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 (II) I L R - CUT.

MAY - 2020

Pages : 1 to 160

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/-

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MOHAMMAD RAFIQ, C. J & CHITTA RANJAN DASH, J.

WRIT PETITION (CIVIL) NO.12209 OF 2020

ALL ODISHA LAWYERS ASSOCIATION ……Petitioner

.Vs.

THE ODISHA STATE BAR COUNCIL & ANR. ……...Respondents

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ jurisdiction – Exercise of – Writ petition – Challenge is made to the instructions issued by Bar Council of India and Odisha State Bar Council with regard to constitution of interim Committees for Bar Associations during COVID-19 pandemic – Competency of BCI and OSBC for issuing such instruction questioned – Court urged to direct holding of election of the Bar Associations by observing the COVID-19 guidelines – The question arose as to whether such a writ of mandamus/direction can be given during such situation? – Held, no, High Court in its discretion refuse to issue a writ even if there is infraction of any law – Scope thereof – Discussed.

"*It is trite that remedy provided under Article 226 of the Constitution of India is a discretionary remedy. The High Court has always the discretion to refuse to grant such remedy even though a legal provision might have been infringed, the only exception being the enforcement of any fundamental right. Here it may be pertinent to note that the High Court has been conferred with wider discretion in the writ jurisdiction that it exercises under Article 226 of the Constitution of India vis-a-vis the Supreme Court under Article 32. While the right to move the High Court under Article 226 is a constitutional right but unlike Article 32, there is no constitutional guarantee attached to it. The High Court may therefore in its discretion refuse to issue a writ even if there is infraction of any law. Since the High Court has been conferred with discretion, it is not expected to use discretion without any justification. The High Court has to be always conscious of the responsibility attached to such high discretion confided in it by the Constitution which has to be used in a most judicial manner. It is trite that this Court does not issue writ in exercise of its jurisdiction under Article 226 of the Constitution of India, as a matter of course. This being the Court of equity, it will not issue any such writ, which may give rise to inequitable results. In other words, the relief to be granted in exercise of such power should be an equitable one. Writ of Mandamus is a high discretionary remedy as the aggrieved person has to not only establish the infraction of a statutory provision of law but is also required to further establish that such infraction has resulted in invasion of a judicially enforceable right. Mere infraction of a statutory provision would not automatically give rise to a cause for issuing a writ of Mandamus. What flaws from this discussion of law, is that a writ court can even decline to grant the relief in the given facts of the case even if legal flaw in the impugned decision is made out if the writ prayed for is likely to result in another illegality and if the substantial justice has otherwise been done."*

Case Laws Relied on and Referred to :-

1. AIR 1995 MP 137 : R.N. Tiwari .Vs. State Bar Council of M.P. & Ors.
2. 1992 Supp. (2) SCC 312 : H.B. Gandhi, Excise and Taxation Officer-cum-Authority, Karnal & Ors..Vs. M/s. Gopi Nath and Sons & Ors.
3. AIR 1955 SC 425 : Sangram Singh .Vs. Election Tribunal & Anr.
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5. (1997) 1 SCC 134 : Ramniklal N. Bhutta & Anr. .Vs. State of Maharashtra & Ors.
6. (1999) 6 SCC 237 : M.C. .Vs. Union of India & Ors.
7. (1994) 2 SCC 481 : State of Maharashtra & Ors..Vs. Prabhu,
8. (2010) 10 SCC 677 : Ritesh Tewari and another .Vs. State of Uttar Pradesh & Ors.
9. (2014) 13 SCC 681 : Eastern Coalfields Limited & Ors..Vs. Bajrangi Rabidas,

For Petitioner(s) : Mr. Gautam Mukherji, Sr. Adv.
B.P. Mohapatra, S.S. Padhy & G.M. Rath

For Respondent(s) : Mr. A.P. Bose

JUDGMENT Date of Judgment : 14.05.2020

PER: MOHAMMAD RAFIQ, C. J.

This writ petition has been filed by All Odisha Lawyers Association-petitioner (for short "the Association"), which claims to be an association of a group of advocates, inter alia with the prayer that the letter dated 14.04.2020 (Annexure-4) issued by the Bar Council of India-opposite party no.2 (for short "the BCI") and the consequential guidelines dated 04.05.2020 issued by the Odisha State Bar Council-opposite party no.1 (for short "the OSBC") as well as its subsequent clarification vide letter dated 06.05.2020 under Annexures-6 and 7 respectively, may be quashed and set aside.

2. Dispute pertains to annual election of the various Bar Associations in the State of Odisha.

3. The case set up by the petitioner-Association in the present writ petition is that the OSBC vide Notification dated 10.02.2020 notified 28.03.2020 as the date for election to all the Bar Associations in the State of Odisha. All the affiliated Bar Associations of Odisha notified the programme to hold election in their respective Associations following the principle of 'One Bar, One Vote, One Day'. All such Associations appointed their Election Officers and sold nomination papers. Different candidates purchased the nomination papers by depositing the non-refundable security amounts and filed the nomination papers. After scrutiny of the nomination papers, withdrawal process was also completed. Thereafter, final list of contesting

members for different posts was published by the Election Officers. Due to outbreak of the pandemic Coronavirus (COVID-19) and the lockdown imposed throughout the country, the OSBC intimated to all the Election Officers of the State to postpone the date of election from 28.03.2020 to 25.04.2020.

4. Considering that since entire nation is grappling with the pandemic Coronavirus (COVID-19), holding of election may not be possible as all have been mandated to maintain social and physical distance, the BCI vide its letter dated 14.04.2020, addressed to the Presidents and Secretaries of all the Bar Associations of the country stayed the election process in all such Bar Associations and directed for constitution of an Interim Committee where the term of the elected body has expired by adopting following methodology:-

> "*Thus, it is hereby resolved, that as an interim measure, till further directions are issued, all such Bar Associations where elections are due, and/or where the term/tenure of the present office bearers have expired and which has less than 500 valid voters shall unanimously or by way of majority, if required, through teleconference, whatsapp groups, social media, nominate a Committee of 3 senior members with experience of managing affairs of the Bar to oversee and look into the affairs of the Bar in the intervening period till next elections are possible. Similarly, all those Bar Associations which have more than 500 valid voters shall unanimously/or by way of majority nominate a Committee of 5 senior members with experience in the affairs of the Bar for the same purpose. This can be done by the members of the respective Bar Associations. It may be kindly noted that, in both the Committees, the senior most member, amongst the members who have been nominated, by each such Bar Association, shall be the Chairman of each such Committee of the Bar Association/s respectively."*

5. Acting on the communication received from the BCI, the OSBC vide letter dated 15.04.2020 (Annexure-5), addressed to the Election Officers of all the Bar Associations, directed postponement of the election until further orders. The OSBC issued further Guidelines vide its letter dated 04.05.2020 to the Election Officers of all the Bar Associations in the State along with the proceedings of extra ordinary meeting of the Special Committee held on that date. In this letter, the OSBC required the Bar Associations to constitute the Interim Committees but suggested a slightly different methodology than the one envisaged in the above referred communication of the BCI and gave justification why it was doing so, as would be seen from the following excerpts thereof:-

"As most of the districts of the state are preventing free movement of the people, it is not possible to hold General Body meeting of the different bar associations as the general public including the advocates are required to maintain the social distancing and sanitization as a preventing measure, if the meeting of General Body of the Bar Associations are held there would be gathering of huge number of advocates & such congregation may spread Covid-19 virus and due to such eventuality the people of the state would be in danger. Considering the huge number of voters of different Bar Associations, it is not possible to obtain views of all the voters General Body Meeting held through video conferencing or whats app as well as the member voters may not have such facility. Therefore, the nomination of members of the Interim Committee is not possible through meeting of the General Body of the affiliated Bar Associations. We have also received a communication in this respect from Bar Council of India."

6. That the OSBC in the said Guidelines, required all the Bar Associations to form an Interim Committee, which shall take over the entire administration and management of the Associations from the elected body whose term has expired. Such Interim Committees are required to be constituted latest by 20.05.2020 failing which, the OSBC shall constitute such committees. Direction was also issued for refund of the nomination fees.

7. Mr. Gautam Mukherji, learned Senior Counsel for the petitioner, while referring to Sections 6 and 7 of the Advocates Act, 1961, argued that neither the BCI nor the OSBC has any legal competence to issue the impugned directions. It is submitted that despite prevailing circumstances due to lockdown following spread of pandemic Coronavirus (COVID-19), several other activities have been gradually permitted. Therefore, elections to different Bar Associations in the State can also be held by maintaining social and physical distance on the basis of valid voter list. It is argued that all the Bar Associations of the State are affiliated to the OSBC only for a limited purpose. Functioning of the Bar Associations in the State is governed by their own bye-laws. Neither the OSBC nor the BCI has any right to supersede the byelaws of the Associations, which have been registered under the Societies Registration Act, 1860. The direction of the BCI and OSBC to form Interim Committees has no statutory backing; particularly when the term of the elected body of the BCI itself has come to an end. This tantamount to interference in the autonomy of the Bar Associations.

8. Mr. A.P. Bose, learned counsel appearing for the BCI submits that the present writ petition has been filed by a group of advocates who claim to have formed an Association. The petitioner-Association has no *locus standi* to file this writ petition as it is not recognized either by the BCI or the OSBC.

No recognized Bar Association of the State has questioned the postponement of the elections. Therefore, the petitioner association has no right to question the constitution/ formation of the Interim Committees. It is submitted that this decision has been taken under compelling circumstances because regular elections cannot be held without violating the mandatory guidelines/directions with regard to maintenance of social distancing issued by the Government of India and Government of Odisha as a precautionary measure to contain the spread of pandemic Coronavirus.

9. We have given our anxious consideration to rival submissions and perused the material on record.

10. The object of the impugned direction issued by the BCI is best summarized in the subject heading of the guidelines dated 14.04.2020, which reads thus:-

> *"Sub.: Direction to all Bar Associations of Country, where elections are due, and/or where terms/tenure of present office bearers have expired, to stay all/any election or election process, campaigning or to resort to any means which leads to violation of norms of social distancing and leads to a gathering, in order to be able to assist each other and the entire Nation to overcome the pandemic of Corona Virus (Covid-19) and to emerge safely out of the same by resorting to social and physical distancing and by taking adequate safety precautions, and further directions on forming Interim Committees of Senior/experienced members of the Bar in such Bar Associations where elections are due, till further directions."*

11. In order to combat the global pandemic Coronavirus (COVID-19), the Union Government by invoking the provisions of the National Disaster Management Act imposed the nationwide lockdown; in the first phase from 25.03.2020 to 14.04.2020 and in second phase from 15.04.2020 to 03.05.2020. We are presently passing through the third phase of lockdown. The State Government of Odisha vide notification date 13th March, 2020 invoked the Epidemic Diseases Act, 1897 and the Code of Criminal Procedure to declare Coronavirus (COVID-19) a disaster. It also imposed restrictions on all kind of congregations so as to ensure "social distancing" for containing the spread of COVID-19. In fact, the Government of Odisha vide notification dated 8th April, 2020 issued Ordinance No.1 of 2020 for incorporating state amendments in the Epidemic Diseases Act, 1897 to make contravention or disobedience of any order or regulation made thereunder an offence punishable with imprisonment for a term which may extend to two years or with fine which may extend up to ten thousand rupees or with both.

12. Holding of such elections of the Bar Association located at different divisional, district, sub-division and Tehsil head quarters of the State of Odisha, would not be possible, without risking the breach of the instructions issued by the Government of India and Government of the State. This is bound to violate the condition of staying inside home, especially in area where members of such Associations are residing in Red Zones and Containment Zones. Furthermore, this will violate the requirement of maintaining social and physical distance as it might attract congregation of large number of advocates at different places throughout the State. Reference in particular may be made the Order No.40-3/2020-DM-I(A) of Government of India, Ministry of Home Affairs, New Delhi dated 1st May, 2020 containing consolidated guidelines on the measures to be taken by Ministries/Departments of Government of India, State/Union Territory Governments and State/Union Territory Authorities for containment of COVID-19 epidemic in the country. Enforcement of measures enumerated in those guidelines are intended to put in place a slew of bans, curbs and restrictions so as to minimize the societal effect of the pandemic Coronavirus. Accordingly to these guidelines, all the Government offices will function with officers of the level of Deputy Secretary and above to the extent of 100% strength and the remaining staff only upto 33%. The private offices are to remain closed barring few exceptions specifically incorporated therein, which too have been permitted with minimum number of employees and others have to work from home. While the medical establishment, hospital and other medicals are allowed to function, all commercial and private establishment have been closed barring few exception. Similarly, all industrial establishment except those specified under the guidelines have been ordained to remain closed. All transportation services other than the hospitality shall also been closed. According to these guidelines, all schools, colleges, education/training/coaching institutions, will remain closed and all religious places/places of worship will also be closed for public and no religious congregations will be permitted without any exception. The activities prohibited under sub-clause ix of Clause 4 of the guidelines read as under:-

> *"ix. All social/political/sports/entertainment/academic/cultural/religious functions and other gatherings."*

Infraction of any of the above measures introduced for containing Coronavirus, especially about maintaining social distancing, as advised by the Health Department provided for penal provisions in Clause 16, which reads as under:

"16. Penal provisions.

Any person violating these lockdown measures and the National Directives for COVID-19 Management will be liable to be proceeded against as per the provisions of section 51 to 60 of the Disaster Management Act, 2005, besides legal action under Sec.188 of the IPC, and other legal provisions as applicable…."

13. In view of above, the only way-out in the present circumstances could have been to postpone the elections. But at the same time, considering that the tenure of elected bodies of most of the Bar Associations has come to an end, the BCI required for constitution of the Interim Committees with varying numbers, depending on the voter strength of the Bar Associations, in our view, rightly. No doubt, the BCI in their communication dated 14.04.2020 required the various Bar Associations to form the Interim Committees unanimously or by way of majority, if required, through teleconference, whatsapp groups, social media, nominate a Committee of 3 senior members with experience of managing the affairs of the Bar. But the OSBC has suggested a different system to form such Interim Committees, however, by more or less adhering to the spirit of the decision of the BCI. Given the fact that the petitioner is questioning the competence of both the BCI and the OSBC, in the prevailing circumstances, the methodology devised by the OSBC appears to be more conducive to the requirement of maintaining social and physical distancing and preventing congregation of the group of advocates at different places throughout the width and length of the State of Odisha.

14. The Special Committee of the OSBC, headed by the Advocate General of the State, in their extra-ordinary meeting held on 04.05.2020, resolved thus:-

"Keeping in view the aforesaid aspects and considering the spirit of the letter of Bar Council of India dtd. 14.04.2020, issued to all State Bar Councils this committee unanimously resolved as follows:-

1. The Executive Body of the Bar Association elected for the year 2019-2020 shall nominate members of the Interim Committee from amongst the voter of their respective Bar Association latest by 20th May, 2020 (20.05.2020), failing which the State Bar Council shall constitute the Interim Committee adhering broadly to the said guidelines in the best interest of the respective bar associations within a period of seven days.

2. The Bar Associations having voter strength up to one hundred shall have the Interim Committee consisting of three (3) members having experience in the management of Bar Association. Out of the three, one must be ex-president and two ex-secretaries.

3. The Bar Associations having voter strength of 101 to 500 shall have Interim Committee consisting of 5 (five) members including 2 (two) ex-presidents and 3 (three) ex-secretaries.

4. The Bar Associations having voter strength of 501 to 1000 shall have Interim Committee consisting of 7 members including 3 (three) ex-presidents and 4 (four) ex-secretaries.

5. The Bar Associations having voter strength of 1001 to 3000 shall have Interim Committee consisting of 9 (nine) members including 4 (four) ex-presidents and 5 (five) ex-secretaries.

6. The Bar Associations having voter strength of 3001 and above shall have Interim Committee consisting of 11 (eleven) members including 5 (five) ex-presidents and 6 (six) ex-secretaries.

It is made clear that no member voter who is not in regular active practice and thereby is not in a position to actively participate in the functioning and management of affairs of the Bar Association shall be nominated as a member of the Interim Committee of the Bar Association.

7. The members of the Interim Committee shall be nominated by the continuing Executive Body unanimously or by majority, in present of the Election Officer who is appointed by the General Body of the Bar Association to conduct the election of the Office Bearer for the year 2020-2021.

8. In case of any Bar Association whose any of the required numbers of ex-presidents and ex-secretaries are not available in such cases senior voter members of the Bar shall be nominated to fill up such membership of the Interim Committee.

9. The senior most ex-president nominated as member of the Interim Committee shall be the chairman of the committee & he/she shall be vested with powers & functions of the president of the Bar Association as provided in its Bye-Law.

10. The Interim Committee in its 1st Meeting shall nominate one of its members as secretary of the committee unanimously or by majority. The secretary shall be vested with the powers and functions of the secretary of the Bar Association as provided in its Bye-Law.

11. If there is any provision in the Bye-law of the Bar Association for operation of the bank account by any other office bearer like treasurer the Interim Committee shall nominate one of its member as such office bearer unanimously or by majority.

12. The Election Officer shall intimate the name, address and mobile number of the chairman and members of the Interim Committee to the Secretary Odisha State Bar Council immediately after the constitution of the Interim Committee.

13. The Chairman immediately after the 1st meeting of the Interim Committee shall intimate the name of the secretary and other office bearers to the Secretary, Odisha State Bar Council as soon as possible."

15. This writ petition has been filed seeking issuance an unusual kind of writ of Mandamus. We have to however consider whether despite the argument of the petitioner with regard to the lack of competence of BCI and OSBC, should this Court necessarily issue the writ prayed for in the circumstances that are prevailing in the country? This Court is cognizant of the view taken by two High Courts, namely Madhya Pradesh High Court in ***R.N. Tiwari v. State Bar Council of M.P. and others,*** AIR 1995 MP 137 and in ***Bar Association Chachoda, Dist… v. State Bar Council of M.P.,*** passed in W.P.No.750 of 2017 on 09.01.2018 and Allahabad High Court in ***Janpad Diwani Evam Faujdari Bar.. v. Bar Council of U.P. and others,*** in Writ Case No.42417 of 2015 dated 27.11.2015, holding that the State Bar Council does not have any legal competence to interfere with the election of the Bar Associations. But priority at this point of time is not the holding of election of the Bar Associations but to ensure containment of the deadly Coronavirus. Elections can take place only when normalcy is restored and till that happens, an interim arrangement to run the affairs of the Bar Associations has to be in place. Therefore, whatever methodology has been evolved by the OSBC has to be allowed to stand, regardless of whether it is competent to do so. In any case, the petitioner has failed to suggest a better system to provide for an interim arrangement for such interregnum. In this kind of extra ordinary situation, contention of the learned counsel for the petitioner for directing election of the different Bar Associations of the State, by maintaining social and physical distance, can hardly be countenanced. This Court in view of prevailing pandemic Coronavirus all over, does not deem it appropriate to either direct or permit the Bar Associations, to hold their elections during the period of Lock-down.

16. It is trite that remedy provided under Article 226 of the Constitution of India is a discretionary remedy. The High Court has always the discretion to refuse to grant such remedy even though a legal provision might have been infringed, the only exception being the enforcement of any fundamental right. Here it may be pertinent to note that the High Court has been conferred with wider discretion in the writ jurisdiction that it exercises under Article 226 of the Constitution of India vis-a-vis the Supreme Court under Article 32. While the right to move the High Court under Article 226 is a constitutional right but unlike Article 32, there is no constitutional guarantee attached to it. The High Court may therefore in its discretion refuse to issue a writ even if there is infraction of any law. Since the High Court has been conferred with discretion, it is not expected to use discretion without any justification. The

High Court has to be always conscious of the responsibility attached to such high discretion confided in it by the Constitution which has to be used in a most judicial manner.

17. Law is that writ is a discretionary remedy and there are certain sound reasons behind this rule. In the case of an appeal against the decision of inferior Court, where such decision can be substituted by the appellate authority, the High Court while exercising the power of judicial review in writ jurisdiction under Article 226 of the Constitution of India is mainly concerned with the question whether action or order under attack should be allowed to stand or not. The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches, on a matter, which is authorized by law to decide, a conclusion which is correct in the eyes of the law, as held by the Hon'ble Supreme Court in ***H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal and others v. M/s. Gopi Nath and Sons and others,*** 1992 Supp. (2) SCC 312, in para 8 of the report thus:-

> *"8. xxx.Judicial review, it is trite, is not directed against the decision but is confined to the decision making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches, on a matter which is authorized by law to decide, a conclusion which is correct in the eyes of the Court…."*

18. The High Court under Article 226 of the Constitution of India need not grant relief merely because the petitioner approaches it and makes out a legal point. We may in this connection refer to the law propounded by the Supreme Court speaking through Vivian Bose J. in one of the earliest judgments on this subject, in a leading case of ***Sangram Singh v. Election Tribunal and another,*** reported in AIR 1955 SC 425. Therein the Supreme Court delineated the scope of interference by the High Courts in its power under Article 226 of the Constitution of India in the following terms:-

> *"14. That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued , or is likely to ensue. They will not allow*

themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case."

19. The Supreme Court in ***Gadde Venkateswara Rao v. Government of Andhra Pradesh and others,*** reported in AIR 1966 SC 828, held that the High Court rightly refused to exercise its extraordinary discretionary power despite the fact that the Government had no power under Section 72 of the Andhra Pradesh Panchayat Samitis and Zilla Parishads Act (for short, 'the Act') to review an order made under Section 62 of the said Act and also because it did not give notice to the representatives of Dharmajigudem village. The Supreme Court held that had the High Court quashed the order of Government, it would have restored an another illegal order and therefore upheld the decision of High Court in not exercising its extraordinary discretionary jurisdiction.

20. The Supreme Court in ***Ramniklal N. Bhutta and another v. State of Maharashtra and others,*** (1997) 1 SCC 134, while holding that the exercise of power under Article 226 of the Constitution of India by the High Court is a discretionary held that:

*"*10. xxx *The power under Article 226 is discretionary. It will be exercised only in furtherance of interests of justice and not merely on the making out of a legal point."*

The Supreme Court in that case further held that "the courts have to weigh the public interest vis-a-vis the private interest while exercising the power under Article 226─indeed any of their discretionary powers."

21. In this context, it is appropriate to reproduce paragraphs-15 and 17 of decisions of the Supreme Court in ***M.C. Mehta v. Union of India & ors.,*** (1999) 6 SCC 237.

"15. It is true that whenever there is a clear violation of the principles of natural justice, the courts can be approached for a declaration that the order is void or for setting aside the same. Here the parties have approached this Court because the orders of the Department were consequential to the orders of this Court. The question however is whether the Court in exercise of its discretion under Article 32 or Article 226 can refuse to exercise discretion on facts or on the ground that no de facto prejudice is established. On the facts of this case, can this Court not take into

consideration the fact that any such declaration regarding the 10-3-1999 order will restore an earlier order dated 30-7-1997 in favour of Bharat Petroleum Corporation which has also been passed without notice to HPCL and that if the order dated 10-3-1999 is set aside as being in breach of natural justice, Bharat Petroleum will be getting two plots rather than one for which it has no right after the passing of the latter order of this Court dated 7- 4-1998?

xxx xxx xxx

17..... The above case is a clear authority for the proposition that it is not always necessary for the Court to strike down an order merely because the order has been passed against the petitioner in breach of natural justice. The Court can under Article 32 or Article 226 refuse to exercise its discretion of striking down the order if such striking down will result in restoration of another order passed earlier in favour of the petitioner and against the opposite party, in violation of the principles of natural justice or is otherwise not in accordance with law."

22. It is trite that this Court does not issue writ in exercise of its jurisdiction under Article 226 of the Constitution of India, as a matter of course. This being the Court of equity, it will not issue any such writ, which may give rise to inequitable results. In other words, the relief to be granted in exercise of such power should be an equitable one. Writ of Mandamus is a high discretionary remedy as the aggrieved person has to not only establish the infraction of a statutory provision of law but is also required to further establish that such infraction has resulted in invasion of a judicially enforceable right. Mere infraction of a statutory provision would not automatically give rise to a cause for issuing a writ of Mandamus. What flaws from this discussion of law, is that a writ court can even decline to grant the relief in the given facts of the case even if legal flaw in the impugned decision is made out if the writ prayed for is likely to result in another illegality and if the substantial justice has otherwise been done.

23. The Supreme Court in ***State of Maharashtra and others v. Prabhu,*** (1994) 2 SCC 481 while considering the scope of equity jurisdiction of the High Court under Article 226 of the Constitution of India held thus:-

"5. ..... It is the responsibility of the High Court as custodian of the Constitution to maintain the social balance by interfering where necessary for sake of justice and refusing to interfere where it is against the social interest and public good."

24. The Supreme Court, relying on the above judgment in *State of Maharashtra* (supra) observed hereunder in ***Ritesh Tewari and another v. State of Uttar Pradesh and others,*** (2010) 10 SCC 677:-

> *"26. The power under Article 226 of the Constitution is discretionary and supervisory in nature. It is not issued merely because it is lawful to do so. The extraordinary power in the writ jurisdiction does not exist to set right mere errors of law which do not occasion any substantial injustice. A writ can be issued only in case of a grave miscarriage of justice or where there has been a flagrant violation of law. The writ court has not only to protect a person from being subjected to a violation of law but also to advance justice and not to thwart it. The Constitution does not place any fetter on the power of the extraordinary jurisdiction but leaves it to the discretion of the court. However, being that the power is discretionary, the court has to balance competing interests, keeping in mind that the interests of justice and public interest coalesce generally. A court of equity, when exercising its equitable jurisdiction must act so as to prevent perpetration of a legal fraud and promote good faith and equity. An order in equity is one which is equitable to all the parties concerned."*

25. Relying on the judgment in *Sangram Singh* (supra), the Supreme Court in ***Eastern Coalfields Limited and others v. Bajrangi Rabidas,*** (2014) 13 SCC 681, observed thus:-

> *"It is well settled in law that jurisdiction of the High Court under Article 226 of the Constitution is equitable and discretionary. The power of the High Court is required to be exercised "to reach injustice wherever it is found". In Sangram Singh v. Election Tribunal [AIR 1955 SC 425 : (1955) 2 SCR 1], it has been observed that jurisdiction under Article 226 of the Constitution is not to be exercised whenever there is an error of law. The powers are purely discretionary and though no limits can be placed upon that discretion, it must be exercised along recognised lines and not arbitrarily and one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in such class of cases unless substantial injustice has ensued or is likely to ensue. That apart, the High Court while exercising the jurisdiction under Article 226 of the Constitution can always take cognizance of the entire facts and circumstances and pass appropriate directions to balance the justice. The jurisdiction being extraordinary it is required to be exercised keeping in mind the principles of equity. It is a well-known principle that one of the ends of equity is to promote honesty and fair play. If a person has taken an undue advantage the court in its extraordinary jurisdiction would be within its domain to deny the discretionary relief."*

26. As would be seen from the afore-extracted part of the resolution of the OSBC, the Bar Associations having strength upto 100 members, have been required to constitute an Interim Committee with 3 members, with 1 ex-President and 2 ex-Secretaries. The Bar Associations having strength of 101 to 500 members, have been required to constitute an Interim Committee with 5 members, with 2 ex-Presidents and 3 ex-Secretaries. The Bar Associations having strength of 501 to 1000 members, have been required to constitute an Interim Committee with 7 members, with 3 ex-Presidents and 4 ex-

Secretaries. The Bar Associations having strength of 1001 to 3000 members, have been required to constitute an Interim Committee with 9 members, with 4 ex-Presidents and 5 ex-Secretaries. The Bar Associations having strength of more than 3000 members, have been required to constitute an Interim Committee with 11 members, with 5 ex-Presidents and 6 ex-Secretaries. It has been further required that the Interim Committee shall be nominated by the existing Executive Body unanimously or by majority. The senior most ex-President nominated as member of the Interim Committee shall be the Chairman of the Committee. The Interim Committee in its first meeting shall unanimously or by majority, nominate one of its members as its Secretary.

Aforementioned criterion laid down by the OSBC appears to be quite reasonable. It goes without saying that all the ex-Presidents and ex-Secretaries of the Bar Associations at one point of time were elected office bearers of such Associations by popular vote. Therefore, having Interim Committee comprising of such ex-Presidents and ex-Secretaries would in the prevailing circumstances be the best way to ensure representative character of such interim body.

27. What therefore can be culled out from the treasure trove of the above referred to precedents is that besides being discretionary, the remedy of writ jurisdiction under Article 226 of the Constitution of India is an equitable remedy, for the writ court exercises equity jurisdiction. Although it is true that scope of power of writ court to undertake judicial review of administrative actions is very wide, but the exercises of such jurisdiction by the Court is always subject to self-imposed restrains. It is the bounden duty of writ court to ensure justice and equity but it is also duty bound to see that extraordinary jurisdiction under Article 226 of the Constitution of India is exercised with great caution and only in furtherance of public interest or to set right grave illegality. In a case like the present one, the writ court may refuse to grant relief even when there is breach of statutory prescription.

28. In view of above discussion, we do not find any reason to interfere with the present interim arrangement made by the OSBC as per the decision taken by the BCI. The writ petition is therefore dismissed.

As Lock-down period is continuing for COVID-19, learned counsel for the petitioner may utilize the soft copy of this judgment available in the High Court's website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587, dated 25.03.2020.

2020 (II) ILR - CUT- 15

MOHAMMAD RAFIQ, C. J & CHITTA RANJAN DASH, J.

WRIT PETITION (CIVIL) NO.11977 OF 2020

MAHENDRA KUMAR PARIDA .....Petitioner

.Vs.

STATE OF ODISHA .....Respondent

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition in the nature of PIL challenging the decision of the State Govt., making Aadhaar card, the only mode of identification for registration of migrant workers during COVID-19 pandemic period – Prayer to direct the State to accept other ID proofs, such as Voter ID, Ration Card, MGNREGS ID Card etc. and in absence of any of them, the identification by the Sarpanch of Gram Panchyayat concerned attesting the identity of such migrant labourers, as valid proof for registration as an alternate to Aadhaar Card for registration in COVID-19 Odisha State Portal – Prayer accepted – Held, possession of Aadhaar Card and its number cannot be the sole criteria for registration of any migrant labourer and any other citizens entering the State of Odisha for the purpose of registration with State Portal or with the Gram Panchayat/Urban Local Bodies. (Para 10)

Case Laws Relied on and Referred to :-

1. (2019) 1 SCC 1 : K.S. Puttaswamy (retired) & Anr. .Vs. Union of India & Anr.

For Petitioner(s) : Mr. Ishwar Mohanty.
For Respondent(s) : Mr. Ashok Kumar Parija, (Advocate General)

JUDGMENT Date of Judgment **:** 14.05.2020

PER: MOHAMMAD RAFIQ, C.J.

This writ petition by way of Public Interest Litigation has been filed by Mahendra Kumar Parida-petitioner questioning the decision of the Government of Odisha to consider Aadhar Card as the only proof of identification of the migrant workers and other people in the COVID-19 Odisha State Portal and offline forms available at Gram Panchayats or Urban Local Bodies for the purpose of registration.

2. Prayer has been made to direct the respondent-State to accept other ID proofs, such as Voter ID, Ration Card, MGNREGS ID Card etc. and in absence of any of them, the identification by the Sarpanch of Gram Panchyayat concerned attesting the identity of such migrant labourers, as

valid proof for registration as an alternate to Aadhaar Card for registration in COVID-19 Odisha State Portal.

3. Mr. Ishwar Mohanty, learned counsel for the petitioner has argued that the respondent-State at the initiative of Union of India during the continuation of Lock-down 3 in the light of pandemic COVID-19 has taken a laudable decision to bring back several lakhs of Odia migrant labourers from other parts of the country to the State. It has for this purpose made an online portal-named COVID-19 Odisha State Portal (for short "the State Portal"), for registration of such returnees into the State. Simultaneously, forms have been made available at the Gram Panchayat Offices from where the relatives of such migrant labourers can procure and register them at the Panchayat Offices. Registration by either of the modes mandatorily requires Aadhaar Card with its number of the person willing to register as the only proof of identification. Those who are unable to submit the Aadhaar number would not be registered on the portal, thus depriving him/her from entering the State.

4. Referring to Section 7 of the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 (for short 'the Aadhaar Act'), learned counsel for the petitioner submitted that Aadhaar number can be used only for the purpose of establishing identity of individual for receipt of any such subsidy, benefit or service, which are incurred on the Consolidated Fund of India. Even the proviso to section 7 of the Aadhaar Act stipulates that if Aadhaar number is not assigned to an individual, then alternative and viable means of identification shall be offered to the individual for delivery of the subsidy, benefit or service. The registration process in the present case is aimed at regulating the entry of stranded migrant labourers and other persons who are willing to enter the State of Odisha. It has therefore no nexus with any of the stated purposes enumerated under Section 7 of the Aadhaar Act.

5. Learned counsel for the petitioner in support of his argument has relied on the decision of the Supreme Court in the case of ***K.S. Puttaswamy (retired) and another v. Union of India and another,*** (2019) 1 SCC 1 and argued that the majority opinion therein while interpreting the "benefits" and "services" categorically held that the scope is not to be unduly expanded thereby widening the net of Aadhaar, where it is not permitted otherwise.

6. Learned counsel for the petitioner has also argued that every person including those who are permanent native of the State of Odisha, being citizens of the country, have fundamental right to reside and settle in any part of India guaranteed under Article 19(1)(d) and (e) of the Constitution of India. Non-furnishing of Aadhaar number cannot be a criteria to deny them entry into the State vis-à-vis this action is only illegally and arbitrary.

7. Looking to the significance of the issue and the urgency of the situation, this Court, when the matter was listed on 12th of May, 2020, while issuing notice to the respondent-State, called upon the learned Advocate General to seek instructions of the State Government as to why, apart from Aadhaar Card, the other documents, such as Voter ID Card, Ration Card, MGNREGS ID Card or any other documents, may not also be additionally allowed to be used for the purpose of registration of the migrant labourers and others entering the State of Odisha for registration, on the State Portal for online, as well as offline on forms available at various Gram Panchayats and other Urban Local Bodies of the State of Odisha.

8. The State Government has filed its counter affidavit to the writ petition stating that after announcement of Lock-down, many migrant labourers and Odia travelers stranded in other States of the country have requested Government of Odisha to bring them back and to make such necessary arrangements, as required. In this regard, Government of Odisha launched the registration process for such migrants. It was also declared by Government of Odisha that the migrant workers will also have to mandatorily undergo quarantine for a specified period. Launch of such portal for registering these stranded people was intended to get a measure of authentic duplication-free citizen data so that the travel plans, quarantine/medical facilities and other infrastructures can be planned by the State of Odisha. The sole purpose was to use this portal as a planning tool. This portal was never made as a planning tool. Registration on this portal was never made a precondition for entry into the State of Odisha.

It is submitted that the aforesaid purpose is clearly mentioned in the Frequently Asked Questions (for short 'FAQs') section of the State Portal, appended hereto as Annexure-1, which states that "in order to prevent the spread of the COVID-19 pandemic, all the persons returning to Odisha will have to undergo mandatory 14-days quarantine as a precautionary measure. Government will be creating quarantine facilities in the gram Panchayats and Urban Local Body areas. The registration is required for the Government to make the required arrangements for the Quarantine.

It is further submitted Aadhaar number is not mandatory for entry into the State of Odisha. The Aadhaar number collected during registration of migrant was not only a proof of identity but was primarily used to avoid duplication in registration process. The intention of the pre-registration is not to disallow anyone to come into Odisha, if the person has not pre-registered but for purpose of planning for ensuring that Odisha government is able to protect its people from Covid-19 in the best possible manner.

It is further submitted that people travelling to Odisha have not been denied entry into the state on the grounds of non-registration in this portal. It can be seen that many persons have come to Odisha, who were not registered at all. The details are given in Annexure-B and Annexure-C which gives sample data of the persons who have returned to Odisha during this process in trains, buses and private vehicles. It clearly shows that people who were not registered have also been allowed entry and are being treated at par.

9. Learned Advocate General submitted that apart from Aadhaar Card, the State Government has allowed various other documents to be used for the purpose of registration both online and offline, of the migrant labourers and others entering the State of Odisha during the period of Lock-down and therefore the apprehension of the petitioner is unfounded. Annexure-D to the counter affidavit filed by the State specifies several other documents which can be used for the purpose of registration.

10. We are inclined to uphold the argument that possession of Aadhaar Card and its number cannot be the sole criteria for registration of any migrant labourer and any other citizens entering the State of Odisha for the purpose of registration with State Portal or with the Gram Panchayat/Urban Local Bodies. We may in this connection, usefully refer to the following observations of the Constitutional Bench of the Supreme Court in ***K.S. Puttaswamy*** (supra).

> *"376. Another facet which needs examination at this stage is the meaning that is to be assigned to the expression "benefits" occurring in Section 7 of the Aadhaar Act, along with "subsidies" and "services". It was argued that the expression "benefits" is very loose and wide and the respondents may attempt to bring within its sweep any and every kind of governmental activity in the name of welfare of communities, which would result in making the requirement of Aadhaar virtually mandatory. It was pointed out that by issuing various circulars the Government has already brought within the sweep of Section 7, almost 139 such subsidies, services and benefits.*

377. No doubt, the Government cannot take umbrage under the aforesaid provision to enlarge the scope of subsidies, services and benefits. "Benefits" should be such which are in the nature of welfare schemes for which resources are to be drawn from the Consolidated Fund of India."

The majority opinion finally concluded the above issue at para 511 as under:

*"**511.13.** As far as subsidies, services and benefits are concerned, their scope is not to be unduly expanded thereby widening the net of Aadhaar, where it is not permitted otherwise. In this respect, it is held as under:*

***511.13.1.** "Benefits" and "services" as mentioned in Section 7 should be those which have the colour of some kind of subsidies, etc. namely welfare schemes of the Government whereby Government is doling out such benefits which are targeted at a particular deprived class*

***511.13.2.** It would cover only those "benefits", etc. the expenditure thereof has to be drawn from the Consolidated Fund of India."*

11. The State Government has now clarified this position in their counter affidavit that it has now incorporated various other documents, alongside the Aadhaar Card, as the basis of such registration, which are enumerated in Annexure-D thereto. Various indicated documents therein are as follows:

"Aadhaar Card

Address Card with photo issued by Deptt. of Posts, Govt. of India

Arms License

Cast and Domicile Certificate with photo issued by State Govt.

Certificate of address having Photo issued by MP/MLA/Group-A Gazetted Officer

Certificate of address with photo from Govt. recognized educational institutions

Certificate of photo identity issued by Village Panchayat head

CGHS/ECHS Card

Current passbook of Post Office / any scheduled bank having photo

Driving License L

Election Commission ID Card

Freedom Fighter Card having photo

Income Tax PAN Card

Kissan Passbook having photo

Passport

Pensioner Card having photo L

Photo Credit Card

Photo Identify Card (of Central Govt./PSU or State Govt./PSU only)

Photo Identity Card issued by Govt. recognized educational institutions."

12. In view of the above, this writ petition is disposed of directing the respondent-State Authorities and Collectors of all the districts of the State to act upon any of the aforementioned documents for the purpose of registration of migrant labourers and other travelling to State of Odisha during the Lock-down period imposed on account of spread of pandemic Coronavirus (COVID-19).

13. With the above observation, the writ petition is accordingly disposed of.

As Lock-down period is continuing for COVID-19, learned counsel for the petitioner may utilize the soft copy of this judgment available in the High Court's official website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587 dated 25.03.2020.

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2020 (II) ILR - CUT- 20

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

W.A. NO. 232 OF 2019

PRADEEPTA MOHANTY & ORS. …….Appellants

.Vs.

