to secure a decent marks in "Record of Service" which have been wrongly denied to him leading to poor score in the C.C.R. – The Railway authority has also failed to intimate him about his entry in ACR. In fact, he would have got an opportunity to rectify or upgrade the score, if it is not satisfactory – Direction to consider the promotion of the petitioner retrospectively with all consequential benefits within two months from the presentation of this order.

Case Laws Relied on and Referred to :-

1. 2008 (8) SCC 725 : Deva Dutta Vs. Union of India.
2. 2009 (16) SCC 146 : Abhijit Ghose Vs. Union of India.
3. (1978 SCR(2) 621 : Menaka Gandhi Vs. Union of India.

For Petitioner : M/s.Ganeswar Rath, N.R.Routray, S.Mishra,
For Opp. Parties : M/s.Piyush Kumar Mishra, Satya Sundar Mishra

JUDGMENT Date of Hearing: 03.03.2020 : Date of Judgment:17.03.2020

S.K. PANIGRAHI, J.

The petitioner, in this writ petition, questions the validity and propriety of the empanelled promotion list which has unjustifiably excluded him. The petitioner is working as a Senior Section Engineer (Estimate), in the Office of the XEN/T & A/C, Bhubaneswar, under the Deputy Chief Engineer (Con.), East Coast Railway, Bhubaneswar. He appeared in the selection test conducted for the formation of Group-B Panel (AENs) against 70% for departmental promotion quota vacancies. According to the petitioner, in 2004, in the same East Coast Railway, some of the candidates, juniors to him, were empanelled for promotion, but the petitioner was illegally excluded from the list even though he had no adverse remark.

2. It is submitted by learned counsel for the opposite parties that out of 61 candidates appeared in the written examination, 23 candidates qualified in the written test, including the petitioner, and were called for the viva-voce

test on 01.10.2004. It is further submitted that the entire selection process was transparent and full proof. There was no scope left for anybody to make any objection on the selection process. The said selection was conducted by a committee comprising 3 SAG/PHODs, i.e., Principal Chief Engineer (PCE), Chief Personnel Officer (CPO) and Chief Mechanical Engineer (CME) who had been nominated by the General Manager, East Coast Railway. The committee includes PHOD (Principal Head of Department), i.e., in the present case, Principal Chief Engineer (PCE) who set the question papers for the written test. The answer sheets of the written test were evaluated by one of the SAG Officer of Engineering Department, i.e., CGE, who was also nominated by the General Manager.

Since it is the case of 70% departmental promotion quota, one Professional Paper of 150 marks was prescribed for the written test in addition to other tests. Finally, the Selection Committee submitted selection proceedings before the General Manager, who is the approving authority.

The candidates who secured 60% marks in the written examination i.e. 90 marks out of 150, qualified for the viva-voce test and were sent for medical examination before the viva-voce test. In the instant case, the petitioner was also sent for medical examination before the viva-voce was conducted. In terms of the Railway Board's letter No.E(GP) 80/2/8 dated 31.10.1991 and as per the instructions contained in Para-206.2 of IREM-Vol. I, condition stipulated in the above circular and rules are mandatory in nature and at no point of time, deviation or relaxation is permitted to anybody. Accordingly, those who come out successful both in the written test as well as in medical test, were called upon to face the viva-voce test.

In the viva-voce test, out of total 50 marks, 25 marks are allotted for Record of Service and 25 marks allotted for viva-voce as per the instructions issued by the Railway Board. Candidates those who secured 60% marks, i.e., 30 marks out of 50 marks (including at least 15 marks in the Record of Service) become eligible for final empanelment in order of their integrated seniority against 70% quota vacancies. The petitioner was also found fit in the medical test, and accordingly appeared in the viva-voce test on the said date. After conclusion of the viva-voce test, the opposite party no.3 published a provisional panel of the successful candidates wherein the name of the petitioner was conspicuously absent.

3. Being aggrieved by the said Empanelment order dated 09.03.2006, the petitioner approached the Central Administrative Tribunal (CAT),

Cuttack Bench, Cuttack vide O.A. No.623 of 2006. His contention before the Tribunal was that he is senior to candidates especially opposite party Nos. 5 to 12. It was also contended by the petitioner that his service career was clean and unblemish. He has also not been subjected to any adverse remarks during his past service, hence, he is entitled to get full marks against the "Record of Service". The petitioner also agitated the issue of non-communication of the entry made in the ACR by the authority. During course of argument, learned counsel for the petitioner invited our attention to an apex Court judgment in ***Deva Dutta Vrs. Union of India,*** *2008 (8) SCC 725* wherein the apex Court held that every entry in the ACR of a public servant must be communicated. This issue has further been reinforced in ***Abhijit Ghose vs. Union of India,*** *2009 (16) SCC 146*. The petitioner didn't get a chance to make representation and ask for upgradation. Hence, non-communication of the entry made in the ACR by the authority of the employee is arbitrary which violates Article 14 of the Constitution as held in ***Menaka Gandhi vs. Union of India*** (*1978 SCR(2) 621*.

4. Per contra, learned counsel for the opposite parties states that the petitioner does not have to be empanelled because he has failed in the selection at the viva-voce test and having been failed in the viva-voce test, he is estopped from approaching the Tribunal. During subsistence of the O.A. No.623 of 2006, the petitioner filed M.A. No. 299 of 2008 seeking direction to opposite party Nos.1 to 4 to produce the marks obtained by the petitioner during the process of selection. Accordingly, vide letter dated 08.01.2009 the opposite party Nos. 1 to 4 produced the marks secured by the petitioner which may be read as follows:-

(i)	Total Marks for written examination	150
(ii)	Pass marks for written test	90
(iii)	Marks secured in written examination	94
(iv)	Total marks for viva voce test	50
(v)	Pass marks for viva voce	30
(vi)	Marks secured in records of service	16.6
(vii)	Marks secured in viva voce test	10
(viii)	Total marks secured in viva voce test	26.6

5. Having considered all aspects, the Tribunal finally rejected the prayer of the petitioner on the ground that he has failed to achieve the desired marks, hence, the Tribunal does not have the power to interfere in it.

6. Being aggrieved by the order of the Tribunal, the petitioner has approached this Court by way of this writ petition. The contentions advanced by the petitioner in his petition are that the selection procedure was scrupulously followed in accordance with Chapter-II of Indian Railway Establishment Manual (IREM). He further submits that since it is not a competitive one, rather a qualifying one, and the petitioner had obtained more than the minimum qualifying marks, there is no reason why the opposite parties deny the opportunity of getting empanelled him for promotion. It is also not desirable on the part of the opposite party No.2 to prepare a part panel wherein the eligible and qualified employees are available as per the following selection procedure:

	Maximum Marks	Qualifying Marks
(i)Professional ability	50	30
(ii)Personality,Address, Leadership & Academic technical qualifications	25	15
(iii)Record of service	25	15
	100	60

7. In the instant case, there were a total number of twenty one posts notified to be filled up through departmental promotion, but only 14 candidates were notified to have been promoted and the rest seven vacancies remained unfulfilled. The petitioner herein, was neither given promotion nor was communicated with the sufficient reasons of his non-selection.

8. It is also submitted that since the petitioner did not have any adverse remarks in his service career, he is entitled to get sufficiently higher marks in so far as "Record of Service" is concerned. Further, the opposite party No.2 has taken written test, viva voce test and "Record of Service" separately, which is wholly undesirable while computing the marks for promotion, because they are always taken together. It is further submitted that the opposite party Nos. 5 to 11 have been selected, who were similarly placed with the petitioner, whereas the petitioner was unjustifiably denied.

9. On perusal of the original record, it has been revealed that the letter dated 08.01.2009 has contained the detail marks secured by the petitioner, which may be furnished below:

Name of the candidate	Total makrs for Written Examination	Pass marks for Written Test	Marks secured in Written Examination	Total marks for Viva-voce Test	Pass marks for Viva-voce Test	Marks secured in Records of Service	Marks secured in Viva-voce Test	Total marks secured in Viva-voce Test	Remarks
Shri Puspak Ranjan Nayak SSE (Con.)/KUR/BBS	150	90	94	50 -25 marks each for Record of Service and Viva-voce	30 Including minimum 15 marks in Record of Service	16.6	10	26.6	Not Suitable

10. In our view two important aspects have given a raw deal by the authority that is (i) the non-communication of the insertion of entry in the ACR (ii) the non-communication about his non-selection. The communication of entries in the annual confidential report of a public servant warrants a civil consequence and may adversely affect his chance of promotion or other service related benefits. Hence, such non-communication is arbitrary and violative of Article 14 of the Constitution. Every entry in the "Service Book" whether it is fair, poor, average, good or very good marks need to be communicated to the concerned employee within a reasonable period which brings about the desired level of transparency in the selection/promotion process. Admittedly, in the present case, the petitioner had no adverse remarks or any negative record, hence he deserves to secure a decent marks in "Record of Service" which have been wrongly denied to him leading to poor score in the C.C.R.. The Railway authority has also failed to intimate him about his entry in ACR. In fact, he would have got an opportunity to rectify or upgrade the score, if it is not satisfactory.

11. In the instant case, we are of the view that the petitioner has neither been communicated any reasons for his non-selection nor has he been communicated about the entry in his ACR. These two aspects have not been taken into account properly, which resulted in poor score in the evaluation of C.C.R.. Had the C.C.R. been evaluated properly, the petitioner would have scored higher marks and his exclusion from the empanelled list could have been averted.

12. In view of the aforesaid findings, we set-aside the impugned order dated 16.03.2009 passed by CAT, Cuttack Bench, Cuttack in O.A. No.623 of 2006 with a direction to the opposite party Nos. 2 and 3 to consider the promotion of the petitioner retrospectively with all consequential benefits within two months from the presentation of this order.

13. Accordingly, the writ petition is disposed of. No order as to cost.

2020 (I) ILR - CUT- 749

DR. B.R. SARANGI, J.

W.P.(C) NO. 21738 OF 2018

NIRMALA NAYAK .....Petitioner

.Vs.

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

ODISHA HOME GUARDS ACT, 1961 – Sections 1,2,3,10 and 11 read with Rules 2, 14, 19 and 20 of the "The Odisha Home Guards Rules, 1962 – Provisions under – Writ petition challenging the order rejecting the prayer for grant of compensation – Petitioner, wife of deceased Home Guard who died while on duty – Claim of compensation – Provisions of the Act and Rules clearly enumerates payment of compensation – Relying on the resolution of the Finance Department, application of the petitioner was returned on the ground that she claimed for compassionate grant after expiry of one year from the date of death of her husband – Whether can be accepted? – Held, No. – Reasons explained.

"*On perusal of such resolution dated 02.11.2001, it would be evident that its subject has been captioned as "sanction of special incentive package to the police personnel of the State engaged on naxalite duty". Therefore, it can be safely concluded that the said resolution is applicable to "police personnel" of the State engaged on "naxalite duty".Husband of the petitioner was neither a "police personnel" nor was he engaged in "naxalite duty", rather he was a "Home Guard" as defined under the Odisha Home Guards Act and Rules framed thereunder,. Therefore, taking resort to such resolution dated 02.11.2001 amounts to sheer non-application of mind by the authority concerned. As such, rejection of the claim of the petitioner and return of the application form along with the documents, pursuant to Annexures-6 and 7 dated 23.06.2018 and 11.07.2018 respectively, placing reliance on the resolution which is not applicable, cannot sustain in the eye of law." (Para 13)*

Case Laws Relied on and Referred to :-

1. (2004) 5 SCC 65 : AIR 2004 SC 2141 : Ghaziabad Development Authority Vs. Balbir singh
2. AIR 2001 SC 1333 : (2001) 3 SCC 714 : Ratni Menon Vs. Union of India,
3. AIR 2006 SC 1223 : Sandvik Asia Ltd. Vs. Commissioner of Income Tax.
4. (2003) 7 SCC 197 : AIR 2003 SC 172 : K.S.R.T.C. Vs. Mahadeva Shetty.
5. (2009) 7 SCC 205 : G.M. Uttanchal Jal Sansthan Vs. Laxmi Devi.

For Petitioner : M/s. B.K. Nayak-3 & S. Rath.
For Opp. Parties: Mr. B. Senapati, Addl. Govt. Adv.

JUDGMENT Decided on : 06.02.2020

DR. B.R. SARANGI, J.

The petitioner, being the wife of the deceased Home Guard late Bidyadhar Nayak, by way of this writ petition, seeks to quash the

communication dated 23.06.2018 in Annexure-6, whereby the Under Secretary to the Government of Odisha in Home Department has returned to the Commandant General, Home Guards, Odisha, Cuttack the original application in the prescribed Form-I along with enclosures for compassionate grant in favour of NOKs of deceased Home Guard-Bidyadhar Nayak, referring to para-6 of the Finance Department Resolution No. 53885/F dated 02.11.2001, on the ground that such application was not filed within one year from the date of death or injury of the concerned police personnel; as well as communication dated 11.07.2018 in Annexure-7, by which the petitioner has been intimated by the Commandant Home Guards, Nayagarh that she does not come under the purview of Finance Department Resolution referred to above and accordingly returned the original application for compassionate grant.

2. The factual matrix of the case, in hand, is that the petitioner's husband Late Bidyadhar Nayak, was engaged as Home Guard in Gania Police Station in the district of Nayagarh. As per entry serial no. 375 dated 19.02.2005 of Gania P.S. Diary Book, he was engaged in law and order duty at Kantilo Magha Mela, Kantilo in the district of Nayagarh. On 21.02.2005 at about 3 a.m., while he was on duty, complained some pain in his body, for which he was immediately shifted to Community Health Centre, Gania, where the medical officer declared him dead. Consequently, postmortem was conducted on his body and the doctor opined that the cause of death was due to hypertensive heart failure. An enquiry was conducted and on its completion, the inquiry officer closed the case. The petitioner, being the wife of the deceased Home Guard and legal heir, is entitled to compassionate grant from the opposite parties as her husband died while was on duty. Consequentially, she approached the authorities time and again by way of representations, the last of which was dated 26.09.2016 at Annexure-2, but nobody gave any heed to her grievance.

