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.

JUNE - 2020

Pages : 161 to 320

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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Santosh Kumar Sahoo -V- Secretary, State Transport Authority, Odisha, Cuttack & Anr.

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MOHAMMAD RAFIQ, C.J. & DR. B.R. SARANGI, J.

W.P.(C) NO. 12316 OF 2020

BABAMANI WSHG .....Petitioner

.Vs.

STATE OF ODISHA & ORS. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Prayer for extension of lease of the sairat source (tank) for five years by quashing the notice for putting the said sairat into auction for the year 2020-21 – Petitioner was the auction holder for the year 2019-2020 – Plea that it has not harvested the fish – Petitioner participated in the process of auction for a specified period, i.e., from 2019-2020 – The question arose as to whether after expiry of the term of lease, he can claim extension of the term of the lease period – Held, No – Reasons explained.

"Keeping in view the settled position of law, as discussed above, and applying the same to the present context, this Court is of the considered view that the petitioner, having participated in the process of auction for a specified period, i.e., from 2019-2020, after expiry of the term of lease, has no right to claim for grant of extension of time from one year to five years and, as such, the Court cannot give any interpretation beyond the conditions stipulated in the notice of auction and consequential agreement executed between the parties, particularly when the petitioner is bound by the conditions stipulated therein. In other words, the Court cannot also give any other interpretation to the conditions stipulated therein, as the language is unambiguous and on a plain reading this Court comes to a conclusion that the petitioner is bound by its own terms and conditions and, as such, beyond the period prescribed, i.e., 2019-2020, the extension claimed for further period of five years cannot sustain in the eye of law." *(Para 18)*

Case Laws Relied on and Referred to :-

1. AIR 1998 SC 74 : Institute of Chartered Accountants of India .Vs. M/s. Price Waterhouse & Anr.
2. (1978) 1 All ER 948 (HL) : Stock .Vs. Frank Jones (Tiptan) Ltd.
3. (1910) AC 445 (HL) : Vickers Sons and Maxim Ltd. .Vs. Evans.
4. AIR 1962 SC 847 : Jamma Masjid, Mercara .Vs. Kodimanjandra Deviah & Ors.
5. AIR 1990 SC 981 : Union of India & Ors..Vs. Filip Tiago De Gama of Vedem Vasco De Gama.
6. AIR 1977 SC 842 : D.R. Venkatchalam & Ors.etc. .Vs. Dy. Transport Commissioner & Ors.etc..
7. (2000) 5 SCC 511 : Commissioner of Sales Tax, M. P. .Vs. Popular Trading Company, Ujjain.
8. AIR 2015 SC 2583 : Bharati Airtel Ltd. .Vs. Union of India, etc.

For Petitioner : M/s. Bikram Chandra Ghadei & R.B. Mishra.
For Opp. Parties : Mr. Debakanta Mohanty, Addl. Govt Adv.

JUDGMENT Decided On : 28.05.2020

DR. B.R. SARANGI, J.

Babamani Women Self Help Group, Nuagaon, represented through its president, has filed this writ application seeking mandamus to the opposite parties to extend the period of lease of Dandimunda tank situated in Mouza-Bayangadihi, P.O.- Nuahat, P.S.- Dhusuri, Dist-Bhadrak for five years by quashing the notice dated 21.05.2020 issued by the Tahasildar, Dhamnagar for putting the sairat into auction for the year 2020-21 pursuant to misc. case no. 78 of 2020-21.

2. Factual matrix of the case, in hand, is that the Tahasildar, Dhamnagar-opposite party no.4 issued an auction notice for auctioning the sairat source of Dandimunda tank for the year 2019-20. Pursuant to which, the petitioner participated in the process of auction and the source was allotted in its favour for the year 2019-20, being the highest bidder, whereafter the petitioner started pisciculture, but not harvested till date. Since the period for 2019-20 has been over, fresh notice was issued by the Tahasildar, Dhamnagar in misc. case no. 78/2020-21 vide Annexure-1 fixing 21.05.2020 as the date of auction at 9 a.m. in his office. Hence this application.

3. Mr. B.C. Ghadei, learned counsel for the petitioner contended that the petitioner has invested money for pisciculture, but not harvested the same. Before harvesting, fresh auction notice vide Annexure-1 has been issued. Though the petitioner has submitted a representation to grant long term lease for five years, as per the Government guidelines contained in Orissa Fisheries Policy, 2015, during pendency of the same issuance of impugned notice cannot sustain in the eye of law. The petitioner also relied upon a circular issued by the Director of Fisheries dated 19.08.2016, where long term lease of Gram Panchayat/revenue tanks for pisciculture was directed to be considered by the Collectors for a period of five years. It is further contended that as per the said guideline of the Fisheries Department, the petitioner should be allowed to continue for a period of five years, instead of the term lease of one year. To that extent, it is contended that the petitioner has also approached the Sub-Collector, Bhadrak by filing representation, which is available at page-18 of the brief, and the same has also not been considered till now. It is further contended that the Director of Fisheries on 28.05.2018

have stated that the selected WSHGs will be imparted training on scientific pisciculture and would be extended input subsidy assistance up to 60% and further reliance has also been placed on Government circular of Panchayati Raj and Drinking Water Department dated 08.06.2018 with regard to grant of lease for a period of three to five years by the Gram Panchayat, but that shall not be granted without prior approval of the Sub-Collector and Collector respectively. Therefore, it is urged that when the grievance of the petitioner is still pending for enhancement of the lease period from one year to five years, the notice issued in Annexure-1 by the opposite party no.4 for auction for the year 2020-21 cannot sustain in the eye of law.

4. Mr. D.Mohanty, learned Addl. Government Advocate appearing for the State opposite parties contended that admittedly the petitioner was granted on lease the sairat source in question for the year 2019-2020, which has been admitted in the pleading in para-3 of the writ application and such period has already expired by 31.03.2020, therefore, there is no illegality or irregularity committed by the Tahasildar, Dhamnagar-opposite party no.4 by issuing a fresh notice in Annexure-1 for conducting fresh auction of the sairat source for the year 2020-2021 fixing the date to 21.05.2020, as date of auction. So far as extension of lease period from one year to five years is concerned, it is contended that the petitioner has relied upon the circulars dated 19.08.2016 and 28.05.2018 issued by the Fisheries Department, but the sairat source belonged to Panchayati Raj Department. Thereby, the provisions contained in Gram Panchayat Act and Rules are applicable for grant of lease of sairat source belonging to Gram Panchayat department. As per Rule 49 of the Gram Panchayat Rules, 2014 procedure has been envisaged for leasing out the source for a period of one year, i.e., for the session 2019-2020 and that period, having been expired, cannot be extended for a period of five years, because the petitioner is bound by the terms and conditions stipulated in the notice of auction vis a vis the agreement executed between the parties. Reliance has been placed by the petitioner on letter dated 08.06.2018 issued by the Panchayati Raj & Drinking Water Department, whereby the Government has decided to grant long term lease of Gram Panchayat tanks for pisciculture, but admittedly the petitioner has been granted sairat source in question in the year 2019-2020 knowing fully well that such circular is made available. Thereby, the claim of the petitioner to extend the period of the said lease for five years cannot sustain.

5. This Court heard Mr. B.C. Ghadei, learned counsel for the petitioner and Mr. D.Mohanty, learned Addl. Government Advocate appearing for the State opposite parties, and perused the record. On the basis of the undisputed factual matrix, as discussed above, it is to be decided whether the lease granted to the petitioner from one year to five years, pursuant to the auction held in 2019 for the period 2019-2020, can be extended and the petitioner will be allowed to continue with the same without going for a fresh auction pursuant to Annexure-1.

6. It is pertinent to mention here that Mr. Ghadei, learned counsel for the petitioner relies upon the letter dated 19.08.2016 issued by the Director of Fisheries, Odisha addressed to all the Collectors for long term lease of GP(Gram Panchayt)/revenue tanks for pisciculture. On perusal of the said letter it appears that the Director of Fisheries, Odisha has expressed his view that most of MIPs/GP/revenue tanks below 40 Ha under the jurisdiction of Panchayati Raj/Revenue & DM Department is being leased out for pisciculture for a duration of 1 to 3 years which creates less opportunity for lessee to make investment for increasing fish production from 2 MT/Ha/Yr to 5 MT/Ha/Yr through adoption of scientific management practice, which will also encourage the bankers to extend credit to fish farmers for taking up intensive aquaculture. Reliance has also been placed with regard to para 7.1.4 (C) of Odisha Fishery Policy, 2015 for grant of lease for a period of three years. Therefore, requisition was made to the Collectors for giving long term lease to GP tanks for pisciculture. Therefore, no specific direction has been issued by the Director of Fisheries, Odisha in the said letter dated 19.08.2016 to grant long term lease for a period of five years to the existing lessee, rather opinion has been expressed for consideration for grant of long term lease in the said letter addressed to all the Collectors. On 18th May, 2018, the Director of Fisheries also addressed a letter to all the Collectors and District Magistrate for promotion of pisciculture in Gram Panchayat tanks on long term lease basis through Women Self Help Groups, where view has been expressed that selected WSHGs will be imparted training on scientific pisciculture and would be extended input subsidy assistance up to 60% with an unit cost of Rs.1.5 lakhs/ha under RKVY. This letter also does not indicate for extension of lease for one year to five years.