ROURKELA DEVELOPMENT AUTHORITY & ORS. …….Respondents

LETTERS PATENT APPEAL – Natural justice – Order in the writ petition passed in absence of the affected persons as parties – Effect of – Held, the person affected must have the reasonable opportunity of being heard – Order not sustainable.

"Coming to the second point, it is held in the case of ***Swedeshi Cotton Mills -Vrs.- Union of India reported in (1981) 1 Supreme Court Cases 664*** *that rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But there are two fundamental maxims of natural justice viz. (i) audi alteram partem and (ii) nemo judex in re sua. The audi alteram partemrule has many facets, two of*

them being (a) notice of the case to be met; and (b) opportunity to explain. This rule cannot be sacrificed at the altar of administrative convenience or celerity. The general principle as distinguished from an absolute rule of uniform application seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely, if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing, shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyze the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The Court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But, the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise.

There is no dispute that by passing of the impugned common order dated 11.04.2018, the appellants were affected and the authority issued letters dated 15.02.2019 cancelling the allotment of shop rooms in their favour vide Annexure-6 series and therefore, we are of the humble view that the appellants were necessary parties to the writ petitions. Neither they were made parties nor was any opportunity of hearing provided to them either during the hearing of the writ petitions or at the time of issuance of letters of cancellation of allotment of shop rooms which is per se illegal." *(Para 8)*

Case Laws Relied on and Referred to :-

1. A.I.R. 2000 S.C. 3266 : M.S. Jayaraj .Vs. Commissioner of Excise, Kerala.
2. A.I.R. 1976 S.C. 578 : Jasbhai Motibhai Desai .Vs. Roshan Kumar.
3. A.I.R. 1971 S.C. 246 : The Nagar Rice & Flour Mills .Vs. N. Teekappa Gowda.
4. (1981) 1 SCC 664 : Swedeshi Cotton Mills .Vs. Union of India.

For Appellants : Mr. Asok Mohanty Sr.Adv.)
For Respondents : Mr. D.K. Mohapatra, Mr. Pravakar Behera
S.C. Pradhan

ORDER Date of Hearing & Order: 13.02.2020

BY THE BENCH:

The appellants have filed this writ appeal challenging the impugned common order dated 11.04.2018 passed by the learned Single Judge in O.J.C. Nos. 4859 of 2000 and 4860 of 2000 as well as to quash the letters of

cancellation of allotment of shop rooms dated 15.02.2019 vide Annexure-6 series issued by the Secretary, Rourkela Development Authority (Respondent no.2).

2. The respondent no.3 Santanu Hota filed O.J.C. No. 4859 of 2000 and the respondent no.4 Binod Kumar Sharma filed O.J.C. No. 4860 of 2000 praying for a direction to Rourkela Development Authority (hereafter 'RDA') to take urgent and immediate steps against the owners of the shop rooms situated in the ground floor of the bus terminal building at Gandhi Road, Rourkela, who were using those shop rooms as restaurants/hotels in gross violation of the terms and conditions of the licence agreement and to ensure that none of the shop owners in the ground floor of the bus terminal building use their shops for any other purpose except for which the same have been allotted.

The grievance of the writ petitioners is that RDA without enforcing the terms and conditions with regard to the nature of use of the shop rooms situated at bus terminal building, Rourkela as specified in its brochure, permitted illegal establishment and operation of hotel/restaurant in the ground floor of the building, thereby causing financial loss and hardship to them. Pursuant to an advertisement, the writ petitioners applied for allotment of commercial space in the first floor of the bus terminal building, Rourkela for running a restaurant/hotel as per the terms and conditions mentioned in the brochure, wherein it was specifically mentioned that all the rooms or space in the ground floor of the bus terminal building at Rourkela would be given for use as shops and the first floor of such building to be used for commercial space and for running of two restaurants, one vegetarian and the other non-vegetarian. It is the further case of the writ petitioners that RDA issued letters of allotment in their favour intimating them regarding the provisional allotment of restaurant at Gandhi Road in the said bus terminal building. The writ petitioners were asked to make a security deposit of Rs.1,00,000/- (rupees one lakh) out of which they had already deposited Rs.25,000/- (rupees twenty five thousand) as EMD and was required to pay the balance Rs.75,000/- (rupees seventy five thousand) in favour of RDA. The rent for the floor space allotted to the writ petitioners were fixed at Rs.2.75 per square feet. This allotment letters were issued in favour of the writ petitioners in the month of May 1994. The writ petitioners were required to enter into an agreement of tenancy with RDA and accordingly, the writ petitioners executed agreements of tenancy for the tenanted premises measuring 850 sq.

ft. in size including dining hall, pantry and store room and the writ petitioners were required to pay a monthly rent of Rs.2,338/- only to RDA and were also required to pay Rs.14,082/- only, being the equivalent rent for six months at the time of taking delivery of possession which amount was to be retained by the RDA as additional security deposit and necessary tenancy agreement was entered into between the parties. The writ petitioners entered into possession of the tenanted premises measuring 850 sq. ft., including dining hall, pantry and store room situated in the first floor of the terminal building for running a specialized vegetarian food -cum- catering centre. The writ petitioners continued to occupy the tenanted premises and used the same as a vegetarian/ non-vegetarian restaurant in the first floor of the said building as per the master plan of the building and in terms of usage as given in the brochure issued by the RDA. The grievance of the writ petitioners is that some of the owners of the shop rooms situated in the ground floor of the building, though had been allotted the said shop rooms for specific purposes of running of different types of shops, viz. grocery, stationary etc. but they had illegally converted the said shop rooms to restaurants and started running such restaurants in the shop rooms allotted to them in the ground floor of the building causing unhealthy competition with the restaurants of the writ petitioners and putting them to serious financial loss as the writ petitioners had been specifically allotted the tenanted premises and the rent had been fixed for such premises at a higher rate of Rs.2.75 per sq. ft. and also a higher security deposit and advance rent had been made and further the writ petitioners were required to make huge investment towards furnishing and interior decoration for making it habitable restaurants. The writ petitioners raised complaints before RDA against such illegal running of restaurants in the shop rooms situated in the ground floor of the building in gross violation of the nature of use for which such shop rooms had been allotted to the shop owners and/or tenants and after repeated complaints and requests by the writ petitioners and the other restaurant owners, the Secretary, RDA (respondent no.2) ultimately issued notices to such shop owners regarding cancellation of their allotments for having used the shop rooms as restaurants, in gross violation of the terms and conditions of the agreement and against the master plan and out-lay of the terminal building as detailed in the brochure. The shop owners were directed to handover physical occupation of the shop rooms to the officers of RDA within a specified time. Against such aforesaid cancellation of the shop rooms, the shop owners who had been using such shop rooms in violation of the terms of the agreement moved this Court. The shop owner namely Smt. Manjula Nayak was granted an interim order

against such cancellation of allotment in O.J.C. No.7412 of 1997 but thereafter since the said shop owner agreed to stop using her shop room as restaurant and further agreed to use the shop room according to the terms and conditions of the agreement and prayed for withdrawal of the writ application, the said writ application was disposed of as withdrawn as per order dated 05.08.1997. After withdrawal of the writ application, the Secretary, RDA (respondent no.2) directed the shop owners to give an undertaking by way of an affidavit that they shall abide by the terms and conditions of the agreement. Accordingly, all the shop owners filed undertakings by way of affidavits before the respondent no.2. In pursuance of such undertakings, the respondent no.2 issued a letter of revocation of cancellation of allotment in favour of the said shop owners indicating therein that the shop owners were required to deposit Rs.100/- towards revocation fee and Rs.3,000/- towards legal expenses and to execute fresh agreements in respect of their shop rooms to carry on business or trade according to the terms and conditions and were also required to deposit up-to-date licence fees. Pursuant to the undertakings filed by the shop owners by way of affidavits and after the deposit of renewal fees and expenses, RDA entered into fresh licence agreement with the shop owners with specific undertaking that the shops situated in the ground floor shall not be used as restaurant/hotel and on the basis of such undertaking, the shop owners were allowed to operate and run their business and after such revocation of cancellation letter, four shop rooms bearing nos. BT/29 to BT/32 were closed but even after submitting such undertaking by way of affidavit, the other shop rooms including three new shop rooms continued to use the said shop rooms as restaurant in gross violation of the terms and conditions of the agreement. Though the agreement of the tenancy/ licence agreement was entered into between RDA and the owners of shop rooms situated in the ground floor of the bus terminal building that the shop rooms are to be used for which they are meant and not for use for running restaurant/hotel, in spite of such undertakings given by the shop owners, nine numbers of shop rooms continued to use the same as restaurants in gross violation of the terms and conditions of the agreement of licence entered into between them with RDA. As the said shop rooms were not suitable for running of restaurants, the adjacent areas of such shop rooms were being made dirty on account of throwing of food packets and other residue and in spite of general complaints by the other shop owners and commercial complex, no action was taken by RDA against the shop owners. After such violation by the nine shop owners, the writ petitioners again filed complaint/representation before the respondent

no.2 against such violation of terms and conditions and against the loss suffered by them due to such illegal competition caused by unauthorized running of restaurant by the shop owners. In the said complaint/representation, the writ petitioners also expressed their financial inability to pay the monthly rent for their tenanted premises as their restaurants have been adversely affected because of running of cheap restaurants in the ground floor causing them irreparable financial loss and hardship. The writ petitioners requested the respondent no.2 to take immediate action to ensure that the said shop rooms are not put to unauthorized use of illegal running of restaurants and to ensure that no restaurant should run in any of the shop rooms in the ground floor of the building. Subsequently the writ petitioners repeatedly reminded and requested RDA to take immediate steps against those nine shop rooms which were causing irreparable financial loss to them but after repeated request and reminders, RDA did not take any effective steps or action against such illegal running of restaurants. The writ petitioners were served with show cause notices to give reply within seven days for alleged non-payment of arrear licence fee amounting to Rs.44,422/- which was for the period from 4/98 to 10/99. Pursuant to the aforesaid notice, the writ petitioners submitted their show cause before the respondent no.2 stating the reasons of their inability to deposit the monthly licence fee and that they have no intention of violating the terms and conditions and are ready and willing to pay the entire fee in installments and abide by all conditions subject to the condition that their grievances and complaints which are being made consistently since 1997 are to be looked into and to take urgent steps to stop such illegal running of restaurants by the shop owners in the ground floor and also to ensure that no restaurant is run or operated in such shop rooms in the ground floor of the building.

3. The learned Single Judge considering the submissions made by the respective sides, disposed of both the writ petitions as per the impugned common order observing, inter alia, that the authority had no occasion to change the mode of business involving the shop rooms allotted by virtue of advertisement Annexure-7 and having been done so at the cost of the public exchequer, the Court interfered with the action of RDA and further observed that the agreement involving the shop owners particularly the shops involved in changing the run of business would all stand invalid. It is further held that Rourkela Regional Improvement Trust or RDA in charge of the property has changed the type of business involving the shops during the pendency of the

writ petition. Accordingly, interfering with the action of the Rourkela Regional Improvement Trust or RDA, the Court directed to seek applications from the allottees intending to continue in the terms and conditions as per the advertisement vide Annexure-7 within fifteen days of receipt of the copy of order. It is further observed that in the event, there is no interest shown by the shop owners to run in the manner involving the advertisement, it would be open to RDA to cancel the allotment of the shop rooms involved therein and to go for fresh advertisement in respect of the shop rooms falling vacant in the process. It is further observed that there is no necessity of giving opportunity to the persons likely to be affected pursuant to the said order.

4. Mr. Asok Mohanty, learned Senior Advocate for the appellants challenging the impugned common order dated 11.04.2018 contended that the appellants were not parties in O.J.C. Nos.4859 of 2000 and 4860 of 2000 and therefore, they had no knowledge about the pendency of those writ petitions and the learned Single Judge passed the impugned order without hearing them. The respondent no.2 vide its letter no.1703(7) dated 08.05.2018 directed the appellants to file applications as per the order of this Court to continue their business in the shop rooms as per the terms and condition pursuant to the initial advertisement. It is further submitted by Mr. Mohanty that the appellants had been allotted with some shop rooms as per the terms and conditions pursuant to the initial advertisement. He further submitted that the appellants ascertained about the order of this Court and found that the same has been passed on the basis of the submission made by the writ petitioners as well as the opposite parties therein to the effect that the allottees had changed their nature of business in violation of the terms and conditions of the advertisement without referring to the permission letter granted by the authority. Therefore, the order of the learned Single Judge is liable to be set aside as the same has been passed without following the principles of nature justice. He argued that the appellants had not changed the nature of business on their own but it was done only after the written permission of the competent authority in the year 2004. He further submitted that pursuant to the letter dated 08.05.2018, they submitted their respective replies stating therein that till date they have been doing their business smoothly and therefore, RDA should have considered this aspect. He further submitted that the respondent no.2 did not communicate anything on their replies for which the appellants remained under the impression that their replies have been accepted. It is argued that the respondent no.2 did not consider the fact that the appellants were running their respective business as

per the permission granted in their favour. He brought to the notice of this Court that just before the order of cancellation, the respondent no.2 had executed an agreement with the appellant no.1. He further submitted that in the advertisement, it was specifically mentioned that in the ground floor, there will be a restaurant and other commercial space and there are eighteen numbers of shop rooms with a specification that shop rooms shall be used for the purpose of selling of variety of goods, coal drinks, snacks etc. He brought to the notice of this Court that the space specified for restaurant in the ground floor having an area of 2440 sq. ft. was partitioned by pucca wall by making fourteen shop rooms. Out of fourteen shop rooms, thirteen of shop rooms were allotted in favour of different allottees and one room was kept for the office purpose. He further submitted that the nature of business of the allottees has been changed with due permission of the authority and the said fact was not brought to the kind notice of the learned Single Judge during hearing of the writ petitions which amount to suppression of facts. He further submitted that in consequence of the impugned order dated 11.04.2018, the respondent no.2 has acted illegally and has passed the order of cancellation of the allotment of the shop rooms without even asking for a show cause reply as directed by the learned Single Judge and therefore, the orders of cancellation of the shop rooms are also liable to be set aside.

Mr. Pravakar Behera, learned counsel for the respondent No.4 supported the impugned order and contended that it is a reasonable one. He placed reliance in the case of **M.S. Jayaraj -Vrs.- Commissioner of Excise, Kerala reported in A.I.R. 2000 S.C. 3266** and contended that writ petitioners have got *locus standi* as the authority by permitting to change the nature of business in the shop rooms of the appellants allotted by virtue of advertisement Annexure-7 caused financial loss to the writ petitioners and their business activities were hampered.

Mr. D.K. Mohapatra, learned Counsel for RDA on the other hand submitted that the writ petitioners were defaulters and they were also utilizing their shops otherwise. It is further submitted that appellants changed their business after due permission and allotment of shop rooms in their favour was cancelled as per the impugned order.

5. It appears that the appellants have moved an application vide I.A. No.108 of 2020 for deletion of the name of respondent no.3 Santanu Hota from the cause list as the shop room of the said respondent was closed by

RDA and this Court vide order dated 07.02.2020 disposed of the aforesaid I.A. and directed to delete the name of respondent no.3 at their risks.

6. Adverting to the contentions raised by the learned counsel for the respective parties, the vital points which arise for consideration in this writ appeal are as follows:-

> **(i)** Whether the writ petitioners have got locus standi to challenge the change of nature of business activities of the appellants?
>
> **(ii)** When the impugned common order affected the business activities of the appellants including their livelihood, whether they were necessary parties to the writ petitions or not?

7. Coming to the first point for consideration, in the case of **Jasbhai Motibhai Desai -Vrs.- Roshan Kumar reported in A.I.R. 1976 S.C. 578**, it is held as follows:-

> "38. To distinguish such applicants from 'strangers', among them, some broad tests may be deduced from the conspectus made above. These tests are not absolute and ultimate. Their efficacy varies according to the circumstances of the case, including the statutory context in which the matter falls to be considered. These are: Whether the applicant is a person whose legal right has been infringed? Has he suffered a legal wrong or injury, in the sense, that his interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of? Is he a person who has suffered a legal grievance, a person "against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something? Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public? Was he entitled to object and be heard by the authority before it took the impugned action? If so, was he prejudicially affected in the exercise of that right by the act of usurpation of jurisdiction on the part of the authority? Is the statute, in the context of which the scope of the words "person aggrieved" is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community? Or is it a statute dealing with private rights of particular Individuals?
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> xxx xxx xxx xxx
>
> 46. Thus, in substance, the appellant's stand is that the setting up of a rival cinema house in the town will adversely affect his, monopolistic commercial interest, causing pecuniary harm and loss of business from competition. Such harm or loss is not wrongful in the eye of law, because it does not result in injury to a legal right or a legally protected interest, the business competition causing it being a lawful activity. Juridically, harm of this description is called damnum sine injuries, the term injuria being here used in its true sense of an act contrary to law. The reason

> why the law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to society at large.
>
> 47. In the light of the above discussion, it is demonstrably clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully affect his title to something. He has not been subjected to a legal wrong. He has suffered no legal grievance. He has no legal peg for a justiciable claim to hang on. Therefore he is not a 'person aggrieved' and has no locus standi to challenge the grant of the No Objection Certificate."

In the case of **The Nagar Rice & Flour Mills -Vrs.- N. Teekappa Gowda reported in A.I.R. 1971 S.C. 246**, it is held as follows:-

> "10. Section 8(3)(c) is merely regulatory: if it is not complied with the appellants may probably be exposed to a penalty, but a competitor in the business cannot seek to prevent the appellants from exercising their right to carry on business, because of the default, nor can the rice mill of the appellants be regard as a new rice mill. Competition in the trade or business may be subject to such restrictions as are permissible and are imposed by the State by a law enacted in the interests of the general public under Article 19(6), but a person cannot claim independently of such restriction that another person shall not carry on business or trade so as to affect his trade or business adversely. The appellants complied with the statutory requirements for carrying on rice milling operations in the building on the new site. Even assuming that no previous permission was obtained, the respondents would have no locus standi for challenging the grant of the permission, because no right vested in the respondents was infringed."

In the case of **M.S. Jayaraj** (supra) on which reliance was placed by the learned counsel for the respondent no.4, it is held as follows:-

> "13. In the light of the expanded concept of the locus standi and also in view of the finding of the Division Bench of the High Court that the order of the Excise Commissioner was passed in violation of law, we do not wish to nip the motion out solely on the ground of locus standi. If the Excise Commissioner has no authority to permit a liquor shop owner to move out of the range (for which auction was held) and have his business in another range it would be improper to allow such an order to remain alive and operative on the sole ground that the person who filed the writ petition has strictly no locus standi. So we proceed to consider the contentions on merits."

The decision placed by the learned counsel for the respondent no.4 is no way helpful to him inasmuch as it is not the case of the writ petitioners that the authority lacks power to allow the change in the nature of business activities of he shop allottees like the appellants. It is a case where the

appellants suffered heavy financial loss in their business for which looking into the market condition of the locality, they sought permission of the authority to change the nature of business and the authority being satisfied that permission had been sought for on genuine grounds, accorded permission and therefore, it cannot be said that any legal wrong has been committed by the authority in granting such permission. The world is changing every day, the population is changing, the customer trends are changing, the technology is changing and the economy is changing. Businesses that fail to meet the ever changing needs of the customers and fail to embrace change would lose their competitive edge and can easily wind up being unable to compete under current trading conditions. If there is business crisis, one cannot be prevented to change the nature of business and try his luck in some other business. The choice of doing a particular business which is legally permissible cannot be curtailed by any authority if one is ready and willing to comply all the legal necessities for carrying on such business. The law does not compel a person to carry on a business against his will or to deprive him of his freedom to carry on a particular business. The writ petitioners are mere business competitors and except bald assertions that they suffered financial loss due to grant of permission to the appellants to carry on similar business activities in the bus terminal building, there is nothing on record to show that they have been denied or deprived of any legal right or sustained injury to any legally protected interest or subjected to any legal wrong. Therefore, we are of the view that the writ petitioners have no locus standi to challenge the grant of permission by the authority to the appellants to change the nature of business.

8. Coming to the second point, it is held in the case of **Swedeshi Cotton Mills -Vrs.- Union of India reported in (1981) 1 Supreme Court Cases 664** that rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But there are two fundamental maxims of natural justice viz. (i) audi alteram partem and (ii) nemo judex in re sua. The audi alteram partemrule has many facets, two of them being (a) notice of the case to be met; and (b) opportunity to explain. This rule cannot be sacrificed at the altar of administrative convenience or celerity. The general principle as distinguished from an absolute rule of uniform application seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely, if

the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing, shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyze the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The Court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But, the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise.

There is no dispute that by passing of the impugned common order dated 11.04.2018, the appellants were affected and the authority issued letters dated 15.02.2019 cancelling the allotment of shop rooms in their favour vide Annexure-6 series and therefore, we are of the humble view that the appellants were necessary parties to the writ petitions. Neither they were made parties nor was any opportunity of hearing provided to them either during the hearing of the writ petitions or at the time of issuance of letters of cancellation of allotment of shop rooms which is per se illegal.

9. In view of the foregoing discussions, we are of the humble view that the impugned common order dated 11.04.2018 passed by the learned Single Judge in O.J.C. Nos.4859 of 2000 and O.J.C. No.4860 of 2000 is not sustainable in the eye of law and accordingly, we quash the same as well as the consequential letters issued to the appellants cancelling the allotment of shop rooms vide Annexure-6 series. In the result, the writ appeal is allowed.

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2020 (II) ILR - CUT- 32

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

W.A. NO. 506 OF 2018

DR. KESHABA CH. PANDA .....Appellant

.Vs.

SAMBALPUR UNIVERSITY & ORS. .....Respondents

LETTERS PATENT APPEAL – Appeal – Disciplinary proceeding – As per the principles of Vishaka's case, the proceeding initiated against the appellant – Committee constituted which submitted its inquiry report – Inquiry report revealed prima facie case against the appellant – Punishment of suspension awarded – Second enquiry proceeding started on the basis of inquiry report of the Committee by framing of charge and appointing Inquiry officer – Whether such a course is permissible? – Held, No – Reasons indicated.

"The question that now crops up for consideration is whether after the Complaints Committee submitted its report to the Vice-Chancellor to the effect that there was prima facie case against the appellant and the Syndicate in its meeting on 19.04.2003 considered such report and resolved to place the appellant under suspension with immediate effect and accordingly, the appellant was placed under suspension by order dated 19.04.2003, is it permissible under law for the disciplinary authority to take recourse to Rule 15 of 1962 Rules virtually from the beginning by framing definite charges, inviting the appellant to submit written statement of defence, to appoint an enquiring officer and then the inquiring authority to inquire into the matter and prepare the inquiry report at the conclusion of inquiry as per sub-rule (7) of the said Rule. The answer would be an emphatic 'No'. The reason is that as per law laid down by the Hon'ble Supreme Court, the Complaints Committee constituted will be deemed to be an inquiry authority for the purposes of 1962 Rules and the report of the Complaints Committee shall be deemed to be an inquiry report as per sub-rule (7) of the Rule 15 and not a mere preliminary investigation or inquiry report leading to a disciplinary action. Such a report has to be treated as a finding/report in an inquiry into the misconduct of the appellant. The Syndicate basing on such inquiry report and after due deliberation has passed the order dated 19.04.2003 imposing suspension as penalty upon the appellant which is as per the mandates of Vishaka law. Once the stage of 15(7) of 1962 Rules has reached on the submission of the inquiry report of the Complaints Committee, there is no question of reverting back the stages enumerated under sub-rules (1) to (6) of 1962 Rules. We are of the humble view that once the inquiry report of the Complaints Committee is prepared at the conclusion of inquiry, it is to be treated as a finding/report in an inquiry into the misconduct of the delinquent and framing of definite charges in consonance with Rule 15(2) of 1962 Rules thereafter by the

disciplinary authority amounts to commencement of second inquiry which is not permissible in law. Framing of definite charges by the disciplinary authority will be on the basis of the allegations on which the inquiry is to be held. Once the inquiry is completed by the Complaints Committee and inquiry report is prepared, the question of framing charges does not arise. Even though as per ***Vishaka*** *judgment, whether a particular conduct amounts to misconduct in employment as defined by the relevant service rules is to be first enquired into by the Complaints Committee and basing on the report submitted by such Committee, appropriate disciplinary action can be initiated by the employer in accordance with such service rules but since as per* ***Medha Kotwal Lele (supra)*** *case, findings and the report of the Complaints Committee shall be treated as a finding/report in an inquiry into the misconduct of the delinquent and disciplinary authority shall act on such report accordingly and in the case in hand, the Syndicate has acted on the report of the Complaints Committee and imposed penalty of suspension, no further inquiry is permissible.*

When the proceeding was dealt with right from the beginning as per guidelines framed in ***Vishaka's*** *case which was the law declared by the Hon'ble Supreme Court under Article 141 of the Constitution of India and the directions were held to be binding and enforceable in law and the Hon'ble Court on 26.04.2004 directed in the case of* ***Medha Kotwal Lele*** *(supra) that Complaints Committee as envisaged in* ***Vishaka's*** *case will be deemed to be an inquiry authority for the purposes of CCS Rules and the report of the complaints Committee shall be deemed to be an inquiry report under the CCS Rules and thereafter the disciplinary authority will act on the report in accordance with the rules, even though the show cause notice of dismissal has been issued to the appellant on 24.04.2004 (which was two days prior to the order dated 26.04.2004) by the Registrar of the University basing on the report submitted by the Inquiring Officer to the Vice-Chancellor on 12.04.2004 and thereby giving thirty days time to the appellant to submit his show cause on such notice and since the cause of action was still surviving, therefore, the proceeding has to be dealt as per the aforesaid order dated 26.04.2004.*

Even though the ground of commencement of second inquiry with the framing of charges on 14.05.2003 was not specifically taken in the writ petition and seems to have been taken in the writ appeal and canvassed during hearing of the case but since the point goes to the root of the matter relating to the jurisdiction of the disciplinary authority in framing the charges at that stage and commencing inquiry afresh after submission of inquiry report of the Complaints Committee, in the interest of justice, we cannot ignore the same." *(Para 11)*

Case Laws Relied on and Referred to :-

1. (1997) 6 SCC 241 : Vishaka and others .Vs. State of Rajasthan & Ors.
2. (1999) 1 SCC 759 : Apparel Export Promotion Council .Vs. A.K. Chopra.

3. (2013) 5 SCC 470 : The Rajasthan State Industrial Development and Investment Corporation .Vs. Diamond and Gem Development Corporation Ltd.

For Appellant : Mr. Asok Mohanty (Sr. Adv.) & Mr. Gouri Mohan Rath
For Respondents: Mr. Prasanna Kumar Parhi.

JUDGMENT Date of Judgment: 29.04.2020

S. K. SAHOO, J.

In this writ appeal, the appellant Dr. Keshaba Chandra Panda seeks to set aside the impugned judgment and order dated 29.08.2018 passed by the learned Single Judge of this Court in W.P.(C) No.5598 of 2004 in rejecting the prayer made by the appellant to quash the charges framed against him by the disciplinary authority on 14.05.2003 and further directing the respondents to furnish a copy of the enquiry report along with the 2nd show-cause notice to the appellant and then to proceed with proceeding.

2. The case of the appellant, in short, is that he was appointed as Lecturer in Physics in Sambalpur University (hereafter 'the University') during September 1979 and was promoted to the post of Reader in the year 1993. There was no blemish in his service career. The victim girl was appointed as Junior Research Fellow on 14.08.2002 in the Department of Physics by the Vice-Chancellor of the University. She was not sincere with her research work for which she was cautioned time and again. The victim as a Post-Graduate student for the academic session 1998-2000 had the acquaintance with the appellant. She also cooperated and participated in the research work. As a project leader, it was the duty of the appellant to see, remind, reprimand the fellows those who were working in the project in order to have a good reputation of the project work. The victim girl submitted her resignation on 30.09.2002 but the same was not accepted with a hope that she would improve but all the efforts made by the appellant ended in a fiasco. Finally when the victim submitted her resignation on 24.02.2003, the same was accepted on 28.02.2003.

While the matter stood thus, the father of the victim girl made a complaint on 26.03.2003 before the Vice-Chancellor of the University with regard to the sexual harassment of his daughter by the appellant. The complainant alleged in the complaint that the victim enrolled herself as a research scholar under the appellant in a project namely, 'Studies in Nuclear Reaction' and she never thought that her career would come to an abrupt end

for no fault of her. She had a brilliant academic record in Physics and great enthusiasm in fundamental research but her ordeal started after joining the project work. The appellant as a guide talked with regard to unrelated work of the research with the victim and was making amorous advances in talks and gestures and used to comment about her dress and looks. His lasciviousness and mischief were visible and his lewd remarks and lecherous looks became a routine event. A national symposium on nuclear physics was to be held in Chennai from 26th December to 30th December 2002. Around second week of December 2002, the victim registered for the said national symposium as was asked by her guide. Days before the event, she was told that her railway ticket and accommodation had been taken care of. The appellant told her that they would stay together for which she was shocked and did not go to Chennai. Thereafter the appellant became very irritable and uncooperative with the victim and started troubling her. The appellant made a second effort in February 2003 when the victim's 'Project Definition' was to be done at IUC/DAEI, Calcutta Centre. Just two days before the event i.e. 16th February 2003, the victim was informed by the appellant about the programme and told that they would stay together as there was no time for making arrangements for separate accommodation. The victim vehemently protested to it but the appellant told her that to earn a Ph.D. degree, she had to bear all these and if she was unwilling and try to divulge anything, she would be ruined. The appellant warned the victim of the consequences of going against him and often talked of his links with Chancellor's Office and Minister of Higher Education.

The appellant received a letter on 07.04.2003 from Professor P.K. Mohapatra, Convenor of Enquiry Committee to remain present on 10.04.2003 at 09.30 a.m. in the Syndicate Hall of the University in order to respond to the charges made against him by the father of the victim. Pursuant to such letter, the appellant appeared before the Enquiry Committee and submitted his reply. Then he received another letter dated 12.04.2003 to appear before the Committee on 15.04.2003 at 09.30 a.m. The appellant submitted a written request before the Committee on 15.04.2003 to supply the recorded statements of all the persons examined by the Committee ex-parte at the first instance for preparing an effective defence and then to give his own statement. Enquiry was not completed on 15.04.2003. On 16.04.2003 some of the students appeared before the Committee and stated that it was an effort to tarnish the image of the appellant at the behest of some of the interested persons having ill intention and motive. The Committee submitted

its report to the Vice-Chancellor on 16.04.2003/17.04.2003. After receipt of the report, the Vice-Chancellor convened the Syndicate meeting on 19.04.2003 for discussion. The Syndicate considered the report of the Enquiry Committee and resolved to place the appellant under suspension with immediate effect and accordingly by order dated 19.04.2003, the appellant was placed under suspension pending framing of charges. The charges were framed against the appellant and it was placed before the Syndicate for approval. The Syndicate after due deliberations and as per resolution dated 12.05.03 approved the charges and resolved to appoint a retired High Court Judge/retired District Judge as Inquiring Officer as per the Odisha Civil Services (Classification, Control and Appeal) Rules, 1962 (in short '1962 Rules'). Charges were served upon the appellant on 14.05.2003 and he was called upon to file his reply within thirty days. The appellant sent a letter to the Registrar of the University on 12.06.2003 to supply the documents at an early date enabling him to submit an effective explanation. On 06.08.2003 the Registrar of the University sent a letter to the appellant indicating that no other copies of any document in support of the complaint petition dated 26.03.2003 was submitted except the copy which had already been supplied to him along with the charge sheet. The appellant was asked to inspect the documents with prior permission of the Inquiring Officer on the date, time and place fixed for such inspection. It is the case of the appellant that the Registrar refused to supply the documents and a copy of the preliminary report was not furnished to him and that he was prevented to submit explanation. Again the appellant submitted a representation on 05.10.2003 requesting the Registrar of the University to supply the documents as per his letter dated 12.06.2003 enabling him to submit his reply. Being aggrieved, the appellant filed an appeal before the Chancellor for supply of documents, payment of subsistence allowance and also to revoke the order of suspension which was kept pending for consideration. While the matter stood thus, the appellant received a letter from the Marshalling Officer to appear before the Inquiring Officer on 12.01.2004 in the University Guest House. The appellant pointed out to the Vice-Chancellor that he was not given adequate opportunity to file his reply to the charges for non-supply of documents. On 12.01.2004 the appellant received a letter from the Inquiring Officer about his non-appearance on that day and about the adjournment of the proceeding to 21.01.2004. On 13.01.2004 the appellant was intimated about the appointment of Mr. G.R. Dubey, a retired District Judge as Inquiring Officer pursuant to the resolution of the Syndicate. On 21.01.2004 the appellant requested the Inquiring Officer to supply the copies

of day to day order sheet of the proceeding. The Inquiring Officer directed the appellant to file his written statement by 31.01.2004 and accordingly the appellant filed a list of documents/witnesses.

According to the appellant, the appointment of Inquiring Officer was illegal. The Inquiring Officer was biased and conducted the inquiry with undue haste and closed the same on 30.03.2004. The Inquiring Officer submitted the report to the Registrar of the University which was placed before the Syndicate on 24.04.2004. The Syndicate resolved to accept the report of the Inquiring Officer and take action as per the statutory provision. A copy of the enquiry report was not furnished to the appellant before issuing 2nd show cause notice on 24.04.2004. According to the appellant, the Inquiring Officer had no role to suggest imposition of penalty on the delinquent officer and the finding rendered by the Inquiring Officer is perverse and that the resolution of the Syndicate also suffers from non-application of mind.

3. The appellant preferred W.P.(C) No. 5598 of 2004 for quashing the show-cause notice dated 24.04.2004 and also to quash the charges framed against him on 14.05.2003.

4. Counter affidavit was filed by the University in the writ petition wherein it is stated that the father of the victim girl lodged a written complaint on 26.3.03 before the Vice-Chancellor of the University making allegations of sexual harassment against the appellant to the victim. A fact-finding enquiry was conducted by an Enquiry Committee presided over by Professor P.K. Mohapatra on 15.04.2003 and 16.04.2003 and a report was submitted to the effect that there was prima facie case against the appellant and accordingly, the Syndicate placed the appellant under suspension as per the office order dated 19.04.2003. The report of the Enquiry Committee was considered by the Syndicate and the Syndicate resolved and approved the charges against the appellant on 12.05.2003 and to appoint an Inquiring Officer as per 1962 Rules. The Registrar of the University issued the charges to the appellant on 14.05.2003 and the appellant received the same on 19.05.2003. The departmental proceeding was initiated under Statute 299 of the Odisha University First Statutes, 1990 read with Rule 15 of the 1962 Rules. Mr. G.R. Dubey, a retired District Judge was appointed as Inquiring Officer and on completion of the inquiry, the Inquiring Officer submitted his report to the Vice-Chancellor on 12.04.2004 in a sealed cover which was

placed before the Syndicate on 24.04.2004 and the Syndicate accepted the recommendation of the Inquiring Officer and resolved to issue show cause notice of dismissal against the appellant and accordingly show cause notice was issued to the appellant. In the counter affidavit, it is specifically denied that there was any hastiness to close the proceeding rather the inquiry commenced on 09.12.2003 and it was closed on 30.03.2004.

5. An additional affidavit was filed by the appellant annexing some documents received through RTI Act. A specific stand taken in the writ petition was reiterated regarding non-supply of daily order sheet of the proceeding and copies of statements of some of the witnesses recorded during the inquiry on 19.03.2004 and 21.03.2004.

6. The learned Single Judge considering the submissions made by the respective sides and placing reliance on a number of citations has been pleased to hold that the charges are clear and unambiguous and that the appellant participated in the inquiry without any demur or protest and that a battery of lawyers appeared for him and therefore, merely because the Inquiring Officer was not palatable to the appellant, it cannot be said that he was biased. It was further held that the appellant was afforded fullest opportunity to defend his case and that the inquiry was conducted in a free and fair manner and that the allegation of bias and malafide against the Inquiring Officer is a ruse and the learned Judge was not inclined to quash the charges. Accordingly, the writ petition was disposed of with a direction to the opposite parties to furnish a copy of the inquiry report along with 2nd show-cause notice to the appellant and thereafter the opposite parties were directed to proceed with the matter.

7. Challenging the impugned judgment and order of the learned Single Judge, Mr. Asok Mohanty, the learned Senior Advocate for the appellant emphatically contended that the complaint dated 26.03.2003 made against the appellant was treated as the complaint of sexual harassment at the work place and as per the declared law by the Hon'ble Supreme Court in the case of **Vishaka and others -Vrs.- State of Rajasthan and others reported in (1997) 6 Supreme Court Cases 241**, a Complaints Committee was constituted by adhering to the guidelines for conducting inquiry into such complaint and the enquiry report of the said Complaints Committee was placed before the Disciplinary Authority i.e. Syndicate and the Syndicate after due deliberation passed final order of suspension as penalty. Thereafter

there was no scope for holding any further inquiry. Elaborating his submissions, he contended that it was a complaint of sexual harassment at work place and the Complaints Committee was appointed to conduct inquiry under Rule 15(4) of the 1962 Rules and the report of the Complaints Committee was treated as inquiry report under Rule 15(7) of the said Rules and the Syndicate deliberated on such inquiry report and passed the final order dated 19.04.2003 imposing suspension as penalty upon the appellant as per the mandates of ***Vishaka*** law. The commencement of a second inquiry thereafter by framing of charges on the basis of inquiry report of Complaints Committee is wholly unwarranted. ***Vishaka*** provides for one inquiry and there is no provision for the Disciplinary Authority to completely set aside the previous inquiry. It was further argued that the charges were framed against the appellant when there was a decision of the Disciplinary Authority/Syndicate not to hold another enquiry into the self-same allegations on 19.04.2003. Such a decision was taken by the Disciplinary Authority at the conclusion of a disciplinary proceeding and after imposing suspension as penalty against the appellant. The Disciplinary Authority acts as a quasi-judicial authority and once it has arrived at such a decision, it cannot be varied as per the will of the Disciplinary Authority itself. The Disciplinary Authority has not found that its decision dated 19.04.2003 was contrary to the provisions of law or unreasonable. It was argued that in spite of order of suspension as penalty for the alleged misdemeanor after due process, the charges framed on 14.05.2003 basing on the same cause of action is hit under the principle of double jeopardy. It is further argued that the learned Single Judge was not justified in not quashing the charges as it intended to penalize the appellant for the second time in respect of the self-same misdemeanor/misconduct. According to the learned counsel, even though this aspect was brought to the notice of the learned Single Judge, yet no finding was given on it in the impugned judgment. It is further submitted that the appellant was not supplied with the documents along with the inquiry report which he had sought for. According to the learned counsel, the initiation of the proceeding for appointment of Inquiring Officer before the receipt of the explanation, the biasness of Inquiring Officer, non-supply of the copy of the inquiry report before issue of show-cause notice, not giving a chance to the appellant to submit a written statement of defence constitute serious prejudice and it reflects malafideness for which the appellant availed the discretionary jurisdiction of this Court under Article 226 of the Constitution but the points raised were not properly adjudicated and the vital points raised remained unanswered for which the impugned judgment and order is to be set aside.