2.1 Due to inaction on the part of the authorities, she approached this Court by filing W.P.(C) No. 1974 of 2017, which was disposed of on 23.02.2017 with the direction to opposite partyno.3 to consider and dispose of the representation of the petitioner within a period of two months from the date of receipt of the certified copy of the order. Since no action was taken, the petitioner filed CONTC No. 1249 of 2017, which was disposed of on 15.09.2017 with the direction to the contemnor to comply the order within a period of seven working days. Even then since the contemnor sat over the matter, she filed another contempt application bearing CONTC No. 771 of

2018 and the same was disposed of in view of further developments in the matter. Thereafter, vide letter dated 14.04.2017, opposite party no.3 required certain documents from the petitioner in quadruplicate for onward submission to opposite party no.2. On receipt of such documents from the petitioner, as required vide letter dated 14.04.2017 in Annexure-3, the same were forwarded by opposite party no.3 vide its letter dated 07.10.2017 to opposite party no.2. On consideration of the case of the petitioner, opposite partyno.2 forwarded the application of the petitioner to opposite party no.1, vide letter dated 07.05.2018, along with all relevant documents, and requested the Government for payment of Rs.1.5 lakhs as compassionate grant to next kin of late Bidyadhar Nayak, who died while was engaged in law and order situation in Kantilo Magha Mela in the district of Nayagarh.

2.2 Opposite party no.1, vide communicated dated 23.06.2018 in Annexure-6, by ignoring the recommendation of opposite party no. 2, relying upon resolution no. 53885/F dated 02.11.2001 of the Finance Department, returned the application form of the petitioner on the ground that she claimed for compassionate grant after expiry of one year from the date of death of late Bidyadhar Nayak. Pursuant thereto, opposite party no.3 communicated the petitioner, vide letter dated 11.07.2018 in Annexure-7, that since the application was submitted much after the death of Home Guard Bidyadhar Nayak, in view of Finance Department Resolution referred to above, the same was returned to the petitioner. Hence this application.

3. Mr. B.K. Nayak-3, learned counsel for the petitioner emphatically submitted that the husband of the petitioner, being a Home Guard, was to be regulated by the provisions contained under the Odisha Home Guards Rules, 1962, and the petitioner, being the next kin, is entitled to get compensation for the damage caused due to death of her husband while he was on duty. He further submitted that the resolution no. 53885/F dated 02.11.2001 of the Finance Department, relying upon which the application of the petitioner along with the documents have been returned, is only applicable to the police personnel of the State engaged on naxalite duty. Late husband of the petitioner, being a Home Guard, is neither a police personnel nor engaged in naxalite duty. Therefore, the resolution dated 02.11.2001 is not applicable to the case of the petitioner. Consequentially, the impugned communications dated 23.06.2018 and 11.07.2018 in Annexures-6 and 7 respectively cannot be allowed to stand and are to be quashed, and the opposite parties are to be directed to pay compensation as due and admissible to the petitioner in accordance with law.

4. Mr. B. Senapati, learned Addl. Government Advocate appearing for the State opposite parties, relying upon the counter affidavit filed by opposite party no.3, contended that the Government returned the original application in form-I along with enclosures on the ground of limitation, i.e. the date of death of the deceased and the date of application mentioned in form-1 of the application to be 21.02.2005 and 01.10.2017 respectively. Therefore, the petitioner is not entitled to get compensation.

5. This Court heard Mr. B.K. Nayak-3, learned counsel for the petitioner and Mr. B. Senapati, 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.

6. The facts, as delineated above, are not in dispute. Therefore, if at the time of his death, the husband of the petitioner was working as Home Guard and was engaged in law and order duty, pursuant to entry serial no. 375 dated 19.02.2005 of Gania P.S. Diary Book, at Kantilo Magha Mela, Kantilo in the district of Nayagarh, are the opposite parties justified in denying compensation to the petitioner and that too taking recourse to the limitation prescribed in Finance Department resolution dated 02.11.2001 at Annexure-8.

7. In order to answer the above question, it is necessary to mention that the legislature of the State of Odisha enacted the Odisha Home Guards Act, 1961 to provide a Volunteer Organization for use in emergencies and other purposes in the State of Odisha. As per sub-Section (1) of Section 2, the State Government shall, for the areas notified under Sub-Sec. (3) of Section 1, constitute a volunteer body called "Home Guards", the members of which shall discharge such functions and duties in relation to the protection of persons, the security of property and public safety and for such other functions as may be assigned to them in accordance with the provisions of this Act and the rules made thereunder. As per Section 11, the members of the Home Guards acting under this Act shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code. In exercise of the powers conferred under Section 10 of the Home Guards Act, 1961, the State Government framed a set of Rules called "The Odisha Home Guards Rules, 1962". Sub-Rule (iv) of Rule-2 defines "Home Guards" as the Home Guards constituted under Section 2 of the Home Guards Act, 1961. Sub-Rule (v) of Rule 2 states "Member of the Home Guards" as a member appointed under Section 3. Following the rules, the husband of the petitioner was appointed as

Home Guard. As per sub-Rule(1) of Rule 14, a member of the Home Guards shall obey every order of his superior officer. Rule-15 envisages about providing uniform and Rule-16 postulates about training. Functions and duties of the Home guards have been defined under Rule 17 and as per Rule 19 their remunerations are fixed. Rule-20 deals with compensation, which reads as follows;

> *" if a member of the Home Guards suffers any damage to his person or property while under training or on duty, he shall be paid such compensation as may be determined by the State Government; provided that such damage is not caused by his own negligence or willful act or omission in contravention of any of the provisions of the Act or rules made thereunder or orders or directions issued by his superior officer."*

In view of the above rules, the petitioner's husband late Bidyadhar Nayak, having expired while was on law and order duty, she is entitled to get compensation. Neither the provisions of the Act nor the Rules framed thereunder prescribes any limitation to make application to get compensation under Rule 20.

8. In ***Ghaziabad Development Authority v. Balbir singh*** (2004) 5 SCC 65 : AIR 2004 SC 2141, the apex Court held "compensation", according to dictionary, it means, 'compensating or being compensated; thing given as recompense;'.

9. In ***Ratni Menon v. Union of India,*** AIR 2001 SC 1333 : (2001) 3 SCC 714, referring to **Black's Law Dictionary,** the apex Court held 'compensation' is shown as equivalent in money for a loss sustained or giving back an equivalent in either money which is but the measure of value, or in actual value otherwise conferred, or recompense in value for some loss, injury or service especially when it is given by statute.

10. In ***Sandvik Asia Ltd. v. Commissioner of Income Tax,*** AIR 2006 SC 1223, as per **P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edn., 2005** the word 'compensation' has been defined to mean 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 damnified may receive equal value for his loss or be made whole in respect of his injury.

11. In ***K.S.R.T.C. V. Mahadeva Shetty*** (2003) 7 SCC 197 : AIR 2003 SC 172 the apex Court held the word 'compensation' is derived from the Latin word 'compensare' meaning 'weight together' or 'balance'.

12. The meaning of compensation as has been held by the apex Court in different judgments, vis-à-vis Rule 20 of the Odisha Home Guard Rules, 1962 entitles the petitioner to get the compensation due to the death of her husband late Bidyadhar Nayak, who was declared dead while on duty. The opposite parties are obliged under law to pay compensation to the petitioner, but the same has not been paid despite several approaches made by her to the authorities. Not only that, when no action was taken by the authorities, the petitioner approached this Court by filing writ petition, wherein this Court issued direction to consider the representation of the petitioner. As the said order was not complied, she moved contempt application and despite specific direction the same was also not obliged. But, subsequently, when second contempt application was moved, then only opposite party no.3, on 14.04.2017, called upon the petitioner to file required documents for onward submission to opposite party no.2. As such, the opposite party no.2, on consideration of such documents recommended the case of the petitioner for payment of compensation, but the same was denied by opposite party no.1, relying upon the circular no. 53885/F dated 02.11.2001 issued by the Finance Department, which appears to be an outcome of sheer non-application of mind.

13. On perusal of such resolution dated 02.11.2001, it would be evident that its subject has been captioned as "sanction of special incentive package to the police personnel of the State engaged on naxalite duty". Therefore, it can be safely concluded that the said resolution is applicable to "police personnel" of the State engaged on "naxalite duty". Husband of the petitioner was neither a "police personnel" nor was he engaged in "naxalite duty", rather he was a "Home Guard" as defined under the Odisha Home Guards Act and Rules framed thereunder,. Therefore, taking resort to such resolution dated 02.11.2001 amounts to sheer non-application of mind by the authority concerned. As such, rejection of the claim of the petitioner and return of the application form along with the documents, pursuant to Annexures-6 and 7 dated 23.06.2018 and 11.07.2018 respectively, placing reliance on the resolution which is not applicable, cannot sustain in the eye of law.

14. As has been discussed above, the Odisha Home Guard Rules, 1962 prescribes unequivocally for payment of compensation in case a member of the Home Guards suffers any damage to his person or property while under training or on duty. The resolution in question, being in the nature of an administrative instruction, cannot supersede the statutory Rules. Accordingly,

it is observed in ***G.M. Uttanchal Jal Sansthan v. Laxmi Devi***, (2009) 7 SCC 205 as follows:-

> *"We fail to understand how a mere circular letter which has no force of law shall prevail over the statutory rules. The respondents themselves have relied upon the decisions of the Court in* ***DDA v. Joginder S. Monga****, (2004) 2 SCC 297 : A. 2004 SC 3291 wherein it was held that executive instructions cannot run contrary to the statutory provisions."*

Similar view has also been taken by the apex Court in catena of decisions.

15. The stand of the opposite parties as taken in the counter affidavit, that since the petitioner filed the application beyond the limitation period, the same was returned along with the documents, is not at all tenable, as because such limitation prescribed in the Finance Department Resolution dated 02.11.2001 has no application to the claim of the present petitioner, which is guided by Odisha Home Guard Rules, 1962 and Rule 20 thereof does not contemplate any limitation for payment of compensation as due and admissible in accordance with law. More particularly, when opposite parties no.2 and 3 had recommended the case of the petitioner for grant of compensation in consonance with the statute, the opposite party no.1 should have applied its mind on such recommendation and extended the benefits, instead of returning the application along with the documents to the petitioner. In absence of any limitation prescribed either under the Odisha Home Guards Act or the Rules framed thereunder, the application submitted by the petitioner and recommended by opposite parties no.2 and 3, should have been taken into consideration and the petitioner should have been paid compensation in accordance with law.

16. In view of above analysis, this Court is of the considered view that the communications dated 23.06.2018 in Annexure-6 and dated 11.07.2019 in annexure-7 cannot sustain in the eye of law and the same are liable to quashed and are hereby quashed. The opposite party no.1 is directed to accept the application of the petitioner along with the documents and sanction compensation in favour of the petitioner for untimely death of her husband while he was on duty as Home Guard. The entire exercise for payment of compensation to the petitioner shall be completed within a period of two months from the date of communication of this judgment.

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

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2020 (I) ILR - CUT- 756

DR. B.R. SARANGI, J.

W.P.(C) NO. 22102 OF 2014

HENALATA SWAIN & ORS. …..…Petitioners

.Vs.

DIVISIONAL RAILWAY MANAGER, EAST COAST RAILWAY & ANR. …...…Opp. Parties

RAILWAYS ACT, 1989 – Sections 18, 113,114,115,124 and 147 read with Rule 4 of Railway Accidents and Untoward Incidents (Compensation) Rules, 1990 – Provisions under – Writ petition – Claim of compensation due to death by a train accident in an un-manned level crossing – No enquiry report produced by the Railways as per the provisions – Plea of maintainability of the writ petition raised – Held, writ petition maintainable – Compensation awarded.

"The inquiry report, as required under Section 115 of the Act, having not been produced, this Court draws an adverse inference against the Railways that there was negligence on the part of the railway administration in not taking sufficient precautionary measures by posting guard or keeping the railway gate closed at the time while the train was due to pass through that level crossing. Non-compliance of the aforesaid statutory obligations by the railway administration, this Court rejects the contentions raised by learned counsel for the Railways that there are serious disputed questions of facts and due to carelessness on the part of the deceased, the claim made in the writ petition cannot sustain. Further, in view of provisions contained under Article 21 of the Constitution, "Right to Life" is a fundamental right as enshrined in Chapter-III of the Constitution of India. "Right to Life" does not mean an animal existence, it requires a meaningful life to be led by citizen of India."

Case Laws Relied on and Referred to :-

1. 2013(I) OLR 674 : Prabir Kumar Das Vs. State of Odisha.
2. 1980 ACJ 435(SC : N.K.V. Bros.(P) Ltd. Vs. M. Karumai Ammal,)
3. 1958-65 ACJ 365 (Assam) : Swarnalata Barua Vs. Union of India.
4. AIR 1983 SC 1086 : Rudul Sah Vs. State of Bihar.
5. 1988 ACJ 780 : Kalawati Vs. State of Himachal Pradesh.
6. 1994 ACJ 623 (HP) : Seemu Vs. Himachal Pradesh State Electricity Board.
7. 1992 ACJ 283(SC) : Kumari Vs. State of Tamilnadu,
8. 2019(II) ILR-CUT-770 : Pranabandhu Pradhan Vs. Union of India.

For Petitioners : M/s. K.K. Jena, A.K. Mohapatra, S.N. Das, S.K. Panda & (Miss) M. Behera.

For Opp. Parties: Mr. D.K. Sahoo, Standing Counsel East Coast Railway

JUDGMENT Date of Hearing & Judgment : 07.02.2020

DR. B.R. SARANGI, J.

The petitioners are the legal representatives of deceased Pratap Swain, who died in a train accident caused on 12.09.2014 in an un-manned level crossing No.167A at Railway location KM-380/19-21 between BYY-BRTG near village Kapastikira in the district of Cuttack. They are, by way of present writ petition, seeking direction to grant compensation of Rs.10,00,000/- (ten lakhs), along with interest, due to negligence on the part of railway authority, from the date of death of deceased till the date of payment.

2. The fact of the case, in a nut shell, is that petitioner no.1's husband, who was aged about 39 years at the relevant point of time, was working in a garage as a manager and was getting Rs.10,000/- towards salary per month. On him, petitioner no.1-wife, petitioners no.2 and 3, the two minor children, and petitioner no.4, the widow mother were dependant. On 12.09.2014 at about 9.20 A.M., the Dn. East Coast Express No.18646, which was crossing the unmanned level crossing situated at village Kapastikira, dashed against the motorcyclist, who was crossing the said level crossing at that time. Consequentially, the husband of petitioner no.1, namely, Pratap Swain died. Thereafter, on the basis of FIR lodged by the Senior Section Engineer-Jayanta Kumar Sahoo, East Coast Railway, Dhanmandal, Cuttack GRPS Case No.109 of 2014 was registered under Sections 279/304 (A) IPC. The fact of death of the deceased due to unmanned level crossing is not in dispute. Thereby, due to death of said Pratap Swain, petitioner no.1 while lost her husband, petitioners no.2 and 3 lost their father and petitioner no.4 lost her son.