7. Reliance has also been placed on letter dated 08.06.2018 issued by the Addl. Secretary to Government Panchayati Raj & Drinking Water Department addressed to all the Collectors with regard to grant of long term

lease of Gram Panchayat tanks for pisciculture, wherein it has been specifically mentioned that the Government has been pleased to approve the guideline for leasing out the Gram Panchayat tanks for the purpose of in-land fresh water pisciculture. It has also been specifically mentioned that the procedure for leasing out the Gram Panchayat tanks, as provided under Rule 49 of the Gram Panchayat Rules, 2014, may continue. Lease for a term of three to five years shall be granted by the Gram Panchayat. Any lease for a term exceeding five years and less than ten years and for any term exceeding ten years shall not be made without prior approval of Sub-collector and Collector respectively. But the said guideline does not indicate that existing lease, which has been granted for a period of one year, would be extended for five years automatically. More particularly, the auction notice was issued for the year 2019-20 for grant of lease for a period of one year and by that time the guidelines issued on 08.06.2018 had seen the light of the day. Knowing fully well that such a guideline has been issued, that auction notice was issued for grant of lease for a period of one year for the year 2019-20, in which the petitioner participated and being the highest bidder, source was allotted in its favour. Therefore, reliance placed on the letters issued by the Director, Fisheries dated 19.08.2016 and 28.05.2018, as well as the subsequent letter issued by the Government fixing guidelines dated 08.06.2018 may not have any assistance to the petitioner to claim that the lease, which was granted for a period of one year, pursuant to auction notice issued for the year 2019-20, should be extended for a period of five years. As such, with the expiry of the period, the petitioner has no locus to claim that its application is pending for extension of lease for a period of five years. Thereby, the subsequent notification issued for grant of lease for the year 2020-21 cannot be said to be illegal. More particularly, the petitioner is bound by the condition stipulated in the notice for grant of sariat source vis-à-vis the subsequent agreement executed between the parties, by which the term of lease was one year and on expiry of period of lease, it cannot claim for extension for a period of five years. Therefore, the claim made that the notice issued under Annexure-1 for grant of lease for the year 2020-21 cannot sustain in the eye of law, is untenable.

8. It is well settled principle in law that the Court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements.

9. In ***Institute of Chartered Accountants of India v. M/s. Price Waterhouse and Another***, AIR 1998 SC 74 the apex Court held that the words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the Legislature enacting it. The intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided.

10. In ***Stock v. Frank Jones (Tiptan) Ltd.***, (1978) 1 All ER 948 (HL)), it is held that it is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so.

11. In ***Vickers Sons and Maxim Ltd. v. Evans***, (1910) AC 445 (HL), it was held that Rules of interpretation do not permit Courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. This principle has been quoted in ***Jamma Masjid, Mercara v. Kodimanjandra Deviah and others,*** AIR 1962 SC 847.

12. In ***Union of India and others v. Filip Tiago De Gama of Vedem Vasco De Gama***, AIR 1990 SC 981, the apex Court held that the question is not what may be supposed and has been intended but what has been said. "Statutes should be construed not as theorems of Euclid". Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them".

13. In ***D.R. Venkatchalam and others etc. v. Dy. Transport Commissioner and others etc.***, AIR 1977 SC 842, it was held that Courts must avoid the danger of a priori determination of the meaning of a provision based on their own pre-conceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

14. In ***Commissioner of Sales Tax, M. P. v. Popular Trading Company, Ujjain***, (2000) 5 SCC 511, the apex Court held that while interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is

for the legislature to amend, modify or repeal it, if deemed necessary. The legislative casus omissus cannot be supplied by judicial interpretative process.

15. In view of the above analogy, it is made clear that there are two principles of construction - one relating to casus omissus and the other in regard to reading the statute as a whole - appear to be well settled. Under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature.

16. In view of such position, the golden rule for construing all written instruments has been stated that the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.

17. The question of extension of period of license was under consideration by the apex Court in ***Bharati Airtel Ltd. v. Union of India, etc.,*** AIR 2015 SC 2583. In that case, refusal to extend the period of license to provide Cellular Mobile Telephone Service (CMTS) and Unified Access (Basic and Cellular) Services License (UAS Licenses) was the subject-matter of challenge. The apex Court held that the extension of license would mean extension of privilege to use spectrum which was bundled with original grant and that would be against its policy to auction spectrum separately, thereby held that refusal of extension is valid. It was further held that licenses in dispute are in the nature of largesses and policy to auction spectrum satisfies condition that grant should in non-arbitrary manner as well as condition that people should be adequately compensated by which authority of Government to grant largesses is fettered.

18. Keeping in view the settled position of law, as discussed above, and applying the same to the present context, this Court is of the considered view that the petitioner, having participated in the process of auction for a specified period, i.e., from 2019-2020, after expiry of the term of lease, has no right to claim for grant of extension of time from one year to five years and, as such, the Court cannot give any interpretation beyond the conditions stipulated in the notice of auction and consequential agreement executed between the parties, particularly when the petitioner is bound by the conditions stipulated therein. In other words, the Court cannot also give any other interpretation to the conditions stipulated therein, as the language is unambiguous and on a plain reading this Court comes to a conclusion that the petitioner is bound by its own terms and conditions and, as such, beyond the period prescribed, i.e., 2019-2020, the extension claimed for further period of five years cannot sustain in the eye of law.

19. In view of the foregoing discussions, this Court does not find any merit in the writ application, which is hereby dismissed. However, there shall be no order as to costs.

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2020 (II) ILR - CUT- 168

MOHAMMAD RAFIQ, C.J. & BISWAJIT MOHANTY, J.

WRIT PETITION (CIVIL) NO. 12132 OF 2020

RAMESH CHANDRA MISHRA ……..Petitioner

.V.

COLLECTOR-CUM-DISTRICT MAGISTRATE, PURI & ORS. ……..Opp.Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Auction of morrum sairat was held in 2015 for a period of five years – Highest bidder did not deposit the amount – Auction cancelled and decision was taken for fresh auction – Second highest bidder filed writ petition in 2015 challenging such decision of the Collector – Writ petition disposed of in November 2019 with a direction to consider the case of the second highest bidder – Collector rejected the claim on the ground that original lease period has already expired and the petitioner can participate in the fresh auction process – Plea of continuing wrong by not awarding the sairat – Held, it cannot be said that petitioner

was suffering a continuing injury on account of non granting of lease in his favour and as such no infirmity in the order passed by the Collector – Writ petition dismissed.

Case Laws Relied on and Referred to :-

1. (2008) 8 SCC 648 : Union of India & Ors Vs. Tarsem Singh.

For Petitioner(s) : Saswati Mohapatra & P. Mangaraj
For Opp.Party : Mr. Subir Palit, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 02.06.2020

MOHAMMAD RAFIQ, C.J.

The petitioner-Ramesh Chandra Mishra, by means of this writ petition, has approached this Court assailing the order dated 23.04.2020 (Annexure-6) passed by the Collector, Puri (opposite party No.1).

According to Ms. S. Mohapatra, learned counsel for the petitioner, originally, an advertisement for lease of Morrum Sairat under OMMC (Amendment) Rules, 2014 was published by the Tahasildar,Delanga (opposite party No.3) on 13.02.2015 and royalty of Rs.28 per CM was fixed by the State authorities. All four Morrum Sairats were clubbed together in order to make cluster approach. The petitioner participated in bidding process. One Shri Dushmanta Kumar Lenka was the highest bidder but he was absent on the date of bidding i.e. on 04.04.2015. In fact, the highest bidder failed to deposit the bid amount within seven days. Even though the petitioner was the second highest bidder, the opposite parties-authorities, instead of inviting the petitioner for grant of lease as per the provisions of Section 26(7) of the OMMC Rules, 2004, cancelled the tender process and dicided to invite fresh bid. In such background, the petitioner approached this Court by filing W.P.(Civil) No.8859 of 2015.

This Court initially passed an interim order on 13.05.2015 directing the authorities not to again put the Sairat in auction. The said writ petition remained pending for almost four years and was finally decided by this Court vide order dated 26.11.2019 (Annexure-5) whereby the letter dated 06.05.2015 (Annexure-4) issued by the Collector, Puri was quashed and the matter was remanded back to him for deciding the same in accordance with law within four months from the date of receipt of certified copy of the order. In compliance with the said direction of this Court, the Collector, Puri has now passed the impugned order under Annexure-6.

The Collector, Puri in the impugned order, has stated that as per the original advertisement inviting bids, the Morrum Sairat was required to be awarded for a period of five years from 2015-16 to 2019-20 and since that period has already been over on 31.03.2020, the grievance of the petitioner cannot be considered at this stage.