8. Mr. Prasanna Kumar Parhi, learned counsel for the University, however, contended that the Complaints Committee as per ***Vishaka*** (supra) judgment was constituted on receipt of the complaint dated 26.03.2003 from the father of the victim addressed to the Vice-Chancellor which consisted of six members out of which there were four women members. The Committee was constituted for the purpose of collection of facts in regard to the conduct and work of the appellant. The Committee during the fact-finding preliminary enquiry held on 15.04.2003 and 16.04.2003 called upon twelve persons including the victim and the appellant and recorded their statements and a report was submitted to the effect that there was prima facie case against the appellant and basing on such report and the resolution of the Syndicate, the appellant was placed under suspension. The departmental proceeding was initiated under Statute 299 of the Odisha Universities First Statutes, 1990 read with Rule 15 of the 1962 Rules and since the Syndicate resolved to frame charges against the appellant and to proceed in accordance with Rule 15 of the 1962 Rules and approved the charges and the proceeding continued accordingly, it cannot be said that by framing of charges on the basis complaint and fact-finding enquiry report, there is commencement of any second inquiry and that the charges famed is hit under the principle of double jeopardy. He argued that as per ***Vishaka,*** whether a particular conduct amounts to misconduct in employment as defined by the relevant service rules is to be first enquired into by the Complaints Committee and basing on the report submitted by such Committee, appropriate disciplinary action can be initiated by the employer in accordance with such service rules. He emphasised that a fact-finding enquiry report submitted by an Complaints Committee presided over by Professor P.K. Mohapatra cannot be deemed to be an inquiry report under Rule 15(7) of the 1962 Rules inasmuch as such a report can be prepared only after the framing of definite charges by the disciplinary authority, filing of written statement of defence by the Government servant, appointing an enquiring officer by the disciplinary authority and examination of witnesses before the inquiring authority. Since the fact-finding enquiry report was submitted by the Complaints Committee without framing of definite charges as per Rule 15(2) of the 1962 Rules, it cannot be treated as an inquiry report contemplated under Rule 15(7) of the said Rules. He argued that the points taken in the writ appeal and raised during the argument that after the enquiry report of Complaints Committee and placing the appellant under suspension by the Syndicate, there is commencement of any second inquiry and that the charges famed is hit under the principle of double jeopardy were never raised in the writ petition or in

the additional affidavit filed by the appellant in the writ petition and it was also not raised during argument of the writ petition and therefore, the learned Single Judge has not dealt with it in the impugned judgment. He submitted that the other points raised by the learned counsel for the appellant have been dealt with in the impugned judgment and there is no perversity in it and therefore, the writ appeal should be dismissed.

9. We have carefully considered the submissions advanced by the learned Counsel for the parties and perused the documents available on record. However, before we proceed to deal with the rival contentions, we consider it necessary to take a quick glance to the ***Vishaka*** judgment inasmuch as the main contentions of the parties revolve around this judgment as well as Rule 15 of the 1962 Rules.

A three Judge Bench of the Hon'ble Supreme Court by a rather innovative judicial law making process issued certain guidelines in ***Vishaka*** judgment which was delivered on 13.08.1997. The Hon'ble Court in the absence of enacted law, to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, laid down the guidelines and norms for due observance at all work places or other institutions, until a legislation is enacted for the purpose. The Hon'ble Court in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights formulated it and it was further emphasised that the same would be treated as the law declared by this Court under Article 141 of the Constitution. Under the heading of *criminal procedure*, it is observed, inter alia, that where the conduct of the perpetrator amounts to a specific offence under the Indian Penal Code or any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. Under the heading of *disciplinary action*, it is observed that where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules. Under the heading of *complaint mechanism*, it is observed that whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints. Similarly under the heading of *Complaints*

Committee, it is observed that the said complaint mechanism, should be adequate to provide, where necessary, a Complaints Committee, a special counselor or other support service, including the maintenance of confidentiality and the Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment. The Complaints Committee was directed to make an annual report to the Government department concerned of the complaints and action taken by them and the employers and person in charge shall also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department. It was further directed that the guidelines and norms should be strictly observed in all the work places for the preservation and enforcement of the right to gender equality of the working women and such directions were held to be binding and enforceable in law until suitable legislation is enacted to occupy the field.

In the case of **Apparel Export Promotion Council -Vrs.- A.K. Chopra reported in (1999) 1 Supreme Court Cases 759** which was decided on 20.01.1999, the Hon'ble Supreme Court while analysing the definition of 'sexual harassment' as suggested in the case of ***Vishaka*** judgment, held as follows:-

> "26. There is no gainsaying that each incident of sexual harassment at the place of work, results in violation of the fundamental right to gender equality and the right to life and liberty - the two most precious fundamental rights guaranteed by the Constitution of India. As early as in 1993 at the ILO Seminar held at Manila, it was recognized that sexual harassment of woman at the workplace was a form of 'gender discrimination against woman'. In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate. The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Woman, 1979 ("CEDAW") and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women beside taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions

> particularly important for woman. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate working environment. These international instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned.....
>
> 29.....In a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression "molestation". They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case. Where the evidence of the victim inspires confidence, as is the position in the instant case, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the superior officer is wholly misplaced and mercy has no relevance....."

The ***Vishaka*** judgment was again brought to the notice of the Hon'ble Supreme Court in the nature of public interest litigation in the case of **Medha Kotwal Lele and Ors. -Vrs.- Union of India reported in (2013) 1 Supreme Court Cases 297** raising principally the grievance that women continue to be victims of sexual harassment at workplaces and the guidelines in ***Vishaka*** are followed in breach in substance and spirit by State functionaries and all other concerned and the women workers are subjected to harassment through legal and extra legal methods and they are made to suffer insult and indignity, after hearing the learned Attorney General and learned Counsel for the States, the Hon'ble Court on *26.04.2004* directed as follows:

> "Complaints Committee as envisaged by the Supreme Court in its judgment in Vishaka's case will be deemed to be an inquiry authority for the purposes of Central Civil Services (Conduct) Rules, 1964 (hereinafter called 'CCS Rules') and the report of the complaints Committee shall be deemed to be an *inquiry report* under the CCS Rules. Thereafter the disciplinary authority will act on the report in accordance with the rules."

The Hon'ble Court while disposing of the matter in **Medha Kotwal Lele (supra)** finally on 19.10.2012, held as follows:-

> "16. In what we have discussed above, we are of the considered view that guidelines in ***Vishaka*** should not remain symbolic and the following further directions are necessary until legislative enactment on the subject is in place.
>
> (i) The States and Union Territories which have not yet carried out adequate and appropriate amendments in their respective Civil Services Conduct Rules (By

> whatever name these Rules are called) shall do so within two months from today by providing that the report of the Complaints Committee shall be deemed to be an *inquiry report* in a disciplinary action under such Civil Services Conduct Rules. In other words, the disciplinary authority shall treat the report/findings etc. of the Complaints Committee as the findings in a disciplinary inquiry against the delinquent employee and shall act on such report accordingly. The findings and the report of the Complaints Committee shall not be treated as a mere preliminary investigation or inquiry leading to a disciplinary action but shall be treated as a finding/report in an inquiry into the misconduct of the delinquent."

Therefore, in the path breaking ***Vishaka*** judgment, the Hon'ble Supreme Court made it clear that the Complaints Committee created in the employer's organization after receipt of complaint of sexual harassment has to enquire into the matter and prepare a report indicating therein as to whether the conduct of the alleged perpetrator employee constitutes an offence under law or a breach of service rules. If as per the report submitted, the conduct amounts to a specific offence under the Indian Penal Code or any other law, the employer shall initiate appropriate action against the employee in accordance with law by making a complaint with the appropriate authority. Similarly if as per the report submitted, the conduct of the employee amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action shall be initiated by the employer in accordance with such rules. In view of the interim order dated 26.04.2004 passed in the case of **Medha Kotwal Lele** (supra), the Complaints Committee as per ***Vishaka*** case will be deemed to be an inquiry authority for the purposes of CCS Rules and the report of the Complaints Committee shall be deemed to be an *inquiry report* under such Rules and the disciplinary authority will act on the report in accordance with the Rules. The final order passed in the case of **Medha Kotwal Lele** (supra) made it clear that the disciplinary authority shall treat the report/findings etc. of the Complaints Committee as the findings in a disciplinary inquiry against the delinquent employee and shall act on such report accordingly. The findings and the report of the Complaints Committee shall not be treated as a mere preliminary investigation or inquiry leading to a disciplinary action but shall be treated as a finding/report in an inquiry into the misconduct of the delinquent.

A comprehensive legislation was enacted by way of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereafter '2013 Act') keeping in view ***Vishaka*** judgment to provide for safe, secure and enabling environment to every woman,

irrespective of her age or employment status free from all forms of sexual harassment which came into force on 09.12.2013. The notification in that respect is given herein below:

MINISTRY OF WOMEN AND CHILD DEVELOPMENT
NOTIFICATION
New Delhi, the 9th December, 2013

S.O. 3606(E).—In exercise of the powers conferred by sub-section (3) of Section 1 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (14 of 2013), the Central Government hereby appoints the 9th day of December, 2013 as the date on which the provisions of the said Act shall come into force.

[F. No. 19-5/2013-WW]
Dr. SHREERANJAN, Jt. Secy.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 was also framed to carry out the provisions of 2013 Act.

10. Keeping in view the ratio laid down in the aforesaid judgments of the Hon'ble Supreme Court, if the factual scenario of the case in hand is assessed, we find the following undisputed factual aspects:

(i) The father of the victim girl lodged a written complaint on 26.03.2003 before the Vice-Chancellor of the University making allegations of sexual harassment against the appellant to the victim;

(ii) A Complaints Committee was constituted for the purpose of collection of facts in regard to the conduct and work of the appellant which consisted of six members out of which there were four women members;

(iii) The Complaints Committee during enquiry held on 15.04.2003 and 16.04.2003 called upon twelve persons including the victim and the appellant and recorded their statements;

(iv) The Complaints Committee submitted its report to the Vice-Chancellor to the effect that there was prima facie case against the appellant;

(v) Basing on such report, the Vice-Chancellor convened the Syndicate meeting on 19.04.2003 for discussion. The Syndicate considered the report of the Enquiry Committee and resolved to place the appellant under suspension with immediate effect and accordingly by order dated 19.04.2003, the appellant was placed under suspension;

(vi) The majority of Syndicate members also opined regarding initiation of departmental inquiry against the appellant;

(vii) The Syndicate resolved and approved the charges against the appellant on 12.05.2003 and to appoint an Inquiring Officer as per 1962 Rules;

(viii) Mr. G.R. Dubey, a retired District Judge was appointed as the Inquiring Officer vide Syndicate resolution dated 19.11.2003 who on completion of the inquiry submitted his report to the Vice-Chancellor on 12.04.2004 in a sealed cover;

(ix) The sealed cover containing report of the Inquiring Officer was placed before the Syndicate on 24.04.2004 and the Syndicate accepted the findings and recommendations of the Inquiring Officer and resolved to issue show cause notice of dismissal against the appellant;

(x) The show cause notice of dismissal was issued to the appellant on 24.04.2004 by the Registrar of the University.

At this stage, it would be profitable to refer Statutes 299 and 301 of the Odisha Universities First Statutes, 1990. Statute 299 comes under Chapter VI which relates to Classification Control Discipline and Appeal and it states that Rules 12, 15 and 16 of the Odisha Civil Services (Classification, Control and Appeal) Rules, 1962 as amended from time to time and the Government clarification issued thereunder in the matter of suspension and for imposing major and minor penalties, shall apply mutatis mutandis to all employees. The words "mutatis mutandis" used in statute means that the application of provisions will be with necessary changes and it cannot be adopted as if it is to be read as it is. In the case of **The Rajasthan State Industrial Development and Investment Corporation -Vrs.- Diamond and Gem Development Corporation Ltd. reported in (2013) 5 Supreme Court Cases 470**, it is held that the phrase "mutatis mutandis" implies that a provision contained in other part of the statute or other statutes would have application as it is with certain changes in points of detail. Under Statute 301, it is mentioned that the following penalties may for good and sufficient reasons be imposed on an employee i.e. (i) fine; (ii) censure; (iii) withholding of (a) increment, (b) promotion; (iv) recovery from pay of the whole or part of any pecuniary loss caused to the University by negligence or breach of orders; (v) suspension; (vi) reduction to a lower service, grade or post or to a lower time-scale or to a lower stage in a time-scale; (vii) compulsory retirement; (viii) removal from service which shall not be a disqualification for future employment; (ix) dismissal from service which shall be a disqualification for future employment in the University. In the explanation to the said Statute, it is mentioned as which actions shall not amount to a penalty within the meaning of this Statute.

Thus in the matter of suspension and for imposing major and minor penalties on an employee of the University as specified under Statute 301, Rules 12, 15 and 16 of the 1962 Rules are to be followed.

11. The question that now crops up for consideration is whether after the Complaints Committee submitted its report to the Vice-Chancellor to the effect that there was prima facie case against the appellant and the Syndicate in its meeting on 19.04.2003 considered such report and resolved to place the appellant under suspension with immediate effect and accordingly, the appellant was placed under suspension by order dated 19.04.2003, is it permissible under law for the disciplinary authority to take recourse to Rule 15 of 1962 Rules virtually from the beginning by framing definite charges, inviting the appellant to submit written statement of defence, to appoint an enquiring officer and then the inquiring authority to inquire into the matter and prepare the inquiry report at the conclusion of inquiry as per sub-rule (7) of the said Rule. The answer would be an emphatic 'No'. The reason is that as per law laid down by the Hon'ble Supreme Court, the Complaints Committee constituted will be deemed to be an inquiry authority for the purposes of 1962 Rules and the report of the Complaints Committee shall be deemed to be an *inquiry report* as per sub-rule (7) of the Rule 15 and not a mere preliminary investigation or inquiry report leading to a disciplinary action. Such a report has to be treated as a finding/report in an inquiry into the misconduct of the appellant. The Syndicate basing on such inquiry report and after due deliberation has passed the order dated 19.04.2003 imposing suspension as penalty upon the appellant which is as per the mandates of *Vishaka* law. Once the stage of 15(7) of 1962 Rules has reached on the submission of the inquiry report of the Complaints Committee, there is no question of reverting back the stages enumerated under sub-rules (1) to (6) of 1962 Rules. We are of the humble view that once the inquiry report of the Complaints Committee is prepared at the conclusion of inquiry, it is to be treated as a finding/report in an inquiry into the misconduct of the delinquent and framing of definite charges in consonance with Rule 15(2) of 1962 Rules thereafter by the disciplinary authority amounts to commencement of second inquiry which is not permissible in law. Framing of definite charges by the disciplinary authority will be on the basis of the allegations on which the inquiry is to be held. Once the inquiry is completed by the Complaints Committee and inquiry report is prepared, the question of framing charges does not arise. Even though as per ***Vishaka*** judgment, whether a particular conduct amounts to misconduct in employment as defined by the relevant

service rules is to be first enquired into by the Complaints Committee and basing on the report submitted by such Committee, appropriate disciplinary action can be initiated by the employer in accordance with such service rules but since as per **Medha Kotwal Lele (supra)** case, findings and the report of the Complaints Committee shall be treated as a finding/report in an inquiry into the misconduct of the delinquent and disciplinary authority shall act on such report accordingly and in the case in hand, the Syndicate has acted on the report of the Complaints Committee and imposed penalty of suspension, no further inquiry is permissible.

When the proceeding was dealt with right from the beginning as per guidelines framed in ***Vishaka's*** case which was the law declared by the Hon'ble Supreme Court under Article 141 of the Constitution of India and the directions were held to be binding and enforceable in law and the Hon'ble Court on 26.04.2004 directed in the case of **Medha Kotwal Lele** (supra) that Complaints Committee as envisaged in ***Vishaka's*** case will be deemed to be an inquiry authority for the purposes of CCS Rules and the report of the complaints Committee shall be deemed to be an inquiry report under the CCS Rules and thereafter the disciplinary authority will act on the report in accordance with the rules, even though the show cause notice of dismissal has been issued to the appellant on 24.04.2004 (which was two days prior to the order dated 26.04.2004) by the Registrar of the University basing on the report submitted by the Inquiring Officer to the Vice-Chancellor on 12.04.2004 and thereby giving thirty days time to the appellant to submit his show cause on such notice and since the cause of action was still surviving, therefore, the proceeding has to be dealt as per the aforesaid order dated 26.04.2004.

Even though the ground of commencement of second inquiry with the framing of charges on 14.05.2003 was not specifically taken in the writ petition and seems to have been taken in the writ appeal and canvassed during hearing of the case but since the point goes to the root of the matter relating to the jurisdiction of the disciplinary authority in framing the charges at that stage and commencing inquiry afresh after submission of inquiry report of the Complaints Committee, in the interest of justice, we cannot ignore the same.

12. In view of the foregoing discussions, we are of the humble view that the view taken by the learned Single Judge is not sustainable in the eye of

law. Accordingly, the charges framed against the appellant on 14.05.2003 and the show cause notice of dismissal issued to the appellant on 24.04.2004 by the Registrar of the University basing on the report submitted by the Inquiring Officer to the Vice-Chancellor on 12.04.2004 stand quashed. The writ appeal is allowed. The impugned judgment and order of the learned single Judge is hereby set aside. The parties are directed to bear their own costs.

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2020 (II) ILR - CUT- 49

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

JAIL CRIMINAL APPEAL NO. 43 OF 2011

SHIBA HAREKA ……..Appellant

.Vs.

STATE OF ODISHA ……Respondent

INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction – Appreciation of evidence – Serious contradictions – No clear, cogent and clinching evidence unerringly pointing towards guilt of the appellant – Seized tangia, blood stained earth and lungi of the accused were not found to have stained with any blood – Held, conviction and sentence cannot be maintained.

For Appellant : Mrs. Sanjuktabala Das & R. Khatun.
For Respondent : Mrs. Saswata Pattanaik, Addl. Govt. Adv.

JUDGMENT Date of Hearing and Judgment : 20.02.2020

S. K. MISHRA, J.

In this appeal under the provision of Sec.383 Cr.P.C. the sole appellant has assailed his conviction U/s.302 of the Indian Penal Code (in short 'the I.P.C.') and sentence to undergo imprisonment for life and to pay a fine of Rs.10,000/-, in default to suffer further R.I. for one year, by the learned Addl. Sessions Judge, Jeypore in his judgment dtd.09.05.2011 passed in Criminal Trial No.47 of 2010.

2. The case of the prosecution, in short, is that the appellant happens to be the brother-in-law of deceased Meleka Taudu (deceased's sister's

husband). It is alleged that prior to the alleged occurrence, the appellant had borrowed Rs.100/- from the deceased as hand loan. On 09.03.2009 after noon the deceased with his wife Meleka Apalamma went to the house of appellant to ask for the loan amount of Rs.100/-. The appellant refused to pay back. Therefore, a quarrel ensued between the appellant and the deceased. At that time, the appellant being enraged, brought out an axe from his house and dealt a blow to the chest of the deceased, as a result, deceased succumbed to the injuries at the spot. Thereafter accused finding the deceased dead, ran into the forest. Meleka Apalamma, the wife of the deceased informed the matter in the village; whereafter the villagers along with the appellant burnt the dead body in the village burial ground to cause disappearance of the evidence. Three days thereafter the wife of the deceased presented a written report in Bandhugaon police station being scribed by one Srinivas Patnaik which was registered as P.S. Case No.4 dtd.12.3.2009 U/ss.302, 201 I.P.C. and the O.I.C. himself took up investigation. During course of investigation the I.O. seized half burnt pieces of bones, a handful of ash from the burial ground, blood stained earth, sample earth from the spot, an axe of which the wooden handle being half burnt and one lungi from the appellant. Except the Lungi he sent other materials for chemical examination, arrested the appellant on the very next day of registration of the case from village Almanda and forwarded to court. On completion of investigation, charge sheet was submitted against the appellant U/ss.302, 201 I.P.C.

3. Prosecution, in order to prove its case, examined only 3 witnesses, two allegedly eye witnesses and the I.O. and proved 6 documents. P.W.1 – Meleka Apalamma is the wife of deceased. P.W.2 – Harika Wannoo @ Wanna is the wife of accused and P.W.3 is the investigating officer. The seized Tangia and Lungi are marked as M.O.I and II. Defence examined none.

4. P.Ws.1 and 2 are eye witnesses to the occurrence. P.W.1 has stated that she is the wife of deceased. About 2 years prior to her deposition in the court, during Nilabadi Yatra, on a Monday evening she along with her husband went to the appellant to ask Rs.100/- which he has taken as loan from her husband. At that time P.W.2 was cooking inside the house. When she asked for money, accused Siba going inside the house, brought out one Tangia and dealt a blow on the left side chest of her husband. He fell down with bleeding injuries and died at the spot. Out of fear she and P.W.2 ran away from the spot. Accused Siba also left the Tangia there and fled away

from the spot. One Lachmi Hikaka has seen the occurrence. But she has not been examined as she died in the meantime.

In her cross-examination, this witness has stated that they went to the house of accused at 4 P.M. She has further stated that no one has seen the assault. After half an hour of Taudu's arrival she went there. By the time she reached the spot, Taudu was lying on the ground.

P.W.2 – Harika Wannoo @ Wanna has stated that her husband brought out a taniga and dealt a blow to the chest of the deceased and deceased fell down with blooding injuries. When she asked as to why he dealt the blow, the accused threatened her to kill. Therefore, out of fear she ran away.

In her cross-examination at paragraph 3 this witness has stated that when she came out of her house from cooking, she found the deceased lying on the ground with the injury. She has further stated that at that time none were present at the spot.

So keeping in view the aforesaid inconsistent evidence of these two witnesses, we do not find any clear, cogent and clinching evidence unerringly pointing towards guilt of the appellant. Moreover, the seized tangia, blood stained earth and lungi of the accused were not found to have stained with any blood.

Keeping in view the aforesaid considerations, we are of the considered opinion that the conviction recorded by learned Addl. Sessions Judge cannot be upheld by this court.

5. In the result, the appeal is allowed. The conviction and sentence of the appellant vide judgment dtd.09.05.2011 passed by the learned Addl. Sessions Judge, Jeypore in Criminal Trial No.47 of 2010 is hereby set aside. The appellant Shiba Hareka be set at liberty forthwith if his detention is not required in any other case / cases. L.C.Rs. be returned forthwith.

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2020 (II) ILR - CUT- 52

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

CRA NO. 180 OF 1999

KAMARAMI RAMA & ORS. .....Appellants

.Vs.

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Offence under Section 302 of IPC – Conviction – Conviction based on the evidence of a child eye witness – It transpires that the evidence of child witness P.W.4 is not free from material contradiction – Her credibility is doubtful – She did not know Oriya language for which an Interpreter was appointed, but there is no material preserved in the lower court record that the questions put to her to test competency was also undertaken through the process of interpreter – As the evidence is not cogent and clear, P.W.4 is found wholly unreliable – Held, the conviction based upon such testimony is not sustainable in the eye of law. (Paras 11-12)

Case Laws Relied on and Referred to :-

1. (1997) 5 SCC 341 : Ratansinh Dalsukhbhai Nayak .Vs. State of Gujarat.
2. 2019 (76) OCR SC 34 : R.Ramesh .Vs. State Rep. By Inspector of Police.
3. AIR 2019 S.C. 1831 : Amrika Bai .Vs. The State of Chhattisgarh.

For Appellant : M/s. Jugal Kishore Panda, S.K.Joshi, S.K.Sahoo & S.K.Mund.

For Respondent : Mr. S. Zafarulla, Addl.Standing Counsel.

JUDGMENT Date of Hearing:12.02.2020 : Date of Judgment: 24.02.2020

DR. A.K.MISHRA, J.

The appellants were convicted under Section 148 of the Indian Penal Code (hereinafter referred to as 'I.P.C.' in brevity) and under Section 302 read with Section 149 of the I.P.C. and sentenced to undergo for six months rigorous imprisonment for the former while imprisonment for life for the later in the judgment dated 31.05.1999 in Sessions Case No. 72 of 1999 passed by learned Additional District and Sessions Judge, Malkangiri.

2. Tersely put, prosecution case is that on 11.09.1997 at about 6.00 P.M. in village Erbanpalli deceased Kamarami Nanda was guarding his paddy field. His daughter P.W.4 was present there. All the accused persons being armed with bows and arrows chased him shooting arrows, the deceased ran

and fell down at a distance and succumbed to injuries. On next day at 12.00 Noon the nephew of the deceased reported the matter in written at Podia Police Out-Post. The A.S.I. (P.W.8) made station diary entry and sent the F.I.R. to the O.I.C., Kalimela Police Station where the same was registered vide Kalimela P.S. Case No. 35 dtd. 13.07.1997. The A.S.I. took up investigation, arrested the accused persons, examined the witnesses and conducted inquest over the dead body. Doctor (P.W.6) conducted postmortem on 13.07.1997 and submitted postmortem examination report Exhibit-3 and also opinion as to the seized M.Os. vide Ext.4. After completion of investigation Charge-sheet was submitted. Learned Judicial Magistrate, First Class, Motu took cognizance and committed case to the Court of Session. All the appellants faced trial for offence under Section 148 of the I.P.C. and Section 302 read with Section 149 of the I.P.C.

3. The plea of defence is denial simpliciter.

4. Prosecution has examined nine witnesses in all, defence examined none. F.I.R., Inquest report, chemical report and postmortem report etc. are marked as Exhibits- 1 to 16. Seized Kati and arrows are made M.O. - I to M.O.-V

5. P.W.1 the nephew of the deceased is the informant. P.W.2 is the scribe of the F.I.R. Ext.1. P.W.5, wife of the deceased is a post occurrence witness along with P.Ws, 2 and 3. P.W.4 is the daughter of the deceased, a child eyewitness. P.W.6 is the Medical Officer. P.W.7 is the Constable who took the dead body to the hospital for postmortem. P.W.8 is the A.S.I. of Podia Police Out-post, who conducted initial investigation. P.W.9 is the O.I.C. of Kalimela P.S., who has submitted the Charge-sheet.

Learned Additional Sessions Judge, Malkangiri found that P.W.3 who is declared hostile is believable to the extent that accused persons did not turn up to the Panchayat. P.Ws 1 and 2 are found to be post occurrence witnesses. P.W.5, the wife of deceased is found to have contradicted with her earlier statement duly proved through I.O. P.W.8 vide para-19 that she had seen the accused persons at the spot after occurrence and for that not reliable. Appreciating the evidence of P.W.4 child witness and believing her as an eyewitness learned Addl. Sessions Judge convicted the accused persons/appellants as stated above.

6. Mr. J.K.Panda, learned counsel for the appellants submitted that the sole eyewitness P.W.4 being a child is not reliable and her statement being translated in the court, is found to have been not done with regard to his understanding of the questions put to her. Mr. Panda further submitted that in absence of motive, the evidence of a child witness which is inconsistent in nature should not be relied upon to base conviction particularly when the F.I.R. lodged after one day naming eight persons and got registered after two days of the occurrence and postmortem was conducted thereafter.

7. Mr. S.Zafarulla, learned Additional Standing Counsel supported the judgment on the ground that the child witness P.W.4 is trustworthy enough to base conviction and one interpreter was appointed to communicate between the witness and the court during recording of deposition.

8. Keeping the above rival contentions, before testing the reliability of the testimony of child witness P.W.4, the contour of situational narratives culled out from the evidence needs to be addressed.

9. The evidence of doctor P.W.6 discloses that on 13.07.1997 he conducted postmortem of the deceased Kamarami Nanda and found seven ante mortem injuries vide Ext. 3 and the time of death was within 36 to 48 hours. In cross examination he admits that the cause of death was due to shock and haemorrhage. So the death of deceased on 11.07.1997 at 6.00 P.M. is found to be homicidal in nature.

Fact remains proved that after two days of the incident the postmortem was conducted. The F.I.R. Ext.1 discloses the name of eight accused persons and name of appellant-Madakami Moka was not mentioned therein. It cannot be said that the F.I.R. Ext.1 was lodged in hot haste.

10. The competency of P.W.4 a child witness is now the eye point. She was examined on 23.09.1998 stating her age to be 10(ten) years. She was given solemn affirmation. The Presiding Officer has mentioned that she gave reasonable answers to the questions asked. Thereafter Presiding Officer has also mentioned in deposition sheet that the witness knew only “Koya” language and on consent of counsel one interpreter was appointed to interpret “Koya” language into Oriya. Neither the deposition sheet nor the order sheet discloses the questions put by the Presiding Officer to the witness to test her competency. Even there is no mention that such questions were translated through the interpreter. This witness on recall was again cross-examined on 22.5.1999.

The evidence was recorded as per the procedure prescribed under Section 276 of the Cr.P.C. Section 277 of the Cr.P.C. provides that if the witness gives evidence in any other language, other than the language of the Court, a true translation of the evidence shall be provided. If the evidence is taken down in English and translation thereof in the language of the Court is not required by any of the parties, the Court may dispense with such translation. As P.W.4 knew only "Koya" language and did not know Oriya language, the Presiding Officer should have kept the questions put to her in the threshold to determine her competency. In the decision reported in (1997) 5 SCC 341: **Ratansinh Dalsukhbhai Nayak V. State of Gujarat**, it is stated by the Hon'ble Apex Court that:-

> "7. …The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe."

In the case at hand learned Presiding Officer has not preserved anything in the record that the questions put by him to P.W.4 and the answer received had undergone a process of translation to determine her competency.

It may be started here that while recalling P.W.4 for further cross-examination vide order dated 27.03.1999 the learned Addl. Sessions Judge found that the allegation that the interpreter mislead the court was not correct. This shows that defence has questioned the recording of the evidence of P.W.4. In the decision reported in 2019 (76) OCR SC 34: **R.Ramesh Vs. State Rep. By Inspector of Police**, the Hon'ble Apex Court has held that:-

> "12. …What the trial judge was required to determine was whether the children were in a fit and competent state of mind to depose and were able to understand the purpose for being present on the occasion. Prior to the recording of evidence of a child witness, the Trial Court must undertake the exercise of posing relevant questions to determine the capacity of the child witness to provide rational answers. This exercise would allow the court to determine whether the child has the intellectual and cognitive skills to recollect and narrate the incidents of the crime."

11. In the light of above law, the testimony of P.W.4 may be seen, least it may overcome the shadow raised on her competency. What P.W.4 has

testified is found contrary on material part. She has stated that when all the accused persons armed with bows, arrows and Tangia came, her father started running. The accused persons chased him and shoot arrows, the deceased fell down. Her father had a Kati (M.O.-I) in his hand. After he fell down, accused Kawasi Unga snatched away Kati and dealt blows to his right side neck as a result deceased expired. Thereafter she immediately returned to her house and narrated to her mother and uncle P.W.1 informant. In cross examination she has stated that even though it was evening she and her father were present in the land and the dead body was found near the boring tube-well at a distance of 1.5 K.M. from the land and after chasing such a distance they murdered the deceased. She was contradicted with the statement under Section 161 Cr. P.C. that accused Kawasi Unga snatched away the Kati from the hand of the deceased and dealt blows to the neck and back of the deceased. She was also contradicted with her previous statement under Section 161 Cr.P.C. that she had stated that only three accused persons namely, Madhi Kosa, Deba and Bhima chased her father and when her father was running, other accused persons restrained him on the way. The above contradiction with regard to 161 Cr.P.C. statement of this witness brought out in para-4 is found to have been proved through the I.O. (P.W.8) in para-18. This witness has stated that she had accompanied with her mother and uncle to the police station where the F.I.R. was written in her presence. It may be stated that in the F.I.R. one appellant-Madakami Moka was not named. The above material contradiction in respect of a child witness creates doubt about her reliability. If this witness has stated about nine persons at the time of preparation of F.I.R., it is not understood as to how F.I.R. had contained only eight names. This contradictory part of the evidence of P.W.4 if separated from her testimony, nothing substantial is left to ascertain as to who the accused persons first approached the spot land and then chased upto a distance of 1.5 K.M. near the tube-well. It may not be ignored that doctor has stated that injury no.7 caused by arrow shooting was the cause of death. So the person who gave fatal blow is not clear. In the decision reported in AIR 2019 S.C. 1831: **Amrika Bai Vrs. The State of Chhattisgarh**, Hon'ble Supreme Court has observed that:-

> "12. …The law is well-settled on the aspect that mere presence in an unlawful assembly cannot render a person liable unless there was a common object, being one of those set out in Section 141 I.P.C. and she was actuated by that common object.[**See: Dani Singh v. State of Bihar, (2004) 13 SCC 203**]"

P.W.5, the mother of child and wife of the deceased has categorically denied to know the reason for which deceased was murdered. So prosecution is not able to show the motive behind the incident.

12. It transpires that the evidence of child witness P.W.4 is not free from material contradiction. Her credibility is doubtful. She did not know the Oriya language for which an Interpreter was appointed, but there is no material preserved in the lower court record that the questions put to her to test competency was also undertaken through the process of interpreter. As the evidence is not cogent and clear, P.W.4 is found wholly unreliable. The conviction based upon such testimony is not sustainable in the eye of law.

13. In the result, the conviction of the appellants under Sections 148/302/149 of the I.P.C. and sentence passed there on vide judgment dated 31.05.1999 by the learned Addl. District & Sessions Judge, Malkangiri is hereby set aside. The accused persons are acquitted and they are set at liberty.

14. Appellant No. 2 was granted bail on 21.11.2000 while other appellants were granted bail on 10.03.2000, hence, their bail bonds stand cancelled.

15. The Appeal is allowed.

16. Return the L.C.R. immediately to the lower court.

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2020 (II) ILR - CUT- 57

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

W.P.(C) NO. 21766 OF 2016

NEELACHAL ISPAT NIGAM LTD. & ANR. ……..Petitioners

.Vs.

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

INDUSTRIAL DISPUTES ACT, 1947 – Section 10(1)(c) – Reference was in 2014 – Adjudication started and the Labour Court settled the issue on 21.9.2015 and directed the workman to adduce evidence – Government issued a corrigendum on 28.10.2016 changing the nature of original reference – Whether permissible ? – Held, No.

On careful perusal of original reference dated 9.12.2014 and corrigendum dated 28.9.2016 in the backdrop of facts that the company management had several circulars to deal with promotion matters, it is apparent that the issuance of corrigendum was meant to substitute the original reference. It is because of the facts that by corrigendum only one circular is referred to while in the initial reference no such limitation is stipulated for consideration of promotion of opposite party no.3. If the adjudication of the Labour Court with regard to the promotion of opposite party no.3 would be confined only to adherence to a circular dated 27.4.2009, in our considered opinion, the scope of adjudication for reference dated 9.12.2014 is squeezed within the compartment of the corrigendum. (Para 6)

Case Laws Relied on and Referred to :-

1. AIR 1958 SC 1018 : State of Bihar Vs. D.N. Ganguly & Ors.

For Petitioners : M/s Sarada P. Sarangi, D.K. Dash, P.K. Dash, D. Mohapatra, V. Mohapatra,T. Patnaik.

For Opp. Party : Additional Govt. Adv. M/s. R. Das, K. Gaya, D.Swain Mr. S. Mohapatra.

JUDGMENT Date of Hearing: 06.02.2020 : Date of Judgment :24.02.2020

DR. A. K. MISHRA, J.

Petitioner No.1 is a company having Human Resource Policy Circular No.24 dated 27.4.2009, the said policy was given effect by notification of rules for promotion vide Human Resource Policy Circular dated 16.6.2009. Thereafter, the company invited application on 25.7.2009 for promotion. The opposite party no.3, working as Operative-Cum-Senior Technician, had applied for promotion along with others. The selection process was not taken up. On 13.11.2010, fresh applications were invited with specification that previously applied employees were not required to apply again. Seventy-eight applicants were found eligible to appear written test. The opposite party no.3 participated in the entire process and in the merit list secured Sl. No.62. Finally, forty-four candidates were selected for promotion to executive cadre, w.e.f. 1.5.2010 and opposite party no.3 did not qualify.

2. The grievance of opposite party no.3 was taken up in a conciliation by the Assistant Labour Commissioner and upon failure of conciliation, the Government made reference under section 10(1)(c) on 9.12.2014 as follows:-

> *"Whether the action of the management of Neelachal Ispat Nigam Ltd., Kalinga Nagar, Jajpur in not considering the case of Sri Narahari Mohanty. Operative-Cum-Senior Technician for promotion to the post of Junior Officer (Executive)*

while giving promotion to 44 persons to that post is legal and/or justified? If not, what relief if Sri Mohanty entitled to?".

2-A. The said reference was taken up by the Labour Court, Bhubaneswar registering I.D. Case No.31 of 2014. The Court settled the issue on 21.9.2015 and directed the workman – opposite party no.3 to adduce evidence.

2-B. The Government issued a corrigendum on 28.10.2016 as follows:-

"The term of reference specified in the schedule issued vide this Department Order No.10072 dtd. 9.12.2014 may be read as follows:

Whether the action of the management of Neelachal Ispat Nigam Ltd. , Kalinganagar, Jajpur in not adhering to the policy Circular No.24 dtd. 27.04.2009 and not considering the case of Sri Narahari Mohanty, Operative-Cum-Senior Technician for promotion to the post of Junior Officer (Executive) while giving promotion to 44 persons to that post is legal and/or justified? If not, what relief is Sri Mohanty entitled to?."

The learned Labour Court on 26.11.2016 resettled the issue in view of the receipt of corrigendum dated 28.9.2016.

3. The prayer of the petitioners in this writ petition is to quash not only the corrigendum issued by the Government on 28.9.2016 but also the order of the Labour Court dtd.26.11.2016 in I.D. Case No.31 of 2014.

3-A. The workman - opposite party no.3 filed counter affidavit, stating that Government has no mala fide intention to bring such corrigendum and the policy circular for promotion was revised without offering opportunity to the Non-Executive employees. The subsequent corrigendum is no way illegal being not meant to cancel, supersede or to withdraw any earlier term of reference.

4. Learned Senior counsel Mr. A. Mohanty relying upon a decision reported in ***AIR 1958 SC 1018; State of Bihar v. D.N. Ganguly*** and others assiduously advanced argument that the impugned corrigendum dated 28.9.2016 is meant to enhance the scope of adjudication with regard to promotion of 44 persons with reference to the policy circular dated 27.4.2009 which was not made in the initial reference dated 9.12.2014 and such corrigendum amounts to withdrawal of the first reference which was confined to adjudicate the matter of not considering the promotion of opposite party no.3 alone. Mr. Mohanty also submits that while making corrigendum, the management was not heard and after two years of the original reference,

when the proceeding had already progressed substantially to the stage of evidence, issuance of a corrigendum was nothing but mala fide and required to be quashed. It is further submitted that the learned Labour Court order to resettle the issue being consequential to the corrigendum without importing the purport of the corrigendum, the said order should be set aside.

4-A. Learned Counsel Mr. Das for opposite party no.3 submitted that a corrigendum can be issued which is clarificatory in nature and the cited decision in ***D.N. Ganguly*** case does not prohibit the same. He has further submitted that management is trying to take advantage against the workmen because the corrigendum was not issued to take away the original reference.

5. The order dated 26.11.2016 of the learned Labour Court in I.D. Case No.31 of 2014 in resettling the issue is a dependent order being consequential to corrigendum issued on 26.10.2016. The legality of the corrigendum would decide the sustainability of the same. It is noteworthy that the ratio of the cited judgment in ***D.N. Gaguly*** case (Supra) was based upon the issue involved pertaining to cancellation or supersession of the reference made and not of the modification or correction, and for that it is distinguishable on facts.

6. On careful perusal of original reference dated 9.12.2014 and corrigendum dated 28.9.2016 in the backdrop of facts that the company management had several circulars to deal with promotion matters, it is apparent that the issuance of corrigendum was meant to substitute the original reference. It is because of the facts that by corrigendum only one circular is referred to while in the initial reference no such limitation is stipulated for consideration of promotion of opposite party no.3. If the adjudication of the Labour Court with regard to the promotion of opposite party no.3 would be confined only to adherence to a circular dated 27.4.2009, in our considered opinion, the scope of adjudication for reference dated 9.12.2014 is squeezed within the compartment of the corrigendum.