2.1. By filing the present writ petition, the petitioners have claimed compensation of Rs.10,00,000/- (ten lakhs), as the railway authorities have not taken reasonable precaution to reduce the damage to the public where a railway line crosses high way path, and as such, the death occurred in an unmanned level crossing. Therefore, the petitioners are entitled to get compensation, as claimed in the writ petition. Hence, this application.

3. Miss. M. Behera, learned counsel appearing on behalf of Mr. K.K. Jena, learned counsel for the petitioners contended that since the deceased died in a train accident in an unmanned level crossing, on account of the Railways Act, 1989 read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, which fixes the compensation of Rs.4,00,000/- in case of no fault liability, the petitioners are entitled to get compensation.

She has relied upon the judgment of this High Court in ***Prabir Kumar Das v. State of Odisha***, 2013(I) OLR 674.

4. Mr. D.K. Sahoo, learned counsel appearing for contesting opposite party no.1, referring to counter affidavit, contended that as per latest Railway Board Guideline, level crossings are made basing on TVU (Train Vehicle Unit) and the level crossing less than the required TVU with clear visibility from the both sides cannot be declared as manned level crossing. The Railway administration has taken every care to give sufficient indications at the unmanned level crossings. The deceased did not care for the instructions and for his negligence, the deceased, who was moving in a motorcycle bearing registration no.OD-05B-1898, was run over by Train No.18646 East Coast Express (Dn) between BYY-Bairi Thengada in the village Kapastitikiri at Km 380/19-21. It is further contended that necessary steps have also been taken to provide a manned level crossing, but the same has not been materialized. As such, it is contended that in view of Section 124 of the Railway Act, 1989 no compensation shall be payable. It is further contended that unmanned level crossing gates are protected areas and one has to cross the same with proper care and caution as per law. The Railway administration have taken sufficient protection by keeping sign boards like "Speed Breaker Board, Whistle Board etc" on both sides of an unmanned level crossing. The death of the deceased was caused due to encroaching upon the protected area without taking sufficient care and precaution, while crossing an unmanned level crossing gate. In spite of all the safety measures taken, if the death has been occurred due to carelessness of the pedestrians/road users, in that case, the railway authorities are not liable to pay any compensation, as claimed in the writ petition.

5. This Court heard Miss M. Behera, learned counsel for the petitioners and Mr. D.K. Sahoo, learned counsel for opposite party no.1. Pleadings have been exchanged between the parties and with their consent the writ petition is being disposed of at the stage of admission.

6. On the basis of the factual matrix discussed above and after considering rival legal contentions raised at the Bar, the following questions fall for consideration by this Court:-

(1) Whether the writ petition is maintainable in law ?

(2) Whether the accident occurred on account of negligence on the part of the railway administration by not providing sufficient protection at the level crossing in deploying guard or putting check gate as required under section 18 of the Railways Act, 1989?

(3) Whether on account of not providing safeguard to the level crossing by the railway administration, the petitioners are entitled to compensation as claimed?

7. To answer the above questions, this Court examined the facts and rival legal contentions as made before this Court in the present case. For just and proper adjudication of the case, relevant provisions of the Railways Act, 1989 are referred hereunder.

"18. ***Fences, gates and bars****.- The Central Government may, within such time as may be specified by it or within such further time, as it may grant, require that-*

(a) boundary marks or fences be provided or renewed by a railway administration for a railway on any part thereof and for roads constructed in connection therewith;

(b) suitable gates, chains, bars, stiles or hand-rails be erected or renewed by a railway administration at level crossings;

(c) persons be employed by a railway administration to open and shut gates, chains or bars.

113. ***Notice of railway accident****.- (1) Where, in the course of working a railway,-*

(a) any accident attended with loss of any human life, or with grievous hurt, as defined in the Indian Penal Code, or with such serious injury to property as may be prescribed; or

(b) any collision between trains of which one is a train carrying passengers; or

(c) the derailment of any train carrying passengers, or of any part of such train; or

(d) any accident of a description usually attended with loss of human life or with such grievous hurt as aforesaid or with serious injury to property; or

(e) any accident or any other description which the Central Government may notify in this behalf in the Official Gazette.

Occurs, the station master of the station nearest to the place at which the accident occurs or where there is no station master, the railway servant in charge of the section of the railway on which the accident occurs, shall, without, delay, give notice of the accident to the District Magistrate and Superintendent of Police, within whose jurisdiction the accident occurs, the officer in charge of the police station within the local limits of which the accident occurs and to such other Magistrate or police officer as may be appointed in this behalf by the Central Government.

(2) The railway administration within whose jurisdiction the accident occurs, as also the railway administration to whom the train involved in the accident belongs shall without delay, give notice of the accident to the State Government and the Commissioner having jurisdiction over the place of the accident.

114. ***Inquiry by Commissioner****.- (1) On the receipt of a notice under section 113 of the occurrence of an accident to a train carrying passengers resulting in loss of*

human life or grievous hurt causing total or partial disablement of permanent nature to a passenger or serious damage to railway property, the Commissioner shall, as soon as may be, notify the railway administration in whose jurisdiction the accident occurred of his intention to hold an inquiry into the causes that led to the accident and shall at the same time fix and communicate the date, time and place of inquiry.

Provided that it shall be open to the Commissioner to hold an inquiry into any other accident which, in his opinion, requires the holding of such an inquiry.

(2) If for any reason, the Commissioner is not able to hold an inquiry as soon as may be after the occurrence of the accident, he shall notify the railway administration accordingly.

115. ***Inquiry by railway administration****.- Whether no inquiry is held by the Commissioner under sub-section (1) of section 114 or where the Commissioner has informed the railway administration under sub-section (2) of that section that he is not able to hold an inquiry, the railway administration within whose jurisdiction the accident occurs, shall cause an inquiry to be made in accordance with the prescribed procedure.*

124. ***Extent of liability.****- When in the course of working a railway, an accident occurs, being either a collision between trains of which one is a train carrying passengers or the derailment of or other accident to a train or any part of a train carrying passengers, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or has suffered a loss to maintain an action and recover damages in respect thereof, the railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and to that extent only for loss occasioned by the death of a passenger dying as a result of such accident, and for personal injury and loss, destruction, damage or deterioration of goods owned by the passenger and accompanying him in his compartment or on the train, sustained as a result of such accident.*

147. ***Trespass and refusal to desist from trespass****.- (1) If any person enters upon or into any part of railway without lawful authority, or having lawfully entered upon or into such part misuses such property or refuses to leave, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both:*

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such punishment shall not be less than a fine of five hundred rupees;

(2) Any person referred to in sub-section (I) may be removed from the railway by any railway servant or by any other person whom such railway servant may call to his aid.

Rule 4 of the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990 states as follows:

> *"4. Limit of compensation- Notwithstanding anything contained in the rule 3, the total compensation payable under that rule shall in no case exceed (rupees four lakhs) in respect of any one person."*

8. In view of statutory provisions, more particularly, Section 18 of the Railways Act, 1989, the railway administration has the statutory obligation to provide sufficient safeguards to the level crossing by putting railway check gate and keeping it closed at the time when train is due to pass at the level crossing area. In the case in hand, the railway administration had not taken any precautionary measure either by putting a railway check gate or keeping it closed at the time when the train was due to pass, or put up some other obstruction, which could prevent the public from passing over the level crossing giving them information and notice of the approaching train, and the accident of the kind that had happened in this case could have been avoided. After receiving notice under Section 113 from the petitioners, as per the Railways Act, 1989, an inquiry must have been conducted by the railway authorities under Sections 114 and 115 of the Act. If such report would have been produced, then it could have disclosed whether there is negligence on the part of the railway administration on account of which the accident took place resulting in death of the deceased. Therefore, the said inquiry report, as required under Section 115 of the Act, having not been produced, this Court draws an adverse inference against the Railways that there was negligence on the part of the railway administration in not taking sufficient precautionary measures by posting guard or keeping the railway gate closed at the time while the train was due to pass through that level crossing. Non-compliance of the aforesaid statutory obligations by the railway administration, this Court rejects the contentions raised by learned counsel for the Railways that there are serious disputed questions of facts and due to carelessness on the part of the deceased, the claim made in the writ petition cannot sustain. Further, in view of provisions contained under Article 21 of the Constitution, "Right to Life" is a fundamental right as enshrined in Chapter-III of the Constitution of India. "Right to Life" does not mean an animal existence, it requires a meaningful life to be led by citizen of India.

9. In ***N.K.V. Bros.(P) Ltd. v. M. Karumai Ammal***, 1980 ACJ 435(SC), the apex Court held as follows:

"(3) Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. The Motor Accidents Claims Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasizing this aspect because we are often distressed by the transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their neighbor. Indeed, the State must seriously consider no fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parsimony practiced by Tribunals. We must remember that judicial Tribunals are State organs and Article 41 of the Constitution lays the jurisprudential foundation for State relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in the disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of Tribunals and the High Courts should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard."

10. In ***Swarnalata Barua v. Union of India***, 1958-65 ACJ 365 (Assam), the High Court of Assam held that there is an obligation on the part of the railway administration to ensure that whenever a railway passes over a thoroughfare adequate warning should be given to the public about passing of the train at the time they pass so that accidents may be avoided. This duty need not necessarily be a statutory duty. It is implied and inherent in the functions to be discharged by the railway administration in the matter of running their railways. It is not disputed that had the railway administration taken the precaution of either putting up of a railway gate and keeping it closed at the time the train was due to pass or put up some other obstruction which could prevent the public from passing over the level crossing giving them information and notice of the approaching train, the accident of the kind that happened in this case could not have happened.

11. In view of the above, this Court is of the considered view that the writ petition is maintainable under Article 227 of the Constitution of India. As such, question no.2 is also answered in favour of the petitioners as the

accident occurred on account of negligence on the part of railway administration in not providing sufficient protection at the level crossing and without deploying guards or putting the check gate closed at the time while the train was due to pass through that level crossing as required under Section 18 of the Railways Act, 1989.

12. Question nos.1 and 2 having been answered in favour of the petitioners, now remains question no.3 to be considered. Under Section 124 of the Railways Act, 1989 read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, no fault liability of the passenger who expires in a railway accident has been fixed at Rs.2,00,000/-. In the instant case, the victim lost his life in the said accident due to negligence on the part of the railway administration in putting gates at the level crossing or public are allowed to cross the railway line without providing precautionary measures, as indicated above. Further, the apex Court in ***Rudul Sah v. State of Bihar***, AIR 1983 SC 1086, observed that in appropriate cases, the court discharging constitutional duties can pass orders for payment of money in the nature of compensation. Consequent upon deprivation of the fundamental right to life and liberty of a petitioner the State must repair the damage done by its officers to the petitioner's right.

Further, in ***Kalawati v. State of Himachal Pradesh***, 1988 ACJ 780 (HP) and in ***Seemu v. Himachal Pradesh State Electricity Board***, 1994 ACJ 623 (HP), the High Court of Himachal Pradesh ruled that writ court can grant relief to the petitioners claiming damages for the injuries arising out of negligence of the State authorities like Electricity Board.

In ***Kumari v. State of Tamilnadu***, 1992 ACJ 283(SC), the apex Court overruling the decision of the High Court of Tamil Nadu observed that the writ jurisdiction under Article 226 of the Constitution can be invoked for awarding compensation to a victim, who suffered due to negligence of the State or its functionaries. The same principle has been reiterated in various judgments of the different High Courts including this High Court and also the apex Court observed that under Articles 226 and 227 of the Constitution, the High Court can issue a direction for payment of compensation if there is deliberate act of negligence on the part of the railway administration.

13. Applying the above principles to the present case, it can safely be said that the death has been caused to the deceased due to unmanned level crossing and due to negligence on the part of railway administration. Under

Section 124 of the Railways Act, 1989 read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, no fault liability of the passenger who expires in a railway accident has been fixed at Rs.4,00,000/-.

14. In ***Prabir Kumar Das*** (supra), this Court awarded a compensation of Rs.5,00,000/- to each of the persons who had lost their life with interest at the rate of 6% per annum in the accident. So far as quantum of damages is concerned, the apex Court in the case of ***M.S. Grewal v. Deep Chand Sood***, (2001) 8 SCC 151, held that the placement in the society or the financial status of the victim can be good guide for determining the quantum of compensation. Under Section 124 of the Railways Act, 1989 read with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990, no fault liability of the passenger who died in a railway accident has been fixed at Rs.4,00,000/-. A claim for damages for negligence of the opposite parties falls in the arena of a civil wrong called a tort action. In relation to claims for railway accidents, the Railways Act provides for fixed compensation on predetermined scales. It also provides a forum for passengers to make claims in the form of Railway Claims Tribunals situated in different parts of India. But there is a limitation. Only a passenger on a train can make a claim before the Tribunal. Passengers of a bus or motor vehicle who may have been harmed after collision with a train can only approach the Motor Accidents Claims Tribunal. However, the tribunal can entertain the claim against the Railways also as a joint tortfeasor if the negligence of the Railways is established. Therefore, it can be held that the duty of care for the Railways extends not only to those who use the Railways' services but also to people who are "neighbours", namely, users of vehicles on roads and passerby that intersect with tracks. Consequentially, there is a common law liability for the railway administration for an accident at an unmanned level crossing, even in the absence of specific provisions in the Railways Act, 1989 where the Central Government can direct the administration to lay manned crossings. An action at common law can be filed for nonfeasance because the Railway was involved in what are recognized as dangerous operations and hence is bound to take care of road users. Therefore, it took up the issue of whether there could be any breach or a common law duty on the part of the Railways if it does not take notice of the increase in the volume of rail and motor traffic at the unmanned crossing, and it does not take adequate steps such as putting up gates with a watchman to prevent accidents at such a point. As such, the Railways should take all precautions that will reduce danger to the minimum.

Similar question has also been considered by this Court in ***Pranabandhu Pradhan v. Union of India***, 2019(II) ILR-CUT-770 wherein this Court passed an order awarding a compensation of Rs.4,00,000/- (four lakhs) in similar circumstances.

15. In view of such position, taking into consideration the facts of the present case with that of, referred to above, this Court is of the considered view that negligence has been caused by the Railway authority in providing proper safeguard in unmanned level crossing. Therefore, it would be just and proper if a compensation of Rs.4,00,000/- (rupees four lakhs) in lump sum is paid to the petitioners towards death caused to the deceased in a railway accident. The opposite parties are directed to pay the above compensation amount within a period of four months from the date of communication of this judgment, failing which it will carry interest at the rate of 6% per annum from the date of accident, i.e., 12.09.2014 till actual payment is made.