Ms. S. Mohapatra, learned counsel for the petitioner argued that merely because the matter was pending before this Court for a long time and the petition could not be decided early, the petitioner should not be penalised. The Collector, Puri has not properly followed the direction of this Court given in the earlier writ petition. Learned counsel relying on the judgment of the Hon'ble Supreme Court rendered in the case of ***Union of India and others vs. Tarsem Singh, reported in (2008) 8 SCC 648***, argued that despite delay and laches, the petitioner ought to be granted Morrum Sairat for a period of five years from the date of the order passed by the opposite party-authority.

After going through the cited judgment, this Court is of the opinion that the said judgment has hardly any application to the facts of the present case. There the dispute pertained to payment of arrears of disability pension. There the respondent had retired from Indian Army on 13.11.1983 and approcahed the High Court in 1999 seeking a direction to the appellants to pay disability pension. While the learned Single Judge allowed the writ petition however restricted the payment of arrears to thirty eight months prior to the filing of writ petition; the Division Bench in appeal allowed the benefit to the respondent from the date it fell due without restricting it to a period of thirty-eight months with interest. The Hon'ble Supreme Court set aside the order of Division Bench and restored the order passed by the learned Single Judge by observing that in a belated service related claim, relief can be granted, where such claim is based on continuing wrong however consequential relief of payment of arrears for past period, should be restricted to three years prior to the date of filing of writ petition. Here in the present case, it cannot be said that the petitioner is suffering a continuing injury on account of non-granting of lease in his favour like in a case of nonpayment of disability pension, where cause of action arises every month. Thus, the cited decision is factually distinguishable.

In the present case, undisputedly, the original advertisement inviting bids for lease of Morrum Sairat was for a period of five years commencing from 2015-16 to 2019-20. That period has already come to an end on

31.03.2020. Though after receipt of this Court's order under Annexure-5, on 13.01.2020, the opposite party No.1 has tried his best to obtain approved Mining Plan and EC, but as the same was a time consuming affair, he could not obtain the same prior to 30.03.2020. In such background, we do not find any infirmity in the decision taken by the opposite party No.1-Collector, Puri, who has also observed in the impugned order that fresh auction shall be undertaken and the petitioner shall be at liberty to participate in the said auction process.

Accordingly, the writ petition having no merit, deserves to be dismissed and is 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.

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2020 (II) ILR - CUT- 171

MOHAMMAD RAFIQ, C.J. & DR. B.R. SARANGI, J.

WRIT PETITION (CIVIL) NO.13422 OF 2020

PRATAP CHANDRA SAHU .....Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition seeking a direction to cancel the E-Tender notice and to notify afresh to give opportunity to the petitioner to participate in the tender process – Plea that during the tender process he was sent by the authority to another place for execution of certain work required due to cyclone 'Amphan' and therefore could not participate in the tender process – Whether the E-tender notice can be cancelled at the behest of the petitioner? – Held, No – Duty of the authority in conducting an auction and the reasons for not allowing the prayer of the petitioner indicated.

"The settled position of law is that merely conducting an auction is not enough; rather it must be an auction which is (i) duly publicized, and (ii) conducted

fairly and impartially, and if so conducted, it is the best method for discharging the burden of "a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition… a non-discriminatory method… which would necessarily result in protection of national/public interest". Hence, it can be concluded that "while transferring or alienating natural resources, the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process". Most importantly, it must be well publicized so that there are enough bidders, there must not be collusion amongst bidders, and obviously, it must be conducted fairly and impartially. Hence, the auction design and how the auction is actually conducted are vital to obtaining the socially optimal result. The permissible method of issuing tender is a public advertisement. Pursuant to such advertisement, if participants have participated in the process of tender and for any reason the same will be rejected or modified, such action amounts to arbitrary exercise of power and violative of Article 14 of the Constitution of India. Therefore, if the petitioner for any reason could not be able to participate in the process of selection, may be for the reasons beyond his control, at his instance the E-Tender process initiated pursuant to Annexure-2 cannot be cancelled in order to give opportunity to him to participate in the E-Tender process. As such, the petitioner has not alleged any illegalities or irregularities committed in the process of E-Tender issued by opposite party no.3, except advancing a simple argument that opposite party no.2 had directed the petitioner to move to Balasore for restoration of electricity work that was disrupted due to cyclonic storm "Amphan". That itself cannot be a ground to facilitate him to participate in the tender process by cancelling the impugned notification, particularly when the E-Tender notice was issued by the opposite parties giving opportunity to the eligible persons, including the petitioner, to participate in the tender process. If the petitioner does not choose to participate in the same, at his behest, the benefit sought cannot be extended and no direction can be issued for cancellation of such E-Tender issued by opposite party no.3 in Annexure-2." (Paras 9 & 10)

Case Laws Relied on and Referred to :-

1. (2012) 3 SCC 1: Centre for Public Interest Litigation Vs. Union of India.

For Petitioner : Mr. Satyabhusan Das.
For Opp. Parties : Mr. Debakanta Mohanty, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 04.06.2020

PER: DR. B.R. SARANGI, J.

The petitioner, who is an electrical contractor, having registration no. 656 (H.T.) which was issued by the competent authority on 24.11.1992 and renewed from time to time, by way of this writ petition seeks for direction to opposite party no.3 to cancel the E-Tender i.e. Bid Identification No. E.E. Koraput (OLIC) 01/2020-21 dated 01.05.2020 and notify afresh to give opportunity to the petitioner to participate in the tender process.

2. The factual matrix of the case, in hand, is that the Executive Engineer, Lift Irrigation Division, Koraput, opposite party no.3 issued an E-Tender Notice vide Bid Identification No. E.E. Koraput (OLIC) 01/2020 -21 on 01.05.2020 inviting pre-qualification along with price bid in shape of percentage rate bids in single cover system for the work "Installation & Energisation of L.I. Projects under Koraput and Malkangiri District" as described in the table detailed therein from valid civil license (D or above) Class with electrical H.T. license/tie up with Electrical (H.T.) License or vice versa. The tie up documents should be registered in any registration office only. As per the tender notice, bid documents consisting of plans, specifications, the schedule of quantities and the set of terms and conditions of contract and other necessary documents were to be seen in the website www.tendersorissa.gov.in. The bid must be accompanied by earnest money deposit, cost of tender paper amount and GST Chhalan specified in Col. No. 05 and 06 as per Clause No. 08 with all other documents relating to the biddings as per DTCN. The bid documents were to be available in the website from 16.05.2020 at 10.00 a.m. to 25.05.2020 up to 5.00 p.m. for online bidding. The same was to be received only "on line" on or before 25.05.2020 by 5.00 p.m.. The bids received "on line" were to be opened at 12.00 O'clock on 26.05.2020 in the office of the Executive Engineer, LI Division, Koraput in the presence of the bidders who wished to attend bidding, and who participated in the bid can witness the opening of the bids after logging on to the site through their DSC. If the office happened to be closed on the last date of opening of the bids as specified, the bid would be opened on the next working day at the same time and venue. After the date and time of receipt of bid was over, the original documents/instruments should be received by the office of the undersigned by Hand or by Post on or before 11 A.M. of 26.05.2020, during office hours on working days, failing which the bid would be rejected. The bid clarification was to be made on or before 20.05.2020 at L.I. Division office Koraput. As such, the jurisdiction of the tender will be valid for 365 days and that, along with other conditions, the authority reserves the right to cancel any or all bids without assigning any reason thereof. In view of such position, any person, who has got the eligibility criteria can apply through "on line" within time specified as mentioned above.

2.1 When the matter thus stood, the Superintending Engineer-cum-Electrical Inspector, Koraput-opposite party no.2 vide its letter dated 19.05.2020 directed the petitioner and other electrical contractors/agencies,

along with man power/machineries, to move to reach at Balasore and report to HR Manager for restoration work in the wake of cyclonic storm "Amphan". Consequentially, the petitioner moved to Balasore in compliance of order dated 19.05.2020, which deprived him from participating in the process of bid, which had been issued in Annexure-2. Hence this application.

3. Mr. S. Das, learned counsel for the petitioner contended that due to compelling reasons, since petitioner could not participate in the tender process pursuant to Annexure-2, such notice is liable to be quashed, in view of the fact that for a greater cause the petitioner left for Balasore in compliance of order dated 19.05.2020 issued by opposite party no.2 to have restoration work to be done due to the cyclonic storm "Amphan". It is further contended that National Disaster Manager Authority, in exercise of power conferred under Section 6(2)(i) of the Disaster Management Act, 2005 had directed to take lock down measures in the country from 25th March, to 14th April, from 15th April to 3rd May, from 4th May to 17th May and from 18th May to 31st May, which is still continuing with modifications, and since the impugned E-Tender notice was notified on 1st May, 2020, during the commencement of lock-down period, the same should be cancelled and a fresh notification should be issued enabling the petitioner, along with other similarly situated persons, to participate in the tender process.