6-A. The Labour Tribunal can consider in addition to the dispute specified in the order of reference, the matters incidental to the said dispute and such implied power cannot be limited by issuing corrigendum subsequent to the reference. While exercising such adjudicating power for original reference, the parties can raise objection and bring the testing materials upon which dispute can be considered. It is noteworthy that in the ***D.N. Ganguly*** case Hon'ble Apex Court has stated that once an order in writing is made by the

appropriate Government referring an industrial dispute to the tribunal, proceedings before the Tribunal are deemed to have commenced and the Tribunals are to hold their proceedings expeditiously.

7. For the reasons stated above the corrigendum dated 28.9.2016 (Annexure-8) is unsustainable in the eye of law and is liable to be set aside.

8. The dependent order dated 26.11.2016 in I.D. Case No.31 of 2014 in resettling the issue is not sustainable because corrigendum the basis of such order is found to be invalid.

9. In the wake of above analysis, the writ application is allowed. The corrigendum dated 20.12.2011 (Annexure-6) and the corrigendum dated 28.9.2016 (Annexure-8) and order dated 26.11.2016 in I.D. Case No.31 of 2014 pending in the Labour Court, Bhubaneswar are hereby quashed.

10. The learned Labour Court is directed to speed up the adjudication so as to ensure its completion within six months from the date of filing of certified copy of this order.

11. All the interim orders passed in the proceeding stands vacated.

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2020 (II) ILR - CUT- 61

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

W.P. (C) NO. 9095 OF 2020

BIJAYA KUMAR RAGADA .....Petitioner

.Vs.

STATE OF ODISHA & ORS. .....Opp. Party

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 read with Section 482 and 483 of the Criminal Procedure Code, 1973 and the inherent power over the civil matters under Section 151 of the Civil

Procedure Code, 1908 – COVID 19 pandemic – Lockdown situation – Working of High Court, other subordinate courts as well as judicial and quasi-judicial authorities working under the superintendence of High Court, has been affected to a great extent – Situation has resulted in hardship for the litigants and ordinary citizens – Legal remedies – Held, with a view to ensure that the litigants and citizens do not suffer on account of their inability to approach the court of law, the court issued several directions to contain the plight of the litigants and non-litigants by invoking the plenary power under Article 226 and power of superintendence under Article 227 of the Constitution of India, inherent power over the criminal matters under Section 482, Cr.P.C., power of superintendence over criminal courts under Section 483, Cr.P.C. and the inherent power over the civil matters under Section 151 of the C.P.C.

For the Petitioner : Mr. Bijaya Kumar Ragada (In Person)
For the Opp. Party : Mr. Ashok Kumar Parija, Advocate General
Mr. Gopal Krishna Mohanty,
President, O.H.C Bar Association.
Mr. A.K. Bose, Asst. Solicitor General.

ORDER Date of Order : 05.05.2020

C.R. DASH, J.

1. Heard Mr. Bijaya Kumar Ragada, learned counsel, who appears in person as the petitioner, Mr. Ashok Kumar Parija, learned Advocate General, Mr. Gopal Krishna Mohanty, President, Orissa High Court Bar Association and Mr. A.K. Bose, learned Asst. Solicitor General for the Union of India.

2. Lock-down Phase 3.0 throughout the country for two weeks w.e.f. 04th May, 2020 is in currency now. Novel Corona Virus (COVID-19) has infected more than 46,000 persons so far across the country. The virus, Novel as it is, in absence of vaccine and medication to arrest its spread, declares with pride "Hide from me to be safe" and "Keep distance from my carrier to be alive". Hon'ble Prime Minister of India and Hon'ble Chief Minister of our State have taken well conceived, well thought of, justly considered, tough and hard steps to contain the crisis arising out of the virus.

3. Staying at home to be safe and maintaining social distance are the only ways to check spread of the virus. India countries cross sections of people of various religion, faith, cast, creed and colour. Law abidingness, however, has

never been a natural habit of a part of the population. Irresponsibility is writ large when it comes to conforming to certain sets of discipline and order. In such a situation, locking down the entire country to keep the people safe was probably the only remedy available, though outcome of a very tough and difficult decision. We, therefore, are one in our view that Executive Government is best fitted and best suited to contain the crisis arising out of the virus in its own novel and extraordinary way, provided everything is done within the constitutional framework and there is proper co-ordination among the implementing agencies.

4. Locking down the entire country was the outcome of a tough decision in fact. Unlocking the country is going to be more tough and a difficult responsibility. In the process, however, the courts' work throughout the country has suffered and consequently the litigants have been suffering.

5. On the face of the crisis, we are sincerely concerned with the plight of the citizens and the litigants, majority of whom in our State are poor. They are not in a position to come to the Court in such a situation to seek legal remedies. We also do not want rush of litigants in the Courts in contravention of the "Social Distancing" discipline.

6. For the consequential lockdown due to COVID-19 in three phases including the present one, working of this Court, other subordinate courts as well as judicial and quasi-judicial authorities working under the superintendence of this Court, has been affected to a great extent. The situation has resulted in hardship for the litigants and ordinary citizens to approach the court of law to take recourse to legal remedies. With a view to ensure that the litigants and citizens do not suffer on account of their inability to approach the court of law, we propose to invoke our plenary power under Article 226 and power of superintendence under Article 227 of the Constitution of India, our inherent power over the criminal matters under Section 482, Cr.P.C., our power of superintendence over criminal courts under Section 483, Cr.P.C. and our inherent power over the civil matters under Section 151 of the C.P.C.

7. We do not see a fathomable end to the present crisis, but we hope that, by the end of the ensuing Summer Vacation of this Court as well as the subordinate judiciary of the State, the situation shall be normal or at least near to normal. Keeping such hope in mind, in exercise of our power under Articles 226 and 227 of the Constitution of India read with Sections 482 &

483, Cr.P.C. and Section 151 of the Code of Civil Procedure, we issue the following directions to at least contain the plight of the litigants and non-litigants.

(i) That all interim orders / directions issued or protection granted including any order requiring any compliance by the parties to such proceedings, passed by this Court or any court subordinate to it or any Family Court or Labour Court or any Tribunal or any other Judicial or Quasi Judicial forum in the State of Odisha, over which this Court has power of superintendence, which were subsisting as on the date of commencement of national lockdown, shall stand extended till 18th June 2020.

(ii) That it is further directed that the interim orders or directions of any court in the State, which are not of a limited duration and were meant to operate till further orders, shall continue to remain in force until modified / altered / vacated by specific order of the court concerned in a particular case.

(iii) Filing of written-statement or return in any Suit or proceeding pending before any Civil Court or any other forum, unless specifically directed, shall stand extended till 18th of June, 2020. It is however clarified that, if the parties are in a position to file such written-statement or return, they may file it before such date, i.e. 18.06.2020.

(iv) That it is further directed that the orders of eviction, dispossession, demolition, etc. passed by this Court or any court subordinate to it or any Tribunal or judicial or quasi judicial forum, shall remain in abeyance till 18th of June 2020.

(v) Interim protection given in all the anticipatory bail applications by the High Court or Sessions Court for a limited period, which are likely to expire by today or has expired in the meantime, shall stand extended till 18th of June, 2020. However, any party aggrieved by the conduct of the accused on such interim protection, may move the Court in seisin over the matter for cancellation of the interim protection, if prejudice is caused to him / her.

(vi) All the interim bail granted under Section 439, Cr.P.C. by the High Court or Sessions Courts and limited by time-frame specifying an expiry date, stands extended till 18th of June, 2020, subject to the condition that, on every 10th day from today the defence counsel shall file a petition supported by affidavit before the competent court in seisin over the matter, to the effect that the person on interim bail is not abusing his/her liberty and he/she is living within the jurisdiction of the Court. If the 10th day falls on a holiday, such affidavit may be filed on the re-opening day succeeding next.

(vii) Parole granted to a person through orders passed by a Court exercising the criminal jurisdiction and limited by time-frame specifying an expiry date, stands extended till 18th of June, 2020, subject to the condition specified in Point No.(ix).

(viii) Unless there is necessity of arrest for maintenance of law and of course order, in a cognizable offence prescribing sentence up to seven years imprisonment, the police should not be in a hurry to arrest the accused without complying with the provision of Section 41(A), Cr.P.C. This shall be effective till 18th June, 2020.

(This is however not an interdict or a direction to curb power of the police to arrest, but on the face of the crisis, an advisory to be followed by the police so far as it is practicable and possible).

(ix) It is further directed that the State Government or any of its Department or any Municipal Corporation / Council / Board or any Gram Panchayat or any other local body or any other agency and instrumentality of the State shall not take any action for eviction, and demolition in respect of the property, over which any citizen or person or party or any Body Corporate has physical or symbolic possession as on today till 18th June, 2020.

(x) That, it is further directed that, any Bank or Financial Institution shall not take action for auction in respect of any property of any citizen or person or party or any Body corporate till 18th June, 2020.

(xi) That it is further directed that if the Government of Odisha and/or any of its Department and/or functionaries, Central Government and/or its departments or functionaries or any Public Sector Undertakings or any Public or Private Companies or any Firm or any individual or person is/are, by the order of this Court or any Court subordinate to it or the Tribunals, required to do a particular thing or carry out certain direction in a particular manner in a time frame, which expired or is going to expire at any time, during the period of lockdown or the extended lockdown, time for compliance of such order shall stand extended up to 18th June 2020, unless specifically directed otherwise.

(xii) To dispel ambiguity, it is clarified that :-

(a) Those interim orders / directions, which are not for a limited duration and are to operate until further orders, shall remain unaffected.

(b) That, in case, extension of interim order(s)/ direction(s) as directed by us cause undue hardship and prejudice of any extreme nature to any of the parties to such proceeding(s), such parties would be at liberty to seek appropriate relief before the competent Court(s), Tribunal, Judicial or Quasi-Judicial Forum, and these directions shall not be a bar for such Courts / Forums to consider such petition(s) filed by the aggrieved party, on its merit, after due notice to the other side.

(c) Our directions vide Point No.(ix) shall have no effect if the State is required to resort to eviction or demolition for any urgent public purpose in the larger interest of the public.

(d) All Courts, Tribunals, judicial and quasi-judicial authorities are directed to abide by these directions, and the parties seeking relief(s) covered by these directions can file hard copy or soft copy of this order before the competent court / forum, and such copy of the order shall be given due weightage.

8. This order be published in the official website of the Court and circulated to all concerned Courts, Tribunals, judicial and quasi-judicial authorities of the State, learned Advocate General, learned Assistant Solicitor General for Odisha and the Chairman of Odisha State Bar Council.

We request the Chairman of the State Bar Council to circulate this order to all the Bar Associations of the State.

9. The Registry is directed to give wide publicity to this order so that the litigants can know about the order and shall not rush to the Court for different relief(s) covered by these directions.

List this matter before the appropriate Bench on 18th of June, 2020.

As Lock-down period is continuing for COVID-19, learned counsel for the petitioner and any person to be benefited by this order, may utilize the soft copy of this order available in the High Court's official website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587 dated 25.03.2020.

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2020 (II) ILR - CUT- 66

DR. B.R. SARANGI, J.

W.P.(C) NO. 2446 OF 2011

M/S. KALINGA HATCHERY (P) LTD. & ANR. ……..Petitioner

.Vs.

REGIONAL DIRECTOR, ESI CORP. & ORS. ….....Opp. Parties

(A) NATURAL JUSTICE – The purpose of following – To prevent miscarriage of justice.

Natural justice, another name of which is common sense justice, is the name of those principles which constitute the minimum requirement of justice and without adherence to which justice would be a travesty. Natural justice accordingly stands for that "fundamental quality of fairness which being adopted, justice not only be done but also appears to be done".

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order directing recovery of ESI contribution – Plea that the petitioner unit is not coming under the ESI Act – Plea not considered but certificate proceeding initiated – Held, not proper.

"In view of the facts and law discussed above, this Court is of the considered view that on the basis of the reply given by the petitioners, the Deputy Director ought to have come to a conclusion with regard to applicability of the Act to the petitioner unit, pursuant to resolution passed by the Government describing poultry as agriculture, and the same should have been communicated to the petitioners. Without doing so, initiation of certificate case No.17648 of 2011 and direction for recovery of the amount, vide letter dated 10.01.2011 in Annexure-10, cannot sustain in the eye of law." *(Para 19)*

Case Laws Relied on and Referred to :-

1. AIR 1974 SC 87 : Union of India .Vs. Mohan Lal Capoor.
2. AIR 1981 SC 1915 : Uma Charan .Vs. State of Madhya Pradesh.
3. 2017 (I) OLR 5 : Patitapaban Pala .Vs. Orissa Forest Development Corporation Ltd. & Anr.
4. 2017 (I) OLR 625 : Banambar Parida .Vs. Orissa Forest Development Corporation Ltd.
5. 1976 2 All ER 865 (HL) : Fairmount Investments Ltd. .Vs. Secy of State for Environment.
6. LJ, 1977 3 All ER 452 : R. Vs. Secy. of State for Home Affairs, ex p. Hosenball, Geoffrey Lane.
7. AIR 1970 SC 150 (1969) 2 SCC 262 : A.K. Kraipak & Ors..Vs. Union of India.
8. AIR 1978 SC 597 (1978) 1 SCC 248 : Maneka Gandhi .Vs. Union of India.
9. AIR 1981 SC 818 : Swadeshi Cotton Mills .Vs. Union of India.
10. (1998) 8 SCC 194 : Basudeo Tiwary.Vs. Sido Kanhu University & Ors.
11. (2008) 16 SCC 276 : Nagarjuna Construction Company Limited .Vs. Government of Andhra Pradesh.
12. AIR 2009 SC 2375 : Uma Nath Panday & Ors..Vs. State of U.P. & Ors.

For Petitioners : M/s. A.K. Roy & D Dey
For Opp. Parties : M/s. P.P. Ray & A.K. Jena

JUDGMENT Decided On: 10.02.2020

DR. B.R. SARANGI, J.

The petitioner no.1, which is a Private Limited Company, having its office at Plot No.1, Industrial Bagabanpur, Patrapada, Bhubaneswar, Dist-Khurda, was carrying on business of hatching in eggs and call birds and registered as a small scale unit bearing registration no.151501208. Petitioner no.2 is the shareholder and Managing Director of petitioner no.1. They have filed this writ petition with a prayer to quash the notice dated 10.01.2011 in Annexure-10 issued by the Recovery Officer, Employees' State Insurance Corporation, Bhubaneswar in respect of Certificate No.17648/2011 for recovery of contributions to the tune of Rs.69,972/- for the period from 01.01.2006 to 30.11.2008, interest of Rs.29,706/- under Section 39(5)(a) of ESI Act up to 31.12.2010 and Process Fee of Rs.2/- in total Rs.99,680/-, as

the same is violative of principles of natural justice for having not served a copy of the order on the petitioners as envisaged under Section 45A of the Employees' State Insurance Act, 1948.

2. The factual matrix of the case, in hand, is that petitioner no.1, being a Private Limited Company and covered under the Scheme of Employees State Insurance Act, 1948 (hereinafter referred to ESI Act, 1948), was allotted Code No.44-2284, pursuant to which it has been depositing the contribution, both employees and employer's shares, before opposite party no.1 to 3 till 31.12.2005. In pursuance of the notification issued by the Government of Orissa, Department of Agriculture published a Gazette Notification dated 23.09.2005 incorporating the Government Resolution dated 10.08.2005, which classified poultry as agriculture and accordingly, poultry farmers/entrepreneurs were allowed to access to the same incentives as being offered for agriculture by other concerned departments like Revenue, Finance, Labour, Energy etc. Therefore, the petitioner-unit, which was contributing to the ESI authority for carrying on business on Poultry farm (Layer Farm) for hatching unit from October, 2003 to December, 2005, filed an application before opposite party no.1 requesting to delete the Code allotted in its favour with effect from 01.10.2006, vide its letter dated 31.01.2006, on the ground that the coverage of the Act did not extend to agriculture and accordingly recovery of employees' contribution was discontinued. The petitioner-unit, having switched over from the business of hatchery to poultry farm, paid contribution under the scheme of the Act from the year 2003 to December 2005 as the coverage of the Act was still continuing under Section 1(6) of the ESI Act, 1948.

2.1. After receiving the representation dated 31.01.2006 of petitioner-unit, opposite party no.2 issued a letter dated 16.05.2006 contending that the Government of Orissa Notification dated 23.09.2005 was not applicable to the petitioner-unit on the ground that it had a manufacturing process like hatching of eggs for which power was being used. On receipt of such letter, the petitioner-unit filed reply to the said letter before opposite party no.2 clarifying the position that it had a layer unit which gave eggs only and no power was being used in the production of eggs and the layers were being kept in the cage where they were giving eggs. As such, power was not being used for the hatching of eggs. The petitioner-unit also moved an application before opposite party no.4 requesting the Government of Orissa, Department of Labour & Employment to direct the ESI Corporation not to insist upon the

payment of contribution etc. as the Act was not applicable to agriculture or no notification was issued for inclusion of agriculture for the purpose of coverage of the Act.

2.2. In spite of several efforts being made, which were pending for consideration, the petitioner-unit again received two show-cause notices from opposite party no.2 on 12.06.2006 in respect of proposed determination of contribution under Section 45A of the Act, 1948 and proposed criminal prosecution for non-compliance of the Act and Regulation made thereunder. After receiving the above show-cause notices, the petitioner-unit appeared before opposite party no.2 on 31.08.2006 through its counsel and filed a detailed show-cause reply bringing all the facts of the case and prayed to drop the proceedings. After a gap of four and half years, the petitioner-unit received a copy of letter from opposite party no.2 addressed to opposite party no.3 for initiating recovery proceedings vide letter dated 05.01.2011. Consequentially, it received other two notices for filing a show-cause reply for determination of adhoc contribution for the period from 01.12.2008 to 31.03.2010 and notice for personal hearing for payment of contribution under Section 45A of the ESI Act. On receipt of such notices, the petitioner-unit appeared before opposite party no.2 through its counsel and reiterated the fact that the ESI Act, 1948 was not applicable to it as the coverage of the Act did not extend to agriculture in view of resolution passed by the Government of Orissa including the poultry as agriculture. Petitioner-unit also brought to the notice of opposite party no.2 that two notices for initiation of recovery proceedings were received by it for the period under dispute, but no order was served on the petitioner-unit or no adjudication or no decision regarding applicability of the Act was communicated to them.

2.3. Pursuant to the letter dated 05.01.2011 issued by opposite party no.2, opposite party no.3-Recovery Officer, ESI Corporation, Bhubaneswar initiated Certificate Case No.17648 of 2011 and served a copy of the notice dated 10.01.2011 on the petitioner-unit on 19.01.2011 directing for recovery of Rs.99,680/-, which includes contributions to the tune of Rs.69,972/- for the period from 01.01.2006 to 30.11.2008, interest of Rs.29,706/- under Section 39(5)(a) of ESI Act up to 31.12.2010 and Process Fee of Rs.2/-. Hence this application.

3. Mr. A.K. Roy, learned counsel for the petitioners though admitted that the petitioner-unit was registered under the ESI Act, 1948 and as such, contributed both employees and employer's share till 31.12.2010, but

contended that by virtue of notification issued by the Government of Orissa, Department of Agriculture dated 23.09.2005 incorporating the Government Resolution dated 10.08.2005 classifying the poultry as agriculture, the petitioner-unit is no more liable to deposit the contribution as it availed incentives being offered for agriculture by other concerned departments like Revenue, Finance, Labour, Energy etc. As such, the petitioner-unit which was registered under the ESI Act, 1948, having changed its business from hatchery to poultry w.e.f. October, 2003, is not liable to pay the contribution from October, 2003 to December , 2005 though the same was paid by it. More particularly, it is contended that the petitioner-unit had no manufacturing process of hatching eggs by using power, rather it was a layers farm as the eggs were put to cage for its hatching, thereby the ESI Act is not applicable. Consequentially, the determination made for recovery of the amount for the period from 01.01.2006 to 30.11.2008 and interest thereon pursuant to initiation of Certificate case No.17648 of 2011 dated 10.01.2011 in Annexure-10, cannot sustain in the eye of law. It is further contended that such recovery is being made without compliance of principles of natural justice, thereby notice issued for such purpose cannot sustain and is liable to be quashed. It is further contended that though the petitioner-unit filed objections to the notice of show-cause for its exclusion from payment of contribution, but the same was not taken into consideration in proper perspective nor was the same communicated to the petitioner-unit, thereby no opportunity of hearing was given to it. Consequentially, initiation of certificate case and consequential direction for recovery of the amount, pursuant to notice dated 10.01.2011, cannot sustain in the eye of law.

4. Per contra, Mr. P.P. Ray, learned counsel appearing for opposite parties no.1 to 3 at the outset raised preliminary objection with regard to maintainability of the writ petition in view of availability of alternative remedy and contended that notice of recovery was issued by initiating certificate proceeding basing upon the report of the Inspector. Consequentially, the Deputy Director, ESI Corporation, Bhubaneswar passed the order of recovery under Section 45-C to 45-I of the ESI Act, 1948 and as the petitioner-unit failed to pay the arrear amount, pursuant to notice dated 02.07.2009, he filed the certificate in Form C-19 dated 05.01.2011 to opposite party no.3-Recovery Officer for recovery of the arrear contribution amount of Rs.69,972/- for the period from 01/06 to 11/08 along with a sum of Rs.29,706/- as interest @ 12 % per annum calculated up to 31.12.2010 totaling to Rs.99,678/-. It is further contended that in view of provisions

contained under Section 2(12) of the Act, which contains two parts, namely, factory and establishment, even though the petitioner-unit had no factory and establishment under Section 1(5) of the ESI Act, 1948, the petitioner-unit is liable to pay the contribution. As such, the petitioner-unit was paying contribution till December, 2005. On the basis of inspection conducted in 2008 for assessment of the year 2008, when it was brought to the notice of the authority that the employer had not deducted the employees contribution and stopped compliance, on the ground that the poultry being an agricultural unit to which ESI Act, 1948 is not applicable, a suitable reply was given to the petitioner-unit regarding compliance of coverage. In view of such report of the Inspector and observation made therein, the Dy. Director (Revenue), ESI Corporation, Bhubaneswar passed order for recovery of contribution along with interest, pursuant to which direction has been issued for recovery of the amount by initiating certificate case by issuing notice to the petitioner-unit in Annexure-10. Thereby, no illegality or irregularity has been committed by the authority by issuing such notice and therefore, seeks dismissal of the writ petition.

5. This Court heard Mr. A.K. Roy, learned counsel appearing for the petitioner and Mr. P.P. Ray, learned counsel appearing for opposite parties no.1 to 3. 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 facts narrated above, it is profitable to refer the provisions of law governing the field for just and proper adjudication of the case. Sections-1(1) (4), (5) (6), 2(12), 39 (5)(a), 45-A to 45-I, 75 and 82 are quoted below:-

> ***"1.Short title, extent, commencement and application.*** — (1) This Act may be called the Employees' State Insurance Act, 1948.
>
> (4) It shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories.
>
> Provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.
>
> (5) The appropriate Government may, in consultation with the Corporation and where the appropriate Government is a State Government, with the approval of the Central Government, after giving one month's notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Act or any of them, to any other establishment, or class of establishments, industrial, commercial, agricultural or otherwise.

Provided that where the provisions of this Act have been brought into force in any part of a State, the said provisions shall stand extended to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of establishments in another part of that State.

(6) A factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of power.

2 (12) " factory " means any premises including the precincts thereof-

(a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or

(b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on,

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a railway running shed ;

39. Contributions. — (1) The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer (hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) and shall be paid to the Corporation.

39(5)(a) If any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent. per annum or at such higher rate as may be specified in the regulations till the date of its actual payment :

Provided that higher interest specified in the regulations shall not exceed the lending rate of interest charged by any scheduled bank.

45-A. Determination of contributions in certain cases. — (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accor-dance with the provisions of section 44 or any [Social Security Officer] or other official of the Corporation referred to in sub-section (2) of section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment.]

Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45-B for the recovery under section 45-C to section 45-I.

45-B. Recovery of contributions. — Any contribution payable under this Act may be recovered as an arrear of land revenue.

[*45-C. Issue of certificate to the Recovery Officer.* — (1) Where any amount is in arrear under this Act, the authorised officer may issue, to the Recovery Officer, a certificate under his signature specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the factory or establishment or, as the case may be, the principal or immediate employer by one or more of the modes mentioned below : —

(a) attachment and sale of the movable or immovable property of the factory or establishment or, as the case may be, the principal or immediate employer ;

(b) arrest of the employer and his detention in prison ;

(c) appointing a receiver for the management of the movable or immovable properties of the factory or establishment, or, as the case may be, the employer :

Provided that the attachment and sale of any property under this section shall first be effected against the properties of the factory or establishment and where such attachment and sale is insufficient for recovering the whole of the amount of arrears specified in the certificate, the Recovery Officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears.

(2) The authorised officer may issue a certificate under sub-section (1) notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

45-D. Recovery officer to whom certificate is to be forwarded. — (1) The authorised officer may forward the certificate referred to in section 45-C to the Recovery Officer within whose jurisdiction the employer —

(a) carries on his business or profession or within whose jurisdiction the principal place of his factory or establishment is situate ; or

(b) resides or any movable or immovable property of the factory or establishment or the principal or immediate employer is situate.

(2) Where a factory or an establishment or the principal or immediate employer has property within the jurisdiction of more than one Recovery Officer and the Recovery Officer to whom a certificate is sent by the authorised officer —

(a) is not able to recover the entire amount by the sale of the property, movable or immovable, within his jurisdiction ; or

(b) is of the opinion that, for the purpose of expediting or securing the recovery of the whole or any part of the amount, it is necessary so to do,

he may send the certificate or, where only a part of the amount is to be recovered, a copy of the certificate certified in the manner prescribed by the Central Government and specifying the amount to be recovered to the Recovery Officer within whose jurisdiction the factory or establishment or the principal or immediate employer has property or the employer resides, and thereupon that Recovery Officer shall also proceed to recover the amount due under this section as if the certificate or the copy thereof had been the certificate sent to him by the authorised officer.

45-E. Validity of certificate and amendment thereof. — (1) When the authorised officer issues a certificate to a Recovery Officer under section 45-C, it shall not be open to the factory or establishment or the principal or immediate employer to dispute before the Recovery Officer the correctness of the amount, and no objection to the certificate on any other ground shall also be entertained by the Recovery Officer.

(2) Notwithstanding the issue of a certificate to a Recovery Officer, the authorised officer shall have power to withdraw the certificate or correct any clerical or arithmetical mistake in the certificate by sending an intimation to the Recovery Officer.

(3) The authorised officer shall intimate to the Recovery Officer any orders withdrawing or canceling a certificate or any correction made by him under sub-section (2) or any amendment made under sub-section (4) of section 45-F.

45-F. Stay of proceedings under certificate and amendment or withdrawal thereof. — (1) Notwithstanding that a certificate has been issued to the Recovery Officer for the recovery of any amount, the authorised officer may grant time for the payment of the amount, and thereupon the Recovery Officer shall stay the proceedings until the expiry of the time so granted.

(2) Where a certificate for the recovery of amount has been issued, the authorised officer shall keep the Recovery Officer informed of any amount paid or time granted for payment, subsequent to the issue of such certificate.

(3) Where the order giving rise to a demand of amount for which a certificate for recovery has been issued has been modified in appeal or other proceedings under this Act, and, as a consequence thereof, the demand is reduced but the order is the subject-matter of a further proceeding under this Act, the authorised officer shall stay the recovery of such part of the amount of the certificate as pertains to the said reduction for the period for which the appeal or other proceeding remains pending.

(4) Where a certificate for the recovery of amount has been issued and subsequently the amount of the outstanding demand is reduced as a result of an appeal or other proceedings under this Act, the authorised officer shall, when the order which was the subject-matter of such appeal or other proceeding has become final and conclusive, amend the certificate or withdraw it, as the case may be.

45-G. Other modes of recovery. — (1) Notwithstanding the issue of a certificate to the Recovery Officer under section 45-C, the Director-General or any other officer authorised by the Corporation may recover the amount by any one or more of the modes provided in this section.

(2) If any amount is due from any person to any factory or establishment or, as the case may be, the principal or immediate employer who is in arrears, the Director-General or any other officer authorised by the Corporation in this behalf may require such person to deduct from the said amount the arrears due from such factory or establishment or, as the case may be, the principal or immediate employer under this Act and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Corporation :

Provided that nothing in this sub-section shall apply to any part of the amount exempt from attachment in execution of a decree of a civil court under section 60 of the Code of Civil Procedure, 1908 (5 of 1908).

(3) (i) The Director-General or any other officer authorised by the Corporation in this behalf may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the factory or establishment or, as the case may be, the principal or immediate employer or any person who holds or may subsequently hold money for or on account of the factory or establishment or as the case may be, the principal or immediate employer, to pay to the Director-General either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due from the factory or establishment or, as the case may be, the principal or immediate employer in respect of arrears or the whole of the money when it is equal to or less than that amount.

(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the principal or immediate employer jointly with any other person and for the purposes of this sub-section, the shares of the joint-holders in such account shall be presumed, until the contrary is proved to be equal.

(iii) A copy of the notice shall be forwarded to the principal or immediate employer at his last address known to the Director-General or, as the case may be, the officer so authorised and in the case of a joint account to all the joint-holders at their last addresses known to the Director-General or the officer so authorised.

(iv) Save as otherwise provided in this sub-section, every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, bank or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made notwithstanding any rule, practice or requirement to the contrary.

(v) Any claim respecting any property in relation to which a notice under this sub-section has been issued arising after the date of the notice shall be void as against any demand contained in the notice.

(vi) Where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the

principal or immediate employer or that he does not hold any money for or on account of the principal or immediate employer, then, nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particulars, such person shall be personally liable to the Director-General or the officer so authorised to the extent of his own liability to the principal or immediate employer on the date of the notice, or to the extent of the principal or immediate employer's liability for any sum due under this Act, whichever is less.

(vii) The Director-General or the officer so authorised may, at any time or from time to time, amend or revoke any notice issued under this sub-section or extend the time for making any payment in pursuance of such notice.

(viii) The Director-General or the officer so authorised shall grant a receipt for any amount paid in compliance with a notice issued under this sub-section and the person so paying shall be fully discharged from his liability to the principal or immediate employer to the extent of the amount so paid.

(ix) Any person discharging any liability to the principal or immediate employer after the receipt of a notice under this sub-section shall be personally liable to the Director-General or the officer so authorised to the extent of his own liability to the principal or immediate employer so discharged or to the extent of the principal or immediate employer's liability for any sum due under this Act, whichever is less.

(x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Director- General or the officer so authorised, he shall be deemed to be a principal or immediate employer in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were an arrear due from him, in the manner provided in sections 45-C to 45-F and the notice shall have the same effect as an attachment of a debt by the Recovery Officer in exercise of his powers under section 45-C.

(4) The Director-General or the officer authorised by the Corporation in this behalf may apply to the court in whose custody there is money belonging to the principal or immediate employer for payment to him of the entire amount of such money, or if it is more than the amount due, an amount sufficient to discharge the amount due.

(5) The Director-General or any officer of the Corporation may, if so authorised by the Central Government by general or special order, recover any arrears of amount due from a factory or an establishment or, as the case may be, from the principal or immediate employer by distraint and sale of its or his movable property in the manner laid down in the Third Schedule to the Income-tax Act, 1961 (43 of 1961).

45-H. Application of certain provisions of the Income-Tax Act. — The provisions of the Second and Third Schedules to the Income-tax Act, 1961 (43 of 1961) and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time, shall apply with necessary modifications as if the said provisions and the rules referred to the arrears of the amount of contributions, interests or damages under this Act instead of to the income-tax :

Provided that any reference in the said provisions and the rules to the " assessee " shall be construed as a reference to a factory or an establishment or the principal or immediate employer under this Act.

45-I. Definitions.— For the purposes of sections 45-C to 45-H, —

(a) " authorised officer " means the Director-General, Insurance Commissioner, Joint Insurance Commissioner, Regional Director or such other officer as may be authorised by the Central Government, by notification in the Official Gazette ;

(b) " Recovery Officer " means any officer of the Central Government, State Government or the Corporation, who may be authorised by the Central Government, by notification in the Official Gazette, to exercise the powers of a Recovery Officer under this Act.

75. Matters to be decided by the Employees' Insurance Court. — (1) If any question or dispute arises as to —

(a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or

(b) the rate of wages or average daily wages of an employee for the purposes of this Act, or

(c) the rate of contribution payable by a principal employer in respect of any employee, or

(d) the person who is or was the principal employer in respect of any employee, or

(e) the right of any person to any benefit and as to the amount and duration thereof, or

(ee) any direction issued by the Corporation under section 55-A on a review of any payment of dependants' benefits, or

(g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act, or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act**.**

such question or dispute **[**subject to the provisions of sub-section (2A) shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (2A), the following claims shall be decided by the Employees' Insurance Court, namely : —

(a) claim for the recovery of contribution from the principal employer ;

(b) claim by a principal employer to recover contributions from any immediate employer ;

(d) claim against a principal employer under section 68 ;

(e) claim under section 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto ; and

(f) If any claim for the recovery of any benefit admissible under this Act.

(2A) If in any proceedings before the Employees' Insurance Court a disablement question arises and the decision of a medical board or a medical appeal tribunal has not been obtained on the same and the decision of such question is necessary for the determination of the claim or question before the Employees' Insurance Court, that Court shall direct the Corporation to have the question decided by this Act and shall thereafter proceed with the determination of the claim or question before it in accordance with the decision of the Medical Board or the Medical Appeal Tribunal, as the case may be, except where an appeal has been filed before the Employees' Insurance Court under sub-section (2) of section 54-A in which case the Employees' Insurance Court may itself determine all the issues arising before it.

(2-B) No matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the Employees' Insurance Court unless he has deposited with the Court fifty per cent. of the amount due from him as claimed by the Corporation :

Provided that the Court may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this sub-section.

(3) No civil Court shall have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which by or under this Act is to be decided by a Medical Board, or by a Medical Appeal Tribunal or by the Employees' Insurance Court.

82. Appeal. — (1) Save as expressly provided in this section, no appeal shall lie from an order of an Employees' Insurance Court.

(2) An appeal shall lie to the High Court from an order of an Employees' Insurance Court if it involves a substantial question of law.

(3) The period of limitation for an appeal under this section shall be sixty days.

(4) The provisions of sections 5 and 12 of the Limitation Act, 1963 (36 of 1963) shall apply to appeals under this section."

7. In view of statutory provisions mentioned above, admittedly the petitioner-unit was initial covered under the Scheme of ESI Act, 1948 and allotted a Code number. Accordingly, contributions were made till December, 2005. The Government of Orissa, Department of Agriculture published a Gazette Notification on 23.09.2005 incorporating the Government Resolution dated 10.08.2005, which reads as follows:

"After careful consideration of all the above issues, State Government has decided to classify poultry as agriculture so that the poultry farmers/entrepreneurs will have access to the same incentives as being offered for agriculture by other

> *concerned departments like Revenue, Finance, Labour, Energy etc. It is also expected that this will enable poultry to get priority sector tending from financial institutions. The benefits and incentives admissible to agriculture by all concerned departments will also be admissible to poultry."*

In view of such Resolution, the Government has decided to classify poultry as agriculture. As a result thereof, the poultry farmers/entrepreneurs got access to the same incentives as being offered for agriculture by other concerned Departments like Revenue, Finance, Labour, Energy etc.

8. Sub-section (4) and (6) of Section-1 of the ESI Act, 1948 is applicable to all the factories (including factories belonging to the Government) other than seasonal factories and a factory or an establishment to which the Act applies shall continue to be governed by the Act notwithstanding that the number of persons employed therein. The petitioner-unit unit was hatchery unit. Though it does not cover under the definition of Section 2 (12), the meaning of factory as defined a manufacturing process is being carried on with the aid of power for preceding 12 months, is liable for contribution towards employees. The hatchery unit of the petitioners' was continued till October, 2003, but subsequently it was discontinued and more particularly, the hatchery was done on the basis of poultry farm (Layer farm) not by using power, but the petitioner-unit was contributing to the ESI authority till December, 2005, though the nature of business was changed to poultry farm from October, 2003. Therefore, the contribution already paid from October, 2003 to December, 2005 is without jurisdiction and subsequently the claim made for contribution from 01.01.2006 to 30.11.2008 and interest charged thereon up to 31.01.2010 cannot sustain in the eye of law. It is of importance to note, after the change of business from hatchery to poultry relying upon the Government Notification dated 23.09.2005, the petitioner-unit requested for deletion of registration under the ESI Act, 1948 specifically contending that the layer unit gave eggs only and no power was being used in the production of eggs. In spite of such request being made, no action was taken by the opposite parties. But, subsequently the petitioner-unit received two show-cause notices on 12.06.2006 with regard to proposed determination of contribution under Section 45-A of the Act and proposed criminal prosecution for non-compliance of the Act and Regulation made thereunder. On receipt of such notices, the petitioner-unit categorically averred in paragraphs-4 to 8 of its reply that the scheme of the Act was not applicable to the petitioners' layer unit. The averments made in paragraphs-4 to 8 of the show-cause reply read as follows:

"4. That the petitioner has been allotted Code No.44-2284 since 1988 when the petitioner had a hatching Unit which was running with the aid of power. The said hatching business has been continuing till October'2003.

5. That from October' 2003, the petitioner discontinued hatching business and started layer unit where the poultry gives egg only and no power is being used. However, the petitioner has been paying regular contribution of ESI under the Act.

6. That the Government of Orissa vide its Gazette No.35 dt. 23.9.2005 declared poultry as a "Agriculture" and accordingly poultry farmers/entrepreneurs will have access to the same incentives as being offered for "Agriculture" by other concerned Departments like Revenue, Finance, Labour, Energy etc. Soon after the publication of the notification, the petitioner had informed your authority about the said notification vide its letter dt. 31.1.2006 and copy of which is enclosed herewith along with notification dt.23.9.2005.

7. That your authority had raised some query on non-applicability of ESI Act to Poultry Farm vide your letter No.OR/TEV/44-2284-11930 dt.16.5.2006. After receiving the said letter, the petitioner has filed its reply on 12.6.2006 stating that it has only layer unit which gives egg only and no power is being used for production of egg. The copy of letter dt. 12.6.2006 is enclosed herewith for your ready reference.

8. That since the act is not applicable to "Agriculture", it requested your authority to delete its Code vide its letter dt.31.1.2006."

9. In spite of such reply given to the notice of show-cause, no decision was taken by the authority. On the other hand, the Deputy Director (Revenue), ESI Corporation, Bhubaneswar made a communication on 05.01.2011 to the Recovery Officer, E.S.I. Corporation directing to take necessary steps for recovery of amount towards contributions as well as interest to the tune of Rs.99,678/-. Basing upon such letter of the Deputy Director (Revenue), ESI Corporation, Bhubaneswar, though the petitioner was called upon for personal hearing, but no order has been communicated to the petitioner. Ultimately, Certificate Case No.17648 of 2011 was initiated by the Recovery Officer and consequentially, notice was issued on 10.01.2011 directing the petitioners to pay the amount of Rs.99,680/-. Thereby it clearly indicates that the opposite parties have not applied their mind and initiated a certificate case mechanically without affording opportunity of hearing to the petitioners. As such, no reason has been assigned while passing the order on the basis of show-cause submitted by the petitioners for exclusion of the petitioner unit from the purview of the ESI Act itself. This clearly indicates that the authorities have acted unreasonably and initiated certificate proceeding for recovery of the amount without affording opportunity of hearing to the petitioners.