16. The writ petition is allowed to the extent indicated above. No order as to cost.

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2020 (I) ILR - CUT- 765

D. DASH, J.

W.P.(C) NO. 21235 OF 2019

JAGA PRADHAN .....Petitioner

.Vs.

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

ODISHA GRAMA PANCHAYAT ACT, 1964 – Section 24 (2) (a) – No confidence motion against sarpanch – Requisition for convening the special meeting signed by 1/3rd members, sent to the Sub- collector – But no resolution to that effect were accompanied – Petitioner pleads that, the mandatory twin requirements of the section 24(2) (a) has not been complied – Proposed notice/requisition challenged – Held, the notice reflecting the decision to convene the special meeting for no confidence motion cannot sustain in the eye of law – Hence the proposed notice stand quashed.

Case Laws Relied on and Referred to :-

1. AIR 2001 Orissa 67 : Smt. Kamala Tiriya Vs. State of Orissa & Ors.
2. 2010 (II) O.L.R. 473 : Muktamanjari Sahu Vs. State of Orissa & Ors.
3. 2014 (II) O.L.R., 574 : Prahallad Dalei Vs. State of Odisha & Ors.

For Petitioner : M/s. S.K.Mishra, S.K.Lenka & S.K.Joshi
For Opp. Parties : Miss. S.Ratho, AGA, Mrs.S.Jena & Mr. G.B.Jena

JUDGMENT Date of Hearing : 20.01.2020 : Date of Judgment : 28.01.2020

D. DASH, J.

The Petitioner, by filing this writ application, seeks to assail the decision of the Sub-Collector, Baliguda dated 2.11.2019, Kandhamal (Opposite Party no.3) in convening a meeting to consider the no confidence motion against him, who is the elected Sarpanch of Parigarh Grama Panchayat (for short, 'Grama Panchayat) in the district of Kandhamal.

2. The Petitioner is the elected Sarpanch of Parigarh Grama Panchayat and has been in the office and discharging him duties as such since his assumption of the charge of the office after the election.

When the matter was continuing as such, the Sub-Collector, Baliguda (opposite party no.3), by his letter no.6019 dated 02.11.2019, convened the special meeting of the Panchayat on 19.11.2019 for consideration of the no confidence motion against the Petitioner in the Panchayat office fixing the time at 10.30 am as under Annexure-3. The challenge here is to the said decision in convening the meeting for record of the no confidence motion against the petitioner by issuance of the notice as at Annexure-3.

3. The Parigarh Grama Panchayat comprising of 11 Wards has thus 11 members including the Sarpanch as one among them. The main contention raised in this application in support of the challenge to the decision of the Opposite Party no.3 by issuance of notice under Annexure-3 pursuant to the so-called requisition dated 11.9.2019 annexed to Annexure-3 said to have been given by 10 Ward Members including the Opposite party nos.6 to 14 as not in consonance with the statutory requirements as provided in section 24 of the Odisha Grama Panchayat Act, 1964 (hereinafter referred to as the O.G.P. Act). Thus it is said that the decision of the Opposite Party no.3 to convene a special meeting in issuing notice under Annexure-3 is arbitrary, illegal and as the outcome of non-application of mind.

4. Mr. S.K. Mishra, learned counsel for the Petitioner in course of hearing confines his submission on the score that the said decision of the Opposite Party no.3 in convening the special meeting for record of no confidence motion against

the Petitioner who is the elected Sarpanch of the Grama Panchayat, is in gross violation of sub-section-2 of section 24 of the O.G.P. Act and thus, it is liable to be quashed. According to him, the decision of the Opposite Party no.3, in issuing the notice under Annexure-3 for convening the said meeting based upon the so-called signed requisition as tendered by the Opposite Party nos.6 to 14 and another vide letter dated 19.9.2019, is in utter violation and non-compliance of the provision of sub-section 2 of Section 24 the O.G.P. Act, which clearly mandates that such requisition signed by 1/3rd members of the Grama Panchayat addressed to the authority has to accompany the resolution, which is proposed to be moved in that meeting. He submitted that this letter under Annexure-3, if is taken as the requisition, as required under section 24 (2)(a) of the O.G.P. Act, no such proposed resolution being sent with the same to the Opposite Party no.3, no decision ought to have been taken by the Opposite Party no.3 for issuance of the notice under Annexure-3 in convening the special meeting for said move of no confidence motion against the petitioner, the Sarpanch of the Grama Panchayat as desired. He submitted that as mandated under section 24(2)(a) of the O.G.P. Act, the members have not been served with any such copy of the proposed resolution to be moved in the said convened meeting. He submitted that the legislature in its wisdom having provided the safeguard that not only 1/3rd of the total members of the Grama Panchayat have to send the requisition to the authority but also they must enclose the resolution which they propose to move in the said specially convened meeting, it was not within the competence/domain of the Opposite Party no.3 to dispense with the requirement of either of those two, treating one as composite serving as requisition as also the proposed resolution. He submitted that the provision of law in this regard has to be strictly construed and here in the case the so-called letter of the Opposite Party nos.6 to 14 and another even if said to be the requisition in terms of the provision of the 24(2)(a) of the O.G.P. Act, it cannot also be taken to be the proposed resolution in terms of that provision so as to meet the twin requirements as provided thereunder. It was submitted that the letter dated 11.09.2019 said to have been sent by the Opposite Party nos.4 to 16 and another even if is read in entirety do not satisfy the twin requirements as provided in section 24(2)(a) of the Act and it can be only said to be a request made by those Opposite Party nos.6 to 14 and another to convene a meeting for record of no confidence motion against the petitioner without due compliance of the provision of law in that regard.

With all the above, he submitted that the Opposite Party no.3 has committed grave error both on fact and law in accepting the letter dated 11.9.2019 and by reading or construing it as the requisition as well as the proposed resolution in proceeding ahead in the matter by taking a decision to

convene a meeting by issuing the notice for the purpose as at Annexure-3 without annexing the copy of the proposed resolution which is mandatory. In support of his submission, he heavily relied upon the decision of this Court in the case of "Smt. Kamala Tiriya –V- State of Orissa and others; AIR 2001 Orissa 67, Muktamanjari Sahu Vrs. State of Orissa and Others, 2010 (II) O.L.R. 473 and Prahallad Dalei Vrs. State of Odisha and Others; 2014 (II) O.L.R., 574, which would be discussed hereinafter at the appropriate place.

5. Miss. S. Ratho, learned Additional Government Advocate submitted all in favour of the said decision as to issuance of the notice under Annexure-3. According to her, the requisition dated 11.9.2019 sent by the Opposite Party nos.6 to 14 and another had been thoroughly scrutinized and ascertained to have been so given by them under their signatures and as per their own desire and volition for the reason and purpose stated therein. She, therefore, submitted that the Opposite Party no.3 has rightly taken the decision to convene the special meeting. She submitted that the said letter dated 11.9.2019 since satisfies the twin requirements as provided in section 24(2)(a) of the O.G.P. Act, the Opposite Party no.3 did commit no mistake in deciding to convene the special meeting by issuing the notice under Annexure-3. She further submitted that in every case, it is not so required that the requisition should accompany the proposed resolution in separate sheet/s and if in the requisition the proposed resolution also finds mention or is indicated/hinted, the decision pursuant to the same if is taken by the concerned authority in reading the requisition as also comprising the proposed resolution, is not amenable to challenge as the outcome of non-application of mind and it cannot at all be said to be arbitrary and illegal. She submitted that in such appropriate case if the authority concerned arrives at a satisfaction that the requisition also comprises of the proposed resolution and takes the decision thereof, the objection that as regards the absence of the proposed resolution falls flat and in that event, issuance of the notice with the copy of the requisition would satisfy the requirement of section 24(2)(c) of the O.G.P. Act. She, however, placed that pursuant to the interim order dated 14.11.2019 passed by this Court, the result is awaited.

6. Mrs. S. Jena learned Counsel appearing on behalf of the Opposite Party nos.6 to 14 reiterating the submission of Miss. Ratho, the learned Additional Government Advocate, contended that there being no violation of the statutory provisions in taking the decision by the Opposite Party no.3 in

convening the special meeting for record of no confidence motion followed by the issuance of notice as provided in section 24 of the O.G.P. Act, this writ application is liable to be dismissed. In support of their submissions, they placed strong reliance upon the decisions of this Court in the following cases:-

> "(i) *Jagadish Pradhan and others –V- Kapileswar Pradhan and others*; OJC No.11288 of 1985 (decided on 27.08.2005);
>
> (ii) *Padmini Nayak –V- State of Orissa*; W.P.(C) No.9603 of 2004 (decided on 30.08.2005, MANU/OR/0507/2005); and
>
> (ii) *Binodini Das –V- State of Orissa and others*; 2013 (Supp-I) OLR 891."

7. In order to address the rival submissions, it would be appropriate to refer section 24 (2) of the O.M.Act.

> "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"

It provides that no such meeting shall be convened except upon receipt of a requisition signed by at least 1/3rd of the total membership of the Grama Panchayat addressed to the Sub-Divisional Officer along with the copy of the resolution proposed to be moved at the meeting. The Sub-Divisional Officer then shall fix the date, hour and place of such meeting by

giving notice to all the members holding office on the date of such notice along with the copy of the requisition and the proposed resolution at least fifteen clear days before the date so fixed for the meeting.

To put it more clearly, the aforesaid provision would show that the decision by the authority to convene the special meeting for recording want of confidence in the Sarpanch of the Grama Panchayat, should be upon the receipt of a requisition addressed to him being signed by at least one-third of the total membership of the Grama Panchayat and that requisition is required to be accompanied with a copy of the resolution proposed to be moved at the meeting. On receipt of such requisition along with the proposed resolution, the Sub-Divisional Officer will take a decision in the matter of convening the meeting and give notice fixing the date, hour and place of such meeting to all the members i.e. the requisitionist members as well as others holding office annexing a copy of the requisition and as also the proposed resolution for further needful action.

8. The requisition letter dated 19.9.2019 annexed to the notice given by the Opposite Party No.3 for said meeting being, read reveals that it has been addressed to the Collector, Kandhamal, the opposite party no.2. The Opposite Party Nos.6 to 14 and another have not sent any such letter being addressed to the Opposite Party no.3 for his decision in convening the meeting. It further reveals therefrom that they have expressed their lack of confidence on the petitioner for the reason that during the meeting and at other time, when they are expressing their view and resolving in any such matters to be carried out in discharge of the duties and functions of the Grama Panchayat keeping in view the rules and regulations holding the field in greater public interest; those resolved views are being thrown to the winds by the petitioner who instead has been going ahead to do all said acts according to his own desire and whims. It is also not indicated in that letter as to if they had also enclosed the proposed resolution. They have also not expressed therein that said letter had been sent in the direction of compliance of the sending of the requisition as also the resolution meeting the twin requirements. Nor it is stated therein that said letter be read as a composite one i.e. requisition as well as resolution. It appears therefrom that they have decided to proceed for a no confidence motion and place it before the Government. They, in the greater interest of the Grama Panchayat and its development in every respect, have requested the Opposite Party No.2 to immediately enquire and accept the proposal. In that letter, those members have not made any request to convene

the meeting for the purpose of passing of a resolution expressing no confidence on the petitioner's continuance as Sarpanch of the Grama Panchayat.

9. In case of Kamala Tiria (Supra), the resolution passed in the specially convened meeting regarding the want of confidence in the Chairperson of the Zilla Parishad as also the notification of the Government in the Department of Panchayat Raj publishing that resolution have been quashed for the reasons of non-compliance of the provisions in that regard as contained in Odisha Zilla Parishad Act, which are in pari material with the provision of Section 54 of the O.M.Act that the proposal to be moved in the meeting had not been sent to the authority along with the requisition and thus not circulated to all the members.

In case of Muktamanjari Sahoo (Supra), the notice issued by the authority for convening a special meeting of the Grama Panchayat for discussion of the no confidence motion against its Sarpanch has been quashed in the absence of the copy of the proposed resolution being enclosed by those 1/3rd of the total members of the Grama Panchayat to the authority with the requisition and obviously for the reason of its non-circulation to all the members.

In Prahallad Dalei's case (Supra), the court finally quashed the resolution passed by the Grama Panchayat in which want of confidence in the Sarpanch had been recorded on the ground that the authority while issuing the notice expressing the decision to convene the specially meeting of the Panchayat for the purpose had not enclosed the copy of the proposed resolution for being served upon all the members of the Panchayat.

10. In case of Jagadish Pradhan and others (Supra), after the resolution being passed in the meeting, State Government having passed the order as required under Odisha Panchayat Samiti Act that the Chairman of the Panchayat Samiti lacks confidence of the Panchayat Samiti, a revision had been moved by the said Chairman. The Revisional Authority quashed the resolution on the ground that the requisition was not in accordance with law and in the absence of a seal in the notice given by the authority, the said Chairperson was mislead and could not attend the meeting. It had also been held by the Revisional Authority that the requisition is invalid as the required number of members had not signed therein.

This Court, by taking the proposed resolution passed into consideration which contained the signatures of the required number of members of Panchayat Samiti has held that non-appearance of signatures of all those members also in the requisition is of no significance to say that the decision taken thereunder for convening the special meeting for moving the no confidence motion against the Chairman of the Panchayat Samiti is illegal and vitiated. Interpreting the relevant provision of the Odisha Panchayat Samiti Act, it has been said that the law requires that the copy of the resolution proposed to be moved at the meeting to be sent along with the requisition and in the resolution the proposal was clearly mentioned to be the absence of confidence of the signatories on the Chairman. So, it has been said that merely because the proposal is not in a separate document, the action taken thereupon does not become illegal when there is no form prescribed for such proposed resolution and the authority well understood the intention behind the resolution. In that view of the matter, the decision of the Authority to convene the meeting has been held to be right treating everything to be in non-compliance of the relevant provisions of law contained in the Panchayat Samiti Act.

In Padmini Naik's case (Supra), the decision as to convene a meeting for the no confidence motion against the Sarpanch of the Grama Panchayat had been called in question. The issue raised therein that the requisition under Annexrue-2 was not the requisition as mandated in law and so also the proposed resolution under Annexure-3 of said application was not the proposed resolution in consonance with law. The court, on going through Annexure-2, found that eight out of twelve Ward Members of the Grama Panchayat had written to the authority requesting him to take further step in taking the initiative for follow up action on the no confidence motion brought by them against the Sarpanch of the Grama Panchayat. Upon perusal of Annexure-3, which had been enclosed that Annexure-2, the Court found that on 11.3.2004, an urgent meeting under the Chairmanship of one Ward Member had been held where eight Ward Members had attended and in that meeting, there being thorough discussion about the action and manner of functioning of the Sarpanch of the Grama Panchayat finally request had been made to the Authority by sending Annexure-2 enclosing Annexure-3. In that eventuality, the court has repelled the objections raised that Annexure-2 and Annexure-3 do not satisfy the legal requirements as that of a valid requisition and proposed respectively.