4. Mr. D. Mohanty, learned Addl. Government Advocate contended that the reasons for which the petitioner seeks for cancellation of E-Tender notice in Annexure-2 cannot sustain in the eye of law. As such, by virtue of the E-Tender process, opportunity has been given to persons having requisite qualification to participate in the process. For some reason or other, if the petitioner could not participate in the process of tender, at his behest, the same cannot be cancelled. Thereby, it is contended that there is no valid and justifiable reason to cancel such tender at the behest of the petitioner causing prejudice to the similarly situated persons, who have already applied as per the terms and conditions specified in the tender documents, and seeks for dismissal of the writ petition.

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

6. On the basis of the undisputed facts mentioned above, the only question which is to be decided in this writ petition is, whether at the instance of the petitioner, who could not participate pursuant to E-Tender notice in Annexure-2, the process of tender can be cancelled or not.

7. On careful analysis of the above mentioned factual aspects vis-à-vis arguments advanced by learned counsel for the parties, admittedly, opposite party no.3, which is a State authority, with a view to executing the work in question, issued E-Tender notice inviting bids from the eligible persons. Law is well settled that the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants.

8. In ***Centre for Public Interest Litigation v. Union of India,*** (2012) 3 SCC 1, the apex Court held as follows:

> *"Wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. The State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and not attempt should be made to scuttle the claim of worthy applicants."*

9. The settled position of law is that merely conducting an auction is not enough; rather it must be an auction which is (i) duly publicized, and (ii) conducted fairly and impartially, and if so conducted, it is the best method for discharging the burden of "a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition… a non-discriminatory method… which would necessarily result in protection of national/public interest". Hence, it can be concluded that "while transferring or alienating natural resources, the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process". Most importantly, it must be well publicized so that there are enough bidders, there must not be collusion amongst bidders, and obviously, it must be conducted fairly and impartially. Hence, the auction design and how the auction is actually conducted are vital to obtaining the socially optimal result.

10. The permissible method of issuing tender is a public advertisement. Pursuant to such advertisement, if participants have participated in the process of tender and for any reason the same will be rejected or modified, such action amounts to arbitrary exercise of power and violative of Article 14

of the Constitution of India. Therefore, if the petitioner for any reason could not be able to participate in the process of selection, may be for the reasons beyond his control, at his instance the E-Tender process initiated pursuant to Annexure-2 cannot be cancelled in order to give opportunity to him to participate in the E-Tender process. As such, the petitioner has not alleged any illegalities or irregularities committed in the process of E-Tender issued by opposite party no.3, except advancing a simple argument that opposite party no.2 had directed the petitioner to move to Balasore for restoration of electricity work that was disrupted due to cyclonic storm "Amphan". That itself cannot be a ground to facilitate him to participate in the tender process by cancelling the impugned notification, particularly when the E-Tender notice was issued by the opposite parties giving opportunity to the eligible persons, including the petitioner, to participate in the tender process. If the petitioner does not choose to participate in the same, at his behest, the benefit sought cannot be extended and no direction can be issued for cancellation of such E-Tender issued by opposite party no.3 in Annexure-2.

11. Considering the matter from all angles, this Court is of the opinion that the writ petition merits no consideration and the same is hereby 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 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- 176

MOHAMMAD RAFIQ, C.J. & BISWAJIT MOHANTY, J.

WRIT PETITION (CIVIL) NO.12494 & 13853 OF 2020

SURENDRA PANIGRAHI .....Petitioner

.Vs.

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

&

WRIT PETITION (CIVIL) NO. 13853 OF 2020

DILLIP KUMAR RAY .....Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petitions in the nature of public interest litigation – In one writ petition prayer is made to postpone the Car Festival at Puri due to pandemic COVID-19 – Another writ petition the prayer to allow Car Festival/Rath Yatra/Gundicha Yatra by strictly adhering to the conditions imposed in the guidelines including maintaining social distancing and wearing mask and the Chariots/Car of Lords may be allowed to be pulled only by the heavy duty machineries rather than the men power – Pleas of parties with reference to the various provisions of the Disaster Management Act 2005 considered – Held, the State Govt. to take a decision in the matter.

"While therefore not issuing any mandamus as prayed for, this Court is inclined to hold that it is up to the State Government to decide whether or not to allow the Rath Yatra on 23.6.2020, depending on the situation then prevalent on the ground about the spread of Coronavirus. If however any such decision is eventually taken, the State Government shall ensure strict adherence to the directives issued by the Government of India in Clause 3 of their letter dated 07.05.2020; with regard to the adherence to the lockdown measures issued by the Ministry of Home Affairs, Government of India in their Guidelines dated 30.5.2020 and also the National Directives for Covid-19 Management. The State Government shall also ensure strict adherence to its own order dated 01.6.2020 containing additional and further guidelines. As regards the other prayer that the Chariots/Car should be allowed to be pulled manually or mechanically, we are inclined to observe that deploying heavy duty machineries or any other means like elephants, than the men power, for pulling the Chariots/Rath, would obviously obviate the necessity of involving large number of persons, which number could be in many hundreds. It is therefore directed that this aspect should be duly considered by the State Government while taking a decision for holding Rath Yatra, consistent with the guidelines issued by the Central Government and the State Government." *(Para 21)*

For Petitioner : M/s. S.K. Padhi, N.C. Rout, & Sk. Kalimuddin.

For Intervenor(s) : Dr. A. K. Mohapatra, Sr. Adv.
A.K. Mohapatra, B. Panda, S. Sarangi, A. Pati &
J.S. Samal (in I.A. No.6129 of 2020)
M/s. B. K. Ragada, L.N. Patel, H.K. Muduli & M.Sahoo,
(in I.A. Nos.5811 and 5898 of 2020)
M/s. S. Das, B. Mohanty, C.K. Agarwal & A. Patnaik,
(in I.A. No.5779 of 2020)

For Petitioner : In person **(W.P (CIVIL) NO.13853 OF 2020)**

For Opp. Parties : Mr. Chandrakanta Pradhan,
Central Government Counsel (For Union of India)
Mr. S. Satpathy,(For Shree Jagannath Temple
Managing Committee)
Mr. Ashok Kumar Parija, Adv. General.

JUDGMENT Date of Judgment : 09.06.2020

PER: MOHAMMAD RAFIQ, CJ.

These two writ petitions have been filed in the nature of Public Interest Litigation, raising the issue about the Car Festival of Lord Shree Jagannath at Puri, which is scheduled to take place on 23.06.2020. One of the above writ petitions i.e. W.P.(C) No.13853 of 2020, filed by one Dillip Kumar Ray, has been taken up on special mention today, along with W.P.(C) No. 12494 of 2020, already on board, after notice to learned counsel for the State-opposite parties.

2. The prayer in the first writ petition filed by Surendra Panigrahi-petitioner is that the Temple Managing Committee of Lord Shree Jagannath, Puri and other opposite parties-the State Government and other authorities, may be directed to postpone the Car Festival at Puri due to pandemic Coronavirus (COVID-19). Another writ petition has been filed with the prayer that Car Festival/Rath Yatra/Gundicha Yatra should be allowed to be held by strictly adhering to the conditions imposed in the guidelines issued by the Government of India, Ministry of Home Affairs, New Delhi vide Order No.40-3/2020-DM-I(A) dated 30.05.2020 (Annexure-B/5 to the Preliminary Counter Affidavit) and the order dated 01.06.2020 passed by the Government of Orissa, by maintaining social distancing and wearing mask. An additional prayer has been made that the Chariots/Car of Lords may be allowed to be pulled only by the heavy duty machineries rather than the men power.

3. We have heard learned counsel for petitioners, learned Advocate General and learned Counsel for the interveners.

4. Mr. S.K. Padhi, learned counsel for the petitioner in the first writ petition submitted that more than 10 lakhs people have always attended the Rath Yatra in the past. If the Car Festival is allowed to take place on 23.06.2020, it might attract lakhs of devotees this time also. The entire country including the State of Odisha is presently passing through a very critical phase due to the outbreak of pandemic Coronavirus. Such large gathering in and around Puri might prove super spreader of Coronavirus; jeopardizing lives of thousands of people. Learned counsel submitted that the Government of India in its guidelines dated 30.05.2020, issued under the Disaster Management Act, 2005 has prohibited all kinds of social/political/sports/entertainment/academic/cultural/religious functions and

other large congregations. It has directed the State Government not to dilute these guidelines in any manner. All the District Magistrates have been asked to strictly enforce the same. Any person violating these measures will be liable to be proceeded against as per the provisions of Sections 51 to 60 of the Disaster Management Act, besides legal action under Section 188 of the IPC, and other legal provisions.