10. It is well settled that reasons being a necessary concomitant to passing an order, the appellate authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference to those given by the original authority.

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

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

Similar view has also been taken in ***Patitapaban Pala v. Orissa Forest Development Corporation Ltd. & another***, 2017 (I) OLR 5 and in ***Banambar Parida v. Orissa Forest Development Corporation Limited,*** 2017 (I) OLR 625.

11. The petitioners have to be given opportunity of hearing in compliance of the principles of natural justice. The same having not been extended to the petitioners, the order so passed for recovery of the amount by initiating Certificate Proceeding No.17648 of 2011 cannot sustain in the eye of law.

12. The soul of natural justice is '*fair play in action'*

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

In ***Fairmount Investments Ltd. v. Secy of State for Environment***, 1976 2 All ER 865 (HL), Lord Russel of Killowen somewhat picturesquely described natural justice as '*a fair crack of the whip'*

In ***R. v. Secy. Of State for Home Affairs, ex p. Hosenball, Geoffrey Lane, LJ***, 1977 3 All ER 452 (DC & CA), preferred the homely phrase '*common fairness'* in defining natural justice.

13. ***A.K. Kraipak and others v. Union of India, AIR 1970 SC 150= (1969) 2 SCC 262,*** *is a landmark in the growth of this doctrine. Speaking for the Constitution Bench, Hegde,J. observed thus:*

> *"If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have far reaching effect than a decision in a quasi-judicial enquiry".*

In ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597 = (1978) 1 SCC 248, law has done further blooming of this concept. This decision has established beyond doubt that even in an administrative proceeding involving civil consequences doctrine of natural justice must be held to be applicable.

14. In ***Swadeshi Cotton Mills v. Union of India***, AIR 1981 SC 818, the meaning of 'natural justice' came for consideration before the apex Court and the apex Court observed as follows:-

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

15. In ***Basudeo Tiwary v Sido Kanhu University*** and others (1998) 8 SCC 194, the apex Court held that natural justice is an antithesis of arbitrariness. It, therefore, follows that audi alteram partem, which is facet of natural justice is a requirement of Art.14.

16. In ***Nagarjuna Construction Company Limited v. Government of Andhra Pradesh***, (2008) 16 SCC 276, the apex Court held as follows:

> *"The rule of law demands that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice. Thus, whenever a man's rights are affected by decisions taken under statutory powers, the court would presume the*

> *existence of a duty to observe the rules of natural justice. It is important to note in this context the normal rule that whenever it is necessary to ensure against the failure of justice, the principles of natural justice must be read into a provision. Such a course is not permissible where the rule excludes expressly or by necessary intendment, the application of the principles of natural justice, but in that event, the validity of that rule may fall for consideration."*

17. The apex Court in ***Uma Nath Panday and others v State of U.P***. and others, AIR 2009 SC 2375, held that natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.

18. Natural justice, another name of which is common sense justice, is the name of those principles which constitute the minimum requirement of justice and without adherence to which justice would be a travesty. Natural justice accordingly stands for that "*fundamental quality of fairness which being adopted, justice not only be done but also appears to be done*".

19. In view of the facts and law discussed above, this Court is of the considered view that on the basis of the reply given by the petitioners, the Deputy Director ought to have come to a conclusion with regard to applicability of the Act to the petitioner unit, pursuant to resolution passed by the Government describing poultry as agriculture, and the same should have been communicated to the petitioners. Without doing so, initiation of certificate case No.17648 of 2011 and direction for recovery of the amount, vide letter dated 10.01.2011 in Annexure-10, cannot sustain in the eye of law. Thereby notice issued for recovery of contributions amounting Rs.69,972/- for the period from 01.01.2006 to 30.11.2008 and Rs.29,706/- towards interest under Section 39(5)(a) of ESI Act up to 31.12.2010 read with section 45(1) of the ESI Act including process fee of Rs.2/- in total Rs.99,680/- cannot sustain in the eye of law. Accordingly, the same is liable to be quashed and is hereby quashed. The matter is remitted back to the Deputy Director, ESI Corporation, Bhubaneswar, for being reconsidered with regard to applicability of the Act to the petitioner-unit after October, 2003, from the date hatchery unit has turned to poultry unit, in view of the Government Resolution mentioned above, and for taking a decision in accordance with law within a period of four months from the date of communication of this judgment.

20. Accordingly, the writ petition stands disposed of. No order to costs.

2020 (II) ILR - CUT- 84

DR. B.R. SARANGI, J.

W.P.(C) NO. 31679 OF 2011

DHANANJAY CHARAN DEY & ORS. .....Petitioners

.Vs.

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

(A) WORDS AND PHRASES – Repeal – Definition – The word 'repeal' has been defined as – "To repeal an Act is to cause it to cease to be a part of the corpus juris or body of law – To repeal an enactment contained in an Act is to cause it to cease to be in law a part of the Act containing it – The general principle is that, except as to transactions past and closed, an Act or enactment which is repealed is to be treated thereafter as if it had never existed – However, the operation of the principle is subject to any savings made, expressly or by implication, by the repealing enactment, and in most cases it is subject also to the general statutory provisions as to the effects of repeal" – In view of the law discussed, the expression repeal signifies the abrogation of one statute by another.

(B) SERVICE LAW – Education department – Writ petition – Petitioners are having Matric CT, +2 CT and Trained Graduate qualification – Challenge is made to the decision taken by the State Government in the resolution no. 22445 dated 17.11.2011, wherein decision was taken to absorb the eligible Trained Gana Sikshyaks as Sikshya Sahayaks, without taking into consideration the Government resolution no. 3368 dated 16.02.2008 and the proceeding of the meeting held on 29.11.2010 under the Chairmanship of the Hon'ble Minister, School & Mass Education Department, as a result of which the period of service rendered by the petitioners as Gana Sikshyak is not being taken into account for the purpose of extending the benefit of Career Advancement Policy, i.e. to be engaged as Junior Teacher on completion of 3 years of service as Sikshya Sahayak and 3 years thereafter as Primary School Teacher – Plea that such decision is illegal – Plea considered – Held, such decision cannot sustain in the eye of law – Reasons indicated.

In view of such position, like Sikshya Sahayaks, the petitioners those who were working as Gana Sikshyakas, on completion of three years from the date of absorption, i.e., w.e.f. 03.05.2008 were to be treated as junior teachers w.e.f. 03.05.2011 and, thereafter, on completion of three years, they were to be treated as regular teacher w.e.f. 03.05.2014. Non-extension of such benefit to the petitioners,

vide resolution dated 17.11.2011, is contrary to the settled position of law, as the petitioners have been rendering service against regular vacancies of Sikshya Sahayaks. In view of such position, the absorption of 619 eligible trained graduate teachers as Sikshya Sahayaks, pursuant to resolution dated 17.11.2011 in Annexure-6, cannot sustain in the eye of law and they should be absorbed as Sikshya Sahayaks w.e.f. 03.05.2008, pursuant to resolution dated 16.02.2008 under Annexure-2, and extended all the benefits of regularization of service after three years of completion of service as junior teacher on 03.05.2011 and thereafter regular teacher w.e.f. 03.05.2014 and also entitled to get all the benefits as admissible to the post of Sikshya Sahayak. (Paras 20 to 23)

Case Laws Relied on and Referred to :-

1. (2006) 3 SCC 354 : Gammon India Ltd. Vs. Special Chief Secretary.
2. AIR 1964 SC 1284: State of Orissa Vs. M.A. Tulloch & Co.
3. (1975) 3 SCC 512 : India Tobacco Co. Ltd. Vs. Commr. Tax Officer.
4. AIR 2003 SC 290 : (2003) 6 SCC 611 : John Vallamattom Vs. Union of India.
5. AIR 2003 SC 296 : (2003) 1 SCC 95 : Government of Andhra Pradesh Vs. Maharshi Publishers Pvt. Ltd.

For Petitioners : Mr. D.N. Rath,
For Opp. Parties : Mr. D. Vardwaj, Standing Counsel (S & ME)

JUDGMENT Date of Hearing :24.02.2020 : Date of Judgment: 05.03.2020

DR. B.R. SARANGI, J.

The petitioners, who are having Matric CT, +2 CT and Trained Graduate qualification, have filed this writ petition challenging the decision taken by the State Government in the resolution no. 22445 dated 17.11.2011, wherein decision was taken to absorb the eligible Trained Gana Sikshyaks as Sikshya Sahayaks, without taking into consideration the Government resolution no. 3368 dated 16.02.2008 and the proceeding of the meeting held on 29.11.2010 under the Chairmanship of the Hon'ble Minister, School & Mass Education Department, as a result of which the period of service rendered by the petitioners as Gana Sikshyak is not being taken into account for the purpose of extending the benefit of Career Advancement Policy, i.e. to be engaged as Junior Teacher on completion of 3 years of service as Sikshya Sahayak and 3 years thereafter as Primary School Teacher.

2. The factual matrix of the case, in hand, is that the petitioners are all trained persons and were initially engaged as Education Volunteer under Education Guarantee Scheme. After abolition of such scheme, they were rehabilitated as Gana Sikshyak in the year 2008 under Sarva Shiksha Abhiyan (S.S.A.), in view of resolution of the State Government dated

16.02.2008 under Annexure-2. As per Clause-5 of the said resolution, it was stated that Gana Sikshyaks will be engaged against the existing created vacancies of Sikshya Sahayaks and their consolidated remuneration etc. will be borne out of S.S.A. budget, and they will be engaged in the Government Primary Schools. As per Clause-11, Gana Sikshyaks will continue to avail the benefits in the process of selection for engagement of Sikshya Sahayak, pursuant to Office Order No. 23845/SME dated 04.12.2007 of the Government in School & Mass Education Department. Accordingly, the petitioners were engaged as Gana Sikshyaks on 03.05.2008 and posted at different primary Schools.

2.1 While the petitioners were so continuing as Gana Sikshyaks, on 29.11.2010, a meeting was held under the Chairmanship of Hon'ble Minister, School and Mass Education Department regarding different problems raised by Gana Sikshyak Mahasangha and under Annexure-3 wherein it was decided that regularization of Gana Sikshayaks as Primary School Teachers is to be made as per the Career Advancement Policy of Sikshya Sahayaks, the Sikshya Sahayaks will be promoted as Jr. Teacher and Jr. Teachers will be promoted as regular Primary Teachers after completion of 6 years. The Career Advancement Policy of Gana Sikshyaks will be worked out keeping in view the career advancement policy of Sikshya Sahayak. Accordingly, on 14.02.2011, under Secretary to the Government in School and Mass Education Department wrote a letter to the Commissioner-cum- State Project Director, OPEPA and the Director, Elementary Education, Odisha stating inter alia that the meeting was held on 29.11.2010 on the demand of the Gana Sikshyak Mahasangha and accordingly required that necessary action be taken for implementation of the decision taken in the aforesaid meeting and furnish the same for required approval at the Government Level. Thereafter, the State Government in its letter dated 17.11.2011 decided to absorb 619 eligible trained Gana Sikshyaks as Sikshya Sahayaks and on absorption directed that they will be paid remuneration of Rs.4000/- per month. But the petitioners, who were engaged as Gana Sikshyaks in the year 2008 and were to be taken as Primary School Teacher, in view of the Career Advancement Policy, as is extended to the Sikshya Sahayaks, were treated as fresh Sikhya Sahayaks from the date when they were absorbed, without calculating the previous period when they were continuing as Gana Sikhyaks, i.e. from the year 2008 till 2011, particularly when a specific decision was taken on 16.02.2008 under Annexure-2, and such decision was taken without considering the office order dated 04.12.2007, wherein it was decided that the

persons who were engaged in different schemes like DPEP/EFA/NFE, having the requisite qualification for engagement as Sikshya Sahayaks, were to be regularized by relaxing their upper age limit, wherever necessary, and taking their past experience into consideration. Therefore, for non-consideration of the period during which the petitioners were engaged as Gana Sikshyaks, i.e. from 2008 till 2011, when the petitioners were absorbed as Sikhya Sahayaks, for the purpose of regularization of their service, the petitioners are before this Court.

3. Mr. D.N. Rath, learned counsel appearing for the petitioners empathically submitted before this Court that the petitioners, who are Matric CT, +2 CT as well as Trained Graduation qualification, had been absorbed as Gana Sikshyaks on 03.05.2008. On completion of 3 years, they were to be treated as Junior Teacher w.e.f. 03.05.2011 and as Regular Teacher w.e.f. 03.05.2014 after completion of 3 years thereafter. But, pursuant to resolution dated 17.11.2011, when they were absorbed as Sikhya Sahayaks, the services rendered by them for the period from 03.05.2008 to 17.11.2011 have not been taken into consideration, but by that time they would have been absorbed as Junior Teacher w.e.f. 03.05.2011, which is contrary to the decision taken in the Government guidelines dated 16.02.2008 and the decision taken by the School and Mass Education Department vide Office Order dated 04.12.2007.

It is further contended that to examine the demands of Gana Sikshyaks, a Ministerial Sub-committee was constituted under the chairmanship of the Minister, Finance and Public Enterprise and on the basis of recommendations of the said Ministerial Sub-committee, the Government, after careful consideration, resolved vide resolution dated 04.12.2013 in Annexure-A/1 that Gana Sikshyaks, after completion of 6 years of continuous and satisfactory engagement, to be treated as "Senior Gana Sikshyaks". For all purpose of calculation for benefits, the beginning of the year will be from next succeeding 1st April. Whereas, the trained Gana Sikshyaks with +2 or above academic qualification to be treated as Zilla Parishad Grade-II Teacher, after completion of 6 years of continuous and satisfactory service or after 3 years from completion of training whichever is later. The said resolution dated 04.12.2013 was challenged before the Odisha Administrative Tribunal in O.A. No. 1758 of 2014 (which was filed by one Santosh Kumar Nahak) and other similar batch of matters. The tribunal, vide order dated 10.03.2015, directed the State Government to issue appropriate orders

modifying the order dated 04.12.2013, in compliance of which the resolution dated 04.12.2013 was withdrawn, pursuant to resolution dated 25.02.2016. As a consequence thereof, the Department Resolution no. 3358 dated 16.02.2008 and Resolution nos. 22445 and 224450 dated 17.11.2011, which were repealed, vide clause-20 of the resolution dated 04.12.2013, were revived. As a result, the petitioners are entitled to get the benefit pursuant to resolution dated 16.02.2008. It is further contended that the benefit which was extended to the petitioners, pursuant to the decision taken by the School and Mass Education Department vide Office order dated 04.02.2007 and consequential resolution passed by the Government dated 16.02.2008, cannot and could not have been curtailed by subsequent resolution dated 17.11.2011, which is unreasonable, arbitrary and contrary to the provisions of law.

4. Mr. D. Vardwaj, learned Standing Counsel for School and Mass Education Department contended that the resolution dated 04.12.2013 in Annexure-A/1, having been withdrawn on 25.02.2016 pursuant to order dated 10.03.2015 passed by the Odisha Administrative Tribunal in O.A. No. 1758 of 2014 and other batch of matters, the scheme, which was formulated on 16.02.2008, was revived. On 25.07.2016, on the basis of the recommendation of Ministerial Sub-committee, the Government passed a resolution, where it was decided that the Gana Sikshyaks, who have +2/Degree qualification with either CT/B.Ed and who have completed 8 years of continuous and satisfactory engagement, will be regularized as Elementary Level-V teacher in the year 2016-17 after detailed modalities on regularization are worked out by the Government in School and Mass Education Department. Thereby, no illegality or irregularity has been committed by the authority in regularizing the services of the petitioners in the year 2016-17. Therefore, this Court may not interfere with the decision taken by the Government to extend the benefit to the trained persons those who have been absorbed as Gana Sikshyaks and more particularly no prejudice has been caused to such persons in view of resolution dated 25.07.2016 passed by the authority.

5. This Court heard Mr. D.N. Rath, learned counsel for the petitioner and Mr. D. Vardwaj, learned Standing Counsel for School and Mass Education Department, and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, these writ petitions are being disposed of finally at the stage of admission.

6. The facts, which are delineated above are not in dispute. The petitioners no. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 11, 12, 14, 15 and 18 are having trained graduate qualification, petitioners no. 16 and 19 are having Matric CT qualification, petitioner no.5 is having B.Com B.Ed qualification and petitioners no. 8 and 17 are having I.A. C.T. qualification and petitioner no. 13 is having M.A. B.Ed qualification to their credit. Meaning thereby, all the petitioners are having either Matric or +2 CT or trained qualification to their credit. In accordance with the principles adopted by the Central Government for universalisation of primary education in the country, from time to time different schemes were formulated, such as non-formal persons, Sikshya Karmis and Swechha Sevi Sikshya Sajhayaks under SSA Scheme and for the purpose either trained or untrained persons were engaged as Non-Formal Facilitators and Sikshya Karmis. But so far as the Swechha Sevi Sikshya Sahayaks are concerned under Sarva Sikshya Abhiyan they were engaged having training qualification either in graduate stage or H.S.C. stage. All such schemes were floated by the Central Government and are operated by the State Government under the Central Government Finance and as and when the Central Government decided to abolish the scheme and introduce a new scheme, accordingly the State Government was implementing the same. The Central Government introduced an Education Guarantee Scheme (EGS) and engaged persons as Education Volunteers so as to see that such persons assist the teaching of primary education system run by the State Government and also to see that the attendance in such institutions are to be increased by the assistance of these education volunteers.

7. The petitioners belong to Balasore Education Circle and were engaged as Education Volunteers by the President of the Village Education Committee having been selected by the District Project Officer. The petitioners, while continuing as Education Volunteers in respective EGS Centres, the State Government issued an office order on 04.02.2007 stating inter alia that the persons those who are engaged under different schemes like DPEP/EFA/NFE, having requisite qualification for engagement of Sikshya Sahayaks, are to be regularized by relaxing their upper age limit wherever necessary and taking their past experience into consideration. Thereafter, the State Government on principle decided, vide resolution no. 3368 dated 16.02.2008 under Annexure-2, to upgrade the EGS centers to Regular Primary Schools and for various reasons, the Education Volunteers engaged in such EGS Centres, which were operating in the State of Orissa from the year 2001-2002 and the Education Volunteers, who are continuing and

discharging their duties, are to be rehabilitated as Gana Sikshyaks under SSA. Meaning thereby, the Education Volunteers are to be rehabilitated in such schools, provided they do have the training qualification such as Trained Matric/+2 with CT, B.Sc., B. Com with B.Ed., and are to be paid consolidated remuneration of Rs.2000/- per month. Such Gana Sikshyaks are to be engaged against the existing/created vacancy of Sikhya Sahayaks and their consolidated remuneration etc. will be borne out of the SSA budget and they will be engaged in the Government Primary Schools.

8. The relevant part of resolution dated 16.02.2008 is quoted below:

> *"Government after careful consideration of the problems of the Education Volunteers under the Education Guarantee Scheme decided to rehabilitate Education Volunteers in E.G.S. Centres who have been disengaged or facing disengagement under the Education Guarantee Scheme on the following manner.*
>
> *1. Such disengagement Education Volunteers will be rehabilitated as "Gana Sikshyaka" under Sarba Sikshya Abhijan.*
>
> *2. Such disengaged Education Volunteers who are trained (Matric, 10th (H.S.C./+2 with C.T. B.A./B.Sc./B.Com with B.Ed. will be engaged as Gana Sikshyaka with a consolidated remuneration of Rs.2000/- per month. Those who are untrained(Minimum qualification of Matric, 10th (H.S.C.E.)/+2 will be engaged with a consolidated remuneration of Rs.1750/- per month.*
>
> *3. Such disengaged Education Volunteers who are having 10th qualification (H.S.C. Examination) will have to acquire +2 qualification within a period of 3 years from their engagement as "Gana Sikshyaka" to be considered eligible for C.T. Training. Those who are having +2 minimum qualification will be allowed to complete C.T. Training on a distance mode either through IGNOU or from the Directorate of TE & SCERT within a period of 3 years. And after completion of C.T. Training the "Gana Sikshyaka" will be eligible to get consolidated remuneration of Rs.2000/- from the date of passing C.T. Training.*
>
> *xx xx xx*
>
> *5. The Gana Sikshyak will be engaged against the existing created vacancies of Sikshya Sahayaks and their consolidated remuneration etc. will be borne out of S.S.A. budget. They will be engaged in the Government Primary Schools.*
>
> *xx xx xx*
>
> *11. The Gana Sikshyak will continue to avail of the benefits in the process of selection for engagement of Sikshya Sahayak as extended in the Government in School & Mass Education Department Office Order No. 23845/dt. 04.12.07."*

Pursuant to such resolution passed by the State Government, all the petitioners, who were continuing as Education Volunteers, were engaged as Gana Sikshyak in respect of different primary schools/upper primary schools

on 03.05.2008 against existing vacancies of Sikshya Sahayak. The process of selection and qualification adopted by the State Government for engagement of Sikshya Sahayak is same so far as selection of Gana Sikshyak is concerned and more particularly the nature of work discharged by the Gana Sikshyak is similar and same to the work of Sikshya Sahayak, save and except the designation and nomenclature, one is named as Gana Sikshyak and other is Sikshya Sahayak.

9. The Government of Orissa on principle has decided to extend the benefit of Career Advancement Policy in favour of Sikshya Sahayak that on completion of three years as Sikshya Sahayak, one will be promoted to the post of junior teacher and after completion of three years thereafter to the post of primary school teacher. Thereby, after working as Sikshya Sahayak for a period of 6 years, one will become regular teacher. As such, no appointment to the primary school teacher would be made directly, save and except Siksha Sahayaks those who come through the above process.

10. The Gana Sikshyaks raised a grievance through their Mahasangha and claimed similar benefits like that of Sikshya Sahayak. Pursuant thereto, a meeting was held on 29.11.2010 under the chairmanship of the Minister, School and Mass Education Department, along with Commissioner-cum-Secretary and other high officials and, after threadbare discussion, the following decision was taken:-

> *"1. Regularization of Gana Sikshyaks as regular Primary School Teachers- As per the career advancement policy of Sikshya Sahayaks the Sikshya Sahayaks are promoted as Jr. Teacher and Jr. Teachers are promoted as regular primary teachers after completion of 6 years. The career advancement policy of Gana Sikshyaks will be worked out keeping in view the career advancement policy of Sikshya Sahayaks."*

Pursuant to such decision, since no action was taken, question was raised before the floor of the Legislative Assembly and the Minister replied that the Gana Sikshyaks, having engaged against the vacant post of Sikshya Sahayaks, considering the principle adopted by Union of India under Right to Education provision, the State Government is taking steps to adopt Career Advancement Policy and also increase the salary of the Gana Sikshyaks. But the Government in School and Mass Education Department passed a resolution on 17.11.2011 that the Government, after careful consideration, have been pleased to decide for absorption of 619 eligible trained Gana Sikshyaks as Sikshya Sahayaks and after absorption as Sikshya Sahayaks

they will be eligible to get monthly remuneration of Rs.4,000/- per month and their absorption as Sikshya Sahayaks will be guided by the School & Mass Education Department Resolution/ Notification issued from time to time for engagement of Sikshya Sahayaks. As such, the remuneration of such Sikshya Sahayaks shall be borne out of SSA fund. By virtue of such resolution dated 17.11.2011, the petitioners have been discriminated, in view of the fact that they had been engaged as Gana Sikshyak w.e.f. 03.05.2008 and discharging their duties similar to the Sikshya Sahayaks and, as such, they are entitled to be considered for absorption as junior teacher on completion of three years and as regular teacher on completion of six years. Subsequently, the Government of Odisha in School & Mass Education Department, vide resolution no.22450 dated 17.11.2011, after careful consideration, was pleased to enhance and reschedule the remuneration of untrained Gana Sikshyaks in the manner specified therein.

11. At this point of time, the petitioners approached this Court by filing the present writ petition. This Court, while entertaining the writ petition, passed an interim order on 08.12.2011 in Misc. Case No. 19002 of 2011 to the following effect:-

> *"Issue notice as above.*
> *In the interim, it is directed that the decision taken by the opposite party no.1 as per the letter no. 22450 dated 17.11.2011 shall not be given effect to so far as the petitioners are concerned till the next date.*
> *Urgent certified copy of this order be granted on proper application."*

As no counter affidavit was filed till 2015, this Court passed an order on 14.05.2015 to the following effect:-

> *"Heard.*
>
> *The petitioner has approached this Court for issuance of direction to extend the benefit in their favour of Gana Sikshyak, to the post of which they have been engaged by virtue of resolution dated 16.02.2008 w.e.f. 03.05.2008.*
>
> *In a meeting held on 29.11.2010 under the Chairmanship of the Hon'ble Minister, School & Mass Education Department as decision was taken to work out a career advancement policy of Gana Sikshyak governing the future prospect. In view of the said decision, a communication has been issued for under Secretary to Government Addressed to the Commissioner-cum-State Project Director, OPEPA, Bhubaneswar stating therein that the decision taken in the meeting held on 29.11.2010 under the Chairmanship of the Hon'ble Minister, School and Mass Education Department, the required decision may*

be taken for implementation and furnish the same for required approval at the Government level.

The grievance of the petitioner is that no decision has been taken and the meanwhile the petitioner who are trained, have been absorbed as Sikshya Sahayaks vide resolution dated 17.11.2011, disentitling them from the benefit of career advancement policy which has been decided governing the future advancement of Gana Sikshyakas and thereby the Government will intend to give the benefit of absorbing the petitioners as Jr. Teacher and Jr. Teachers are promoted to regular teacher three years to be counted from 03.05.2008, the entire period rendered as Sikshya Sahayak is not taken into consideration in absence of career advancement policy.

The grievance of the petitioner is that by virtue of resolution taken by the Government (Annexure-2), they are entitled to give the benefit of the post of Gana Sikshyaks and for that purpose a decision has been taken by way of formulating career advancement policy.

On the other hand, learned counsel for the opposite parties has submitted that he will ascertain as to whether the career advancement policy has been formulated and approved by the Government or not because the claim of the petitioner purely depends on the policy decision the Government and if the Government has taken a decision, the petitioner will be entitled to get the benefit of the same. But, however if the Government has not adapted the policy decision merely on the basis of meeting held under the Chairmanship of the Hon'ble Minister the petitioner cannot be said to be entitled.

However, he prays for three weeks to apprise this Court to substantiate his argument.

List this matter after the ensuing summer vacation."

But the said order dated 14.05.2014 was not compiled. Thereafter, though the matter was listed on 23.07.2015 and on 14.09.2015, no counter affidavit was filed. Finally, the counter affidavit was filed by the opposite parties on 12.07.2016 contending that the Sikshya Sahayaks and Gana Sikshyaks are not similarly situated and Sikshya Sahayaks are recruited through recruitment process i.e. merit basis, whereas Gana Sikshyaks are recruited under EGS scheme.

12. After closure of the EGS Scheme, pursuant to resolution dated 16.02.2008, on the demand raised by the Gana Sikshyaks, a Ministerial Sub-Committee was constituted under the chairmanship of the Minister, Finance and accordingly a resolution dated 04.12.2013 in Annexure-A/1 was passed. For better appreciation, clause-1, 2 and 20 of the said resolution are quoted below:-

" 1. Ganasikshyaks, after completion of 6 years of continuous and satisfactory engagement to be treated as "SENIOR GANASIKSHYAK. For all purpose of calculation for benefits, the beginning of the year will be from next succeeding 1st April.

2. The trained Ganasikhyaks with +2 or above academic qualification to be treated as Zilla Parishad Gr.II Teacher, after completion of 6 years of continuous and satisfactory service or after 3 years from completion of training, which ever is later.

The Zilla Parishad Ganasikshyaks, Gr.II to be allowed the consolidated remuneration of Rs.7,000/- per month.

20. This Deptt. Resolutions No.3358/SME dt.16.02.2008, No. 22445/SME dt.17.11.2011 and No.22450/SME dt.17.11.2011 are hereby repealed."

But, the said resolution dated 04.12.2013 was challenged before the Odisha Administrative Tribunal by one Santosh Kumar Nahak in O.A. No. 1758 of 2014, which was disposed of, along with batch of matters, vide order dated 10.03.2015. The operative portion of order dated 10.03.2015 passed by the tribunal reads thus:-

"12. In view of above we hold that the classification among the Ganashikhsyaks belonging to General and those belonging to SC/ST/PH categories relating to benefits of regularization violates Article 14 of the Constitution of India and is discriminatory and such classification does not satisfy the criteria fixed by the Hon'ble Apex Court. Accordingly, we direct the State respondents to issue appropriate orders modifying the order dated 04.12.2013 so that the same is in turn with provisions of Constitution of India.

This may be done within a period of three months from the date of receipt of a copy of this order.

All these O.As are accordingly disposed of.

13. On receipt of order dated 10.03.2015, the Government in School and Mass Education Department, after consultation with the law department, referred the matter to the Ministerial Sub-committee constituted for the purpose for proper decision. Accordingly, the committee decided to withdraw the department resolution dated 04.12.2013 on Career Advancement Policy by resolution dated 25.02.2016 in Annexure-C/1. By virtue of such withdrawal, clause-20 of the resolution dated 04.12.2013, by which the department Resolution No. 3358/SME dt.16.02.2008, No. 22445/SME dt.17.11.2011 and No.22450/SME dt.17.11.2011, which were repealed, were revived.

14. The effect of "repeal" at this point of time has to be considered. In HALSBURY's Laws of England, 4th Edn. the word 'repeal' has been defined as under:-

> *"To repeal an Act is to cause it to cease to be a part of the corpus juris or body of law. To repeal an enactment contained in an Act is to cause it to cease to be in law a part of the Act containing it. The general principle is that, except as to transactions past and closed, an Act or enactment which is repealed is to be treated thereafter as if it had never existed. However, the operation of the principle is subject to any savings made, expressly or by implication, by the repealing enactment, and in most cases it is subject also to the general statutory provisions as to the effects of repeal."*

Similar view has also been taken in ***Gammon India Ltd. v. Special Chief Secretary,*** (2006) 3 SCC 354.

15. In ***State of Orissa v. M.A. Tulloch & Co.,*** AIR 1964 SC 1284 the apex Court held 'Repeal' connotes abrogation or obliteration of one statute by another, from the statute book as completely 'as if it had never been passed; when an act is repealed, it must be considered (except as to transaction past and closed) as if it had never existed.

Similar view has also been taken in ***India Tobacco Co. Ltd. v. Commr. Tax Officer,*** (1975) 3 SCC 512.

16. In view of the law discussed above, the expression repeal signifies the abrogation of one statute by another. Applying the same principle to the present context, clause-20 of resolution dated 04.12.2013, which had abrogated the resolutions no. 3358/SME dated 16.12.2008, no. 22445/SME dated 17.11.2011 and no. 22450/SME dated 17.11.2011, having been withdrawn, as a consequence thereof the effect of repeal in clause-20 of the resolution dated 04.12.2013 cannot sustain. Thereby, the resolutions mentioned in clause-20, namely, the resolutions no. 3358/SME dated 16.12.2008, no. 22445/ SME dated 17.11.2011 and no. 22450/SME dated 17.11.2011 are restored back to its original position.

17. In view of the resolution dated 16.02.2008, the benefit thereof having not been extended to the petitioners, although they have been engaged against existing vacancies of Sikshya Sahayaks in Government Primary Schools and discharging similar nature of work assigned to regular Sikshya Sahayaks by giving a different nomenclature, namely, Gana Sikshyaka, the benefit

admissible to the Sikshya Sahayaks cannot be denied. As such, it violates Article 14 of the Constitution of India.

18. In ***John Vallamattom v. Union of India,*** AIR 2003 SC 290 : (2003) 6 SCC 611 the apex Court held that the equality clause enshrined in article 14 is of wide import. It guarantees equality before the law or the equal protection of the laws within the territory of India.

19. In ***Government of Andhra Pradesh v. Maharshi Publishers Pvt. Ltd.,*** AIR 2003 SC 296 : (2003) 1 SCC 95 the apex Court held Article 14 guarantees equal treatment to persons who are equally situated.

20. The petitioners, who are the trained Gana Sikshyakas and have been absorbed as such, pursuant to Clause-5 of resolution dated 16.02.2008 in Annexure-2, against the existing vacancies of Sikshya Sahayaks and their consolidated remuneration etc., will be borne out of SSA budget, and as per Clause-11 the Gana Sikshyaks will continue to avail the benefits in the process of selection for engagement of Sikshya Sahayaks as extended in the Government in School & Mass Education Department Office Order No. 23845/SME dated 04.12.2007. Furthermore, in view of the proceeding of the meeting held on 29.11.2010, the decision has been taken that the career advancement policy of Gana Sikshyaks would be worked out keeping in view the career advancement policy of Sikshya Sahyaks.

21. In view of such position, like Sikshya Sahayaks, the petitioners those who were working as Gana Sikshyakas, on completion of three years from the date of absorption, i.e., w.e.f. 03.05.2008 were to be treated as junior teachers w.e.f. 03.05.2011 and, thereafter, on completion of three years, they were to be treated as regular teacher w.e.f. 03.05.2014. Non-extension of such benefit to the petitioners, vide resolution dated 17.11.2011, is contrary to the settled position of law, as the petitioners have been rendering service against regular vacancies of Sikshya Sahayaks

22. In the affidavit filed on behalf of opposite party no.1 dated 22.08.2016, by which the opposite party no.1 has relied upon resolution dated 25.07.2016 in Annexure-A/1, in which the demand of Gana Sikshyaks have been considered by a Ministerial Sub-committee. Clause-1 of the said resolution reads as follows:-

> *"1. Gana Sikshyakas, who have +2/Degree qualification with either C.T./B.Ed. and who have completed eight years of continuous and satisfactory engagement*

> *will be regularized as "Elementary Level-V teacher" in the year 2016-17 after detailed modalities on regularization are worked out by the Govt. in School & Mass Education Department."*

On perusal of the above mentioned clause, it is evident that on completion of eight years of continuous and satisfactory engagement, the Gana Sikshyaks will be regularized as "Elementary Level-V teacher" in the year 2016-17, after detailed modalities on regularization are worked out by the Government in School & Mass Education Department. The very resolutions passed from time to time clearly indicates that the Government is taking an apathetic attitude towards Gana Sikshyaks, who are rendering service from their engagement as Education Volunteer and consequently absorbed as Gana Sikshyaks w.e.f. 2002-2003 till date. By passing different resolutions at different point of time, the benefits admissible to the petitioners are being delayed and are not being paid which they are entitled to get under law. Admittedly, the petitioners are rendering service against vacant posts of Sikshya Sahayaks. In view of the nature of work discharged by the petitioners, who are Gana Sikshyaks and discharging the duties of Sikshya Sahayaks, they cannot be denied the benefits admissible to their counterpart Sikshya Sahayaks. But, the claims of such Gana Sikshyaks have been ignored from time to time by passing different resolutions, though they have got requisite academic qualification and are discharging their duties at par with the Sikshya Sahayaks, being absorbed against the vacant posts of Sikshya Sahayaks, and are being paid a very meager consolidated remuneration for their duties discharged.

23. In view of such position, the absorption of 619 eligible trained graduate teachers as Sikshya Sahayaks, pursuant to resolution dated 17.11.2011 in Annexure-6, cannot sustain in the eye of law and they should be absorbed as Sikshya Sahayaks w.e.f. 03.05.2008, pursuant to resolution dated 16.02.2008 under Annexure-2, and extended all the benefits of regularization of service after three years of completion of service as junior teacher on 03.05.2011 and thereafter regular teacher w.e.f. 03.05.2014 and also entitled to get all the benefits as admissible to the post of Sikshya Sahayak.

24. The wit petition is thus allowed. No order to costs.

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2020 (II) ILR - CUT- 98

D. DASH, J.

W.P.(C) NO. 21724 OF 2019

MAMATA BEHERA .....Petitioner

.Vs.

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

ORISSA MUNICIPAL ACT, 1950 – Section 54 (2) (a) – No confidence motion against the Chairperson of N.A.C – Requisition for convening the special meeting signed by 1/3rd members, sent to the District Magistrate – But no resolution to that effect was accompanied – Petitioner pleads that, the mandatory twin requirements of the section 54(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 – Reasons indicated – Proposed notice 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 : Mr.D.P.Dhal, Sr. Counsel
M/s.B.S.Dasparida, S.K.Dash, A.P.Bose, S.Mohapatra, K.Mohanty and M.K.Agrawalla.

For Opp. Parties : Miss. S.Ratho, AGA (For O.Ps.1 and 2)
Mr. L.K.Mohanty and Mr.B.K.Jena (For O.P.3)
M/s. G.M.Rath, A.P.Rath, S.Jena, K.Ansari and P.Panda. (For O.Ps.4 to 2)

JUDGMENT Date of Hearing : 17.01.2020: Date of Judgment :28.01.2020

D. DASH, J.

The Petitioner, by filing this writ application, seeks to assail the decision of the District Magistrate, Kandhamal (Opposite Party no.2) in convening a meeting to consider the no confidence motion against her, who is the elected Chairperson of Baliguda Notified Area Council (for short, 'the NAC') in the district of Kandhamal.

2. The Petitioner is the elected Chairperson of Baliguda N.A.C. and has been in the office and discharging her duties as such since her assumption of the charge of the office after the election.

When the matter was continuing as such, the District Magistrate, Kandhamal (opposite party no.2), by his letter no.4883 (13)// DUDA dated 08.11.2019, convened the special meeting of the N.A.C. on 16.11.2019 for consideration of the no confidence motion against the Petitioner in the sitting hall of the N.A.C. fixing the time at 11 am under Annexure-1. 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 such notice as at Annexure-1.

3. The Baliguda N.A.C. comprising of 13 Wards, the Council has thus 13 Councillors including the Chairperson as one among them. The main contention raised in this application in support of the challenge to the decision of the Opposite Party no.2 by issuance of notice under Annexure-1 pursuant to the so-called requisition under Annexure-2 said to have been given by seven Councillors, i.e. Opposite party nos.4 to 10 is that those are not in consonance with the statutory requirements as provided in section 54 of the Odisha Municipal Act, 1950 (hereinafter referred to as the O.M. Act). Thus it is said that the decision of the Opposite Party no.2 to convene a special meeting in issuing notice under Annexure-1 is arbitrary and illegal resulting from non-application of mind.

4. Mr. D.P. Dhal, learned Senior Counsel for the Petitioner in course of hearing confines his submission on the score that the said decision of the Opposite Party no.2 in convening the special meeting for record of no confidence motion against the Petitioner who is the elected Chairperson of the N.A.C., is in gross violation of sub-section-2 of section 54 of the O.M. Act and thus, it is liable to be quashed. According to him, admittedly, the notice reflecting the decision of the opposite party no.2, for convening the said meeting as at Annexure-1 is based on the so-called signed requisition as tendered by the Opposite Party nos.4 to 10 as at Annexure-2, there has been total non-compliance of the provision of sub-section 2 of section 54 of the O.M. Act, which clearly mandates that such requisition signed by 1/3rd members of the Council has to accompany the resolution, which is proposed to be moved in that meeting. He submitted that this letter under Annexure-2, if is taken as the requisition, as required under section 54 (2)(a) of the O.M. Act, no such proposed resolution being sent with the same to the Opposite Party no.2, no decision ought to have been taken by the Opposite Party no.2 for issuance of the notice under Annexure-2 in convening the special meeting for said move of no confidence motion against the petitioner, the Chairperson

of the N.A.C as desired. He submitted that as mandated under section 54(2)(a) of the O.M.Act, the Councillors 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 Councillors 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.2 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.4 to 10 addressed to the opposite party no.2 even if is said to be the requisition in terms of the provision of the 54(2)(a) of the O.M. 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 as at Annexure-2 said to have been sent by the Opposite Party nos.2 to 4 on being read in entirety, do not satisfy the twin requirements as provided in section 54(2)(a) of the Act and thus it can be only said to be a request as required in law made by those Opposite Party nos.4 to 10 to the Opposite Party no.2 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.2 has committed grave error both on fact and law in accepting the letter under Annexure-2 and by reading 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-1 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 referring to the averments taken in the counter filed by the Opposite Party no.2 submitted all in favour of the said decision as to issuance of the notice under Annexure-2. According to her, the requisition under Annexure-2 sent by the Opposite

Party nos.4 to 10 had been thoroughly scrutinized and has been 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.2 has rightly taken the decision to convene the special meeting. She submitted that the said letter as at Annexure-2 since satisfies the twin requirements as provided in section 54(2)(a) of the O.M. Act, the Opposite Party no.2 did commit no mistake in reading to convene the special meeting by issuing the notice. 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 on the ground of non-application of mind and it cannot be at all 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 has to fall flat and in that event, issuance of the notice with the copy of the requisition would satisfy the requirement of section 54(2)(c) of the O.M.Act. She, however, placed that pursuant to the interim order dated 14.11.2019 passed by this Court, said convened meeting has been deferred and further action in that direction would follow as per the decision in this writ application.