11. Adverting to the case on hand, here said letter dated 19.9.2019 given by the Opposite Parties 6 to 14 and another which is said to have triggered the action at the end of Opposite Party No.3 in issuing notice convening the special meeting for consideration of the no confidence motion against the petitioner who happens to be the elected Sarpanch of the Grama Panchayat first of all is not addressed to the Opposite Party No.3 as mandated under Clause (b) of sub-section 2 of Section 24 of the O.G.P. Act. That being addressed to the Opposite Party No.2, it is not seen nor stated as to how it came to the hands of the Opposite Party no.3. That letter's copy as indicated therein at the foot note had been sent to the opposite party no. 3 for information and necessary action. There was thus no formal request before the opposite party no.3 for convening the meeting for the purpose of consideration of no-confidence motion against the petitioner. In fact even in that letter, there was no such request for convening the special meeting for that specific purpose. In such state of affairs as emanate from the letter dated 11.09.2019, the same, in my considered view, cannot be taken as a requisition addressed to the Opposite Party No.3 as mandated in clause (b) of sub-section 2 of section 24 of the O.G.P. Act.

12. Next even assuming for a moment that this was the requisition as required under the law, the proposed resolution as required to be annexed to it, is wanting. The law does not require that the 1/3rd member of the total membership of the Grama Panchayat must pass a resolution by holding a meeting and then enclose the same with the requisition for the decision of the Authority to convene the meeting for the purpose of discussion of the no confidence motion. The very purpose of the twin requirements, in my considered view, appears to be that those required members, if feel that the Sarpanch does not carry the confidence, they may make a request to the Authority by sending the requisition expressing therein that a resolution, as enclosed therewith, would be placed for being passed in the said meeting. The purpose of due circulation of both i.e. the copy of the requisition as well as the proposed resolution to all the members with the notice for the purpose is that they must be well aware of the requisition as has been made as also its purpose and the resolution which is proposed to be moved in the said meeting for being passed so as to prepare themselves to effectively take part in the discussion by making due deliberation, if so required, on any such issue/s.

The sending of the requisition being addressed to the particular Authority as well as the proposed resolution to the Authority and its onward

circulation to all the members in case a decision in favour of convening said meeting by the Authority is so taken, are not empty formalities. The purpose of sending requisition with the proposed resolution to the Authority and their onward circulation to all the members in case of convening the meeting is to see that all concerned are apprised of the specific purpose behind the convening of the meeting as asked for by the members/requisitionists and the objective that those members/requisitionists seek to achieve in that meeting. The word 'resolution' as has been defined in Black's Law Dictionary (Tenth Edition) is 'A main motion that formally expresses the sense, will or action of the deliberative assembly whereas the 'requisition' has the definition as that of formal request to. So, in my considered view, the twin requirements can of course be met if in the requisition duly addressed to the Authority, the resolution as the requisitionists propose also finds mention for the Authority to so view instead of insisting upon a separate enclosure of that and for being satisfied that it can be so read as to provide satisfaction to all the members in that direction. In the instant case, as already discussed, said view that the so called requisition also satisfied the purpose of proposed resolution cannot be taken.

The well recognized rule and sound principles are that when the statute gives the power to do a certain thing in a certain manner, the thing must be done in that way or not at all. Statute conferring a power for doing an act when lays down the method in which the power has to be exercised, it necessarily prohibits the doing in any other manner than that has been prescribed.

Here, the opposite party no.3 has arrived at the decision without receiving the requisition but by receiving the copy of the letter sent to the opposite party no.2 who had also not received the proposed resolution along with that copy of the letter. The copy of said letter being sent for information and action as deemed just and proper at the end of opposite party no.3, he could not have taken that as the requisition and even then that could not also been said to be serving the twin requirements such as the requisition as also the proposed resolution. Here, the Opposite Party no.3 has arrived at the decision without receiving the requisition and the copy of the proposed resolution and thus as a follow up action as mandated in law that copies of the requisition as also the proposed resolution have not been circulated to all the members.

13. In the wake of aforesaid discussion, here in the case the decision of Opposite Party no.3 in convening the special meeting of the Grama Panchayat by issuing notice under Annexure-3 being not with the fulfilment of the statutory requirements, i.e., the receipt of the requisition and the proposed resolution for their circulation to all the members, the notice under Annexure-3 reflecting the decision of Opposite Party no.3 to convene the special meeting for discussion on that no confidence motion cannot sustain in the eye of law.

In the result, the decision of the opposite party no.3 in convening the meeting to consider the no confidence motion against the petitioner, the elected Sarpanch of Parigarh Gramaa Panchayat by issuance of notice under Annexure-3 stands quashed.

14. The writ application is accordingly allowed. No costs.

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2020 (I) ILR - CUT- 775

D. DASH, J.

W.P.(C) NO.19070 OF 2019

SUNITA NAYAK .....Petitioner

.Vs.

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

ODISHA GRAMA PANCHAYAT ACT, 1964 – Sections 19 & 115(1), (2) – Order of suspension against the Sarpanch – Allegation raised that, in her absence, her husband presided over the Grama Panchayat meeting – Violation of section 19 of the Act – Petitioner pleads that, sub-section (1) of section 115 not been complied – Neither any opinion have been formed as to wilful violation of section 19 of the Act nor any reason have been assigned while passing the order of suspension – Held, the order of suspension is not sustainable.

Case Laws Relied on and Referred to :-

1. 62 (1986) CLT 548 : Tarini Tripathy Vs. Collector, Koraput & Ors.
2. 1987(II) OLR 407 : Ch. Srinivas Vs. State.
3. AIR 1967 SC 295 : Barjum Chemical Ltd. & Another Vrs. Company Law Board & Ors.

For Petitioner : M/s. Bijaya Kumar Behera-1, P.K.Dash & A.Mohanty

For Opp. Parties : Ms. S.Ratho, AGA

JUDGMENT Date of Hearing: 21.01.2020 : Date of Judgment :04.02.2020

D. DASH, J.

The petitioner, by filing this writ application, has prayed for quashment of an order dated 26.09.2019 of the Government in the Department of Panchayati Raj and Drinking Water under Annexure-5 as to the suspension of the petitioner, who is the elected Sarpanch of Kalyanpur Grama Panchayat under Binjharpur Block in the district of Jajpur.

By the said order, proceeding has been initiated against the petitioner for his removal from the office of Sarpanch for alleged willful violation of the provisions of section 19 of Odisha Grama Panchayat Act, 1964 (hereinafter called as "the OGP Act") and acting in a manner prejudicial to the interest of the Grama as such her continuance in the office as detrimental to the interest of the inhabitants of the Grama Panchayat. In view of that, the petitioner has been called upon to to explain the charges with their factual settings as annexed to the said order within thirty days of receipt of the same as to why action as deemed proper under sub-section 1 of section 115 of the O.G.P. Act shall not be taken against her. The charge against the petitioner is that her husband have presided over the Grama Panchayat meetings several times, in her absence.

While issuing the notice for the purpose of exercising the power under sub-section 1 of section 115 of the OGP Act, the petitioner, who is the elected Sarpanch of Kalyanpur Grama Panchayat has been placed under suspension in exercise of power under sub-section 2 of section 115 of the O.G.P. Act. This order of suspension is specifically under challenge in this writ application.

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

The petitioner being the elected Sarpanch of Kalyanpur Grama Panchayat had been in the office and discharging her duty as such since her assumption of the charge of the office after election.

When the matter was continuing as such, the Grama Panchayat Officer, Opposite Party No.5, by his letter no.1016 dated 5.8.2019 under the subject "Notice for allowing unwanted person inside the GP Meeting held on 30.07.2019"; called for an explanation from the petitioner as to why action under sub-section 1 of section 115 of the O.G.P. Act shall not be taken for her act in allowing such unwanted person during the Grama Panchayat meeting. The letter as finds mention therein is based upon the allegation that in course of Grama Panchayat meeting on 30.07.2019, the petitioner's husband had gone to the place

where meeting of the Grama Panchayat was going on. There he had vomited some untoward/unpleasant remarks against the Government as well as Chief Minister for which the members present in the meeting raised their protest and opposing his entry, expressed displeasure over such remarks given by the petitioner's husband and had requested her to take appropriate step as provided in law in the matter.

The petitioner, having received the above letter under Annexure-1, submitted her explanation on 8.8.2019. It is stated that on 30.07.2019, all the Ward Members were present in the meeting presided over by her and it was also so attended by the G.R.S., Pratima Behera and no such situation had at all taken place during the meeting. The facts alleged in the notice are stated to be false. The petitioner has asked the Opposite Party No.5 to make a field enquiry in ascertaining the truth behind such allegations. The allegations to the effect of appearance of the husband of the petitioner in the Grama Panchayat meeting and making of unwanted remarks against the Government and Chief Minister have been flatly denied as blatant lies. In support of the same, it has been further stated that 13 to 14 members having been confronted with such allegations; they have expressed that no such incident had ever taken place on 30.07.2019 in further stating that their signatures taken on some blank papers have been used in creating that letter addressed to Opposite Party No.5 by manipulation so as to serve the ulterior goal of removing the petitioner who is the elected Sarpanch as she does not have the affiliation to the political party presently ruling the State.

3. The opposite party no.4 in the counter has stated that before interim order having been passed on 04.10.2019, the order of suspension dated 26.09.2019 under Annexurer-5 had been communicated to the petitioner with an instruction to her to handover the charge of the office on 27.09.2019 as at Annexure-A/4 which she failed to do. It is further stated that due to urgency, the Naib Sarpanch has already taken charge of the office of Sarpanch and has been acting as such since 30.09.2019, also has convened meeting of the Grama Sabha on 02.10.2019 and thereafter. This is all the counter of said opposite party no.4.

4. Placing the order under Annexure-5, learned counsel for the petitioner submitted that the action as to the suspension of the petitioner, the elected Sarpanch of the Kalyanpur Grama Panchayat, in exercise of power under sub-section 2 of Section 115 of the Act as has been taken, is not sustainable

in the eye of law. It was submitted - 4 - that no such reason has at all been given in the order as to the immediate need of suspension of the petitioner pending the proceeding for her removal from the office and the statements in a general manner that the petitioner has willfully violated the provisions of section 19 of the O.G.P. Act and acted in a manner prejudicial to the interest of the Grama are not enough to support and say that it has been done in consonance with the law as embodied in sub-section 2 of section 115 of the Act in its letter and spirit. He submitted that the order of suspension is vague and has been so perused without arriving at a satisfaction as to the prerequisite requirements as mandated in law. He submitted that the charge is vague and the order of suspension is motivated only with a view to oust the elected Sarpanch i.e. the petitioner since she is not a member of the ruling political party in the State. He further submitted that the order of suspension is the outcome of total non-application of mind.

5. Ms. Savitri Ratho, learned Additional Government Advocate submitted all in favour of the suspension of the petitioner as at Annexure-5. It was her submission that pending enquiry into the allegations for taking action under sub-section 1 of section 115 of the O.G.P. Act, the Government having exercised the power under sub-section 2 of said section, there remains very limited scope for the court to interfere with the same. She further submitted that the conduct of the petitioner in allowing her husband to preside over the meetings of the Grama Panchayat and thereby creating a platform for him to discharge the duty as Sarpanch of the Grama Panchayat certainly amounts to willful violation of provisions of section 19 of the O.G.P. Act and the inaction on the part of the petitioner in preventing the situation right from the beginning and her silence on that is prejudicial to the interest of Grama. It was thus submitted that the order of suspension as under Annexure-5 is not liable to be interfered with in exercise of extra ordinary writ jurisdiction pending the proceeding against the petitioner for her removal from the office.

6. Before going to address the rival submission, first of all, it is profitable to take note of the provision of section 115 of the O.G.P. Act which governs the field. It reads as under:-

"115. Suspension and removal of Sarpanch, NaibSarpanch and member:-

(1) If the State Government, on the basis of a report of the Collector or the Project Director, District Rural Development Agency, or suo motu are of the opinion that circumstances exist to show that the Sarpanch or Naib Sarpanch of a Grama

Panchayat wilfully omits or refuses to carry out or violates the provisions of this Act or the rules or orders made thereunder or abuses the powers, rights and privileges vested in him or acts in a manner prejudicial to the interest of the inhabitants of the Grama and that the further continuance of such person in office would be detrimental to the interest of the Grama Panchayat or the inhabitants of the Grama, they may after giving the person concerned a reasonable opportunity of showing cause, remove him from the office of Sarpanch or Naib-Sarpanch, as the case may be;

(2) The State Government may, pending initiation of the proceeding on the basis of their opinion under Subsection (1), by order, for reasons to be recorded in writing, suspend the Sarpanch or Naib-Sarpanch, as the case may be, from the office;

(3) The State Government, at any time during the pendency of proceeding under Sub-section (1), revoke the order of suspension of a Sarpanch or Naib-Sarpanch passed under Sub-section (2);

(4) A Sarpanch or Naib-Sarpanch on removal from office under Subsection (1) shall also cease to be a member of the Grama Panchayat, and such person shall not be eligible for election as member for a period not exceeding four years as the State Government may specify;

(5) The provisions of this section shall, so far as may be, apply in respect of any member of the Grama Panchayat not being a Sarpanch or Naib-Sarpanch ; provided that no such member shall be liable to be placed under suspension under the said provisions;

(6) (a) Whenever the Collector is of the opinion that the Sarpanch of a Grama Panchayat has failed in convening any meeting of the Grama Panchayat within a period of three continuous months he may, after making such enquiry as he deems fit, by order, remove the Sarpanch from Office and may also declare him not to be eligible for election as member for a period not exceeding one year as he may specify in his order, and on such order being made the Sarpanch shall cease to be a member of the Grama Panchayat.

(b) Nothing contained in the preceding sub-sections snail apply in respect of a default as specified above."