5. Mr. Dillip Kumar Ray, the petitioner in person in W.P.(C) No.13853 of 2020, has also expressed similar apprehensions as have been voiced by learned counsel for the petitioner in the other writ petition. He submitted that if the State authorities are permitted to hold the Rath Yatra, they should be mandated to strictly adhere to the guidelines issued by the Government of India and the State Government, for maintaining social distancing and allow only limited number of Sebayat/Daitapati, priests and police personnel to participate, who should be mandated to wear masks. His additional submission is that rather than pulling manually, which might require seven to eight hundred persons, the Chariots/Car should be pulled with the help of heavy duty machineries so that involvement of such large number of persons in pulling the Chariots/ Car can be avoided.

6. Learned Advocate General submits that in view of the total lockdown imposed by the Central Government, the State Government vide its letter dated 06.05.2020 approached the Government of India, seeking permission for construction of Rathas as well as conduct of Rath Yatra. The Ministry of Home Affairs, Government of India vide its letter dated 07.05.2020 (Annexure-A/5 to the preliminary counter affidavit) addressed to the Chief Secretary of the State, while permitting construction of the Ratha to be undertaken in the Ratha-Khala, directed that no religious congregations shall be allowed to take place in the Ratha-khala and complete segregation should be ensured and the guidelines issued by the MHA and the National Directives for Covid-19 Management should be compulsorily adhered to. Attention of the Court in particular is invited towards para-4 of the aforesaid letter, wherein it has been stated that decision regarding holding of Ratha Yatra should be taken by the State Government, keeping in view the conditions prevailing at that point of time. Learned Advocate General submits that sub-clause (iv) of Phase III in Clause 1 of the latest guidelines dated 30.05.2020 (Annexure-B/5 to the preliminary counter affidavit) issued by the Central Government for Phased Re-opening (Unlock 1), categorically provides that dates for re-starting certain activities with regard to the social/ political/

sports/ entertainment/ academic/ cultural/ religious functions and other large congregations shall be decided based on the assessment of the situation. Clause 5 of the said guidelines further provides that the State Government, based on its assessment of the situation, may prohibit certain activities even outside the Containment zones, or impose such restrictions as it may deem necessary. Clause-9 of the said guidelines directs that the State/UT Governments shall not dilute these guidelines issued under the Disaster Management Act in any manner. Learned Advocate General submits that this however does not mean that the State Government cannot enforce further restrictions on the basis of evaluation of the situation. He further submits that the State Government has also issued an order dated 01.06.2020 (Annexure-C/5 to the preliminary counter affidavit) containing these and many other guidelines. In sub-clause (v) of Clause 3 of the said order, it has been provided that Social/political/sports/entertainment/academic /cultural/religious functions and other large congregations will continue to remain closed till 30.06.2020.

7. Learned Advocate General submits that the first case of Coronavirus in State of Odisha was reported on 16.03.2020. Thereafter, due to the pre-emptive measures taken by the State Government to tackle the spread of Coronavirus, there was no spurt of positive cases in the State. However there has been a steep increase in the number of positive cases on account of recent influx of the migrants and people coming from the outside the State. It is submitted that while on 30.03.2020, there were only 3 positive COVID-19 cases in the State, but the number increased to 143, 2104 and 2856 on 30.04.2020, 31.05.2020 and 07.06.2020 respectively. The situation on ground is thus changing everyday. As per the assessment of the experts in the medical field, number of positive Coronavirus cases is likely to increase sharply in the months of June and July, before reaching a peak. Learned Advocate General submits that the number of positive case at Puri on 1st may, 2020 was only one but number of such cases in district Puri has increased drastically and as on 07.06.2020, it has reached 108. Keeping this in mind, Puri was classified as a high risk zone and therefore included in the 11 districts earmarked for weekend (Saturday and Sunday) shutdown vide order dated 01.06.2020.

8. Learned Advocate General relied on the decision of this Court dated 04.06.2020 in *W.P(C) No.13539 of 2020*, wherein the petitioner Jayanta Kumar Bal approached this Court with a prayer that State Authorities may be directed to allow him and the devotees/senior citizens/sevakas/people of Puri

to have darshan of Lord Shree Jagannath on Shnana Purnima on 05.06.2020 outside the Meghanada Pacheri and further prayed to quash and set aside the Clause 3 (a) (i) of the order dated 01.06.2020 issued by the Government of Orissa, being contrary to the guidelines issued by the Government of India dated 30.05.2020. This Court, while considering the guidelines issued by the Central Government dated 30.5.2020 and the order of the State Government dated 01.06.2020, declined to interfere in the matter by holding that the State Government in having extended the restrictions upto 30.06.2020 with regard to the entry into the religious places/places of worship, appears to have taken into consideration the larger public interest. It was held that decision of the State Government was in consonance with the guideline issued by the Central Government, aimed at preventing spread of Coronavirus. Learned Advocate General submits that the decision whether or not to allow the Rath Yatra shall be taken by the State Government only few days before the scheduled date i.e. 23.06.2020, on the basis of the situation then prevailing on ground. Learned Advocate General drew the attention of the Court towards such specific stand of the Government in para 18 of its counter affidavit.

9. We have given our thoughtful consideration to rival submissions and examined the material on record.

10. Corona Virus disease, which has now come to be known as COVID-19, is caused by Novel Corona Virus. This was first detected in Wuhan city of Hubei province of China sometime in December 2019. This virus rapidly spread across the world—in and around 167 countries including India by mid of March 2020, as a result of which, the World Health Organization declared this as a pandemic. The Government of India comprehending the gravity of the problem invoked the Disaster Management Act 2005 (for short, the Act), for management of the disaster, where in the "disaster" has been defined in 2(d), where "disaster management" has been defined in 2(e) of the Act to mean "a continuous and integrated process of planning, organising, coordinating and implementing measures which are necessary or expedient for—(i) prevention of danger or threat of any disaster; (ii) mitigation or reduction of risk of any disaster or its severity or consequences; (iii) capacity-building; (iv) preparedness to deal with any disaster; (v) prompt response to any threatening disaster situation or disaster; (vi) assessing the severity or magnitude of effects of any disaster; (vii) evacuation, rescue and relief; (viii) rehabilitation and reconstruction."

11. Section 3 of the Act envisages establishment of National Disaster Management Authority, headed by Prime Minister of the Country, as its *ex officio* Chairperson. Similarly, Section 14 of the Act provides for establishment of the State Disaster Management Authority with the Chief Minister of the State, as its *ex officio* Chairperson. The power and functions of National Authority has been enumerated under Section 6 of the Act, which includes the power for laying down the policies, plans and guidelines for disaster management; approving the National Plan; laying down guidelines to be followed by the different Ministries or Departments of the Government of India for the purpose of integrating the measures for prevention of disaster or the mitigation of its effects in their development plans and projects; and take such other measures for the prevention of disaster, or the mitigation, or preparedness and capacity building for dealing with the threatening disaster situation etc. Section 18 of the Act enumerates the powers and functions of the State Authority, which includes the power to lay down the State Disaster Management Policy; approve the State Plan in accordance with the guidelines laid down by the National Authority; approve the disaster management plans prepared by the departments of the Government of the State; lay down guidelines to be followed by the departments of the Government of the State for the purposes of integration of measures for prevention of disasters and mitigation in their development plans and projects and provide necessary technical assistance therefor; and review the measures being taken for mitigation, capacity building and preparedness by the departments of the Government of the State and issue such guidelines as may be necessary.

12. While the National Plan has been separately defined in Section 11 of the Act, Section 23 stipulates the State Disaster Management Plan for the State, which may include the vulnerability of different parts of the State to different forms of disasters; the measures to be adopted for prevention and mitigation of disasters; the manner in which the mitigation measures shall be integrated with the development plans and projects; the capacity-building and preparedness measures to be taken; the roles and responsibilities of different Departments of the Government of the State in responding to any threatening disaster situation or disaster.

13. The National Disaster Management Authority while invoking the power under Section 6(2)(i) of the Act issued an order dated 24.03.2020, directing the Ministries/Departments of Government of India, and the State/Union Territory Governments and State/Union Territory Authorities to

take effective measures to prevent the spread of COVID-19 in the country. As a consequence, the Ministry of Home Affairs, (MHA) issued an order dated 24.03.2020 under Section 10(2)(*l*) of the Act, imposing lockdown and directing all concerned to take effective measures for ensuring social distancing so as to prevent the spread of COVID-19 in the country. This order remained in force in all parts of the country for a period of 21 days with effect from 25.03.2020. National Lockdown was then extended further by order of the MHA dated 14.04.2020 upto 30.04.2020 and thereafter, by order dated 01.05.2020, it was extended upto 17.05.2020. A fresh order was then issued by the MHA on 17.05.2020 extending the lockdown measures so as to contain the spread of COVID-19 in the country for a period upto 31.05.2020. It is in continuation thereof that the MHA has now issued fresh directives extending the lockdown in the containment zones by order dated 30.05.2020, however named as Unlock-1, with certain prohibited activities being allowed to be reopened in phased manner in areas outside the containment zones.

14. 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.