6. Mr. L.K. Mohanty, learned Counsel for the N.A.C. (Opposite Party no.3) placing the averments taken in the counter filed by the Opposite Party no.3 submitted that there is not illegality or impropriety in the said decision of the Opposite Party no.2 in convening the special meeting for consideration of the no confidence motion against the Petitioner pursuant to said requisition-cum-resolution sent by the Opposite Party nos.4 to 10 comprising 1/3rd of the total number of Councillors.

7. Miss. S. Jena and Mr. G. Rath, learned Counsels appearing on behalf of the Opposite Party nos.4 to 10 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.2 in convening the special meeting for record of no confidence motion followed by the issuance of notice as provided in section 54 of the

O.M.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."

8. In order to address the rival submissions, it would be appropriate to refer section 54 (2) of the O.M.Act.

> *"54. Vote of no confidence against Chairperson or Vice-Chairperson:-*
>
> *(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 number of Councillors alongwith a copy of the resolution of proposed to be moved at the meeting;*
>
> *(b) the requisition shall be addressed to the District Magistrate;*
>
> *(c) the District Magistrate shall, within 10 days of receipt of such requisition, fix the date, hour and place of such meeting and give notice of the same to all the Councillors holding office on the date of such notice alongwith a copy of the resolution and of the proposed resolution, at least three 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; and*
> (i) xx xx xx xx"

It provides that no such meeting shall be convened except upon a requisition signed by at least 1/3rd of the total number of Councillors holding the office along with the copy of the resolution proposed to be moved at the meeting. The requisition will be addressed to the District Magistrate who within ten days of receipt of it shall fix the date, hour and place of such meeting and give notice of the same to all the Councillors holding the office

along with the copy of the requisition and the proposed resolution at least three clear days before the date so fixed.

A close and careful reading of the aforesaid provision would show that the decision by the authority to convene the special meeting for recording want of confidence in the Chairperson of the Municipal Council, should be upon the receipt of a requisition to be addressed to the said authority signed by at least one-third of the total member of Councillors holding the office 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 District Magistrate 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 Councillors holding the office along with a copy of the requisition and as also the proposed resolution to be passed at such meeting.

9. The requisition as at Annexure-2 being read reveals that Opposite Party Nos.4 to 10 have informed the Opposite Party no.2 that the petitioner carries no confidence of the Council and thus they want to bring a no confidence motion against her. This is an undated letter. The Opposite Party nos.4 to 10 also did not indicate in their courter affidavit as to when said letter had been sent to the Opposite Party no.2 or was received. It is also no indicated as to if they had also enclosed the proposed resolution. They have also not expressed herein the counter affidavit that said letter had been sent in the direction of compliance of the sending of the requisition as well as the proposed resolution.

The Opposite Party no.3, in his counter, is also silent on that score. Now, perusal of the counter affidavit of Opposite Party no.2 reveals that nowhere it has been stated as to when said letter under Annexure-2 had been received. It is also not stated that if the said letter had any other enclosures/annexures.

10. It is pertinent, at this stage, to mention that pursuant to the interim order dated 14.11.2019 passed by this Court, the said specially meeting scheduled to be held on 16.11.2019 has been deferred.

11. 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 Gram 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 Gram 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 Gram 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.

12. 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 Gram 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 Gram 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 Gram 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 Gram 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.

13. Adverting to the case on hand, at the cost of repetition, it may be stated that it is nobody's case that Annexure-2 had any such enclosure when had been sent to the Opposite Party no.2. It reveals that those Opposite Party nos.2 to 4 having sat in a meeting and upon discussion, decided that the Petitioner by discharge of her duty, as the Chairperson of the Council in the past four years does not carry the confidence of general public as also the Council and that she does not carry the support of majority to continue in the

Office of the Chairperson of the Council. So, it has been said therein that those Opposite Party nos.4 to 10 would move the no confidence motion which be accepted and accordingly, decision be taken. The word 'requisition' as per the Black's Law Dictionary (10th edition) is - "formal request to" whereas the word 'resolution' has been defined as "a main motion that formally expresses the sense, will, or action of a deliberative assembly". In one go, it can be said that this Annexure-2 does neither satisfy the requirement of a requisition as provided in section 54(2)(a) of the O.M.Act nor that of the proposed resolution. On a plain reading, to me it appears to be a resolution passed by those Opposite Party no.4 to 10 to the effect that the Petitioner does not have the confidence of the general public as also the Council but it, in my considered view, cannot be taken as the required requisition.

14. So being taken that this was the proposed resolution, the requisition as required under the law is wanting. The law of course does not require that the 1/3rd member of the total members of Councillors of the Council must pass a resolution for 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 number of the Councillors, if feel that the Chairperson does not carry the confidence, they may make a request by sending the requisition to the Authority expressing therein that a resolution, as enclosed thereto, would be in the said meeting. The purpose of circulation of the copy of the requisition as well as the proposed resolution with the to all the members is for the reason that they must be well aware of the resolution with the pointed or hinted reason as also the final outcome as expected, which is proposed to be moved, discussed and resolved in either way 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. This has the reference to the provision of section 64 of O.M.Act read with Rule 13 of the rules made thereinder. Section 64 of the O.M.Act says that the Chairperson, in his absence, the Vice-Chairperson can convene a special meeting on a requisition signed by not less than 1/3rd of the total members of the Councillors and if the Chairperson or Vice-Chairperson, as the case may be, fails to call a special meeting within ten days of receipt of such requisition of the meeting, it may be called on five days notice by those Councillors/requisitionists and even in the absence of the Chairperson or

Vice-Chairperson, the meeting can be presided over by any of the Councillors elected at the meeting for the purpose.

The relevant rule reads that in the special meeting, only the business for which the meeting was called shall be considered and only when the Councillors present give their consent for any other business to be so considered, it can be taken up for consideration. The sending of the requisition as well as the proposed resolution to the Authority and its onward circulation to all the Councillors in case a decision in favour of convening said meeting by the Authority of all the members is taken are thus not empty formalities. The purpose of sending requisition with the proposed resolution to the Authority and their onward circulation to all the Councillors 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 Councillors/requisitionists and the objective that those Councillors/requisitionists seek to achieve in that meeting.

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 decision of opposite party no.2 in convening the meeting is clearly the outcome of non-application of mind as to the satisfaction of the twin requirements as provided in clause (b) and (c) of sub-section 2 of section 54 of the O.M. Act

15. In the wake of aforesaid discussion, here in the case the decision of Opposite Party no.2 in convening the special meeting by issuing notice under Annexure-1 being without the fulfilment and satisfaction as to the twin requirements, i.e., the receipt of the requisition and the proposed resolution for their circulation to all the Councillors, the notice under Annexure-1 reflecting the decision of Opposite Party no.2 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.2 in convening the meeting to consider the no confidence motion against the petitioner, the elected Chairperson of Balliguda NAC by issuance of notice under Annexure-1 stands quashed.

16. The writ application is accordingly allowed. No costs.

2020 (II) ILR - CUT- 108

BISWANATH RATH, J.

W.P.(C). NO. 22394 OF 2012

ASHOK KUMAR MISHRA .....Petitioner

.Vs.

INDUSTRIAL DEVELOPMENT CORP. OF ORISSA LTD. & ORS. .....Opp. Parties

SERVICE LAW – Departmental Proceeding – Show cause by the disciplinary authority to the delinquent who was to be transferred within two days – Petitioner exonerated from the proceeding by the inquiry officer – However the disciplinary authority differed from the inquiry officer and imposed penalty on the petitioner – No Opportunity of hearing provided by the disciplinary authority to the delinquent while imposing the penalty – Action of the authority challenged – Held, this Court remits the proceeding to the stage of inquiry report for fresh consideration on the inquiry report by the disciplinary authority while giving Opportunity of show cause and hearing to the delinquent.

Case Laws Relied on and Referred to :-

1. AIR 1998 SC, 2713 : Punjab National Bank and Ors. V. Kunja Behari Misra.
2. AIR 1999 SC 3734 : Yoginath D.Bagde v. State of Maharashtra & Anr.

For Petitioner : M/s.S.K.Das, S.K.Mishra & P.K.Behera
For Opp.Parties : M/s.B.K.Pattanaik, K.Mohanty, S.S.Parida, & S.P.Mangaraj.

JUDGMENT Date of Hearing & Judgment: 18.02.2020

BISWANATH RATH, J.

In this writ petition, the petitioner challenges the order of punishment imposed by the Disciplinary Authority vide Annexure-9.

2. Limiting the submissions involving the writ petition, Sri Das, learned counsel for the petitioner contended that after the inquiry report is submitted exonerating the delinquent therein, the 'X" functioning as the Disciplinary Authority differing from the view of the Inquiry Officer, issued a show cause notice just 2 days ahead of his transfer to another place and action involving such differing opinions was without affording opportunity of hearing to the delinquent-petitioner while functioning as Disciplinary Authority took final decision on imposition of penalty on the petitioner. It is on the premises of

decision differing from the view of the Inquiry Officer being taken by 'X', Sri Das learned counsel submitted that 'X' not being available for undertaking the exercise of Disciplinary Authority, 'Y' who has joined as Disciplinary Authority ought to have given a re-thought on the report of the Inquiry Officer in absence of which the final order of Inquiry Authority vitiates. Further, looking to the Disciplinary Authority differing from the view of the Inquiry Officer and a fresh decision since is required to be taken by the Disciplinary Authority, Sri Das, learned counsel contended that in the interest of justice, an opportunity of hearing before decision is taken by the subsequent Disciplinary Authority shall also be warranted. To support his case, learned counsel for the petitioner relied on two decisions in the case of ***Punjab National Bank and others v. Kunja Behari Misra,*** AIR 1998 Supreme Court, 2713 and in the case of ***Yoginath D.Bagde v. State of Maharashtra and another,*** AIR 1999 Supreme Court 3734. Referring to paragraphs 16, 17, 18 and 19 in the Case of ***Punjab National Bank and others v. Kunja Behari Misra*** (supra) and paragraph-31 in the case of Yoginath D.Bagde (supra), learned counsel for the petitioner attempted to justify the applicability of such decisions to the case at hand and subsequently made a prayer for allowing the writ petition and thereby passing appropriate order.

3. In his opposition, Sri Pattanaik, learned counsel for the contesting opposite parties while not disputing the fact that the Disciplinary Authority did not agree with the view of the Inquiry Officer and the Disciplinary Authority has taken a different view that of the Inquiry Officer, further also not disputing that the show cause notice issued to the petitioner by the 'X' Disciplinary Authority just prior to 2 days ahead of his transfer from the establishment debarring him from continuing as a Disciplinary Authority any further and also not disputing that there has been no opportunity of hearing by the 'Y' Disciplinary Authority undertaking the exercise of Disciplinary Authority but, however, contended that for the both actions being undertaken by the Disciplinary Authority, the proceeding undertaken by the 'Y' Disciplinary Authority cannot be found to be faulted. Sri Pattanaik, learned counsel for the contesting opposite parties also opposes the entertainbility of the writ petition on the premises that the petitioner not preferring the statutory appeal available to him. Further, taking this Court to the findings of the Y disciplinary Authority, Sri Pattanaik, learned counsel also attempted to justify the impugned action involved herein.

4. Considering the rival contentions of the parties and proceeding to decide the legal aspect involving the matter, taking the legal aspect involved herein and for the admitted position of the parties, this Court observes that the Disciplinary Authority was about to be transferred, it should not have been discharged within 2 days and he should not have discharged his role as a Disciplinary Authority knowing fully well that the Disciplinary Proceeding should not have been concluded during his tenure. Further considering the other aspect involved herein so as to the validity of the order passed by the 'Y' Disciplinary Authority for not providing opportunity of hearing, this Court here observes, since the Disciplinary Authority differed from the view of the Inquiry Officer, for the differing view ,opportunity of hearing and contest also be provided to the delinquent before the Disciplinary Authority going to his own conclusion. Taking into account the decision of the Hon'ble Apex Court in the case of ***Punjab National Bank and others v. Kunja Behari Misra*** (supra), this Court finds the paragraphs- 16, 17, 18 and 19 reads as follows:

> "16 In Karunakar's case (supra) the question arose whether after the 42nd amendment of the Constitution, when the inquiry officer was other than a disciplinary authority, was the delinquent employee entitled to a copy of the inquiry report of the inquiry officer before the disciplinary authority takes decision on the question of guilt of the delinquent. It was sought to be contended in that case that as the right to show cause against penalty proposed to be levied had been taken away by the 42nd amendment, therefore, there was no necessity to give to the delinquent a copy of the inquiry report before the disciplinary authority took the final decision as to whether to impose a penalty or not. Explaining the effect of 42nd amendment the Constitution Bench at page 755 observed that "All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence of the charges." The Court explained that the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, inquiry officer's report and the delinquent employee's reply to it. the second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. It is the second right which was taken away by the 42nd Amendment but the right of the charged officer to receive the report of the inquiry officer was an essential part of the first stage itself. This was expressed by the Court in the following words:
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> "The reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage and

also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. the findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenants of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the enquiry officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the enquiry officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute an additional material before the disciplinary authority of which the delinquent 4 employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving on its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. the disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it."

17. These observations are clearly in tune with the observations in Bimal Kumar Pandit's case (supra) quoted earlier and would be applicable at the first stage itself. the aforesaid passages clearly bring out the necessity of the authority which is to finally record an adverse finding to give a hearing to the delinquent officer. If the inquiry officer had given an adverse finding, as per Karunakar's case (supra) the first stage required an opportunity to be given to the employee to represent to the disciplinary authority, even when an earlier opportunity had been granted to them by the inquiry officer. It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be over-turned by

the disciplinary authority then no opportunity should be granted. The first stage of the inquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the inquiring officer holds the charges to be proved then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the inquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings what is of ultimate importance is the findings of the disciplinary authority.

18. Under Regulation - 6 the inquiry proceedings can be conducted either by an inquiry officer or by the disciplinary authority itself. When the inquiry is conducted by the inquiry officer his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the inquiry officer. Where the disciplinary authority itself holds an inquiry an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the inquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the inquiry officer they are deprived of representing to the disciplinary authority before that authority differs with the inquiry officer's report and, while recording of guilt, imposes punishment on the officer. In our opinion, in any such situation the charged officer must have an opportunity to represent before the Disciplinary Authority before final findings on the charges are recorded and punishment imposed. This is required to be done as a part of the first stage of inquiry as explained in Karunakar's case (supra).

19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof whenever the disciplinary authority disagrees with the inquiry authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the inquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favorable conclusion of the inquiry officer. The principles of natural justice, as we have already observed, require the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer."

5. Similarly, in the case of ***Yoginath D.Bagde v. State of Maharashtra and another(supra)*** in paragraph-31, the Hon'ble Apex Court held as follows:

> "The Court further observed as under: (AIR 1998 SC 2713:1998 AIRSCW 7262: 1998 Lab IC3002: 1998 AULI 2009, para) 18:
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> "When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds an enquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and inequitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer's report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation, the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed."

6. For the observation of this Court and also for the support of the decisions referred to hereinabove involving the case at hand, this Court interfering in the impugned orders at Annexures-6 and 9, sets aside the same. However, considering that the matter should be relegated back to the stage of inquiry report, ,this Court remits the proceeding to the stage of inquiry report for fresh consideration on the inquiry report by the Disciplinary Authority giving opportunity of show cause and hearing. For the remand of 8 the matter, the position of the petitioner shall also be relegated back to the stage of submission of inquiry report. Financial benefits, if any, likely to be accrued, shall be dependent on the ultimate outcome by the decision of the Disciplinary Authority.

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2020 (II) ILR - CUT-114

S. K. SAHOO, J. B.P. ROUTRAY, J.

JCRLA NO. 30 OF 2005

BHASKAR BARIHA ……...Appellant

.Vs

STATE OF ODISHA ……Respondent

(A) CRIMINAL APPEAL – Offence U/s.302 of IPC – In the trial, evidence of all the prosecution witnesses recorded but the evidence of investigating officer could not be recorded inspite of issuance of process in various ways – Evidence of I.O closed – Trial Proceeded – Conviction order passed – Order of conviction challenged on the ground of non-examination of investigating officer – Effect of such non-examination discussed – Held, when material contradictions in the evidence of the witnesses could not be proved on account of non-examination of the I.O and the appellant has been seriously prejudiced for such non-examination in bringing many more relevant facts and also for non-production of the weapon of offences either before the doctor or in court, non-production of chemical examination report in court, in our humble view, it is a fit case where the appellant is entitled to the benefit of doubt – In the result, jail criminal appeal is allowed and order of conviction set aside. (Para.12)

(B) CRIMINAL APPEAL – Offence U/s.302 of IPC – In the trial, evidence of all the prosecution witnesses recorded but the evidence of investigating officer could not be recorded inspite of issuance of process in various ways – Grant of forty seven adjournments when the appellant is languishing in custody – Evidence of I.O closed – Right to speedy trial pleaded – Held, in the entire blame game goes to the prosecution and the appellant is in no way responsible for that – Direction issued to take departmental action against the erring officer. (Para.12)

Case Laws Relied on and Referred to :-

1. (2013) 6 SCC 417 : Lahu Kamlakar Patil .Vs. State of Maharashtra.

For Appellant : Mr. Nayan Behari Das & Mr. B.R. Mohanty
For Respondent : Mr. Dilip Kumar Mishra Addl. Govt. Adv.

JUDGMENT Date of Hearing and Judgment: 29.02.2020

BY THE BENCH:

Assailing the judgment of conviction and order of sentence dated 22.01.2005 passed by the learned Adhoc Additional Sessions Judge (F.T.), Padampur in S.T. Case No.186/15 of 1998/S.T. Case No. 32 of 2004, the

appellant has preferred the present appeal from jail. The appellant has been found guilty for the commission of offence under section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life.

2. The prosecution case sans unnecessary details, is that the informant Sadananda Bariha (P.W.3) is the cousin brother of the appellant. The deceased Sakuntala Bariha was the wife of the informant. The appellant and the informant along with other brothers were staying in their houses fell to their respective shares. The appellant had left his wife in her father's place at village Balipata on account of some dispute between them relating to having no issue. Two days prior to the date of occurrence, there was some quarrel between the appellant and the deceased and the deceased made aspersion against the appellant for not bringing his wife back from her father's place. It is the further prosecution case that in the morning hours on 29.05.1998, while the deceased was cleaning potherb leaves (in Odia 'Saga') in her courtyard for cooking, the appellant all of a sudden came there holding an axe and dealt a blow on the neck of the deceased with that axe from her backside. The axe pierced and stuck in the neck of the deceased and the appellant ran away from the spot. P.W.1 Radhika Bariha, the wife of younger brother of the informant saw the assault on the deceased by the appellant and raised hulla for which her husband and others rushed to the spot and they immediately shifted the deceased to the hospital where she was declared dead.

On the basis of the first information report lodged by P.W.3 before the officer in charge of Sohela police station, Sohela P.S. Case No.39 dated 29.05.1998 was registered under section 302 of the Indian Penal Code and after completion of investigation, charge sheet was submitted against the appellant. The appellant was charged by the learned trial Court under section 302 of the Indian Penal Code, to which he pleaded not guilty and claimed to be tried.

3. During course of trial, the prosecution examined eleven witnesses.

P.W.1 Radhika Bariha is the wife of the younger brother of the husband of the deceased and she is an eye witness to the occurrence.

P.W.2 Kr. Sashi Dei Bariha is the daughter of the younger brother of the husband of the deceased and she is a post occurrence witness who came to the spot hearing hulla of P.W.1 and noticed the deceased lying on the ground with bleeding injuries and she further stated to have seen the

appellant coming with an axe to the door of P.W.1. She stated that P.W.1 disclosed before her about the appellant dealing axe blow to the deceased.

P.W.3 Sadananda Bariha is the informant and the husband of the deceased. He is a post occurrence witness before whom P.W.1 disclosed about the assault made by the appellant on the deceased. He also removed the deceased to the Sohela hospital where she was declared dead. He is also a witness to the inquest report.

P.W.4 Satyananda Bariha is also a post occurrence witness who came to the spot hearing hulla of P.W.1 and found the deceased was having pain and unable to speak. On his query, the deceased disclosed that the appellant dealt axe blow on her. He is also a witness to the inquest report vide Ext.2 and also a witness to the seizure of blood stained earth, sample earth, axe and cot as per seizure list Ext.3 and also seizure of lungi of the appellant as per seizure list Ext.4.

P.W.5 Jagat Bariha is the elder brother of the appellant and he stated to have heard hulla of his wife (P.W.1) and rushed to the spot to see the deceased lying on the ground with the axe pierced to her neck and there was profuse bleeding from her neck. He further stated to have gone to the house of the father-in-law of the appellant and found the appellant present there who was arrested by police later on.

P.W.6 Bhagabatia Naik stated to have come to the spot hearing hulla of P.W.1 where he found the deceased lying on the ground sustaining injury on her neck. He further stated to have located the appellant in the house of his father-in-law and on his query, the appellant made extra judicial confession before him to have dealt blow to the deceased. He further stated about the arrest of the appellant from the house of his father-in-law.

P.W.7 Makardwaj Bhoi also stated to have come to the spot hearing hulla of P.W.1 and noticed injury on the neck of the deceased with profuse bleeding. He stated about the arrest of the appellant from Balikata.

P.W.8 Dr. Ghanashyam Nath was the Assistant Surgeon attached to District Headquarters Hospital, Bargarh who conducted post mortem examination over the dead body of the deceased on 29.05.1998 and noticed injury on her neck and he proved the post mortem report vide Ext.5.

P.W.9 Ramesh Bhoi also stated to have come near the house of the deceased hearing hulla of P.W.1 and noticed her lying on the ground in a pool of blood. P.W.1 disclosed before him about the assault made on the deceased by the appellant. He stated to have removed the deceased to the hospital where she was declared dead by the doctor. He is also a witness to the seizure of axe, blood stained earth and sample earth etc. under seizure list Ext.3.

The prosecution exhibited five documents. Ext.1 is the first information report, Ext.2 is the inquest report, Exts.3 and 4 are the seizure lists and Ext.5 is the post mortem report.

4. The defence plea of the appellant was one of denial.

5. The learned trial Court in the impugned judgment has been pleased to observe that the investigating officer Sitakanta Das had not been examined and from the case record, it revealed that the case was lingering since 27.03.2001 for examination of the investigating officer and despite repeated summons, W.T. message and letter to D.I.G.(S), Cuttack and D.P.P., Bhubaneswar vide order dated 09.06.2003, the investigating officer did not appear in the Court to adduce evidence. Bailable warrant of arrest was issued against the investigating officer and S.P., Angul was also directed to execute the warrant for the attendance of the investigating officer and despite all such effort, the investigating officer did not appear in the Court for his examination and therefore, the learned trial Court taking into account the fact that the appellant was in judicial custody since 1998 and the case was lingering since 27.03.2001 for the examination of the investigating officer, dispensed with the examination of the investigating officer and closed the prosecution case on 20.12.2004 and then proceeded to record the accused statement and ultimately after hearing the argument, pronounced the impugned judgment on 22.01.2005. We will deal with this aspect at a later stage.

The learned trial Court discussed the evidence of each witness in extenso and disbelieved the plea taken by the appellant that the death of the deceased was on account of her falling accidentally on a vegetable cutter seized from the spot. The learned trial Court accepted the evidence of P.W.1 to be trustworthy, believable and fully reliable. Taking into account the other corroborative evidence, it was observed that the deceased met with a homicidal death on account of injury inflicted by the appellant which was

sufficient in ordinary course of nature to cause death. The learned trial Court further held that the appellant has not been prejudiced for non-examination of the investigating officer and therefore, on such ground the entire prosecution evidence cannot be thrown out.

6. Mr. Nayan Behari Das, learned counsel appearing for the appellant contended that P.W.1 is the solitary eye witness to the occurrence and her version is not trustworthy and she is a highly interested witness. He further contended that on account of non-examination of the investigating officer, the appellant has been seriously prejudiced and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Dilip Kumar Mishra, learned Additional Government Advocate on the other hand supported the impugned judgment and contended that the evidence of P.W.1 gets corroboration from the evidence of other witnesses who arrived at the spot immediately on hearing hulla of P.W.1 as well as from the medical evidence. He contended that merely because P.W.1 is related to the deceased, the same cannot be a ground to discard her evidence. It is further contended that all possible step have been taken by the learned trial Court to procure the attendance of the investigating officer and since all the attempts failed, the Court decided to dispense with the examination of the investigating officer and closed the prosecution case. It is further contended that when there are no material contradictions in the evidence of the witnesses to be proved through the investigating officer and the learned counsel for the appellant has failed to specifically show in what way, the appellant has been prejudiced on account of non-examination of the investigating officer, the contentions made in that respect should not be accepted and this Court has to adjudicate whether on the basis of available materials on record, the impugned order of conviction is sustainable or not. While concluding his argument, the learned counsel for the State contended that where there is eye witness to the occurrence and her version is clear and trustworthy, non-examination of the investigating officer is immaterial to the prosecution case and as such, the impugned judgment and order of conviction passed by the learned trial Court is quite justified.

7. Let us first discuss how far the prosecution has successfully proved that the deceased met with a homicidal death.

P.W.8 conducted post mortem examination over the dead body of the deceased and he noticed one incised wound horizontally placed on the neck

on its posterior aspect and the size of the injury was 5 c.m. x 2 c.m. x thoracic cavity. The wound had cut seventh vertebrae and spinal cord and it was ante mortem in nature. The doctor opined the cause of death was on account of coma due to injury to the spinal cord. He opined that the injury was possible by blow on the sharp side of axe and he proved his report Ext.5. In the cross-examination, the doctor has stated that he had not examined the weapon of offence. Thus, nothing has been elicited in the cross-examination to disbelieve the evidence of the doctor. The learned counsel for the appellant has also not pointed out any infirmity in the evidence of the doctor. The learned trial Court after analysing the evidence of the doctor came to hold that the death of the deceased was homicidal in nature. We are of the view that the learned trial Court has rightly come to the conclusion that the deceased met with a homicidal death.

8. It is not in dispute that the star witness on behalf of the prosecution is none else than P.W.1 who is related to the deceased being the wife of the younger brother of the husband of the deceased.

Related witnesses are not necessarily false witnesses. Unless their evidence suffers from serious infirmity or raises considerable doubt in the mind of the Court, it would not be proper to discard their evidence straightaway. 'Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefits for the result of litigation. Close relatives of the deceased are most reluctant to spare the real assailants and falsely mention the names of other persons. The close relationship of the witnesses to the deceased is no ground for not acting upon their testimony. If the evidence is otherwise found to be reliable after close scrutiny, it can be acted upon.

Law is well settled that an order of conviction can also be sustained on the basis of the evidence of a solitary witness if his evidence is found to be truthful, reliable, cogent, trustworthy and above board.

P.W.1 Radhika Bariha has stated that while the deceased was preparing green leaves (saga) for the purpose of cooking, the appellant arrived there being armed with an axe and dealt a blow with the axe to the deceased that cut her neck. P.W.1 further stated that she was close to the spot at a distance of two cubits away from the deceased and she shouted. The axe pierced inside the neck of the deceased and was sticking there. Her husband (P.W.5) who was present in the house came hearing her shout and removed

the axe from the neck of the deceased and then others came to the spot and the deceased was removed to the hospital in an injured condition where she died. In the cross-examination, P.W.1 has stated that she was near her husband when the deceased was preparing green leaves for cooking. She further stated that nobody else was present at the spot and the deceased was sitting on the cot and preparing the green leaves and there was no 'paniki' (vegetable cutter) with the deceased. She further stated that she had not seen the injury on the deceased out of fear and cannot say the number of injury. Though she stated about the presence of P.W.2 at the spot but it has been confronted to her that she had not stated so before the investigating officer. It has also been confronted to her that she had not stated before the investigating officer that the deceased fell down on the ground and also not stated to have seen the appellant dealing an axe blow on the neck of the deceased. On account of non-examination of the investigating officer, in order to verify whether there are in fact material contradictions between the statement made by P.W.1 in Court vis-à-vis her previous statement made before the investigating officer as specifically put to her by the learned defence counsel in the cross-examination, in the interest of justice and in order to arrive at a just conclusion, we verified the statement of P.W.1 recorded by the investigating officer under section 161 of Cr.P.C. and found that she had not stated about the presence of P.W.2 at the spot, however the other contradictions are not correct as P.W.1 has stated specifically in that respect in her previous statement before police. It is very strange and a sorry state of affairs that when the defence counsel is putting some questions to contradict the witness with reference to her previous statement before police, neither the Public Prosecutor nor the Court was apt in verifying the previous statement immediately to find out whether there were in fact any such contradictions or not. Trial Court is not expected to be a silent spectator or mute observer. Though he has to play a proper neutral role but he should actively participate in the trial within the boundaries of law in order to elicit the truth inasmuch as he has to deliver the judgment and the entire records should indicate that he has left no stone unturned for the proper dispensation of justice.

A Public Prosecutor has a wider set of duties than to merely ensure that the accused is punished. The duties of ensuring fair play in the proceedings, to see all relevant facts are brought before the Court to have an effective determination of truth and justice for all the parties including the victims are with the Public Prosecutor. It must be noted that these duties do

not allow the Prosecutor to be lax in any of his duties as against the accused. The Court must ensure that the Prosecutor is doing his duties with utmost level of efficiency and fair play. In a criminal trial, the investigating officer, the Prosecutor and the Court play a very important role. The Court's prime duty is to find out the truth. The investigating officer, the Prosecutor and the Court must work in sync and ensure that the guilty are punished by bringing on record adequate credible legal evidence. If the investigating officer stumbles, the Prosecutor must rise to the occasion, pull him up and take necessary step to rectify the lacunae. The criminal Court must be alert, it must oversee the actions of the Public Prosecutor and investigating agency and in case, it suspects foul play, it must use its vast powers and frustrate any attempt to set at naught a genuine prosecution.

9. The other witnesses have stated to have heard about the occurrence from P.W.1 but the evidence of P.W.1 is completely silent in that respect. In absence of any evidence from P.W.1 that she disclosed about the occurrence to others, the statements made by the other witnesses to have heard from P.W.1 becomes 'hearsay evidence' which is not admissible. Section 6 of the Evidence Act embodies a principle, usually known as the rule of res gestae in English Law, as an exception to hearsay rule. The rationale behind this section is the spontaneity and immediacy of the statement in question which rules out any time for concoction. For a statement to be admissible under section 6, it must be contemporaneous with the acts which constitute the offence or at least immediately thereafter.

10. P.W.4 Satyananda Bariha stated that at the spot on their query, the deceased disclosed that the appellant dealt her axe blow but the evidence of other witnesses who were present at the spot till the deceased was removed to the hospital is silent in that respect. On the other hand P.W.2 has stated that the deceased was not able to speak due to pain and P.W.3 has stated that water was administered to the injured and she was not in a condition to speak. It has been confronted to P.W.4 by the defence in the cross-examination with reference to his previous statement before police that he had not stated before the I.O. that on his query, the deceased disclosed before him that the appellant had dealt axe blow to her. On verification of the statement of P.W.4 recorded under section 161 of Cr.P.C., we find that he has not made any such statement relating to the dying declaration made by the deceased at the spot. Thus the evidence relating to dying declaration as deposed to by P.W.4 for the first time in Court is not acceptable.

11. P.W.6 Bhagabatia Naik stated to have located the appellant in the house of his father-in-law where on his query, the appellant made extra judicial confession before him to have dealt blow to the deceased but strangely the other witnesses who accompanied P.W.6 there are silent on this aspect. Moreover it has been confronted to P.W.6 by the defence in the cross-examination with reference to his previous statement before police that he had not stated before the I.O. that on his query, the appellant confessed his guilt stating that he had dealt a blow to the deceased. On verification of the statement of P.W.6 recorded under section 161 of Cr.P.C., we find that he has not made any such statement relating to the extra judicial confession made by the appellant. Thus the evidence relating to extra judicial confession as deposed to by P.W.6 which is made for the first time in Court is not acceptable.

12. On the scanning of the evidence of the witnesses, we find that there are vital contradictions which could not be proved on account of non-examination of the investigating officer.

The Hon'ble Supreme Court in the case of **Lahu Kamlakar Patil -Vrs.- State of Maharashtra reported in (2013) 6 Supreme Court Cases 417** has held as follows:

> "18. Keeping in view the aforesaid position of law, the testimony of P.W.1 has to be appreciated. He has admitted his signature in the F.I.R. but has given the excuse that it was taken on a blank paper. The same could have been clarified by the investigating officer, but for some reason, the investigating officer has not been examined by the prosecution. It is an accepted principle that non-examination of the investigating officer is not fatal to the prosecution case. In **Behari Prasad - Vrs.- State of Bihar : (1996) 2 Supreme Court Cases 317**, this Court has stated that non-examination of the investigating officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In **Bahadur Naik -Vrs.- State of Bihar : (2000) 9 Supreme Court Cases 153**, it has been opined that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial Judge nor the High Court has delved into the issue of non-examination of the investigating officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the Court did not find place in the statement recorded under section 161 of the Code. Thus, this Court in **Arvind Singh -Vrs.- State of Bihar : (2001)6 Supreme Court**

> **Cases 407**, **Rattanlal -Vrs.- State of Jammu and Kashmir : (2007) 13 Supreme Court Cases 18** and **Ravishwar Manjhi and others -Vrs.- State of Jharkhand : (2008)16 Supreme Court Cases 561**, has explained certain circumstances where the examination of investigating officer becomes vital. We are disposed to think that the present case is one where the investigating officer should have been examined and his non-examination creates a lacuna in the case of the prosecution."

The examination of investigating officer in a criminal trial is not just a formality but very relevant and it is not just to prove the omissions and contradictions in the statements of witnesses examined by that officer but many important aspect of the prosecution case could be unearthed by examining such a witness. The investigating officer is the principal architect and executor of the entire investigation. He is a crucial witness for the defence to question the honesty and calibre of the entire process of investigation. It will not only be beneficial to the prosecution but also to the defence and moreover it is very much necessary for the Court to arrive at a just decision of the case. However, non-examination of the investigating officer in every criminal case ipso facto does not discredit the prosecution version. Where there are material contradictions in the statements of the witnesses made in Court vis-a-vis before the investigating officer and on some vital aspect the investigating officer's examination would throw light on the acceptability or otherwise of the prosecution version, a very valuable right accrues in favour of the accused to show that, the witnesses have made improvements or have given evidence that contradicts their earlier statements so that he would be able to satisfy the Court that the witnesses are not reliable. The non-examination of the investigating officer thus deprives the accused of the opportunity to bring before the Court the question of credibility of witnesses, by proving contradictions in the earlier statements and also on many other aspects.

In the case in hand, apart from proving the contradictions, the evidence of the investigating officer would have thrown light as to why the weapon of offence which was seized as per seizure list (Ext.3) was not produced before the medical officer who conducted post mortem examination to find out whether the injury sustained by the deceased on the neck was possible by such weapon or not and whether such weapon was sent for chemical examination and if so, what was the report. When it is the prosecution case that the appellant was in his in-laws' house at Balipata from where he was arrested, the investigating officer would have also thrown light on that aspect. The star witness (P.W.1) on behalf of the prosecution was examined on 29.05.1998 and the appellant was forwarded to Court on

30.05.1998 but the statement of P.W.1 was not forwarded to Court along with the forwarding report as appears from the case records and the investigating officer would have been questioned on this aspect. P.W.1 has stated that the deceased was preparing green leaves (saga) for the purpose of cooking and at that time she was sitting on a cot. In that position, if there was any assault on her neck from her back side, it was all the same necessary on the part of the investigating officer by producing the weapon of offence before the medical officer to seek for his opinion. The medical evidence adduced by P.W.8 is completely silent in that respect. In other words, there is no evidence what was the size of the blade of the axe in question with which the assault was made on the deceased and whether the nature and size of injury as noticed by the doctor was possible by such weapon or not. All these ambiguities would have been solved had the investigating officer come to the witness box to explain.

On verification of the order sheet of the learned trial Court, it appears that in spite of repeated summons and despite issuance of bailable warrant of arrest, the investigating officer did not turn up for more than three years and the unreasonable delay in disposal of the trial occurred on account of that reason. The trial Court sent W.T. message and letter to D.I.G.(S), Cuttack and D.P.P., Bhubaneswar but nobody responded even though it was a case where the accused was facing trial under section 302 of the Indian Penal Code.

In many cases, after the examination of other witnesses, the trial use to linger for non-attendance of the investigating officers. The trial Courts face difficulties in procuring their attendance either on account of their transfer or due to their retirement from service. Sometimes at a belated stage, message reaches the Court regarding the death of the investigating officer. It is the duty of the prosecution to produce their witnesses particularly the official witnesses in time to see that no delay on that score occurs in the trial of the cases. Processes issued by the Court cannot be permitted to be taken lazily or casually. If an investigating officer on receipt of summons from the trial Court fails to attend the Court without making proper application through the Public Prosecutor seeking adjournment on genuine grounds, the trial Court may, if it thinks fit, can recommend the appropriate authority of the concerned officer to take departmental action against him. When for non-examination of vital witnesses which is attributable to the negligence of the prosecution, an accused is acquitted of a serious charge, the sufferer is not only be the victim or the family members of the deceased but also the society

at large who must be awaiting to see the verdict of the case adjudicated in a proper manner in accordance with law. Large numbers of acquittals in criminal cases are on account of laches on the part of the prosecution either due to improper investigation, lack of experience of the Public Prosecutors to conduct the cases involving serious offences properly and also for non-cooperation of the prosecuting agencies in an active manner to the Court to decide the case expeditiously and effectively. It is the paramount duty of the prosecuting agency to see that the people do not lose their faith on the criminal justice delivery system. It is high time that a website containing the names of the police officers, medical officers, their posting details, phone numbers, the e-mail addresses of such officers as well as of their higher authorities should be created and made available to the District Courts as well as the Public Prosecutors to cut short the delay of service of summons.

In view of the discussions above and after perusing the order sheet of the learned trial Court, we are of the view that the learned trial Court was quite justified in closing the prosecution evidence on account of non-appearance of the investigating officer for more than three years in spite of issuance of processes in various ways and after grant of forty seven adjournments particularly when the appellant was languishing inside custody. We are also of the view that the entire blame goes to the prosecution and the appellant who was in judicial custody was no way responsible for that. We hope that if the erring investigating officer is still in service, appropriate departmental action shall be taken against him for non-cooperating with the trial Court in a case of murder.