7. The scheme of section 115 of the OGP Act shows that the State Government on the basis of a report of the Collector or Project Director, District Rural Development Agencies or sou-moto when is of the opinion that the circumstances exists to show that the Sarpanch or Naib Sarpanch of a Gram Panchayat has willfully omitted or refused to carry out or violated the provision of the Act or rules or orders made thereunder or acted in a manner prejudicial to Grama and that further continuance of such person in office would be detrimental to the interest of the inhabitants of the Grama, said person can be removed from the office of Sarpanch or Naib Sarpanch as the

case may be, after giving a reasonable opportunity of showing cause in having his say in the matter. Sub-section 2 of section 115 of the OGP Act empowers the State Government on the basis of an opinion as stated above, to put said Sarpanch under suspension pending initiation of the proceeding by an order, recording the reasons to that effect in writing.

8. It has been held in case of Tarini Tripathy Vrs. Collector, Koraput & Others; 62 (1986) CLT 548, that suspension of an elected representative is indeed a drastic action and should not be taken recourse to cursorily and in a mechanical manner. Therefore, in order to exercise the power of suspension of an elected representative, the legislature has provided the safeguards against arbitrary exercise as indicated in section 115 of the OGP Act.

All the three requirements as stated in sub-section (1)of section 115 of the OGP Act are cumulative. Absence of any one of three would vitiate the suspension. The opinion on both the counts i.e. (i) the satisfaction as to the willful omission or refusal to carry out or violation of the provisions of the Act or the rules and regulations made thereunder or exercise of powers, rights and privileges so vested or action in a manner prejudicial to the Grama Panchayat; and (ii) satisfaction that further continuance in office would be detrimental to the interest of the inhabitants of the Grama are required to be formed. Existence of only one is not sufficient for the purpose.

It has been said further that while thus bringing the tenure of an elected representative to an end either temporary or prematurely, utmost care and circumspection ought to the exercised the right of an elected representative to continue in office for full tenure should not be lightly tinkered with.

In case of Ch. Srinivas Vrs. State; 1987(II) OLR 407, the decision of the Apex Court in case of Barjum Chemical Ltd. & Another Vrs. Company Law Board & Others; AIR 1967 SC 295 having been referred to; it has been said that since existence of circumstances is a condition fundamental on the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist giving no clue to what they are because the circumstances must be such as to lead to “conclusions of certain definiteness”. At this stage, it is felt apposite to place the order dated 26.09.2019 under Annexure-5:-

"Government of Odisha,
PanchayatiRaj & Drinking
Water Department

ORDER

No. 17080 / PR & DW, date 26. Sept. 2019
PR-PADM-MISC-0025-2019

Whereas, it appears from the report of the Collector, Jajpur that Smt. Sunita Nayak, Sarpanch of Kalyanpur Grama Panchayat under Binjharpur Block has willfully violated the provisions of Rule-1 (annexure) Rule of Business of OGP Rules 2014 and willfully violated the provisions under Section 19 of Odisha Grama Panchayat Act, 1964 (Odisha Act, 1 of 1965) and acted in a manner which are prejudicial to the interest of the Grama and as such him further continuance as Sarpanch of Kalyanpur Grama Panchayat is detrimental to the interest of the inhabitants of the said Grama Panchayat.

Now, therefore, exercise of the powers conferred by Sub-section –(2) of Section 115 of the said Act, Government have been pleased to place Smt. Sunita Nayak, Sarpanch of Kalyanpur Grama Panchayat under suspension with immediate effect.

Further, in pursuance of Sub-section (1) of Section 115 of the said Act, Smt. Sunita Nayak, Sarpanch of Kalyanpur Grama Panchayat is hereby called upon to explain on the charges annexed to this order at annexure-A within 30 days from the date of receipt of this order as to why action as deemed proper shall not be taken against her in accordance with law.

If no explanation is received from her within the stipulated period, it will be presumed that she has nothing to explain and the matter will decided exparte.

She may also state, if she desires to be heard in person.

By order of the Governor
Sd/-
Addl. Secretary to
Government."

A plain reading being given to the above order, it appears that based on the report that the petitioner has wilfully violated the provision of section 19 of the OGP Act, it is said that the petitioner has violated the provision of section 19 of the OGP Act and her acting in a manner which is prejudicial to the interest of the Grama and as such her further contention as Sarpanch of Kalyanpur Grama Panchayat is detrimental to the interest of the inhabitants of the said Grama Panchayat. But, there is no such note as to any such opinion to have been formed based upon the said report as to the existence of circumstances in the direction of willful violation of the provision of section 19 of the Act and the action in a manner prejudicial to the interest of the

Grama in saying that the continuation of the petitioner as the Sarpanch is detrimental to the interest of the inhabitants of the Grama Panchayat. Furthermore, no reason has also been assigned. Therefore, the order of suspension of the petitioner who is the Sarpanch of Kalyanpur Gram Panchayat as under Annexure-1 cannot be sustained in the eye of law.

9. In the result, the order of suspension dated 26.09.2019 passed by the Government under Annexure -5 is hereby quashed and it is directed that the petitioner-Sarpanch be given charge of all the relevant papers of Kalyanpur Gram Panchayat forthwith. The writ application is accordingly, allowed. No order as to costs.

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2020 (I) ILR - CUT- 782

BISWANATH RATH, J.

F.A.O. NO. 946 OF 2019

M/s ORIENTAL INSURANCE CO. LTD. CUTTACK .....Appellant

.Vs.

SANTOSH KUMAR DAS .....Respondent

EMPLOYEE COMPENSATION ACT, 1923 – Section 4(1) (c) (ii) – Amount of compensation – Non-specified injury in schedule-1 – Assessment of compensation – Commissioner awarded the compensation only on the basis of disability certificate – Award of the commissioner challenged – Held, the mode of assessment adopted by the commissioner is contrary to the provisions provided under the Act – Hence the matter is remitted for re-adjudication as per law.

ORDER Date of Order 26.02.2020

B. RATH, J.

Heard learned counsel for the respective parties.

This appeal challenges the award in E.C. Case No.268-D/2013, passed by the Commissioner for Employee's Compensation-cum-Divisional Labour Commissioner, Cuttack.

The facts involving the claim at the instance of the claimant is not disputed but the judgment involved herein is challenged on the sole ground that involving a case of non-specified injury in Schedule-1, the statutory requirement as per the provision of Section 4(1)(c)(ii) of the Employee's Compensation Act, 1923 requires assessment of loss of earning capacity being assessed by the qualified medical practitioner. Taking this Court to the pleading, discussion and the materials available on record involving the judgment herein, learned counsel appearing for the appellant in his attempt to establish the ground raised herein submitted that submissions of disability certificate cannot be the sole consideration in the matter of assessment of compensation. Learned counsel appearing for the respondent while seriously objecting the submission of learned counsel for the appellant contended that for their filing of Ext.4 clearly establishing the percentage of disablement involving the injured involved herein there is no wrong committed by the Commissioner for Employees' Compensation to FAO No.946 of 2019 arrive at the decision on compensation.

Considering the rival contentions of the parties, this Court from Section 4(1)(c)(ii) of the Employee's Compensation Act, 1923, along with Explanation II finds the statutory provision reads as follows:

<table>
<tr><td colspan="4">4. Amount of Compensation.– (1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-</td></tr>
<tr><td>(a)</td><td colspan="3">XX XX XX</td></tr>
<tr><td>(b)</td><td colspan="3">XX XX XX</td></tr>
<tr><td>(c)</td><td>Where permanent partial disablement result from the injury</td><td>(i)</td><td>xx xx xx</td></tr>
<tr><td></td><td></td><td>(ii)</td><td>in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;</td></tr>
<tr><td></td><td>Explanation I..-</td><td></td><td>xx xx xx</td></tr>
<tr><td></td><td>Explanation II.-</td><td></td><td>In assessing the loss of earning capacity for the purpose of sub-clause(ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I;</td></tr>
</table>

It is at this stage taking into consideration the material available on record, this Court finds the sole consideration by the Commissioner to come

to the quantum of compensation remains the Disability Certificate (Ext.4). This Court here finds the mode of assessment adopted by the Commissioner for Employee's Compensation remains contrary to the assessment of compensation provided through Section 4(1)(c)(ii) of the E.C. Act, 1923 produced hereinabove. In the circumstances this Court finds the impugned judgment involved herein not sustainable but however for the requirement of fresh adjudication in the matter of earning capacity to come to grant appropriate compensation in favour of injured, this Court remits the matter back to the Commissioner for Employee's Compensation-cum-Divisional Labour Commissioner, Cuttack to re-adjudicate the matter of compensation involving the injured involving E.C. Case No.268-D of 2013 but however strictly in terms of statutory provision under Section 4(1)(c)(ii) of the E.C. Act, 1923.

Parties are directed the appear before the Commissioner for Employee's Compensation-cumDivisional Labour Commissioner, Cuttack along with copy of order of this Court on 12.03.2020 and the Commissioner is also directed to conclude the re- 4 adjudication on the compensation aspect only indicated hereinabove within a period of two months. With the above observation, the FAO succeeds.

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2020 (I) ILR - CUT- 784

BISWANATH RATH, J.

W.P.(C) NO. 10796 OF 2009

ARUN KUMAR JENA .....Petitioner

.Vs.

O.T.D.C. LTD., MANAGING DIRECTOR & ANR. .....Opp. Parties

A) SERVICE LAW – Applicability of O.R.S.P. Rule, 1998 – Petitioner while working as Assistant Manager (Accounts) in the Orissa Tourism Development Corporation was placed under suspension under Rule, 12 of the O.C.S. (C.C.A.), Rule, 1962 on 14.12.2005 – Subsequently re-instated on 7.10.2011 with certain punishment – Claim of benefit under the O.R.S.P. Rule, 1998 as the same had been implemented since 2006 in the OTDC – Benefit granted from the date of reinstatement in 2011 and not from the date when others were given the benefit – Whether justified? – Held, No – Direction to give the benefit from 2006.

"There is no doubt that a person continues in service even while under suspension and in such situation there is only temporary cessation of work of a person during the suspension period, in no stretch of imagination it can be construed that petitioner is out of service. It is in the circumstance, taking into consideration that the petitioner was only under suspension for the period 14.12.2005 till 7.10.2011 and prevented from discharging his duty and also paid with subsistence allowance for his not doing the actual duty, he cannot be deprived of the benefit of O.R.S.P. Rule, 1998 from the date as has been applied with effect from 1.4.2006 in respect of all such employees working then in the particular establishment. As a consequence, this Court while overruling the objection raised by the counsel for the opposite parties, allows the writ petition with a direction to the Orissa Tourism Development Corporation Ltd., to allow the benefit of O.R.S.P. Rule, 1998 to the petitioner with effect from 1.4.2006. The entire entitlement of the arrear involving the period 1.4.2006 till 9.10.2011 be calculated within a period of three weeks from the date of communication of certified copy of this judgment by the petitioner and for the unlawful deprivation of the benefit under O.R.S.P. Rule, 1998, petitioner shall also be entitled to interest @ Rs.7% per annum on such amount all through. Entire arrear along with interest be released in favour of the petitioner within a week thereafter."

(B) SERVICE LAW – Suspension with subsistence allowance – Whether the period of suspension can be treated as out of service – Held, No.

For Petitioner : M/s.A.K.Mohapatra & S.C.Rath.
For Opp.Parties : M/s.B.K.Pattnaik, K.Mohanty & S.S.Parida.

JUDGMENT Date of Hearing & Judgment: 27.02.2020

BISWANATH RATH,J.

This writ petition involves the following prayer:

"In the circumstances the petitioner prays that this Hon'ble Court will graciously be pleased to issue Rule Nisi, calling upon the opp. parties to show cause as to why the petitioner's pay shall not be revised w.e.f. 1.4.2006 under the O.R.S.P. Rules, 1998;

AND

Why the petitioner shall not be paid subsistence allowance in the revised pay w.e.f. 14.12.2005;

AND

Why the petitioner shall not be paid all arrear financial benefits accruing there from;

AND

If the opp. parties fail to show cause or show insufficient cause the said Rule may be made absolute;

AND

Issue any other writ(s)/direction(s)/order(s) as this Hon'ble Court deems fit and proper in the circumstances;

AND

For which act of kindness, the petitioner as in duty bound, shall ever pray."

2. Short background involving the case is that the petitioner was working as Assistant Manager (Accounts) in the Orissa Tourism Development Corporation. On 14.12.2005 he was placed under suspension under Rule, 12 of the O.C.S. (C.C.A.), Rule, 1962 on contemplation of a disciplinary proceeding. On 31.12.2005, the opposite party no.2 issued charge-sheet against the petitioner. Ultimately disciplinary proceeding was ended with direction for recovery of certain amount as well as considering the suspension period to be treated as such. Filing the writ petition, petitioner alleged that in the 65th Meeting of the Board of the Orissa Tourism Development Corporation, the Corporation implemented O.R.S.P. Rule, 1998 for all its employees but, however with effect from 1.4.2006. It is on the premises that the petitioner was facing a disciplinary proceeding through the charge-sheet dated 31.12.2005 and was placed under suspension from 14.12.2005 but, however re-instated ultimately on 7.10.2011 with the aforesaid punishment, the O.R.S.P. Rule, 1998 was implemented in the case of the petitioner with effect from 7.10.2011 on the premises that petitioner though faced a disciplinary proceeding but was under suspension right from 14.12.2005 till he was reinstated by the disposal of the disciplinary proceeding on 7.10.2011. Sri Mohapatra, learned counsel for the petitioner submitted that as the petitioner was continuing as an employee of the Orissa Tourism Development Corporation Ltd., there was no occasion for applying O.R.S.P., Rule, 1998 involving the petitioner from 7.10.2011. It is for prospective application of the benefit of O.R.S.P. Rule, 1998, Sri Mohapatra, learned counsel for the petitioner while claiming that the Orissa Tourism Development Corporation Ltd., has adopted a discriminatory attitude by implementing such benefit O.R.S.P. Rule, 1998 in case of all other employees from 1.4.2006 and giving such benefit to the petitioner with effect from 7.10.2011. In the process, Sri Mohapatra, learned counsel prayed this Court for interfering in the action of the opposite parties and issuing appropriate direction.

3. On the other hand, learned counsel appearing for the opposite party nos.1 and 2 while objecting the claim of the petitioner submitted that for the

petitioner facing suspension with effect from 14.12.2005 and only reinstated in service with effect from 7.10.2011, on the premises of his reinstatement with effect from 7.10.2011, the period from 14.12.2005 till 6.10.2011 dies none. It is on the pretext that the petitioner was not in service and he was reinstated in service only on 7.10.2011, he has been rightly benefited with the benefits of O.R.S.P. Rules, 1998 only after his reinstatement and, therefore, learned counsel for the contesting opposite parties contended that there is no illegality in the matter of implementation of O.R.S.P. Rule, 1998 in case of the petitioner.