15. Perusal of the letter of the Central Government dated 07.05.2020 addressed to the Chief Secretary of the Government of Odisha, indicates that permission for construction of the Ratha in the Ratha-Khala was granted by imposing certain conditions but leaving the decision about holding of the Rath Yatra entirely to the discretion of the State Government, which would be evident from the following excerpts thereof:

> *"3. The undersigned is directed to convey that the activity of Ratha construction is allowed to be undertaken in the Ratha-khala, which is situated on both sides of the Grand Road in front of the Temple Office and Sri Nahar (Palace), subject to the following conditions being fulfilled:*
>
> *a) No religious congregation takes place in the Ratha-khala. Complete segregation of Ratha-khala should be ensured.*

b) The new guidelines on lockdown measures issued by MHA on 1st May, 2020, including the National Directives for Covid-19 Management, should be compulsorily adhered to.

4. However, the decisions regarding holding of Ratha Yatra be taken by the State Government keeping in view the conditions prevailing at that point of time."

16. Sub-clause (iv) of Phase III of the latest guidelines dated 30.05.2020 issued by the Central Government categorically provides that decisions to re-start the activities in the nature ofsocial/political/sports/entertainment/academic/cultural/religious functions and other large congregations shall be taken based on the assessment of the situation. Additionally, the Central Government in Clause-5 of the said guidelines provides that "State/UTs, based on their assessment of the situation, may prohibit certain activities outside the Containment zones, or impose such restrictions as deemed necessary". In Clause-9 of the aforesaid guidelines, the State/UT Governments have been mandated not to dilute any of these guidelines, which have been issued under the Disaster Management Act and all the District Magistrates have been required to strictly enforce these measures. Clause 10 has made violation of any of these measures punishable as per the provisions of Sections 51 to 60 of the Disaster Management Act besides under Section 188 of the IPC.

17. The State Government, on its part having objectively assessed the situation on ground, has imposed certain additional and further restrictions in its order dated 01.06.2020, which would be evident from the Clause 3 thereof:-

*"**3. Graded re-opening of areas outside the Containment Zones***

In areas outside Containment Zones, activities will be regulated as below:

a. The following establishments/activities will continue to remain closed till 30th June, 2020:

(i) Religious places/places of worship for public.

(ii) Shopping malls

(iii) International air travel of passengers, except as permitted by MHA.

(iv) Cinema halls, gymnasiums, swimming pools, entertainment parks, theatres, bars and auditoriums, assembly halls and similar places.

(v) Social/political/sports/entertainment/academic/ cultural/religious functions and other large congregations.

b. Hotels will be allowed to operate up to 30% capacity. Restaurant service will be open only for in-house guests.

c. Restaurants and Hotels are permitted for home delivery/takeaways of food.

d. Schools, colleges, other educational/training/ coaching institutions, etc. will remain closed till 31st July, 2020."

18. No doubt, the various preventive measures introduced by the Central Government in the guidelines issued under the direction of the National Disaster Management Authority, in the state of Odisha, have been implemented and enforced. But the power of the State Government in issuing further and additional guidelines, which do not have the effect of diluting the measures introduced in the guidelines of the Central Government cannot be denied. The State Government is equally competent to prescribe and enforce such additional and further measures as it may deem necessary on the recommendation of the State Disaster Management Authorities in the State Plan, as per the provision of Sections 14 to 24 in Chapter III of the Act.

19. This Court was approached by one ***Jayanta Kumar Bal in W.P(C) No.13539 of 2020*** questioning the competence of the State Government; in particular about continuing restrictions on entry into places of worship for public even beyond 08.06.2020, upto 30.6.2020 and praying to allow him and other devotees/senior citizens/sevakas/people of Puri to have darshan of Lord Shree Jagannath on Shnana Purnima on 05.06.2020. Repelling the contention, this Court upheld the aforesaid guidelines holding thus:-

> "*5. Having heard learned Senior Counsel for the petitioner and learned Advocate General for the State-opposite parties and taking note of the rival submissions, so far as first part of the prayer is concerned keeping the second part open, and considering the guideline issued by the Central Government and the order dated 01.06.2020 passed by the State Government, we are not inclined to hold that the impugned order is in any way opposed to public interest. On the contrary, in our view, the order of the State Government appears to have been passed taking consideration of larger public interest and in consonance with the guideline issued by the Central Government in order to prevent spreading of Coronavirus. This Court would be loath to interfere with the decision of the State Government, which appears to be based on objective evaluation of situation, as in the opinion of this Court, such matters are best left to the discretion of the executive."*

20. What emerges from the submissions made by learned Advocate General appearing for the State, especially in view of the stand taken by the State Government in Para 18 of the counter affidavit is that State Government

is yet to take a decision on the question of holding of Rath Yatra. Para-18 supra is for the facility of reference reproduced hereunder:-

> "18. That in view of the aforesaid and keeping in mind the deteriorating situation pertaining to the spread of COVID-19 virus in the State of Odisha, the State Government is constantly monitoring the situation and any decision with regard to the holding of the Ratha Yatra festival will be taken on the basis of the objective situation of the pandemic as on the relevant date and keeping in mind the interest of the public at large."

In view of the above, it is evident that the State Government is fully cognizant of the deteriorating situation about the spread of Coronavirus in the State. It is constantly monitoring such situation and will take a decision with regard to holding or otherwise, of the Ratha Yatra, on the basis of objective evaluation of the ground situation at an appropriate time, prior to the scheduled date i.e. few days before 23.6.2020, keeping in view safety, security and welfare of the State.

21. While therefore not issuing any mandamus as prayed for, this Court is inclined to hold that it is up to the State Government to decide whether or not to allow the Rath Yatra on 23.6.2020, depending on the situation then prevalent on the ground about the spread of Coronavirus. If however any such decision is eventually taken, the State Government shall ensure strict adherence to the directives issued by the Government of India in Clause 3 of their letter dated 07.05.2020; with regard to the adherence to the lockdown measures issued by the Ministry of Home Affairs, Government of India in their Guidelines dated 30.5.2020 and also the National Directives for Covid-19 Management. The State Government shall also ensure strict adherence to its own order dated 01.6.2020 containing additional and further guidelines. As regards the other prayer that the Chariots/Car should be allowed to be pulled manually or mechanically, we are inclined to observe that deploying heavy duty machineries or any other means like elephants, than the men power, for pulling the Chariots/Rath, would obviously obviate the necessity of involving large number of persons, which number could be in many hundreds. It is therefore directed that this aspect should be duly considered by the State Government while taking a decision for holding Rath Yatra, consistent with the guidelines issued by the Central Government and the State Government.

22. With the above observations, both the writ petitions are 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- 187

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

W.P.(C) NO. 15569 & 15571 OF 2019

MAHANADI COALFIELDS LTD. .....Petitioner

.V.

CLAIMS COMMISSION & ORS. ..... Opp. Parties

W.P.(C) NO. 15571 OF 2019

MAHANADI COALFIELDS LTD. .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petitions by Mahanadi Coal Fields Ltd. – Direction sought for to quash the compensation roll and the impugned order dated 19.08.2016 passed by the learned Claims Commission, Bhubaneswar rejecting the petition filed by the petitioner Company – Plea that after issuance of notification for survey in September 2010, the staff of the learned Claims Commission unilaterally and in connivance with the opposite party no.4 of the respective writ petitions, measured the mud mortar with thatched roof (structure) house of the opposite party no.4 which has been constructed after the cut-off date i.e. September 2010 – Further plea of the writ petitioner that the opposite party no.4 with a malafide intention and by adopting fraudulent means, constructed a new house after the cut-off date i.e. September 2010 to get compensation and R & R benefit including employment under category-I – Fraud on the Court pleaded and report of satellite imagery brought in to record – No authenticated imagery produced – The question arose as to whether the houses/structures were constructed after the cut-off date i.e. September 2010 for the purpose of getting compensation and rehabilitation and resettlement benefits? – Held, such a plea at a belated stage without any authenticated proof cannot be considered.

"The reasons assigned by the learned Claims Commission in the impugned order dated 19.08.2016 in rejecting the petitions filed by the petitioner company for modification/recall of the earlier order passed by the Commission appears to be correct and there is no illegality or perversity in the same. We also find no infirmity in the compensation roll prepared under Annexure-3 and therefore, in view of the ratio laid down by the Constitution Bench of the Hon'ble Supreme Court in the case of ***Syed Yakoob -Vrs.- K.S. Radhakrishnan reported in A.I.R. 1964 S.C. 477*** *regarding the limits of the jurisdiction of this Court in issuing a writ of certiorari under Article 226 of the Constitution of India, we are not inclined to accept the prayer made in these writ petitions."*

Case Laws Relied on and Referred to :-

1. (2010) 11 SCC 269 : Mahanadi Coalfields Ltd. Vs. Mathias Oram & Ors.
2. A.I.R. 1964 S.C. 477 : Syed Yakoob Vs. K.S. Radhakrishnan.

For Petitioner : Mr. Satya Sundar Kanungo, D. Mohanty, A. Mishra, B.P. Panda & D. Behera.