In view of the forgoing discussions, we are of the view that the evidence of the investigating officer was essential in the case and when material contradictions in the evidence of the witnesses could not be proved on account of non-examination of the investigating officer and the appellant has been seriously prejudiced for such non-examination in bringing many more relevant facts and also for non-production of the weapon of offence either before the doctor or in Court, non-production of the chemical examination report in Court, in our humble view, it is a fit case where the appellant is entitled to the benefit of doubt.

13. In the result, the jail criminal appeal is allowed. The impugned judgment and order of conviction passed by the learned trial Court is hereby set aside. The appellant be set at liberty forthwith, if he is not required to be detained in connection with any other case.

2020 (II) ILR - CUT- 126

PRAMATH PATNAIK, J. & DR. A. K. MISHRA, J.

JAIL CRIMINAL APPEAL NO. 68 OF 2009

SANTOSH MAHARANA .....Appellant

.Vs.

STATE OF ODISHA ....Respondent

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 313 – Accused statement – Initially defence case was denial but during the accused statement, accused admitted the incriminating material against him – Whether such admission can be taken into consideration? – Held, once the prosecution has proved the charge to the hilt from the evidence adduced by it, the consideration of the statement recorded U/s.313 Cr.P.C is permissible within the scope of Section 313(4) of the code.

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 31(1) – Punishment of Two life imprisonments – Whether both can run concurrently? – Held, Yes. (2015 (2) S.C.C. 501, O.M. Cherian @ Thankachan Vrs. State of Kerala and Ors. Followed). (Para 9)

Case Laws Relied on and Referred to :-

1. 1992 (II) OLR (SC) 209 : State of Maharastra .Vs. Sukhdeo Singh & Ors.
2. 2015 (2) S.C.C. 501: O.M. Cherian @ Thankachan .Vs. State of Kerala & Ors.

For Appellant : Miss. Swateleena Das.
For Respondent : Mrs. Saswata Pattnaik, Addl. Govt. Adv.

JUDGMENT Hearing and Judgment : 29.02.2020

DR. A. K. MISHRA, J.

In this appeal under Sec.383 Cr.P.C. the sole appellant has assailed his conviction U/s.302 and 307 of the Indian Penal Code (in short 'the I.P.C.') and sentence to undergo imprisonment for life on each count by the learned Ad hoc Addl. Sessions Judge, (F.T.C.), Chatrapur in his judgment dtd.25.07.2009 passed in Sessions Case No.18 of 2002 (S.C. No.32/2001 of GDC). Both the sentences are directed to run concurrently.

2. The case of the prosecution, in short, is that on 18.02.2000 at 4 P.M. in village Sunapalli, the accused, out of previous enmity, entered inside the respective houses of deceased persons, dealt Parsuram Tangia blows to deceased Laxmi and Maya and attempted to commit murder of P.Ws.4 and 5. Both the injured survived after treatment. The husband of Laxmi, P.W.6 lodged F.I.R. (Ext.4) at 6 P.M. resulting registration of Kabisuryanagar P.S.

case No.20 of 2000. In course of investigation accused was arrested and gave recovery of weapon of offence M.O.I which was seized along with other articles. Inquests over the dead bodies were made so also post mortem. After completion of investigation, charge-sheet was submitted U/ss.307 and 302 of the I.P.C. The case was committed to the court of Sessions and accused faced trial under the aforesaid charges.

3. The plea of defence was denial initially but the accused has admitted the incriminating materials U/s.313 Cr.P.C.

3-A. In support of its case, prosecution examined 14 witnesses in all including P.Ws.4 and 5 the injured eye-witnesses. P.W.14, the doctor who conducted post mortem examination, proved the post mortem report, Ext.31 and Ext.33. P.W.10 is the doctor who proved injury reports Ext.8 and Ext.9. The seized Tangia, wearing apparels and photographs of deceased persons were marked as M.O.I to M.O.VII. Defence examined none.

4. Learned trial court relying upon the evidence of injured eye witnesses and doctor P.W.14 held that the death of both the deceased persons were homicidal in nature and such injuries were found to have been caused by M.O.I. basing upon that, he also recorded finding that accused has attempted to commit murder of P.Ws.4 and 5 inflicting injuries by M.O.I. While doing so, learned trial court has considered the admission of guilt of accused U/s.313 Cr.P.C. relying upon the Hon'ble Apex Court judgment reported in **1992 (II) OLR (SC) 209, State of Maharastra Vrs. Sukhdeo Singh and Others**.

5. Learned counsel for the appellant submits that P.Ws.4 and 5 are not reliable and the accused was suffering from legal insanity of mind and for that he should be given benefit of doubt U/s.84 of the I.P.C. It is further submitted that statement U/s.313 Cr.P.C. should not have been considered once the injured persons are found unreliable for enmity.

6. Mrs. Saswati Patnaik, learned Addl. Government Advocate supports the judgment on the grounds stated therein. Adding further, she submits that the plea of insanity was not shown by defence with any probability during trial and also there is no material available to that effect. A well reasoned judgment relying upon injured eye witnesses should not be upset in the appeal when accused is already released prematurely by the State.

7. Keeping the contentions in view, we carefully perused the evidence on record and found that plea of insanity is not proved with preponderance of

probability as per illustration U/s.105 of the Evidence Act. No such circumstances are shown. The testimony of P.W.5 during further cross-examination that the accused was not of sound mind during the time of occurrence, is not acceptable keeping the gamut of scenario in which the crime was committed resulting loss of two lives and injuries on the persons of P.Ws.4 and 5 and his admission of guilt U/s.313 Cr.P.C.

8. The death of Laxmi Maharana and Maya Maharana are proved by doctor P.W.14 and P.M. reports Ext.31 and Ext.33 to be homicidal in nature. M.O.I corroborates the same. Doctor P.W.10 has proved the injuries upon P.W.4 vide injury report Ext.9 and upon P.W.5 vide Ext.8. He has proved his opinion on the seized weapon of offence vide Ext.10. On perusal of nature of injuries upon P.Ws.4 and 5, it can be well said that such infliction by M.O.I was meant to be attempt to commit murder. There is presence of an intent with infliction of injuries. Once the prosecution has proved the charge to the hilt from the evidence adduced by it, the consideration of the statement recorded U/s.313 Cr.P.C. is permissible within the scope of Section 313, Sub-Clause-4 of the Cr.P.C. The learned trial court has not committed any error in considering the same.

9. On our independent appreciation of evidence, we found that P.Ws.4 and 5 are wholly reliable witnesses and learned Trial Court has not committed any error by relying upon their evidence and the conviction based upon that is not required to be upset in this appeal. Hence we are not inclined to interfere with the impugned judgment of conviction and sentence passed thereon. Direction to run two life sentences concurrently cannot be said illegal in view of observation of Hon'ble Apex Court in the decision reported in **2015 (2) S.C.C. 501, O.M. Cherian @ Thankachan Vrs. State of Kerala and Ors.** wherein it is held as follows:-

> *"13. Section 31(1) Cr.P.C. enjoins a further direction by the court to specify the order in which one particular sentence shall commence after the expiration of the other. Difficulties arise when the Courts impose sentence of imprisonment for life and also sentences of imprisonment of fixed term. In such cases, if the Court does not direct that the sentences shall run concurrently, then the sentences will run consecutively by operation of Section 31(1) Cr.P.C. There is no question of the convict first undergoing the sentence of imprisonment for life and thereafter undergoing the rest of the sentences of imprisonment for fixed term and any such direction would be unworkable. Since sentence of imprisonment for life means jail till the end of normal life of the convict, the sentence of imprisonment of fixed term has to necessarily run concurrently with life imprisonment. In such case, it will be*

in order if the Sessions Judges exercise their discretion in issuing direction for concurrent running of sentences. Likewise if two life sentences are imposed on the convict, necessarily, Court has to direct those sentences to run concurrently."

10. At this juncture, it is pertinent to mention that the accused has already been released prematurely on 22.11.2019 pursuant to the order No.12367 dtd.18.11.2019 of the Government of Odisha, Law Department in exercise of State power to commute sentence. In the result, the appeal stands dismissed. Send back the L.C.Rs. forthwith.

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2020 (II) ILR - CUT- 129

P. PATNAIK, J.

W.P.(C) NOS. 20604, 20459 OF 2019 & 1815 OF 2020

PRAVAKAR JAYASINGH & ORS. .....Petitioners

.Vs.

STATE OF ODISHA & ANR. .....Opp.Parties

W.P.(C) NO.20459 OF 2019.
SMT. SUSHMI SUPRIYA MOHAPATRA .....Petitioner

.Vs.

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

W.P.(C) NO.1815 OF 2020.
PINKU PATRA .....Petitioner.

.Vs.

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

(A) SERVICE LAW – Recruitment – Empanelment in the merit list – Whether appointment can be claimed as a matter of right in view of such empanelment? – Held, No.

(B) SERVICE LAW – Recruitment of Contractual Trained Graduate Teachers – Process over, merit list prepared – Claim of Justice, Equity & Good Conscience – When a public interest is pitted against an individual interest, which one to prevail? – Held, it is undoubtedly the public interest which must be allowed to prevail.

"Since in the instant case, the process of recruitment has been finalized and the opposite parties are on the verge of issuing appointment letters in favour of the selected candidates and the petitioners in both the writ petitions are only six members. Therefore, the number of vacancies is around 1828, it would not be interest of justice not to fill up the vacancies because it is well settled principle that when a public interest is pitted against an individual interest, it is undoubtedly the public interest which must be allowed to prevail. Moreover, on consideration of the available materials, this Court is of the considered view that

the process of selection has been made in consonance with the advertisement. Therefore, the violation of Articles, 12 and 16 of the Constitution of India is thoroughly misconceived.On the cumulative effects of the supervening public interest coupled with the attending circumstances and constellation of factual and legal position, this Court is loath to interfere in the process of selection and hence not inclined to accede to the prayer of the petitioners." (Paras 15 & 16)

Case Laws Relied on and Referred to :-

1. (2019) 10 SCC 271: Rajasthan Public Service Commission, Ajmer & Anr, Vs. Shikun Ram Firuda & Anr,
2. (2008) 3 SCC 724 : Madan Mohan Sharma & Anr, Vs. State of Rajasthan & Ors.
3. (2005) 4 SCC 154 : Secretary, A.P. Public Service Commission Vs. B. Swapna & Ors
4. 2015 (II) OLR 752 : Sasmita Manjari Das Vs. State of Orissa & Ors.
5. 2017 (I) ILR CUT 917 (SC) : Deepa E.V. Vs. Union of India & Ors.
6. (2010) 3 SCC : Jitendra Kumar Singh and Anr. Vs. State of Utter Pradesh & Ors.
7. (1998) 2 SCC 332 : Arun Tewari & Ors.Vs. Zila Mansavi Shikshak Sangh & Ors.
8. (1984) 4 SCC 251 : Prabodh Verma & Ors.Vs. State of Uttar Pradesh & Ors.
9. (2010) 12 SCC : Public Service Commission, Uttaranchal Vs. Mamata Bisht & Ors.
10. (2010) 3 SCC 119 : Jitendra Kumar Singh & Anr. Vs. State of Uttar Pradesh & Ors.
11. (1991) 3 SCC 47 : Shankarsan Dash Vs. Union of India.
12. (2006) 6 SCC 532 : Kulwendrapal Sing Vs. State of Punjab S
13. (2006) 3 SCC 330 : State of U.P. Vs. Rajkumar Sharma
14. 2019 SCC Online SC 450 : Karla State Road Transport Corporation & Anr Vs. Akhilesh V.S. & Ors.

W.P.(C) NOS.20604

For Petitioner : Mr. B.P. Das
For Opp.Parties : Mr.Ashok Kumar Parija, Adv. General.
Mr. B. Routray, Sr. Adv.(intervenor)

W.P.(C) NO.20459 OF 2019.

For Petitioner : Mr. Sameer Kumar Das
For Opp.parties : Ashok Kumar Parija,Adv. General.

W.P.(C) NO.1815 OF 2020.

For petitioner : Mr. Prafulla Kumar Rath
For opp.parties : Mr. S.N. Mohapatra, Standing Counsel

JUDGMENT Date of Hearing :03/05.02.2020: Date of Judgment: 25.02.2020

P. PATNAIK, J.

In the captioned writ petitions, the reliefs sought for being more or less similar have been heard analogously and with the consent of the respective counsel have been disposed of by this common order/judgment.

2. The petitioners in the aforementioned writ petitions have sought for quashing of the provisional select list dated 25.10.2019 issued by the State

Government for recruitment to the post of Contractual Trained Graduate Teacher in Government Secondary Schools and with further prayer to prepare a final select list afresh in consonance with the draft common merit list by including the names of the petitioners.

3. The factual matrix in W.P.(C) No.20604 of 2019 in a nut shell is that in pursuance of the advertisement dated 23.02.2019 for recruitment to the post of Contractual Trained Graduate Teachers in Government School of the State, the petitioners applied and the names of the petitioners found place in the draft common merit list prepared on 21.09.2019 in Annexure-2. Along with the draft common merit list, another draft reject list for the candidates was also published. But when a provisional select list of candidates was published on 25.10.2019, to the utter surprise and consternation, the names of the candidates found in the draft reject lists have been included in the provisional select list whereas the petitioners' name along with others, whose names did find place in the draft common merit list have been excluded. The petitioners have assailed the new provisional select list on the ground that same has created class within class having no rational nexus with the object which has created an anomalous position with regard to provisional select list by the authority concerned being violative of Articles, 14 and 16 of the Constitution of India.

4. The brief facts as delineated in W.P.(C) No.20459 of 2019 are that in pursuance of the advertisement, the petitioner is having qualification of B.A., B.Ed. and OSSET. She being eligible for the post of Trained Graduate Teacher (Arts) submitted her online application. Accordingly, she was allowed to appear the computer based test (CBT). On completion of the process of scrutiny of application forms, the examination was conducted as per the scheduled date and on publication of the result of the CBT the draft common list was published by the Director, wherein the name of the petitioner found place at Sl. No.895 of the list with her mark 71.75%. While publishing draft common merit list the Director has called for written objection to such draft merit list with supporting documents. The petitioner, who is a U.R. category candidate along with many other U.R. category candidates have raised the preliminary objections with regard to selection of the SEBC candidates against the U.R. vacancies on the ground that this is in clear violation of Clause-13 (1) of the advertisement dated 23.02.2019 under Annexure-2. But in the provisional select list which was published on 25.10.2019 many SEBC candidates' names did find place in the select list of

UR category. The petitioner in the writ petition has averred that in the provisional select list of U.R. category, names of those candidates have found place, who have availed relaxation as reserved category candidates. It has been stated that the provisional common merit list & the select list dated 25.10.2019 is subject to modification (deletion/addition/replacement of candidates) in the circumstances : "(1) direction of the Hon'ble High Court Odisha or Odisha Administrative Tribunal, Cuttack/Bhubaneswar in the order passed/to be passed in other case filed/to be filed by any person relating to the recruitment pursuant to advertisement no.9383 dated 23.2.2019 of Director Secondary Education Odisha." In this process the Director has taken a caveat against his illegality in the process of selection. By enforcing this condition in the letter dated 25.10.2019, the Director is going to proceed with the selection without considering the valid objections raised by the petitioners and others. It has been further averred in the writ petition that since the appointment order is yet to be issued in favour of selected candidates, therefore, they are neither necessary nor proper party.

In view of the such averments, the petitioner has sought for quashing of the provisional select list issued in letter dated 25.10.2019 under Annexure-8 so far the U.R. category candidates are concerned and direct the opposite party no.2 to prepare a fresh select list confining it to the UR category candidates or the other candidates those who qualified as per Clause-13(1) of the advertisement under Annexure-2 and appoint the petitioner as a contractual teacher (T.G.T. Arts) and grant her all consequential service and financial benefits.

5. The brief facts as depicted in the writ petition, i.e., W.P.(C) No.1815 of 2020 is that in pursuance of the advertisement published by opposite party no.2, the petitioner applied for the post of contractual trained graduate teacher under the general category and his name did not figure in the select list. The provisional select list of the applicants for the post of Trained Graduate Teacher was published dated 25.10.2019 in violation of terms and conditions specified in the advertisement.

With the aforesaid assertions, the petitioner has sought for setting aside the provisional list meant for the post of Trained Graduate Contract Teacher under Annexure-3 and for recasting of the select list afresh under U.R. category following criteria provided in the advertisement under Annexure-1.

6. Controverting the averments made in the writ petition a counter affidavit has been filed by opposite party no.2 in W.P.(C) No.20604 of 2019 wherein it has been submitted that in the interim order dated 07.11.2019 passed in I.A. No.14944 of 2019, the opposite parties have not acted upon the provisional

select list published vide notice dated 25.10.2019. It has been further stated that to ensure recruitment of quality teachers, the Government of Odisha in School & Mass Education Department brought in two important reforms in recruitment of teachers in Secondary Schools, i.e., introduction of Odisha Secondary School Teachers Eligibility Test (OSSTET) in 2017 and then introduction of online competitive examination for selection of teacher in secondary schools in 2018 and due to these reforms being undertaken, the process of recruitment of teachers in Secondary Schools could not be held after 2016 and finally after introduction of the aforesaid reforms, Govt. in School and Mass Education Department vide Resolution dated 27.09.2018 prescribed procedure of selection & eligibility criteria for recruitment of Trained Graduate Contractual Teachers in supersession of previous resolution dated 27.10.2014 as evident under Annexure-A/2 of the counter affidavit and pursuant to the Government Resolution dated 27.09.2018, 2740 vacancies of TG Teachers Post were advertised in two phases i.e., 912 for Special Drive Recruitment & 1828 for General Recruitment. These two advertisements were published in Feburary,2019. The instant writ petition relates to the General Recruitment for 1828 vacancies of TG teacher for which the advertisement was published on 23.2.2019. As per the procedure outlined in the Govt. Resolution a competitive Examination, i.e., Computer Based Test for selection of candidates was held on 30.05.2019 and 31.05.2019. The Common rank list of candidates i.e., including candidates of all social categories who qualified in the Computer Based Test was published vide notice dated 18.5.2019 of Director Secondary Education Odisha. As per the conditions of the advertisements eligibility of candidates qualifying in the Computer Based Test was to be determined through verification of documents. So all the candidates included in the Common rank list were informed vide notice dated 28.8.2019 published in website, to get their documents verified during a stipulated period, i.e., 04.09.2019 to 07.09.2019. To give another opportunity to the candidates who remained absent during this period, another notice was given on 07.09.2019 fixing 10.09.2019 as the date of verification as last chance as per Annexure-B/2 series. After verification of documents draft merit list and draft reject lists were prepared taking the eligible and ineligible candidates respectively. The draft lists were approved by State Selection Committee as per provision contained in para 6(b) of Govt. Resolution dated 27.09.2018 and were published in website vide notice dated 21.09.2019 wherein the candidates were informed to file their respective objections as per the procedure outlined in the advertisement. Subsequently, it was reported by the DEOs, Bargarh and Balasore that 4 candidates had been wrongly marked absent in online verification report submitted by the District although they had got their documents verified. So, an additional draft merit list of 2 candidates and an additional draft reject list of two candidates for the post of TGT Arts were

published vide an addendum no.36828 dated 24.09.2019. These two additional lists of 4 candidates were accorded post facto approval by the State Selection Committee. The process of publishing the draft merit and reject list and inviting objections was intended for providing scope to candidates to point out defects if any and also produce any wanting documents for which the candidature of an applicant has been rejected. It also provides scope to the authorities to re-verify the lists and documents. The ultimate objective is to get the merit list rectified before going to the next selection process. In this case also, many candidates filed their objections and produced the wanting documents as per conditions of the advertisement under Annexure-1. Thereafter, the genuine objections were complied and the draft merit and reject lists were accordingly finalized.

After compliance of objections the Common Merit Lists were prepared for each post and approved by the State Selection Committee. After detection of error in disability status in respect of 3 candidates for the post of TGT Arts and 1 candidate for the post of TGT PCM the Final Common merit list of these posts were revised. In case of TGT Arts, the special category (PWD) status of these three candidates was changed from 'NA' to PWD and in case of TGT PCM 1 PWD candidates included in reject list was brought to the merit list as he was found eligible under PWD category. Accordingly, the common merit list for TGT Arts and TGT PCM approved earlier by the State Selection Committee were revised again and were approved by the Committee.

It has been further submitted that the common merit lists are the list of all candidates finally found eligible after verification of documents and compliance of objections to draft lists. In this list all eligible candidates are arranged in order of marks secured in the Computer Based Test irrespective of their social/reservation category. Similarly the final reject list also contains all in-eligible candidates arranged in order of marks secured in the Computer Based Test irrespective of their social reservation category.

In this case, the number of candidates available in the Common Merit Lists, number of posts advertised and number of candidates selected for different posts were as follows :

Posts	Advertised	Number in common merit list	Number selected
TGT Arts	UR:649 SC:210	2195	UR"649 SC:208
	ST:292 SEBC:146		ST:133 (Required number of candidates not available) SEBC:145
TGT PCM	UR:128 SC:42 ST:57 SEBC:29	204	UR:128 SC:15 (Required number of candidates not available) ST:2 (Required number of candidates not available SEBC:29

The name of petitioner no.4 is at serial no.116 of the common merit list of candidates for TGT PCM post. Similarly the names of petitioner nos.1, 2, 3, & 5 are at Sl. No.835, 825, 944 and 813 of the common merit list of candidates for TGT Arts post. The relevant pages of the Final Common Merit List showing the position of the petitioners and also the final reject list have been marked as Annexure-D/2 series and Annexure-E/2 series respectively.

Further it has been submitted that the inclusion of candidates from the draft reject list in the final common merit list is not illegal. It is the practice to publish the draft list first, invite objections if any, to comply with genuine objections and prepare the final list. In this case also same practice has been followed and it is very much in consonance with the procedure outlined in the advertisement under Annexure-1 and Government Resolution dated 27.09.2018. Therefore, no illegality or irregularity has been committed in the process of selection.

7. Mr. B.P. Das, learned counsel for the petitioners in W.P.(C) No.20604 of 2019 has referred to Clause-5(b) of the advertisement in question, which pertains to eligibility conditions. Further he has referred to clause-9 to the advertisement, more particularly clauses-9 (e) and 9 (g). Learned counsel for the petitioners has further referred to clause -13 (b) of the advertisement, Clauses-14 and 15 by referring two various clauses of the advertisement. Learned counsel for the petitioners has submitted with vehemence that the opposite parties in the guise of correction of mistakes have allowed the candidate for re-submission of documents which is not spelt out anywhere in the advertisement.

Learned counsel for the petitioners submits that by virtue of accepting the documents from the select list at the belated stage has caused prejudice to the petitioners whereby the rank of the petitioners have gone down which ultimately led to their exclusion from select list under Annexure-3. Learned counsel for the petitioners submits that non-submission of the documents by the candidates whose names did find place in the select list could not have been allowed since incurable defects which could not have been rectified at later stage. In support of his contention the learned counsel for the petitioners has referred to decisions reported in **(2019) 10 SCC 271: Rajasthan Public Service Commission, Ajmer and another v. Shikun Ram Firuda and another, paragraphs-2, 3, 4 and 10**, **(2008) 3 SCC 724: Madan Mohan Sharma and another v. State of Rajasthan and others, para-11; (2005) 4**

SCC 154: Secretary, A.P. Public Service Commission v. B. Swapna and others, paras-10, 14 15 and **2015 (II) OLR 752 : Sasmita Manjari Das v. State of Orissa and others.**

8. Controverting the averments made in the writ petition, a counter affidavit has been filed by opposite party no.2 in W.P.(C) No.20459 of 2019 wherein it has been submitted that pursuant to the Government Resolution dated 27.09.2018, 2740 vacancies of TG teachers posts were advertised in two phases i.e., 912 for special drive recruitment and 1828 for General Recruitment. These two advertisements were published in Feburary,2019. The instant writ petition relates to the General Recruitment for 1828 vacancies of TG Teacher for which the advertisement was published vide notice dated 23.2.2019 of Director Secondary Education Odisha. As per the procedure outlined in the Government Resolution dated 27.09.2018 and the advertisement dated 23.2.2019 a Competitive Examination, i.e., Computer Based Test for selection of candidates was held on 30.05.2019 and 31.5.2019. The common rank list of candidates i.e., including candidates of all social categories who qualified in the computer based test was published vide notice dated 28.8.2019 of Director Secondary Education Odisha. In the present recruitment process, relaxations like age relaxation of five years and 5% relaxation in marks secured in Bachelor Degree was given to candidates of SC/ST/SEBC/PWD category to enable them to apply for the post and participate in the selection process. The releaxations are mentioned in para 5A & 5B of the advertisement. These relaxations contained in the advertisement were based on the Government resolution dated 27.09.2018. In para-5C of the advertisement, other eligibility conditions were outlined. Passing OSSTET was one of such eligibility conditions. But relaxation availed by a candidate in qualifying OSSTET was not a part of the said advertisement for recruitment. Clause-13(1) of the advertisement had the above said enabling relaxations in the back ground. The petitioner has interpreted this clause in a manner convenient to her and also with an intention to garner an undue benefit in the litigation. Clause 13(1) deals with migration of candidates of SC/ST/SEBC category selected on merit to select list of UR category as per the position settled in law. The clause 13(1) of the advertisement read as follows :

> "A candidate of any social reservation category shall be treated as UR candidate if he/she is selected on merit and has not availed any relaxation admissible to his/her social category."

Further it has been submitted that the petitioner who was an applicant in UR category for the post of TGT Arts pursuant to the advertisement dated 23.2.2019 having qualified in the Computer Based Competitive Examination and being found eligible after verification of documents was included in the Draft Common Merit List at sl. No.895 with total marks in the Competitive Examination secured by her as 71.75%. Subsequently, after compliance of objections received in respect of draft reject list and draft common merit list, these draft lists were revised and final common merit list was prepared. In the final common merit list the petitioner was placed at sl. No.970 as per her merit. As per her position in the merit list she could not be selected. The mark of the last candidate in the UR select list was 76.25 where as the mark secured by the petitioner was 71.75.

The proviso under Section 3 of Odisha Reservation of Posts and Services (For Socially and Educationally Backward Classes) Act,2008 says: "If a candidate belonging to Socially and Educationally Backward Class is selected on his own merit while competing with others and secures an appointment, his/her appointment as such shall be shown against the post left unreserved and his appointment as such shall not be added to any post reserved for the Socially and Educationally Backward Class and shall not be taken into consideration for working out the percentage of reservation meant for the Socially and Educationally Backward Class".

The above proviso indicates that the policy of Govt. of Odisha allows appointment of a reserved category candidate against the post meant for unreserved, if he/she is selected on his/her own merit while competing with others and while doing this, the relaxations given to enable a candidate to take part in the competition are to be ignored. The process of recruitment pursuant to impugned advertisement was based on a competitive examination and obviously merit in this case implied merit in the result of competitive examination. Accordingly, the relaxations given in age, marks in Bachelor degree have been treated as enabling relaxations and hence in case of candidates who have been selected on merit while competing with UR candidates, these enabling relaxations have been ignored. Further, it has been submitted that if all these 105 candidates had been excluded from UR select list on the ground taken by the petitioner, the petitioner still then would have remained far short of reaching the select list as her position in the common merit list was much below in the order. So being well aware that chances of her selection is almost zero she has tried to stall the selection process to get

vicarious pleasure. Therefore, no illegality has been committed in preparation of select list published vide notice dated 25.10.2019 at Annexure-8.

9. Mr. Sameer Kumar Das, learned counsel for the petitioner in W.P.(C) No.20459 of 2019 has strenuously urged that the select list is the provisional list, none of the selected candidates are necessary or proper party. While referring to various clauses of the advertisement, the learned counsel for the petitioner submits that the Clause 13(l) of the advertisement has not been scrupulously followed. Therefore, there has been serious infirmity in the selection process. Further, the learned counsel for the petitioner by referring objections to rejoinder filed by opposite party no.2 submits that the State Government in its resolution dated 17.09.2016 refers to fixation of eligibility percentage of mark for passing OSSTET examination. From the resolution itself, it is clear that the SEBC/ST/SC/PH/OBC candidates having 45% of mark in Bachelor Degree are eligible to sit in the OSSTET Exam, whereas it is 50% for the UR candidates. So this is one of the relaxation availed by the reserved category candidates. Further percentage of marks fixed to pass the OSSTET exam as provided under clause-8 of the resolution says that for the UR category it is 60%, whereas for reserved category it is 50%. So the OSSTET certificate produced by those reserved category candidates are required to be verified by the opposite party no.2 in order to ascertain as to whether they have availed any relaxation or not. In order to buttress his submission the learned counsel for the petitioner has referred to the decisions in the case of ***Deepa E.V. v. Union of India and others: 2017 (I) ILR CUT 917 (SC)*** wherein the decisions rendered in the case of ***Jitendra Kumar Singh and another v. State of Utter Pradesh and others : (2010) 3 SCC page-119*** has been distinguished by the Hon'ble Supreme Court. Therefore, the relaxation so availed by any of the reserve category candidates cannot be appointed against the UR vacancy. Finally, the learned counsel submits that the impugned select list is a nullity in the eye of law.

Mr. Prafulla Kumar Rath, learned counsel for the petitioners in W.P.(C) No.1815 of 2020 has assailed the process of selection on two grounds:

(a) The selection process has to be conducted strictly in accordance with the selection procedure which needs to be scrupulously maintained. There cannot be any relaxation in terms and conditions of advertisement unless such power is specifically given in the advertisement or in the relevant rules, relaxation of any such conditions in the advertisement is contrary to the mandates of equality in Article 14 and 16 of the Constitution of India.

(b) Relaxation granted in terms of the advertisement to the candidates belonging to SC/ST and SEBC category is an incident of reservation under Article 16(4) of Constitution of India. Candidates who have already availed of age relaxation as reserved category cannot thereafter be accommodated against the general category.

10. Per contra, Mr.Ashok Kumar Parija, learned Advocate General on behalf of the State has vociferously submitted that the writ petitions filed by the petitioners without impleading the selected candidates are not maintainable on the ground of non-joinder of the parties. In support of his contentions, the learned Advocate General has relied upon the judgments of the Hon'ble Apex Court in the cases of ***Arun Tewari and others v. Zila Mansavi Shikshak Sangh and others : (1998) 2 SCC 332; Prabodh Verma and others v. State of Uttar Pradesh and others: (1984) 4 SCC 251*** and ***Public Service Commission, Uttaranchal v. Mamata Bisht & others : (2010) 12 SCC 204, paras,9, 10***:

The second limb of the argument of the learned Advocate General is that clause-9 of the advertisement which pertains to method of selection provides two opportunities for verification of documents pertaining to eligibility that clause 9(c) which provides for first stage of verification of documents in support of age, qualification and other eligibility conditions laid down in the advertisement. Clause-9(g) envisages a draft merit list and a list of in-eligible candidates (draft reject list), after determination of eligibility under para-9(e).

It is further envisaged that the two lists will be published for inviting objections. After necessary corrections, the merit lists will be finalized and the purpose behind inviting objections under para-9(g) was to allow meritorious candidates in the draft reject list, another opportunity to submit their documents and satisfy the eligibility requirements. Accordingly, the draft merit lists published have been modified after compliance of objections received from candidates. The number of candidates in the draft merit list for the post of TGT Arts was 1956 but after compliance of objections, the number became 2195 in the final merit list. Consequently, the number of candidates in the draft reject list was 377 and the number became 137 in the final reject list. Similarly, in case of TGT PCM post also the number of candidates in draft merit list was 190 but it became 204 in the final merit list. Therefore, there is absolutely no infirmity and illegality in the publication of the provisional select list.

It has been further submitted that in so far as in W.P.(C) No.20459 of 2019 the relaxation under Para-5A and 5B vis-à-vis age and minimum marks in the Bachelor's degree as well as under the OSSTET guidelines pertain only to eligibility conditions for candidature in the examination. Such relaxation is granted to provide a level playing field to SC/ST/SEBC/PWD candidates. All candidates irrespective of their category, underwent the same computer based test. Further it has been submitted that para-13(1) does not pertain to relaxation with respect to such eligibility conditions. Para-13(1) applies to relaxation on merit which is applicable post-examination. No relaxation has been granted to SEBC candidates post-examination (after the computer based test). In support of his contention, the learned Advocate General has referred the judgment of the Hon'ble Supreme Court in the case of ***Jitendra Kumar Singh & Anr. V. State of Uttar Pradesh & others: (2010) 3 SCC 119,*** more particularly paras-48, 49, 77 to buttress his submissions.

11. Mr. Budhadev Routray, learned Senior Counsel for the intervenors by referring the I.A. No.17185 of 2019 has submitted that the names of the present intervenors/petitioners have found place in the following manner:

1. Sushant Kumar Gochhi UR 541 (Arts)
2. Ashok Kumar Mallick SC 21 (CBZ)
3. Rajendra Mallick SC 17 (Arts)
4. Hrudhananda Sahoo UR 123 (Arts)
5. Subhakanta Sethi SC 6 (Arts)

Since, the present intervenors are directly affected by the order dated 07.11.2019, therefore, they are necessary and proper parties. Hence, they seek indulgence of this Court for direction to the opposite parties to act upon the select list.

12. In the backdrop of the aforesaid pleadings of the respective parties, the seminal question which hinges for determination is as to whether the process of selection has been vitiated due to non adherence to the conditions in the advertisement?

In order to dilate the contentious and knotty issues, it would be apposite to refer to the advertisement for the recruitment to the post of Contractual Trained Graduate Teacher in Government Secondary School of the State of Orissa,2019 and the relevant conditions of the advertisement are extracted herein below:-

Clause-9 **Method of Selection**:

"(a) The selection will be made on the basis of result of online (Computer based) competitive Examination. The Scheme and syllabus of Examination is placed at Appendix-B.

(b) A candidate has to secure minimum 35% (30% in case of candidates of SC/ST category) marks in each paper to qualify in the examination.

(c) The provisional rank list shall be prepared taking the qualifying candidates only. Names of candidates in the provisional rank list shall be arranged in order of marks secured by the candidates in the examination. In case of two or more candidates secure the same marks the candidate older in age will be placed above in the rank.

(d) Out of the list prepared as per 9(c), candidates equal to 120% of the vacancies of each social reservation category shall be called to get their documents verified at District level. The district mentioned in the permanent address in the application form shall be taken as the district in which the documents of a candidate are to be verified.

(e) The eligibility of candidates included in the rank list prepared as mentioned in para9(c) shall be determined through verification of all relevant documents in support of age, qualification and other eligibility conditions laid down in the advertisement.

(f) Place and dates of verification of documents of candidates shall be published in the website after finalization of results of the online examination.

(g) The provisional common merit list for the state finalized after determination of eligibility as in para-9(e) shall be treated as Draft merit list and this along with the list of in-eligible candidates shall be published for inviting objections. After necessary corrections the merit lists will be finalized.

(h) Select list for each social reservation category will be prepared from the State common merit list taking number of candidates equal to 100% of the number of vacancies for each of the category in the state as a whole.

(i) Inclusion of the name of a candidate in the Merit List/Select List confers no right on the candidate to engagement unless Govt. or the State Selection Committee or the Appointing Authority are satisfied after such inquiry or re-verification of documents, as may be considered necessary, that a candidate is suitable in all respects for engagement to the service.

Clause-13
Important points :

… … …

xx xx xx

(j) For regular vacancies percentage of reservation admissible for different categories such as SC, ST, SEBC, UR, Women, PWD, ESM, Sportsmen have been/shall be calculated taking the vacancies for each post available in the State as a whole.

In respect of unfilled vacancies, the actual vacancies available for SC/ST category in each district have been taken and distributed in two advertisements i.e., advertisement for special recruitment drive published on 13.02.2019 and this advertisement. Similarly actual unfilled vacancies of PWD category carried forward from previous recruitments in different districts have been taken together and distributed in the two advertisements,

> i.e., advertisement for special recruitment drive published on 13.2.2019 and this advertisement."

13. Indisputably in W.P.(C) Nos.20604 & 20459 of 2019, the names of the petitioners did find place in the draft merit list under U.R. category, subsequently in view of some of the SEBC category candidates, those who have come out successful on merits have been treated as UR category. Therefore, the petitioners in the aforesaid writ petitions have been left out from the zone of consideration, as has been disclosed from the counter affidavit, even if all the candidates, those who have availed relaxation, in either age or marks in Bachelor Degree, OSSET Examination are excluded from the general category, the petitioners would not have found place in select list for non-securing the cut-off marks secured by the last candidate of the select list under general category.

14. The Hon'ble Apex Court in the case of ***Shankarsan Dash v. Union of India (1991) 3 SCC 47*** and in subsequent decision in the case of ***Kulwendrapal Sing v. State of Punjab (2006) 6 SCC 532; State of U.P. v. Rajkumar Sharma (2006) 3 SCC 330*** have been pleased to inter alia hold that the select list candidates cannot claim appointment as a matter of right and mere inclusion in the select list does not confer any right to be selected even if some of the vacancies remained unfilled. Therefore, mere empanelment cannot justify a mandamus to make appointment. In the case of ***Kerala State Road Transport Corporation and another v. Akhilesh V.S. and others: 2019 SCC Online SC 450*** wherein the Hon'ble Apex Court in paragraph-6 has been pleased to hold hereunder :

> "**6.** Suffice to observe from ***Kulwinder Pal Singh v. State of Punjab (2016) 6 SCC 532*** ;
>
> "12. In Manoj Manu v. Union of India (2013) 12 SCC 171, it was held that (para-10) merely because the name of a candidate finds place in the select list, it would not give the candidate an indefeasible right to get an appointment as well. It is always open to the Government not to fill up the vacancies, however such decision should not be arbitrary or unreasonable. Once the decision is found to be based on some valid reason, the Court would not issue any mandamus to the Government to fill up the vacancies…."

15. Since in the instant case, the process of recruitment has been finalized and the opposite parties are on the verge of issuing appointment letters in favour of the selected candidates and the petitioners in both the writ petitions are only six members. Therefore, the number of vacancies is around 1828, it would not be interest of justice not to fill up the vacancies because it is well settled principle that when a public interest is pitted against an individual interest, it is undoubtedly the public interest which must be allowed to prevail. Moreover, on consideration of the available materials, this Court is of the considered view that the process of selection has been made in

consonance with the advertisement. Therefore, the violation of Articles, 12 and 16 of the Constitution of India is thoroughly misconceived.

16. On the cumulative effects of the supervening public interest coupled with the attending circumstances and constellation of factual and legal position, this Court is loath to interfere in the process of selection and hence not inclined to accede to the prayer of the petitioners.

17. Before parting with the case in order to subserve the ends of justice, the opposite parties are directed to consider the grievance of the petitioners in W.P.(C) No.20604 & 20459 of 2019 afresh on its own merit in right perspective, as expeditiously as possible, preferably within a period of one month and the consideration of the petitioners shall not stand on the way of the opposite parties to go ahead with issuance of orders of appointment. If on fresh consideration, the case of the petitioners come within the zone of consideration for appointment, consequential necessary steps be taken by the opposite parties with promptitude. With the aforesaid observation/direction, the Writ Petitions are disposed of.

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2020 (II) ILR - CUT- 143

P.PATNAIK, J.

W.P.(C) NO. 5248, 5247 & 5249 OF 2017

KALPANA BAL .....Petitioner.

.Vs.

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

SERVICE LAW – Appointment – Whether the Contractual employee can be replaced by another contractual employee? – Held, No.

Case Laws Relied on and Referred to :-

1. (2006) 4 SCC 1 : Secretary, State of Karnatak .Vs. Uma Devi.
2. (2008) 8 SCC 92 : State Bank of India & Ors.Vs. S.N.Goyal.
3. (2011) 15 SCC 16) : Gridco Limited & Anr. .Vs. Sadananda Doloi & Ors.