4. Considering the rival contentions of the parties, this Court finds there is no dispute that on contemplation of a disciplinary proceeding, the opposite party no.2 placed the petitioner under suspension on 14.12.2005. There is also no dispute that even pending disposal of the disciplinary proceeding, the petitioner was reinstated on 7.10.2011. It is at this stage, looking to the definition of the word "suspension" according to Oxford Dictionary this Court finds the same reads as follows:

> "1. the act of officially removing somebody from their job, school, team, etc. for a period of time, usually as punishment. 2. the act of delaying something for a period of time until a decision has been taken.
>
> Similarly Halsbury's Laws of England, third edition vol.25, Art.989
>
> at page 518 the word "suspension" means:
>
> "Whether or not the master has power to suspend a servant during the duration of the contract of service depends upon the construction of the particular contract. In the absence of any express of implied term to the contrary, the master cannot punishes servant for alleged misconduct by suspending him from employment and stopping his wages for the period of suspension".

5. For there is no doubt that a person continues in service even while under suspension and in such situation there is only temporary cessation of work of a person during the suspension period, in no stretch of imagination it can be construed that petitioner is out of service. It is in the circumstance, taking into consideration that the petitioner was only under suspension for the period 14.12.2005 till 7.10.2011 and prevented from discharging his duty and also paid with subsistence allowance for his not doing the actual duty, he cannot be deprived of the benefit of O.R.S.P. Rule, 1998 from the date as has been applied with effect from 1.4.2006 in respect of all such employees working then in the particular establishment. As a consequence, this Court while overruling the objection raised by the counsel for the opposite parties,

allows the writ petition with a direction to the Orissa Tourism Development Corporation Ltd., to allow the benefit of O.R.S.P. Rule, 1998 to the petitioner with effect from 1.4.2006. The entire entitlement of the arrear involving the period 1.4.2006 till 9.10.2011 be calculated within a period of three weeks from the date of communication of certified copy of this judgment by the petitioner and for the unlawful deprivation of the benefit under O.R.S.P. Rule, 1998, petitioner shall also be entitled to interest @ Rs.7% per annum on such amount all through. Entire arrear along with interest be released in favour of the petitioner within a week thereafter.

6. In the result, the writ petition succeeds. No order as to cost.

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2020 (I) ILR - CUT-788

P.PATNAIK, J.

W.P.(C) NO. 3951 OF 2016

ODISHA GRAMYA BANK ……..Petitioner

.Vs.

DEPUTY CHIEF LABOUR COMMISSIONER (CENTRAL), BHUBANESWAR & ORS. ……..Opp.Parties

SERVICE LAW – Departmental Proceeding – Opp.No-3 was a bank employee – Allegation of financial irregularities against him – Order of dismissal – Gratuity forfeited – Claim application filed before the controlling authority – Application allowed directing payment of the gratuity amount – Order Challenged in Appeal and the same was confirmed by the Appellate Authority – Both the orders challenged in the present Writ Petition – Section 4(6)(a) of the Payment of Gratuity Act Pleaded by the petitioner/Bank – Petitioner had not quantified the quantum of loss attributable to the Opp.No-3 – No show cause was issued while forfeiting the gratuity – However for the recovery of the bank money proceeding before the debt recovery Tribunal is pending – Prayer of the petitioner/bank considered – Held, no interference called for writ petition dismissed.

Case Laws Relied on and Referred to :-

1. 2007 1 SCC 663 : Jaswantsingh Gill Vs. Bharat Cooking Coal Ltd.
2. (2018) 9 SCC 529 : Union Bank of India & Ors Vs. C.G. Ajay Babu & Anr.

For petitioner : Mr. K.C.Kanungo
For Opp.Parties : Mr. S. Mohanty

JUDGMENT Date of Hearing : 13.12.2019 : Date of Judgment:25.02.2020

P. PATNAIK, J.

In the accompanied writ application, the petitioner-Bank constituted under the Regional Rural Banks Act,1976 by assailing the order dated 28.01.2016 passed under Rule 18 (8) of the Payment of Gratuity (Central) Rules,1972, by Appellate Authority under the Payment of Gratuity Act,1972, and Deputy Chief Labour Commissioner (Central), Bhubaneswar-opposite party no.1 has inter alia prayed for quashing of Annexure-1 with further prayer for quashing of payment of Rs.1,55,825/- along with the interest as awarded on gratuity amount to be paid to the opposite party no.3.

2. The brief facts as has been depicted in the writ petition is that vide notification in the year 2006 of the Government of India, the erstwhile Cuttack Gramya Bank and Balasore Gramaya Bank have been amalgamated and named as, 'Kalinga Gramya Bank." Again the Central Government after consultation with National Bank for Agriculture and Rural Development (NABARD), Government of Odisha, the three Regional Rural Bank viz. Neelachal Gramaya Bank, Kalinga and Baitarani Gramya Bank have been amalgamated into one Bank and the name of the said amalgamated bank is Odisha Gramya Bank with its Head office at Bhubaneswar as evident from Annexures-2 and 3. Opposite party no.3 initially joined in above mentioned Cuttack Gramya Bank which later on became Kalinga Gramya Bank by virtue of the amalgamation dated 02.01.2006 and now Odisha Gramya Bank, as an officer on 30.03.1997. During his stint as officer at Cuttack Gramya Bank, being a member of Investment committee of Cuttack Gramya Bank, the opposite party no.3 committed certain financial irregularities and charges were levelled against him vide Annexure-4 series. In pursuance of Departmental Inquiry, the opposite party no.3 was dismissed from the services of the Bank with effect from 22.04.2003 as per Annexure-5. It has been averred that the CBI has taken over the matter of the financial irregularities committed in the Bank and so far as, the punishment of dismissal, the opposite party no.3 has filed the writ petition in W.P.(C) No.5424 of 2003 which is stated to be pending till filing of the writ petition. After more than a decade from the order of punishment of dismissal, the opposite party no.3 filed claim application before the opposite party no.2 and in the said claim, the petitioner filed written submission. The opposite party

no.2 passed order dated 29.10.2014 directing the petitioner-Bank to pay the gratuity amount as per the Payment of Gratuity Act,1972 along with simple interest @ 10% from 24.04.2003 to 25.08.2014. The order dated 29.10.2014 has been marked as Annexure-8. Assailing the order of opposite party no.2, the petitioner-Bank preferred appeal before the opposite party no.1 and the opposite party no.1 has been pleased to uphold the order passed by the Controlling Authority-opposite party no.2 dated 29.10.2014 with little modification vide Annexure-1, which is impugned in this writ petition. Being aggrieved and dissatisfied with the impugned order under Annexure-1, the petitioner-Bank has been constrained to approach this Court invoking the extraordinary jurisdiction under Article 226 and 227 of the Constitution for redresal of its grievances.

3. Learned counsel for the petitioner has assailed the impugned order on the following grounds :

(A) The appellate authority, opposite party no.1 has passed impugned order without any cogent and tenable reasons. On that score, the impugned order is assailable.

(B) The learned counsel for petitioner further submits that the issue of delay and latches, as has been advanced by the petitioner-Bank before the Controlling Authority and the appellate authority has been glossed over and the issue has been conveniently evaded.

(C) The learned counsel for the petitioner further submits that Rule-7 of the Payment of Gratuity Rule,1972 envisages for making an application in writing with 30 days and Rule-10 of the said Rule prescribes the limitation of 90 days from the occurrence of the cause of action and discretion has been provided for condonation of delay with 'sufficient cause' but on perusal of the claim application there has been no adjudication on the issue of delay nor any such application for condonation of delay has been filed by opposite party no.3. Therefore, the order passed by the appellate authority by accepting the stale claim after long lapse of one decade is not in consonance with the decision of the Hon'ble Apex Court in the cases of ***Vijaya Kumar Kaul and others v. Union of India : (AIR 2012 SC 2274*** and ***Parimal v. Veena (AIR 2011 SC 1150)***.

(D) Learned counsel for the petitioner further submits that Section 4 (6) (a) of the Payment of Gratuity Act, which reads as under:

"the gratuity of an employee, whose services have been terminated for any act, willful omission and negligence causing any damage or loss to or destruction of property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused."

(E) The claimant/opposite party no.3 has not specifically quantified the impugned gratuity amount, but surprisingly the opposite party no.2 unilaterally determined the

amount himself along with 10% interest and the same is against the settled legal position that as a rule relief not founded on the pleading should not be granted.

(F) Learned counsel for the petitioner further submits that the relevant portion of Regulation 69 (3) (e) (along with proviso) of the Service Regulations, has not been adverted to while passing the impugned order by the opposite party no.1.

4. Controverting the averments made in the writ petition a counter affidavit has been filed by opposite party no.3 wherein it has been submitted that M/s. Home Trade Ltd., defaulted in giving physical delivery of the securities for Rs.10.81 crore and the matter was referred to the CBI, Bhubaneswar vide F.I.R. dated 02.07.2002 and the CBI conducted the investigation against the opposite party no.3 but filed charge-sheet only against M/s. Home Trade Ltd. Without waiting for the result of the investigation by CBI, the departmental proceedings were drawn up by the Cuttack Gramya Bank against the convenor and the two members of the Investment Committee including the opposite party no.3. Similar charges have been levelled against two General Managers who acted as Chairman of the Investment Committee and against the Chairman of the Cuttack Gramya Bank in the disciplinary proceedings initiated by the UCO Bank. The disciplinary authority found Sri N.N. Pattanaik guilty and penalty of reduction to lower grade was imposed on him without any financial punishment and the said order of penalty was assailed by Sri N.N.Pattanaik before this Hon'ble Court in W.P.(C) No.972 of 2007 and the said writ petition was allowed by the judgment dated 06.01.2012 holding that the charges were vague and defective and the order of penalty was quashed and the said order of this Court as has been affirmed by the Hon'ble Supreme Court by judgment dated 03.02.2015 passed in Civil Appeal No.1451 of 2015 filed by the UCO Bank. Similar allegations have been made against other General Manager, Sri B.S. Nanda, who also acted as the Chairman of the Investment Committee in the Cuttack Gramya Bank and the Chairman of the Bank Sri P.K.Sahu were given the penalty of reduction in rank without any penalty of recovery towards the alleged loss of Rs.10.81 crores. After their retirement, these two officers have already received their gratuity. Against the order of dismissal from services dated 22.04.2013, the opposite party no.3 preferred appeal and the said appeal upon been rejected, he has filed W.P.(C) No.5424 of 2003 which is awaiting disposal.

Further it has been submitted that Cuttack Gramya Bank filed O.A. No.37 of 2005 before the Debts Recovery Tribunal, Cuttack for recovery of the amount of Rs. 10.81 crores with interest from the UTI Bank and M/s.

Home Trade Ltd and has got a decree for recovery of Rs.10.81 crores with interest @ 12% per annum as evident from Annexure-G to the counter affidavit.

In view of such decree against both UTI Bank Ltd as the M/s. Home Trade Ltd was introduced to the Cuttack Gramya Bank by the UTI Bank, it can be safely presumed that members of the committee has not committed any breach of duty in violation of the rules of the Bank nor committed any act of negligence. Further it has been submitted that after getting the decree for Rs.10.81 crores with interest from the D.R.T. in 2007, it cannot be gainsaid that the Bank had suffered any loss. Further the provisions of Section 4 (1) of the Payment of Gratuity Act,1972 has been referred to and Section 2 (q) of the Payment of Gratuity Act has also been referred to. Further it has been submitted that the Bank had not quantified the quantum of loss attributable to the opposite party no.3 in the order of penalty nor had passed any specific order of forfeiture after giving any show cause notice. So the stand taken for the first time in the written statement in the P.G. case has no legs to stand. Though the Bank in written statement in P.G. case has referred to Rule-69(3) of the Service Rule of the Cuttack Gramya Bank, but the proviso to the said rule has been deliberately omitted and extracted of the Rule-69 has been referred as Annexure-H to the counter affidavit. It has also been stated in the counter affidavit that the provision of Section 4 (6) of the P.G. Act,1972 will have overriding effect on the service Rules. Therefore, the contentions of the petitioner-Bank regarding disentitlement of opposite party no.3 to receive gratuity is without any substance.

5. Learned counsel for the opposite party no.3, apart from reiterating the submissions made in the counter affidavit has put much emphasis on Section 4 (6) (a) of the Gratuity Act,1972. Learned Counsel forcefully submitted that the order of Debts Recovery Tribunal in O.A. No.37 of 2005 would make it crystal clear that the UTI Bank Ltd and Home Trade Ltd, who are jointly and severally liable to pay the said amount to the Bank and the Bank is entitled to recover the same. Therefore, the blame cannot be attributed to the amount of loss so caused and out of which the gratuity shall be forfeited on that score. Learned counsel for the opposite party no.3 further submits that the Regulations of the Bank cannot certainly override the statutory law as enumerated under Section 4, 6(a) of the P.G. Act,1972, in view of the decision reported in ***2007 1 SCC 663; Jaswantsingh Gill v. Bharat Cooking***

Coal Ltd and in the case of ***Union Bank of India and others v. C.G. Ajay Babu & another case: (2018) 9 SCC 529*** and the relevant paragraph-20 of Ajay Babu (supra) has been referred to.

Learned counsel for opposite party no.3 submits that the taking recourse of sub-section (6) of Section 4 (A) is impermissible and on that score, the writ petition is liable to be dismissed being devoid of any merit.

6. After giving a thoughtful and anxious consideration to the rivalised submissions and on perusal of the records, the short point which hinges on the hunch of this Bench is as to whether the opposite party no.3 is entitled to gratuity under Rule 69 of the Regulations,2000 read with Section 4, 6(a) of the P.G. Act,1972. In order to advert to the aforesaid issue, the relevant provision of the Rule 69 under Chapter-VII is quoted hereunder :

> " **69.Gratuity.**
>
> 1. An Officer or employee shall be eligible for payment of gratuity in accordance with the Sub-Regulation 2 hereunder.
>
> 2. The amount of gratuity payable to an officer or employee shall be either as per the provisions of the Payment of Gratuity Act,1972 or as per Sub-Regulation (3) hereunder whichever is higher.
>
> 3. (i) Every officer or employee shall be eligible for gratuity on
> (a) Retirement.
>
> (b) Death.
>
> (c) Disablement rendering him unfit for further service as certified by a Medical Officer approved by the Bank, or
>
> (d) Resignation after completing 10 years of continuous service, or
>
> (e) Termination of service in any other way except by way of punishment after completion of 10 years of service:
>
> Provided that in respect of an employee there shall be no forfeiture of gratuity for dismissal on account of misconduct except in cases where such misconduct causes financial loss to the bank and in that case to that extent only.
>
> (ii) The amount of gratuity payable to an officer or employee shall be one month's pay for every completed year of service or part thereof in excess of six months subject to a maximum of 15 month's pay.
>
> Provided that where an officer or employee has completed more than 30 years of service, he shall be eligible by way of gratuity for an additional amount at the rate of one half of a month's pay for each completed year of service beyond 30 years:

> Provided further that in respect of an officer the gratuity is payable based on the last pay drawn:
>
> Provided also that in respect of an employee pay for the purpose of calculation of the gratuity shall be the average of the basic pay (100% dearness allowance and special allowance and officiating allowance payable during the 12 months, preceding death, disability, retirement, resignation or termination of service, as the case may be."