For Opp. Parties : Addl. Govt. Adv.

JUDGMENT Date of Judgment: 19.03.2020

S. K. SAHOO, J.

The petitioner Mahanadi Coalfields Ltd. (in short 'the petitioner company') has filed the writ petition i.e. W.P.(C) No.15569 of 2019 seeking for a direction to quash the compensation roll under Annexure-3 and the impugned order dated 19.08.2016 passed by the learned Claims Commission, Bhubaneswar in Civil (Misc.) Case No.342 of 2016 under Annexure-6 in rejecting the petition filed by the petitioner company for recalling/modifying the order of the Commission passed in Claim Case No. 09 of 2013 which was taken into account by the Commission while recommending the compensation roll prepared by the petitioner company to the Hon'ble Supreme Court for its approval and the same was approved by Hon'ble Court vide order dated 17.10.2014 in SLP (C) No. 6933 of 2007.

Similar order dated 19.08.2016 passed by the learned Claims Commission, Bhubaneswar in Civil (Misc.) Case No.323 of 2016 under Annexure-6 has been challenged by the petitioner company in W.P.(C) No.15571 of 2019.

Since both the impugned orders passed by the learned Claims Commission arise out of similar set of facts, with the consent of learned counsel for the parties, those were heard analogously and disposed of by this common order.

2. From the factual backdrop of both the cases, it appears that the petitioner company is a subsidiary of Coal India Ltd. incorporated under the Companies Act, 1956 having its registered office at Jagriti Vihar, Burla in the district of Sambalpur and it is carrying out mining activities of coal in different areas of Odisha such as Basundhara-Garjanbahal, Orient Area Lakhanpur etc. The Claims Commission (opposite party no.1) was constituted in pursuance of the order dated 19.07.2010 passed in SLP (C) No.6933 of 2007 by the Hon'ble Supreme Court of India in the case of **Mahanadi Coalfields Ltd. -Vrs.- Mathias Oram and others reported in (2010) 11 Supreme Court Cases 269**. The petitioner company preferred I.A. No.38 of 2016 against the common issue/order of the learned Claims Commission in respect of the present cause of action before the Hon'ble Supreme Court in the aforesaid SLP (C) No.6933 of 2007 in the case of **Mahanadi Coalfields Ltd.** (supra) and the Hon'ble Supreme Court while disposing of the Special Leave Petition vide its order dated 10.07.2017, directed this Court to consider the aforesaid I.A. along with other interim applications which were pending against the orders of the learned Claims Commission. Accordingly I.A. Nos. 40 of 2016, 42 of 2016, 47316 of 2017, 53662 of 2017, 53656 of 2017 and 47966 of 2017 were listed before this Court on 19.01.2018 and liberty was granted to the petitioner company to file separate writ petitions assailing the orders of Claims Commission and accordingly the present writ petitions have been filed.

3. The Central Government issued a preliminary notification under section 4(1) of the Coal Bearing Areas (Acquisition and Development) Act, 1957 (hereafter '1957 Act') on 13.11.1984 and 24.07.1987 giving notice of its intention to prospect for coal in different revenue villages in the district of Sundargarh. Thereafter, notification under section 7(1) of the 1957 Act was issued with an intention to acquire the lands on 27.05.1987 in respect of village Sardega (Ac.860.18) (Full), Gopalpur (part) (Ac.3060.22), Jhupurunga (Ac.1862.78 (Full), Ratnansara (Ac.1849.75) (Full) and on 26.09.1989 in respect of village Tikilpara (Ac.1743.85) (Full), Bankibahal (Ac.836.33-Full), Balinga (1234.64-Full), Kulda- Ac.542.82-(Full), Siarmal (Ac.862.34-Full), Tumulia (Ac.2381.32-Full), Lalma (RF) (Ac.420.00-Full), Garjanbahal (Ac.798.35-Full), Bangurkela (Ac.1055.96-Full), Karlikachhar (Ac.511.94-Full), Gopalpur(P) (Ac.140.67-part) and Kiripsira (Ac.1681.11-Full) in the district of Sundargarh. In pursuance of the aforesaid notification under section 7(1), declaration of acquisition under section 9(1) of the 1957 Act was made on 10.07.1989 and 29.10.1990 respectively in respect of the

aforesaid villages. Thereafter the notified lands along with all rights therein vested absolutely in the petitioner company in pursuance of the notification dated 13.09.1990 and 30.03.1993 respectively under section 11(1) of the 1957 Act.

The Hon'ble Supreme Court of India vide its order dated 19.07.2010 passed in SLP (C) No.6933 of 2007 in the case of **Mahanadi Coalfields Ltd**. (supra) directed to establish a Commission to prepare its report as envisaged in the scheme, first in respect of the lands in village Gopalpur in the district of Sundargarh. The Commission was also asked to determine the rate or amount of compensation/mesne profit payable to the landholders. Accordingly, the Claims Commission was established having its office at Bhubaneswar and Sundargarh. Thereafter the learned Commission prepared the reports/schemes i.e. Gopalpur Part-I and II which were accepted by the Hon'ble Supreme Court of India. The learned Commission in Part-I report recommended the cut-off date to be September 2010. The relevant portion of the recommendation regarding cut-off date in page 17 of the Gopalpur Part-I is quoted herein below:

> "*We accordingly recommend the cut-off date to be September 2010 for assessment of compensation of the lands of Gopalpur as per the market rate prevalent in 2010-11*."

The learned Commission further recommended in page 29 of its report under Gopalpur Part-I as follows:

> "*We accordingly feel that whatever structures old, new or incomplete were there in village Gopalpur on the date of issue of notification by the Claim Commission for survey in the year 2010 should be measured and compensated*".

The Hon'ble Supreme Court vide its order dated 19.04.2012 in SLP (C) No.6933 of 2007 accepted the aforesaid report in all respect and made it an order of the Hon'ble Supreme Court and further directed that in respect of rest of the villages where the lands were similarly acquired, the model framed in respect of Gopalpur village shall be followed.

4. It is the case of the writ petitioner in both the cases that after issuance of notification for survey in September 2010, the staff of the learned Claims Commission unilaterally and in connivance with the opposite party no.4 of the respective writ petitions, measured the mud mortar with thatched roof (structure) house of the opposite party no.4 which has been constructed after

the cut-off date i.e. September 2010 in village Siarmal and directed the petitioner company to prepare the compensation roll and as per the direction of the Claims Commission, the compensation roll was prepared and assessed in respect of the house/structure of the opposite party no.4 and as per the direction of the learned Claims Commission, revised compensation roll was prepared and assessed for the new structure which were constructed after the cut-off date i.e. September 2010 and the direction of the Claims Commission to pay the compensation to the opposite party no.4 was at the cost of public exchequer. It is the further case of the writ petitioner that the opposite party no.4 with a malafide intention and by adopting the fraudulent means, constructed a new house in village Siarmal after the cut-off date i.e. September 2010 to get compensation and R & R benefit including employment under category-I from the petitioner company at the cost of public exchequer which is illegal and arbitrary and liable to be interfered with as the fraud on the Court can be agitated at any moment which is to be considered in the interest of justice. It is the further case of the writ petitioner that the learned Commission without hearing the petitioner company and without determining the age of the structures or without taking assistance of any other scientific agency, approved the compensation roll on the basis of unilateral measurement of the staff of the commission in connivance with the opposite party no.4 and directed to pay compensation for such illegal structures. The Secretary of the learned Claims Commission recommended vide its order dated 30.09.2013 for approval of the R & R benefits including employment under Category-I and the same has been approved in favour of the opposite party no.4. It is the further case of the writ petitioner that the aforesaid fraudulent act came to the fore after the Central Mine Planning and Design Institute (hereafter 'CMPDI') took satellite images on 18.05.2015 of village Siarmal and other acquired villages and from the report of the CMPDI, it clearly revealed that no structure was existing as on 13th November 2010 over the plots of the opposite party no.4 in village Siarmal. The learned Claims Commission in his Part-I report categorically stated that the cut-off date is September 2010 and therefore, the new house constructed after September 2010 should not be taken for assessment of compensation. It is the further case of the writ petitioner that since the opposite party no.4 constructed the house after September 2010 as per CMPDI report, the opposite party no.4 is not entitled to get compensation.