For the Petitioner : M/s. Swapna Ku.Ojha, & S.K.Nayak.

For the Opp.Party : M/s. Goutam Mishra, D.S.Patra, A.Dash, A.S.Behera, J.Biswas & J.R.Deo.

JUDGMENT Date of Hearing :10.01.2020 : Date of Judgment:12.05.2020

P.PATNAIK, J.

Relief sought for in the aforesaid writ application are more or less similar, with the consent of the respective parties all the writ petitions have been heard analogously and are being disposed of in this common order.

2. The petitioners in the aforementioned writ petitions have inter alia prayed for direction to the opposite parties to allow him to continue as Assistant Commuter Operator till his service are regularized as per the contractual appointment scheme, 2013 floated by the Government of Odisha.

3. The brief facts of the case are that in pursuance of the advertisement issued by the Registrar of Odisha University of Agriculture and Technology (in short referred to as 'OUAT') for filling up of the post of Assistant Computer Operator (hereinafter called as "ACO") on contractual basis, the petitioners applied for the post in the prescribed form and in prescribed manner. After coming through the process of selection they were issued with order of appointment in their favour on 02.01.2015 calling upon them to join the post and accordingly, the petitioners joined on the said posts. Though the nomenclature of the term of appointment was contractual for a fixed term, but the petitioners were granted annual increment as per the Government of Odisha, General Administration Department Resolution dated 12.11.2013. Thereafter their appointments were extended giving one day artificial break with the same terms and conditions in the previous appointment order. Further, the service period of the petitioners were extended on the basis of recommendation for continuance of the petitioner by opposite party No.4, but to the utter surprise the recommendation of opposite party no.4 was returned by opposite party no.3 with remarks that (it may be preferable if the work will be outsourced to a man power agency. It has been averred in the writ petition that Odisha Group C and Group D post (Contractual Appointment) Rule 2013 has come into effect with effect from 18.11.2013 wherein it has been envisaged that the contractual employees are to be regularized after completion of six years of satisfactory service. Since the OUAT being created and funded by the State of Odisha, the Government Rules are applicable to the OUAT. The OUAT has allowed extension of 13 nos of ACO those who have completed six years of service in office order dated 01.10.2016 and the case of the petitioner and other similarly situated persons have been turned down on the ground that outsourcing will be useful for the organization as evident from Annexur-7 to the writ application Though the post of A.C.O. is very uch essential and one contractual employee

cannot be replaced by any contractual employee but for the reasons best known o the opposite parties the extension has ot been issued in favour of the petitonr which has compelled the petitioner to invoke the extraordinary jurisdiction of Article 226 of the Constitution of India for redressal of her grievance.

An additional affidavit has been filed by the petitioner with regard to applicability and adoption of General Administration Department Notification dated 12.11.2013 and in the said affidavit it has been inter alia mentioned that OUAT administration has not only accepted and adopted the Odisha Group C & Group D posts (Contractual Appointment) Rules, 2013, but also followed the subsequent circular issued on 06.02.2015 basing on which various appointments have been made as per Annexures-8 and 9 series of the said affidavit. Further notification has been published in the daily The Samaj on 05.09.2017 vide Anneure-10 to the Additional Affidavit regarding engagement of Data Entry Operator which post is synonymous with Assistant Computer Operator with qualification.

Mr.S.K.Ojha, learned counsel for the petitioner has vehemently submitted that as per the settled principle of law a contractual employee cannot be replaced by another contractual casual employee and the action would be in violation of Articles 14 and 16 of the Constitution of India. Learned counsel for the petitioner during the course of hearing of Misc.Case No.13068 of 2017 wherein it has been submitted that the opposite parties by floating a tender notice inviting tenders from the Service Providers for supply of semi skilled, skilled and High skilled manpower and the said notice was issued in both ways through paper publication as well as circulating through the OUAT web portal. In view of such tender notice and advertisement vide Annexure-8 and 9 to the said misc.case the interest of the petitioner are going to be seriously jeopardized. During the course of hearing the learned counsel for the petitioner has referred to the decision dated 28.11.2019 in W.P.(C) No.5358 of 2019 wherein the Division Bench of this Court by referring to the decision of the Hon'ble Supreme Court in the case of State of Haryana and others –vrs.-Piara Singh and others reported in (1992).4 SCC 118 has been pleased to hold in paragraph-5.

> "5. Since the petitioners were appointed on contractual basis, ends of justice will be served, if the petitioners, who have served under the State Government for more than five years and they are experienced, if they are otherwise eligible, they should be given preference for appointment, which is to be made by the Contractor, who has been selected through the impugned advertisement."

Controverting the averments made in the writ petition, a counter affidavit has been filed by opposite party Nos. 2 to 4. Under preliminary legal submission, it has been submitted that the petitioners have absolutely no legal

right for continuance as her engagement was purely a contractual engagement and the prayer of the petitioner was contrary to the several constitutional decisions rendered by the Hon'ble Supreme Court. It has been further submitted that the petitioners are no longer in service since 04.01.2017 and the petitioners have not made out a case for continuance of service so also a regularization. It has further been submitted that there is a huge financial crunch at OUAT and allowing the petitioners to continue in service would cause grave financial problem to the University. The petitioners have joined the post of Assistant Computer Operator on contractual basis on 02.01.2015 and they have only worked for a period of two years and the decision of the Hon'ble Supreme Court in the case of Secretary, State of Karntaka-vrs.-Uma Devi reported in (2006) 4 SCC 1 has been referred to. Further it has been submitted that the post of Assistant Computer Operator was never sanctioned by the State Government, as a result of which the entire existence of the said post is a nullity and no person appointed under the said post can claim to be a regular/sanctioned employee of OUAT and the petitioners are precluded from seeking for regularization as they had never been appointed against any sanctioned post of OUAT and cannot claim as regular employee of the OUAT. On 21.11.2016 in the context of grant of further salary to the staff of OUAT the Principal Secretary, Finance Department made additional provisions in the first supplementary statement of expenditure 2016-17 so as to make the lone Agriculture University of the State to run smoothly subject to the following conditions.

1) OUAT will give an undertaking that their funds will not be utilized for non-sanctioned posts.

2) V.C., OUAT will give an over view of total funds from all sources so that Finance department can take a view on resource to be budgeted for 2017-18.

3) Pay slip for all posts sanctioned /non-sanctioned of last month may be submitted.

4) Final list of sanctioned posts and man power in sanctioned post and non-sanctioned posts and man in position to be submitted within a month of time.

It has been submitted that the petitioners have not been under employment of OUAT for a duration which would validate her claim for regulrisation. The petitioners were employed and were in employment for a period of two years (including one year of extension). Such period of time is by no means enough to draw a reasonable conclusion that the petitioners had been employed for a considerable period of time based on which the claim of regularisation can be raised validly. The decision of the Hon'ble Supreme Court in the case of State of Bank of India and others –v-S.N.Goyal reported in (2008) 8 SCC 92 paragraph-17 has been referred to and also the case of Gridco

Limited and another-v.-Sadananda Doloi and others reported in (2011) 15 SCC 16 paragraph-12 of the said judgment has been referred to.

On factual backdrops it has been mentioned that as per the advertisement dated 12.12.2014 under Annexure-C/2, the petitioners participated in the Walk-in-interview and were selected. Hence the said Walk-in-interview was not meant for the selection of regular employees which was laid down in the OUAT Statute 1966. Neither the reservation under ORV Act nor selection for regular appointment was mentioned in the advertisement. As per the terms and conditions of appointment the contractual engagement shall not confer any right or claim neither for regular appointment nor further continuance under any of the Office under OUAT and no claim for any service benefit from the contractual employment shall be admissible. No other benefit like GP, DA, HRA,CCA, RCM and any other relief or benefit is admissible. Filling up posts against regular establishment requires conversion of the post into contractual mode of engagement as per the Finance Department Circular No.Bt.v-47/2004-55764/F dated 31.12.2004 under Annexure-D/2 and as per letter dated 16.11.2016 under Annexure-D/2. The University is not in a position to engage the petitioner who was engaged on contractual basis. With regard to the decision of the of the OUAT to outsource the job done by the Assistant Computer Operation from a manpower agency, it has been submitted that the Government of Odisha under the Finance department vide Office Memorandum dated 26.09.2011 has clarified that in order to reduce costs, sourcing of services may be resorted to if no adequate manpower is not available in the organization for providing the required services. The services where outsourcing is allowed included information and communication technology related service. Under these circumstances, the decision taken by opposite party no.3 to outsource the work done by the Assistant Computer Operator from any manpower agency cannot be faulted with and the office memorandum dated 26.09.2011 issued by the Government of Odisha Finance Department has been annexed as Annexure-F/2. The Odisha Group C and D post (Contractual Appointment) Rules, 2013 has been annexed as Annexure-G/2 to the counter affidavit.

Mr.Goutam Mishra, learned senior counsel appearing for OUAT, opposite pay Nos. 2 and 4 apart from reiterating the averments made in the counter affidavit that similar matter has been dispose of by this Court in the case of Manoj Kumar Dash-vrs. State of Orissa and others reported in 2017 (II) OLR 583 wherein this Court has refused to accede to the prayer made in the writ application. Learned senior Counsel further submits that the prayer of the petitioners runs contrary to the terms of appointment and the same does not warrant regularization and the petitioners were never given appointment

against any sanctioned post.Therefore, the petitioners cannot have any legitimate expectation for regularization when the initial appointment was contractual appointment. With eyes wide open, the petitioners opted for the job. And now it is not open to the petitioners to pray for regularization which is dehors the rule. The action of the University to do away with the services of the petitioners are in consonance with the appointment order dated 02.01.2015. There is no illegality or infirmity in the same so as to warrant interference by this Hon'ble Court. Learned senior counsel further submits that the reliance placed by the petitioners in Odisha Group-C and Group-D Post (Contractual Appointment) Rules, 2013 is completely misplaced and the said Rules are not applicable. Apart from the factual assertion, the learned senior counsel has referred to catena of decisions of Hon'ble Supreme Court in the case of **Secretary, State of Karnatak- v.-Uma Devi reported in (2006) 4 SCC 1** paras-2,3,4,19,34,43,45,47,50,52 and 54, **State Bank of India and others-vrs.—S.N.Goyal reported in (2008) 8 SCC 92** (Paragraph-17), **Gridco Limited and Another v.-Sadananda Doloi and others reported in (2011) 15 SCC 16)** Paragraphs 12 to 20), National Fertilizers v.Somvir Singh (2006) 5 SCC 493 (paragraph-2), Vice Chancellor, Lucknow University, Lucknow, Uttar Pradesh v. Akhilesh Kumar Khare and another (2016) 1 SCC 521 (Paragraphs 8 to 10, 13 to 17). Surendra Kumar and others-v-Greater Noida Industrial Development Authority and others (2015) 14 SCC 382, Secretary to Government, School Education Department, Chennai-v.-R.Govindaswamy and others, (2014) 4 SCC 769 (Paragraphs 6 to 8), University of Rajasthan and another-v.- Prem Lata Agarwal (2013) 3 SCC 705. Learned senior counsel on the law of precedents has submitted eerier view to prevail as per the decision reported in (2008) 10 SCC 1, paragraphs-71,72, 78 to 92.

The petitioners have sought for regularization on the post of Assistant Computer Operator on the basis of Contractual Appointment Rule 2013 and the corollary to the aforesaid prayer another prayer was advanced by the learned counsel for the petitioners during the course of hearing is that the contractual appointee cannot be replaced by another contractual appointee.

In order to decide the first point of regularization the ratio decided by the Constitutional Bench of Hon'ble Supreme Court in the case of Secretary, State of Karnatak-vrs.Umadevi and others (2006) 4 Supreme Court Cases 1, Nihal Singh and others-vrs.—State of Punjab and others (2013) 14 SCC 65 and Amarkant Rai –vrs.-State of Bihar and others (2015) 8 SCC 65, it has been consistently held that the appointment has been given against non-sanctioned post without conducting due procedure of selection would be deemed to be an illegal appointment and the service of irregular appointees those who have worked more than 10 years of service against sanctioned post would be entitled to be considered for regularization in service. In the instant case, the petitioners

have rendered about two years of service on the post of Assistant Computer Operator on contractual basis. Therefore, the period rendered by the petitioners are not enough to come to the conclusion that there is justification for continuance of the petitioners so as to claim regularization of service. In none of the decision of the Hon'ble Apex Court, there has been direction for consideration of regularisation of service where the petitioners have rendered less than five years of service. Therefore, the prayer of the petitioners to claim regularization under State Government Rule 2013 is thoroughly misconceived and cannot be acceded to.

With regard to the submissions of the learned counsel for the petitioners that the contractual employee cannot be replaced by another contractual employee has some force to reckon with. The Hon'ble Supreme Court in the case of State of Haryana and others-vrs.-Piara Singh and others reported in (1992) 4 SCC 118 wherein at paragraph at paragraphs 47,48 and 49 has observed as under:

> "47. Thirdly, even where an ad hoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, some appropriate method consistent with the requirements of Article 16 should be followed. In other words, there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly.
>
> 48. An unqualified person ought to be appointed only when qualified persons are not available through the above processes.
>
> 49. If for any reason, an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularization provided he is eligible and qualified according to the Rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State."

Therefore, it is no more res integra that a contractual employee cannot be substituted by any contractual employee.

On cumulative effect of the facts, reasons and judicial pronouncement while declining the prayer of the petitioners for consideration of regularization under Odisha Group C and Group D posts (Contractual Appointment) Rules, 2013, the writ petition stands disposed of with an observation that since the petitioners were appointed on contractual basis till regular selection is made it is left to the discretion of the opposite parties to engage them contractual basis till regular selection is made. With the aforesaid observation and direction, the writ petitions stand disposed of.

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2020 (II) ILR - CUT- 150

S.K. PANIGRAHI, J.

W.P. (C) NO. 6639 OF 2020

SK. TALIM ALI ……..Petitioner

.Vs.

HINDUSTAN PETROLEUM CORPORATION LTD. & ORS. ...……...Opp. Parties

(A) DOCTRINE OF LAW – The doctrine of '*Pacta sunt servinda*' governs the contractual relationship and the clauses of the contract are the law between the parties – This doctrine presupposes strict compliance of the terms enumerated in the termination clauses of the agreement, otherwise it destroys the sanctity of the contract and eludes the future performance. (Para 17)

(B) CONSTITUTION OF INDIA, 1950 – Arts.226 & 227 – Termination of the contract on the ground as fraud – Plea of violation of natural justice raised – Necessity of the compliance of natural justice, where fraud is committed? – Held, there is no legal requirement to observe the rule of natural justice while terminating the contract if there is a prima facie case of adoption of fraudulent means or misrepresentation. (Para 18 to 20)

(C) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ jurisdiction – Plea of availability of alternative remedy – Scope of exercising of writ jurisdiction – Indicated.

The petitioner's articulation regarding High Court's jurisdiction transcending the arbitraral forum deserves to receive some attention. The Dealership Agreement dated 28.10.2013 and dated 09.03.2019 provides an Arbitration Clause in Clause-38. It is well settled law that if the petitioner has an efficacious alternate remedy, he is not permitted to approach this Court invoking extraordinary Writ jurisdiction under Article 226 of the Constitution. Time and again, it has been reiterated by the Hon'ble Apex Court that the contract between private party and the State or instrumentality of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies available under ordinary civil law rather than approaching the High Court. This Court has also consistently maintained the position that Writ Petition is not maintainable in such cases. But, once the set of facts of a particular case is found tobe in the nature such controversy involving public law element, then the matter can be examined by the High Court under the Writ jurisdiction to examine whether action of the State and/or instrumentality of the State is fair, just and equitable or not. Indian law journals have digested thousands of pages on this issues, the Supreme Court of India has lent its aid while dealing with this issue in ***Harbanslal Sahnia & Anr. vs. Indian Oil Corpn. Ltd. And Ors13,*** *held that:*

> *"In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies:*
>
> a. *where the writ petition seeks enforcement of any of the Fundamental Rights;*

b. where there is failure of principles of natural justice ,

c. where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged" (Para 21)

(D) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Contractual matter – Dispute with regard to termination of the LPG Distributorship – Termination made on the ground of submitting fraudulent "Residence Certificate" – Reference of dispute for the arbitration as per clause of the contract sought for – Adjudication of fraud aspect by the Arbitrator – Scope of – Observed that the disputes involving fraud simpliciter would be arbitrable, while the disputes that involve complex fraud are non-arbitrable. (Para 22)

Case Laws Relied on and Referred to :-

1. 125 (2005) DLT 298 : Ashis Gupta Vs. IBP Ltd. & Ors.
2. (2015) 7 SCC 728 : Joshi Technologies International INC Vs. Union of India & Ors.
3. 1977(1) SCC -1-Pr.- 4 : Jai Singh Vs. Union of India & Ors.
4. 1994(1) SCC 1: S.P. : Chengalveraya Naidu (dead) by Lrs. Vs. Jagannath (dead) by Lrs. & Ors.
5. (2013) 11 SCC 531, Pr-44 : Bhaskar Laxman Jadhav and Others Vs. Karambeer Kakasahed Wagh Education Society & Ors.
6. 2005 (7) SCC-177, para-7 : A.P. Public Service Commission Vs. Koneti Venkateswarulu and Ors.
7. Civil Appeal Nos. 4458-4459 of 2015 : Dharampal Satyapal Ltd. Vs. Deputy Commissioner of Central Excise, Gauhati & Ors.
8. (1956) 1 QB 702 : Lazarus Estate Ltd. Vs. Beasley,
9. 2005) 6 SCC 149 : State of A.P. Vs. T. Suryachandra Rao
10. (2008) 12 SCC 306 : Behari Kunj Sahkari Avas Samiti Vs. State of U.P.
11. AIR 1994 SC 2151 : Andhra Pradesh State Financial Corporation Vs. GAR Re-Rolling Mills & Anr
12. (1994) 2 SCC 481 : State of Maharashtra & Ors. Vs. Prabhu.
13. (2003) 2 SCC 107 : Harbanslal Sahnia & Anr. Vs. Indian Oil Corpn. Ltd. And Ors
14. (2016) 10 SCC 386 : Ayyasamy Vs. A. Paramasivam & Ors.
15. 1962 SCR Supl. (3) 702 : Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak
16. (1880) 14 Ch D 471 : Russell Vs. Russell
17. (2019) 8 SCC 710 : Rashid Raza Vs. Sadaf Akhtar

For Petitioner : M/s.Chandrakanta Nayak, S.C. Tripathy R.K.Nayak and R.N.Swain.

For Opp. Parties : Mr. M. Balakrishna Rao, Advocate
Mr. Manoj Kumar Khuntia, AGA.
M/s. Prafulla Kumar Rath, A. Behera, S.K.Behera, P.Nayak & S. Das,

JUDGMENT Date of Hearing :13.03.2020 : Date of Judgment :24.04.2020

S.K. PANIGRAHI, J.

The instant writ petition challenges the termination letter dated 17.02.2020 issued by the opposite party no.1/ Hindustan Petroleum

Corporation Ltd. (in short 'the HPCL') to the petitioner herein vide reference No.BLRO/DKB on the ground of violation of natural justice. The petitioner herein assails the termination of H.P. Gas (LPG) Distributorship Agreement dated 28.10.2013 which was further renewed vide Agreement dated 09.03.2019.

2. The facts in nutshell, the petitioner was appointed as Distributor of LPG under Rajiv Gandhi Gramin LPG Vitarak (RGGLV) in respect of the advertised RGGLV location called Brahmabarada through a Selection Process by way of an open advertisement issued by HPCL. In the said selection process, the petitioner was one of the applicants for the RGGLV location named Brahmabarada Kalan coming under Rasulpur Block, District-Jajpur (Odisha). The core issue surrounding the present dispute is the submission of "Residence Certificate" of the advertised location though it constitutes one of the essential eligibility criteria for awarding the distributorship as per Clause 3(b) read with Clause-7 of the advertisement issued by HPCL. Accordingly, he submitted a "Residence Certificate" issued in his favour by the Tahasildar, Dharmasala vide Misc. Case No.1958 of 2011. During the currency of the said advertisement, the Dharmashala Tahasil underwent a bifurcation namely Dharashala Tahasil and Rasulpur Tahasil. It is pertinent to note that the village Brahmabarada comes under Rasulpur Tahasil after the bifurcation exercise. In the meantime, the HPCL authority, during the Field Verification of Credential (FVC), asked the petitioner to submit Residential Certificate issued by the Tahasildar, Rasulpur since the new jurisdictional Tahasil is Rasulpur. Accordingly, the petitioner submitted another "Residence Certificate" dated 30.01.2013 issued by the Tahasildar, Rasulpur certified to be a resident of Brahmabarada. On the strength of the said document, he was issued Letter of Intent. Finally, he was found suitable for final award of distributorship for the advertised location-Brahmabarada. However, upon a complaint made by one of the unsuccessful complainants i.e. the Opposite Party No.6 herein, it was discovered that the furnished "Residential Certificate" mentioned him to be the resident of Brahmabarada alleged to be false and incorrect as he is not an ordinary resident of advertised location "Brahmabarada" which is under Rasulpur Block.

3. Upon perusal of records, the petitioner was found to be the resident of village Chandapur and not Brahmabarada. In fact, Residential Certificate issued to the petitioner by the Tahasildar, Rasulpur vide Misc. Certificate Case No. 357 of 2013 was challenged by the opposite Party No.6 before the

Sub-Collector, Jajpur by way of an Appeal bearing Misc. Appeal No.20 of 2013. After hearing the parties, the Sub-Collector, Jajpur vide order dated 27.01.2015 allowed the Appeal and concluded that the petitioner is a resident of village "Chandapur" and not "Brahamabarada". Being aggrieved by the said order dated 27.01.2015 of the Sub-Collector, Jajpur, the petitioner herein, approached to this Court in W.P.(C) No.2582 of 2015 which was dismissed vide judgment and order dated 11.09.2017 confirming the order passed by the Sub-Collector, Jajpur and held that the petitioner herein is a resident of "Chandapur" and not "Brahmabarada". He further invoked the provisions of intra-court Appeal assailing the dismissal order dated 11.09.2017 by Hon'ble Single Judge, by way of Writ Appeal No.340 of 2017. The Division Bench vide order dated 05.02.2018 took the confirmatory view taken by the Single Judge and concluded that the petitioner is a resident of village "Chandapur" and not "Brahmabarada". The order of the Division Bench, was unsuccessfully challenged by the petitioner before the Hon'ble Supreme Court of India by way of Special Leave Petition being SLP (C) No.13004 of 2019. Thus, the findings of Appellate Authority-cum-Sub-Collector, Jajpur have attained finality.

4. Heard learned Counsels for the parties in detail:

5. Mr. S.C. Tripathy, learned counsel for the petitioner submits that village Brahmabarada falls under Rasulpur Tahasil and the requirement of HPCL is that the petitioner is to submit the Residential Certificate issued by the jurisdictional Tehsildar of village Brahmabarada. Accordingly, the petitioner obtained the certificate from the Tahasil, Rasulpur wherein his residential status is shown to be resident of village Brahmabarada.

6. Proprio vigore, Mr Tripathy's submission revolves around the principles of natural justice which got crystalized on the facts that the opposite party no.1 did not show-cause him before issuing the impugned letter of termination dated 17.02.2020. Accordingly, the absence of show-cause notice tantamount to absence of the opportunity of being heard. The impugned termination hits the soul of justice violating Article 14 of the Constitution of India and on this ground alone the said termination letter deserves to be quashed. He heavily relied on the decisions of **Ashis** ***Gupta vs. IBP Ltd. & ors***[1] and ***Joshi Technologies International INC vs. Union of India and others***[2]; to buttress his points.

7. He further contended that the Residential Certificate insisted upon by the Opposite Party No.1/HPCL was not in conformity with the terms of the

1. 125 (2005) DLT 298, 2. (2015) 7 SCC 728

agreement dated 28.10.2013 which was renewed on 9.03.2019 for another period of five years. Had the Residential Certificate been so important or had he furnished fraudulent Residential Certificate, the authority could not have renewed the agreement further. He harped on the principle of estoppel and strenuously tried to convince this Court that the issue of Residential ertificate is irrelevant especially in the aftermath of renewal of the agreement. The written submission filed by the petitioner also succinctly echoes the same sentiment of the court room argument and points out that the agreement dated 28.10.2013 stood concluded after five years, hence the show cause issued by the opposite party No.1 rendered infructuous. It further agitates that that Clause-29 of the Agreement expressly stipulates that a 30 days prior notice is mandatory before initiating the process of termination. Since the renewal of the agreement tantamount to a fresh agreement, hence a fresh cause of action. He, further poignantly submits, the act of termination qua the old Agreement is nugatory and hits the principle of promissory estoppel.

8. On the last limb of his written submission, the petitioner brushed aside the argument of ouster of writ jurisdiction. The availability of efficacious remedies like Arbitration which is provided in the agreement does not prevent him to invoke the Writ jurisdiction of this Court especially when there is a purported violation of the principles of natural justice.

9. Per contra, Mr. M. Balakrishna Rao, learned counsel for the opposite party No.1/HPCL submits that the petitioner is not a resident of the advertised RGGLV location Brahmabarada, but a resident of village "Chandapur". In fact, village Brahmabarada falls under Rasulpur Tehsil which is the competent authority to issue "Residential Certificate" to the petitioner.

10. He further contended that following dismissal of W.P. (C) No.2582 of 2015 and Writ Appeal No.340 of 2017(supra), show-cause notices were issued by the opposite party No.1/HPCL for cancellation of the distributorship Agreement of the petitioner on the ground of furnishing false and incorrect Residence Certificate. It is further contended that the Corporation has issued two show-cause notices dated 22.11.2017 and 11.01.2018 respectively prior to the termination. Hence, the Opposite Party No.1 has not breached the principles of natural justice as averred by the petitioner herein. He endeavored to take this Court through some relevant clauses of the agreement (Annexure-6) which are quoted hereunder:

> ***"28.B**. Notwithstanding anything to the contrary herein contained, the corporation shall also be at liberty at its entire discretion to terminate this Agreement forthwith upon or at any time after the happening of any of the following event, namely:-*

xxx xxx xxx

b(l) *If any information given by the Dealer in his/her application for appointment as a Dealer shall be found to be untrue or incorrect in any materials particular.*

xxx xxx xxx

b(n) *If the Dealer shall either by himself/herself or by his/her servants or agents commit or suffer to be committed any act which, in the opinion of the General Manager of the Corporation for the time being at Kolkata whose decision in that behalf shall be final, is prejudicial to the interest or good name of the Corporation or its products; the General Manager shall not be bound to give reasons for such decision."*

In view of the above, show cause notice is an empty formality in the instant case, yet the Opposite Party No.1 has taken care to serve two notices. Hence, harping on the Principles of natural justice and approaching the writ court is nothing but abuse of judicial process.

11. He further submits that the petitioner once again invoked the Writ Jurisdiction of this Court by challenging the Show Cause Notices dated 22.11.2017 and 11.01.2018 in W.P.(C) No.4257 of 2018. Having heard the petitioner, this Court passed an interim order dated 27.03.2018 directing the General Manager, HPCL not to proceed further in pursuance of the show-cause notice. In the meantime, the employer/HPCL resorted to renewal of the agreement on 09.03.2019. He further contended that LPG being an essential commodity and it requires uninterrupted supply, the distributorship could not be left in vacuum hence the renewal was done. He, however, admitted that the factum of the fraudulent residential certificate did not surface at the time of renewal since the continuity of uninterrupted LPG supply was paramount, at that point of time, to accommodate the interest of the public.

12. However, the petitioner abruptly withdrew the W.P.(C) No.4257 of 2018 vide order dated 06.01.2020 but all issues contained in the show-cause notice were kept open. At this factual back drop, the distributorship agreement dated 09.03.2019 was terminated on the ground of misrepresentation and falsehood qua his residential status.

13. Mr. P.K. Rath, learned counsel for the Opposite Party No.6 endeavored to shed light on some of the important aspects which failed to capture the content of the instant Writ Petition. He submitted that his client/Opposite Party No.6 had also filed a Writ petition bearing W.P.(C) No.3615 of 2020 seeking action against the petitioner by HPCL on the back drop of the dismissal of the Special Leave Petition confirming the finding of Sub-Collector,Jajpur. It is relevant to point out that in view of the cancellation order of the Agreement dated 17.02.2020, the writ petition being W.P.(C) No.3615 of 2020 filed by the Opposite Party No.6 rendered infructuous.

14. Mr. Rath, further placed on record, some intriguing facts especially with respect to filing of C.S. No.268 of 2019 in the Court of Civil Judge (Senior Division), Chandikhole by this petitioner. The said Civil Suit was still ending at the time of filing of the present Writ Petition with identical relief sought. He further urged that the petitioner has deliberately not filed a copy of the said Plaint of the Suit, nor has he taken any averment to that effect. According to him, out of all other prayers, prayer No.(II) and (IV) are identical with the present Writ Petition which may be reproduced below:-

> *"Prayer-(II): Let the Defendant No.1 to 3 be directed to declare the plantiff as the permanent resident of Brahmabarada basing upon the Addhar Card, Voter ID Card and electricity bill. (IV) Let the Defendant no.4 & 5 be directed not to cancel the dealership agreement entered between the plaintiff and defendant no.4 and 5 on dated 09.03.2019 basing upon the residential certificate."*

At this point, he strongly relied on the case of ***Jai Singh vrs. Union of India & Ors3.*** which reads thus:

xx xx xx xx xx

> *"It has also been brought to our notice that after the dismissal of the writ petition by the High Court, the appellant has filed a suit, in which he has agitated the same question which is the subject matter of the writ petition. In our opinion, the appellant cannot pursue two parallel remedies in respect of the same matter at the same time."*

15. He further contended that the petitioner has suppressed the fact before this Court regarding filing of Suit before the learned Civil Judge (Sr. Division), Chandikhole in C.S. No.268 of 2019. Hence, the petitioner is guilty of suppression. He relied heavily on ***S.P. Chengalveraya Naidu (dead) by Lrs. v. Jagannath (dead) by Lrs. and Others[4]*;** which reads thus:

xx xx xx

> *"A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party".*

This Court's attention was also drawn to the case ***of Bhaskar Laxman Jadhav and Others vrs Karambeer Kakasahed Wagh Education Society and Others[5]:***

> *"….It is not for a litigant to decide that what is material for adjudicating a case and what is not material. It is the obligation of a litigant to disclose all the facts of cases and leave the decision-making to the court."*

He further adverted to the decision of the Apex Court in **A.P.** ***Public Service Commission vrs. Koneti Venkateswarulu and others[6];*** which may be quoted below:-

3. 1977(1) SCC -1-Pr.-4, 4. 1994(1) SCC 1, 5. (2013) 11 SCC 531 , Pr-44, 6. 2005 (7) SCC-177, para-7

xx xx

> *In our view, the appellant was justified in relying upon the ratio of Kendriya Vidyalaya Sangathan1 and contending that a person who indulges in such suppressio veri and suggestion falsi and obtains employment by false pretence does not deserve any public employment. We completely endorse this view*."

He strongly articulated that suppression of a material document would also amount to a fraud on the court. Therefore, the Writ Petition deserves to be dismissed on this ground alone and cancellation of dealership is only consequential.

16. On the aforesaid factual backdrop, Mr. Rath took a stand that the petitioner has played fraud in the selection process by submitting fraudulent documents; hence his distributorship has been rightly cancelled. He further states that the agreement dated 09.03.2019 being a continuation of original selection by virtue of agreement dated 28.10.2013; hence no fresh right has been created in favour of the petitioner. The cancellation order is sequel to order passed by the Hon'ble Apex Court which disapproves the petitioner's residential certificate. The issue of fraud, misrepresentation made by the petitioner in the selection process is quite obvious and patently evident.

17. Considering the arguments advanced by the parties and perusal of the records of the case, this Court is faced with the question, as to whether the termination is justified or not. In addition to assessing the rival submissions, it is pertinent to refer to Para-28(B) read with sub-clause (b) (l) and b (n) of the Dealership Agreement dated 28.10.2013 which gives unfettered power to the Opposite Party No.1 for termination, in case, any information found to be untrue or incorrect. A Contract is like a written form of the law or like a private legislation that legally binds the parties, hence the aforementioned clause derives utmost sanctity from the agreement.

The doctrine of '*Pacta sunt servinda'* governs the contractual relationship and the clauses of the contract are the law between the parties. This doctrine presupposes strict compliance of the terms enumerated in the termination clauses of the agreement, otherwise it destroys the sanctity of the contract and eludes the future performance. This Court also took pain in relooking the plenary clause of 28-B read with sub-clauses-b (l) and b (n) which empowers the employer to terminate the Agreement in case any information furnished found to be untrue or incorrect. In the instant case, the petitioner has given blatant disregard to the above mentioned provision which derives its legal validity from Sections 19 read with Sections 14 & 18 of the Indian Contract Act, 1872 which govern voidability of contracts/agreements

without free consent. It is not open for the Petitioner to plead ignorance of law as per settled legal maxim – ignorantia juris non excusat.

18. In fact, the petitioner's plea of breach of natural justice is nothing but an unnatural expansion of natural justice. The natural justice argument can neither be final nor is it fanatical, rather dependent upon the transaction or action of the parties. It is held in ***Dharampal Satyapal Ltd. Vrs. Deputy Commissioner of Central Excise, Gauhati and Others***[7], that:-

> *"39. We are not concerned with these aspects in the present case as the issue relates to giving a notice before taking action. While emphasizing that the principles of natural justice cannot be applied in strait-jacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general special goals, etc."* The validity of the Termination order has to be examined on the touchstone of prejudice which is absent in the instant case.

19. The rival submissions made by the parties and perusal of the case record, it is evident that the Petitioner has secured the distributorship by means of an illegal Residential Certificate. The petitioner, thereby, brazenly violated the terms of the Distributorship Agreement. Further, the issue of his residential status has been already set to rest in an earlier round wherein he has already travelled up to the Supreme Court of India and suffered dismissal. Without delving on the said round of litigation, it can safely be concluded that there is sufficient convolution in the instant lis making it a clear case of forum shopping at the behest of the petitioner, who, having lost in the earlier round of litigation which attained finality, has sought similar remedy in the instant proceedings. This Court has time and again deprecated the practice of forum shopping by litigants and viewed it as an abuse of law.

20. In so far as the issue of show cause notice is concerned, the petitioner as served with two notices dated 22.11.2017 and 11.01.2018 respectively. However, the selection alleged to have been done through Residence ertificate shrouded with doubts and smacks a fraudulent behavior on the part of the Petitioner. Fraud and justice cannot go together. It is a settled law that "Fraud" vitiates every solemn act. In ***Lazarus Estate Ltd. v. Beasley,***[8] Lord Denning observed "No judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." In the same judgment Lord Parker LJ observed that fraud "vitiates all transactions known to the law of however high a degree of solemnity. This principle has been reiterated in ***State of A.P. vs. T. Suryachandra Rao***[9]***, Behari Kunj Sahkari Avas Samiti***

7. Civil Appeal Nos. 4458-4459 of 2015, 8. (1956) 1 QB 702, 9. 2005) 6 SCC 149, 10. (2008) 12 SCC 306

vs. State of U.P[10]., Andhra Pradesh State Financial Corporation v. GAR Re-Rolling Mills and Anr[11]*:, *State of Maharashtra and Ors. v. Prabhu[12]: and so on. The underlined philosophy of the above cited judgments clearly radiates the idea that once a fraud is proved or advantaged taken by wrong means, all advantages gained by playing fraud or wrong means can be taken away. Hence, the termination of the Distributorship Agreement is the consequence.

21. Arguendo, the petitioner's articulation regarding High Court's jurisdiction transcending the arbitraral forum deserves to receive some attention. The Dealership Agreement dated 28.10.2013 and dated 09.03.2019 provides an Arbitration Clause in Clause-38. It is well settled law that if the petitioner has an efficacious alternate remedy, he is not permitted to approach this Court invoking extraordinary Writ jurisdiction under Article 226 of the Constitution. Time and again, it has been reiterated by the Hon'ble Apex Court that the contract between private party and the State or instrumentality of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies available under ordinary civil law rather than approaching the High Court. This Court has also consistently maintained the position that Writ Petition is not maintainable in such cases. But, once the set of facts of a particular case is found to be in the nature such controversy involving public law element, then the matter can be examined by the High Court under the Writ jurisdiction to examine whether action of the State and/or instrumentality of the State is fair, just and equitable or not. Indian law journals have digested thousands of pages on this issues, the Supreme Court of India has lent its aid while dealing with this issue in **Harbanslal Sahnia *& Anr. vs. Indian Oil Corpn. Ltd. And Ors[13],*** held that :

> "*In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies:*
>
> a. *where the writ petition seeks enforcement of any of the Fundamental Rights;*
>
> b. *where there is failure of principles of natural justice,*
>
> c. *where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged"*

22. In addition to the aforesaid aspect, if the nature of dispute like the present one, the Apex Court has succinctly answers in ***Ayyasamy vs. A. Paramasivam & Ors[14]*** which emphasized that a judge must distinguish between 'fraud simpliciter' (simple allegations of fraud) and 'complex fraud' (serious/complex allegations of fraud). It held that disputes involving fraud simpliciter would be arbitrable, while the disputes that involve complex fraud are

11. AIR 1994 SC 2151, 12. (1994) 2 SCC 481, 13. (2003) 2 SCC 107, 14. (2016) 10 SCC 386

non-arbitrable. Similarly, in ***Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak***[15]**,** serious allegations of fraud were held to be a sufficient ground for not making a reference to arbitration. Reliance in that regard was placed by the Court on a decision of the Chancery Division in ***Russell v. Russell***[16] which delved on a case where a notice for the dissolution of a partnership was issued by one of the partners, upon which the other partner brought an action alleging various charges of fraud, and sought a declaration that the notice of dissolution was void. The partner who was charged with fraud sought reference of the disputes to arbitration. The Court held that in a case where fraud is charged, the Court will in general refuse to send the dispute to arbitration. But where the objection to arbitration is by a party charging the fraud, the Court will not necessarily accede to it and would never do so unless a prima facie case of fraud is proved. Similarly, ***Rashid Raza v. Sadaf Akhtar***[17] also follows the above principles. In light of the above discussion, it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter.

23. Uncontrovertibly, the procedural formalities for the termination of contract need to be performed in fairness and good faith. Non-compliance of the formalities, puts the employer in bad light, so does it put a scar on the contractor. However, there is no legal requirement to observe the rule of natural justice while terminating the contract if there is a prima facie case of adoption of fraudulent means or misrepresentation, as in the present case. In the instant case, the employer has faithfully attempted to observe the principle of natural justice vide its show-cause letter dated 22.11.2017 and dated 11.01.2018; hence the plea of violating the principles of natural justice is ill-founded.

24. Since it is a dispute involving the laws of Contract, this court cannot proscribe an appropriate behavior to the parties but the Court can levy a sanction if a party mutilates the sacred spirit of a Contract or agreement. Further, the instant issue has sufficiently occupied the time of this Court and there have been attempts to circumvent the spirit of litigation by using different forums, hence no substantial miscarriage of justice shall be caused if the instant Writ Petition is dismissed. Having considered the matter in the aforesaid perspective and guided by the judgments cited hereinabove, this Court comes to an irresistible conclusion that the petitioner is not entitled to the relief claimed.

25. For the aforesaid reasons, the Writ Petition is dismissed with no order as to costs. Pending Application(s), if any, stand(s) disposed of.

15. 1962 SCR Supl. (3) 702, 16. (1880) 14 Ch D 471, 17. (2019) 8 SCC 710

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