7. The opposite party no.3 has been inflicted with major punishment of dismissal of service and challenging the dismissal order, he has filed W.P.(C) No.5424 of 2003 which is subjudice and Regulation 69 puts an embargo for payment of retirement benefits including the Gratuity and the said regulations, if read with Section 4, 6 (a) of the P.G. Act,1972 make it ample clear that the Bank has got its power under Regulation 2000, more particularly Regulation 1969 for forfeiture of the gratuity to extent the loss is caused to the Bank.

8. On perusal of the order passed in O.A. No.37 of 2005 dated 25.04.2007, it has been ordered by the Debts Recovery Tribunal that UTI Bank Limited and Home Trade Ltd are jointly and severally liable for the amount lost to the Bank and the Bank is entitled to the same with interest. But so far as the financial loss caused to the Bank nothing has been brought on record that there was any pecuniary loss to the Bank due to opposite party no.3 nor the said loss or damage has been quantified by the petitioner-Bank. Though the opposite party no.3's involvement in the alleged loss due to his discharge of duties in his official capacity could have been one of the reason for his dismissal from his services. It would be apposite to refer to the decision cited by the opposite party no.3, two decisions in the cases of ***Jaswantsingh Gill (supra)*** and ***C.G. Ajay Babu (supra).***

Paragraph-5 and 10 of ***Jaswantsingh Gill (supra)*** is quoted hereunder :

> ***"5.*** From perusal of the case record of the Controlling Authority it is observed that the respondent submitted an application in form-N on 5.1.2001 after his superannuation from 30.04.1998 when the appellant did not pay the gratuity amount. It is observed from the decision/direction of the Controlling Authority that he has rightly determined the amount of gratuity as well as correctly interpreted Section 4 (6) of the payment of Gratuity Act,1972. For Application of Section 4 (6) it is pre-condition that the service should have been terminated for any act. For the purpose of Section 4 (6) (a) such act should be about willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the

> employer, shall be forfeited to the extent of the damage or loss so caused and for the purpose of sub-section 4(6) (b) the gratuity can be forfeited wholly or partially only if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence etc. on his part. It is observed from the punishment order that the services have not been terminated and rather could not have been terminated and also does not indicate the extent of damage of loss. Since neither the service terminated nor there is anything about extent/quantification of damage or loss in punishment order, question of forfeiture of gratuity does not arise as per Section 4(6).
>
> **10.** The provisions of the Act, therefore, must prevail over the Rules. Rule-27 of the Rules provides for recovery from gratuity only to the extent of loss caused to the company by negligence or breach of orders or trust. Penalties, however, must be imposed so long an employee remains in service. Even if a disciplinary proceeding was initiated prior to the attaining of the age of superannuation, in the event, the employee retires from service, the question of imposing a major penalty by removal or dismissal from service would not arise. Rule 34.2 no doubt provides for continuation of a disciplinary proceeding despite retirement of employee if the same was initiated before his retirement but the same would not mean that although he was permitted to retire and his services had not been extended for the said purpose, a major penalty in terms of Rule-27 can be imposed."

Paragraph-20 of the case of ***C.G. Ajay Babu (supra)*** is quoted hereunder :

> "**20.** That the Act must prevail over the Rules on Payment of Gratuity framed by the employer is also a settled position as per *Jaswant Singh Gill [Jaswant Singh Gill v. Bharat Coking Coal Ltd. (2007) 1 SCC 663: (2007) 1 SCC (L & S_ 584].* Therefore, the appellant cannot take recourse to its own Rules, ignoring the Act, for denying gratuity. "

9. In the backdrop of the aforesaid facts, coupled with the judicial pronouncements as a logical sequitur to the reasons stated herein above, this Court is not inclined to interfere with the impugned order under Annexure-1. Accordingly, the writ petition is dismissed being devoid of any merit.

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2020 (I) ILR - CUT-796

K.R. MOHAPATRA, J.

CMP NO. 99 OF 2020

RECTOR PUBLIC SCHOOL, JEYPORE ……..Petitioner

.Vs.

SMT. SARASWATI ROUT & ORS. ……..Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 18 Rule 17 – Recall of witness – Trial court allowed the application without recording any reason – Order of trial court challenged – Held, recall of witness cannot be made in a routine manner – The power can only be exercised sparingly in a fit case assigning good reasons thereto for clarification of the doubt.

Case Laws Relied on and Referred to :-

1. (2016) 11 SCC 296 : Ram Rati .Vs. Mange Ram (Dead) through legal representatives & Ors.
2. 2014 SCC OnLine Ori 565 : Bairagi Moharana and another .Vs. Collector, Khurda & Ors.
3. (2011) 11 SCC 275 : K.K. Velusamy .Vs. N. Palanisamy

For Petitioner : M/s. V. Narasingh, B.B. Choudhury, S. Das & S. Devi.
For Opp. Parties : M/s. Basudev Mishra & B.L. Mishra Mr. A.K. Mishra, Addl. Govt. Adv.

JUDGMENT Heard & Disposed of : 28.02.2020

K.R. MOHAPATRA, J.

The petitioner in this petition assails the order dated 03.12.2018 (Annexure-4) passed by learned Civil Judge (Senior Division), Jeypore in C.S. No. 222 of 2016 allowing an application filed by the plaintiffs-opp. parties to recall P.W.1 for further cross-examination.

2. Drawing my attention to the petition dated 10.08.2018 for recall of P.W.1 (Annexure-2 series), who is the plaintiff no.2, Mr. Narasingh, learned counsel for the petitioner submits that the plaintiff no.2 in his petition prays for correction of inadvertent mistakes in the evidence of P.W. 1, which is stated to have been wrongly recorded at para-44, 48, 49 and 65 of his deposition (cross-examination). For ready reference, the same is quoted as under:

"44. I have filed this suit regarding the Govt. land which is granted on lease.
xx xx xx xx xx xx

48. The boundary of land following

North – Land of Laxmi Mallikani
South – National Highway
West – Lease land of Def. No.3

49. The land of J.C. Nayak is adjacent to that of my land to the South.
xx xx xx xx xx xx

65. I have filed false case to grab this land."

3. Learned Civil Judge without considering the scope and ambit of the provisions of Order 18 Rule 17 C.P.C. has passed the impugned order. It his submission that depositions were recorded by the Presiding Officer in accordance with the statement of P.W.1 and after the deposition is recorded, the same was read over and explained to him in Odia by the Presiding Officer to which also he has given an endorsement acknowledging the same by signing the deposition. Although an objection to the petition to recall of P.W.1 for correction of deposition under Annexure-2 series was filed stating that the same is not permissible under law, as P.W. 1 wants to fill up the lacuna in his deposition, learned Civil Judge has passed the impugned order without considering the same. He further submits that learned Civil Judge while passing the impugned order has not assigned any reason as to why he has issued direction to recall P.W. 1 for further cross-examination, when no such prayer is made by the defendants. In support of his case, he relies upon the decision of the Hon'ble Supreme Court in the case of ***Ram Rati –v- Mange Ram (Dead) through legal representatives and others*****,** reported in (2016) 11 SCC 296, wherein it has been observed at paragraphs-10 and 11 as follows:

"10. Order 18 CPC deals with hearing of the suit and examination of witnesses. By an amendment introduced thereunder with effect from 1-2-1977, Rule 17-A was introduced permitting production of evidence not previously known or which could not be produced despite due diligence. It appears, the amendment only caused unnecessary protraction of the litigation, and hence, the said provision was omitted by the Code of Civil Procedure (Amendment) Act, 1999 with effect from 1-7-2002. However, Rule 17 was retained which reads as follows:

*"**17. Court may recall and examine witness**.—The court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the court thinks fit."*

11. The respondent filed the application under Rule 17 read with Section 151 CPC invoking the inherent powers of the court to make orders for the ends of justice or

> *to prevent abuse of the process of the court. The basic purpose of Rule 17 is to enable the court to clarify any position or doubt, and the court may, either suo motu or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt, once the court recalls the witness for the purpose of any such clarification, the court may permit the parties to assist the court by examining the witness for the purpose of clarification required or permitted by the court. The power under Rule 17 cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for the purpose of filling up a lacuna in the evidence. "No prejudice is caused to either party" is also not a permissible ground to invoke Rule 17. No doubt, it is a discretionary power of the court but to be used only sparingly, and in case, the court decides to invoke the provision, it should also see that the trial is not unnecessarily protracted on that ground." (emphasis supplied)*

4. He also relies upon the decision of the Hon'ble Supreme Court in the case of ***Bairagi Moharana and another –v- Collector, Khurda and others*****,** reported in 2014 SCC OnLine Ori 565, wherein it has been observed at paragraphs-4 to 6 as follows:

> *"4. It is clear from the aforesaid decision of the apex Court that power of the Court under Order 18 Rule 17 of the C.P.C. is a discretionary power which should be used sparingly in appropriate cases to enable the court to clarify any doubt it may have in regard to the evidence led by the parties and not intended to be used to fill up omissions in the evidence of a witness, who has already been examined. Order 18 Rule 17 of the Code is also not intended to enable the parties to recall any witnesses for further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced at the time of recording of evidence. After deletion of Order 18 Rule 17-A, the court may in appropriate cases in exercise of its inherent power under Section 151 of the Code may permit cross-examination of a witness, but this inherent power cannot be routinely invoked or exercised for reopening evidence or recalling witnesses.*
>
> *5. The principles laid down in K.K. Velusamy (supra) have been followed in a subsequent decision of the apex Court reported in 2013(I) OLR (SC) 1070: M/s. Bagai Construction Thr. Its Proprietor Mr. Lalit Bagai v. M/s. Gupta Building Material Store.*
>
> *6. In the impugned order except stating that the questions appended to the recall petition appear to be genuine and required for just and proper adjudication of the matter in controversy and to clarify the ambiguities in the evidence of P.W.10, the learned Civil Judge (Senior Division) has not considered the petition in the light of the principles laid down by the apex Court in the decision referred to above. There is also no mention in the impugned order as to what ambiguities are there in the evidence of P.W.10 which need clarification. The impugned order allowing the prayer for recall of P.W.10 for further cross-examination does not indicate whether*

> *the Court below exercised power under Section 151 of the C.P.C., since within the scope of Order 18 Rule 17 of the C.P.C., it is not permissible to allow a party for further examination-in-chief of his own witness or for further cross-examination of a witness of adversary on recall. In the aforesaid circumstances, I allow the writ petition and set aside the impugned order and remit the matter back to the Court below to reconsider the defendants' petition for recall of P.W.10 for further cross-examination in the light of the principles governing the field . No costs."*

5. Mr. Narasingh, therefore, submits that the impugned order is not sustainable and prays for setting aside the same.

6. Mr. Mishra, learned counsel for the opposite parties 1 to 6 vehemently objected to the same and submits that from a bare reading of depositions of P.W.1 at para-44, 48, 49 and 65, it is apparent that depositions have not been correctly recorded by the Presiding Officer, which was inadvertent. He further submits that Order 18 Rule 17 read with Section 151 C.P.C. empowers the Court to recall any witness for clarification of any doubt or confusion in the statement made in the evidence. Learned Civil Judge relying upon the decision of the Hon'ble Supreme Court in the case of ***K.K. Velusamy –v- N. Palanisamy***, reported in (2011) 11 SCC 275, has correctly passed the impugned order and there is no infirmity in the same.

In support of his case he relied upon paragraph-11 of the decision in *K.K. Velusamy* (supra), which reads as follows:

> *"11.There is no specific provision in the Code enabling the parties to reopen the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for reopening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re open the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications."*

7. On perusal of the impugned order, it is apparent that the Court has not recorded any reason/finding as to whether the grievance made by the plaintiffs to recall P.W. 1 falls within the scope and ambit of the provisions of Order 18 Rule 17 C.P.C. Recall of a witness cannot be made in a routine

manner. The power can only be exercised sparingly in a fit case assigning good reasons thereto for clarification of the doubt.

8. In view of the ratio of *Ram Rati* (supra), which is laid down discussing the case law decided in *K.K. Velusamy* (*supra*), it is manifest that a petition under Order 18 Rule 17 C.P.C. can only be entertained, if the Court feels it just and appropriate to clarify any position or doubt in the evidence of the witness. The power conferred under Rule 17, however, should be exercised sparingly and in exceptional cases, assigning good reasons thereto. It cannot be used in a routine manner. While exercising the power under Rule 17, the Court shall take utmost care to see that exercise of the power under Rule 17 does not fulfill any lacuna or omission in the evidence already led. Although such a power can be exercised at any stage of the suit either *suo motu* or at the request of any party to the suit, it must be for clarification of any doubt in the evidence already recorded and it cannot be stretched any further in exercise of inherent power under Section 151 C.P.C., even if such a recall is not prejudicial to either of the parties.

9. Thus, learned Civil Judge ought to have adjudicated the petition under Annexure-2 series taking into consideration the objection raised by the defendant no.3-petitioner and the case law discussed above. It appears that although learned Civil Judge refers to *K.K. Velusamy* (supra) in the impugned order, it has failed to assign any reason, as to how the case at hand satisfies the ratio decided therein.

10. Since learned Civil Judge has not assigned any reason as to how the plaintiffs satisfy the ingredients of Order 18 Rule 17 C.P.C. for recall of P.W. 1 and passed the impugned order without considering the ratio decided in the aforesaid case laws as well as the objection filed by the petitioner-defendant no.3, the same is not sustainable.

11. The impugned order under Annexure-4, therefore, being not sustainable in law is set aside and the matter is remitted back to the learned Civil Judge (Senior Division), Jeypore for fresh adjudication in accordance with law assigning good reasons thereto giving opportunity of hearing to the parties concerned.

12. With the aforesaid observation and direction, this CMP is disposed of.

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