The petitioner company through its General Manager, Basundhara Area filed a Civil (Misc.) Case No.342 of 2016 for recall/modification of the

compensation roll under Annexure-3. In the recall petition, specific stand of the petitioner company was that the compensation roll which has been prepared on the basis of measurement taken by the commission staff has been approved by the learned Commission without giving proper opportunity of hearing to the petitioner. In the recall petition, the petitioner company categorically stated that there was no structure over the case land as on cut-off date i.e. September 2010 as per the satellite imagery and hence the opposite party no.4 was not entitled to get any amount of compensation for the structure in question. According to the petitioner company, the learned Claims Commission without considering the pleadings in the recall petition under Annexure-5 and without determining the fact whether the house of the opposite party no.4 was constructed after the cut-off date or not and whether the said opposite party no.4 adopted fraudulent means to get the new structure measured by influencing the survey staff of the Commissioner in order to extract compensation and R & R benefits, dismissed the recall petition vide its order dated 19.08.2016 holding that the Hon'ble Supreme Court vide its order dated 15.07.2013 passed in SLP (C) No.6933 of 2007 had directed the Commission to hear/adjudicate upon and decide the grievances of only the oustees. According to the petitioner company, the learned Claims Commission misinterpreted the order dated 15.07.2013 passed in SLP (C) No.6933 of 2007 in which it is clearly stated that the jurisdiction of the Civil Court is barred under the 1957 Act and the Claims Commission is to hear the grievances of the oustees and adjudicate upon and decide the same unless very complicated issues are involved therein. No where the Hon'ble Supreme Court directed the learned Claims Commission only to hear the land oustees not the petitioner company. It is the case of the petitioner company that while passing the impugned order, the learned Commission has ignored the order dated 20.11.2014 passed in Civil Case No.31 of 2014 wherein after hearing the petitioner company, the names of Roshan Patel and ten others were deleted from the compensation roll for the structures/houses constructed after cut-off date i.e. September 2010 and it was directed to proceed against the engineering personnel who surveyed and measured the houses and also initiation of criminal action. From the aforesaid order, it clearly reveals that the Claim Commission can delete/modify the compensation roll. Similar observation was made by the learned Claims Commission, Bhubaneswar while disposing of Civil (Misc.) Case No.323 of 2016.

5. In the impugned orders dated 19.08.2016 in both the cases, the learned Claims Commission first adjudicated the maintainability of the civil

cases filed by the MCL seeking recall/modification of the order of the Commission passed in Claim Case No.09 of 2013/Claim Case No.14 of 2013 which was taken into account by the Commission while recommending the compensation roll prepared by MCL to the Hon'ble Supreme Court for its approval and accordingly the same was approved vide order dated 17.10.2014 in SLP (C) No.6933 of 2007.

The learned Commission has been pleased to hold that it is not a Statutory Commission rather it was constituted, functioning and awarding compensation in terms of the judgment dated 19.07.2010 of the Hon'ble Supreme Court in SLP (C) No.6933 of 2007 and other subsequent orders passed in the said Special Leave Petition read with the principles recommended by the Commission in Part(I) report of village Gopalpur and approved by the Hon'ble Supreme Court and the Odisha Rehabilitation and Resettlement Policy, 2006.

It was held that the Commission being created by the Hon'ble Supreme Court, it cannot act in any manner which has not been prescribed by the Hon'ble Court. According to the Commission, it is not vested with any power by the Hon'ble Supreme Court to entertain any grievance of MCL to modify the compensation roll by which compensation has been awarded to land oustees/project affected persons and already approved by the Hon'ble Supreme Court and for the said reason, it has got no power to entertain any petition of MCL to recall/modify its order which has been taken into consideration for revising the compensation roll prepared by MCL and finally approved by the Hon'ble Supreme Court.

The contention raised by the MCL that since the Commission was entertaining the grievance petitions filed by the land oustees/project affected persons, the petitions filed by MCL should also be entertained and adjudicated was rejected by the Commission on the ground that the Hon'ble Supreme Court has directed only to hear/adjudicate upon and decide the grievances of the oustees. The learned Commission reproduced the order of the Hon'ble Supreme Court dated 15.07.2013 passed in SLP (C) No.6933 of 2007 wherein it is held as follows:-

> "It has been pointed out that the jurisdiction of the Civil Court is barred under the C.B.A. (Acquisition and Development) Act, 1957, therefore, we request the Claims Commission *to hear the grievance of the oustees* and adjudicate upon and decide the same unless very complicated issues are involved therein."

The learned Commission further held that in view of the categorical order passed by the Hon'ble Supreme Court, any petition/case of MCL to modify/recall the compensation roll already approved by the Hon'ble Supreme Court or to recall and modify any order of the Commission passed and taken into consideration for revising the compensation roll prepared by MCL and finally approved by the Hon'ble Supreme Court, is not maintainable before the Commission.

The learned Commission further held that in Claim Case No.9 of 2013/ Claim Case No.14 of 2013 of village Siarmal, sought to be recalled/modified by MCL, the question of awarding compensation in favour of opposite party no.4 in respect of house/structure constructed was not the subject matter. Such cases were neither filed by opposite party no.4 of the respective writ petitions for awarding any compensation in respect of house/ structure in question nor did the Commission pass any order on any date directing payment of compensation to such opposite party in the Claim Case. The amount of compensation has been offered by MCL in the compensation roll prepared by it and not by the Commission and the same was approved by the Hon'ble Supreme Court. Accordingly, both the Civil Misc. cases were held to be not maintainable.

It was further observed by the learned Commission that MCL though a Public Sector Company owned by Union Government but it is adopting dilatory tactics for not implementing the order of Hon'ble Supreme Court in the matter of providing compensation and R.R. benefits to the land losers/ project affected families for years together for no reason or by way of filing non-maintainable misconceived/frivolous cases. It is further held that 42 Civil Cases were filed by MCL with a prayer to recall/modify 42 orders passed by the learned Commission in 42 Claim Cases in respect of land oustees/ project affected persons on the ground that compensation has been awarded to those 42 persons for some structures/ houses constructed after the cut-off date without hearing MCL. It was held that in none of those 42 cases, the Commission has passed any order awarding compensation in respect of any house/structure.

It was further observed by the learned Commission that out of total 43 cases filed by MCL, in 32 cases, none of the land oustees who have been impleaded as opposite parties has filed any case before the Commission for grant of compensation in respect of any house/structure nor the Commission has passed any order directing payment of compensation for house/structure

in favour of those 32 opposite parties. Those 32 orders sought to be recalled/modified by MCL were filed by some other land oustees/project affected persons seeking some other relief unrelated to any house/structure. Similarly in the remaining 11 cases, none of the opposite parties in their Claim cases made any prayer for grant of compensation in respect of any house/structure and the commission has not passed any order in their cases granting compensation for any structure/house in the orders in question which MCL seeks for recall/modification. It was further held that all the 43 misconceived/frivolous Civil Cases filed by MCL not only caused harassment to the innocent, illiterate tribal persons and oustees/project affected persons but also deprived them from getting their legitimate dues flowing from the order of the Hon'ble Supreme Court.

6. Learned counsel for the petitioner company emphatically contended that as per the Gopalpur Part-I report, the learned Commission has recommended the cut-off date for compensation and rehabilitation and resettlement to be September 2010 and the same was accepted by the Hon'ble Supreme Court on 19.04.2012. The Survey team conducted survey in respect of the houses/structure of the opposite party no.4 in the respective writ petitions and prepared measurement sheet. Since the age of the structure has not been assessed and there was no material before the Commission that those were constructed before the cut-off date and on the approach of the petitioner company, the CMPDI submitted the report which indicates that no structure existed as on 13.11.2010 over the plots of the opposite party no.4, it is apparent that for the houses/structures which were constructed after the cut-off date, compensation roll was prepared.

7. The crux of the matter, which requires consideration, is whether the houses/structures of the opp. party no.4 in the respective writ petitions were constructed after the cut-off date i.e. September 2010 for the purpose of getting compensation and rehabilitation and resettlement benefits. The petitioner company heavily relies upon on the report of CMPDI dated 18.05.2015 annexed as Annexure-11 series to its affidavit dated 07.01.2020 filed in W.P.(C) No.15571 of 2019 which relates to the status of structures in village Siarmal. From the said report, it appears that the petitioner company gave a letter to the CMPDI giving a list of plots for examination. The status of structures as per satellite imagery of 13th November 2010 was given in Annexure-1 to that report. It is further mentioned that any structure on the plots other than those mentioned against t he plot numbers might be deemed

to be constructed after 13th November 2010. So far as opposite party no.4 Bishnu Patel in W.P.(C) No.15569 of 2019 is concerned, it is mentioned in the report that no structure existed as on 13th November 2010 over Holding no. 31 and Plot no.42/861. Similarly so far as opposite party no.4 Chandra Pradhan in W.P.(C) No.15571 of 2019 is concerned, it is mentioned in the report that no structure existed as on 13th November 2010 over Holding no.21, Plot no.223 so also Holding no.21, Plot no.319. If it is the case of the petitioner company that the report of CMPDI reveals that no structure was existing in November 2010 over the plots of the opp. party no.4 of the respective writ petitions in village Siarmal whereas such report based on satellite images taken in the month of May 2015 indicate presence of the structures, it was nonetheless incumbent on the part of the petitioner company to produce the satellite imagery over the respective plots of the opp. party no.4 of November 2010 as well as of May 2015. The satellite imagery filed with the report of CMPDI which has been annexed as Annexure-11 series indicate that those are the maps of the year 2013. The customer name has been mentioned as Mahanadi Coalfields Ltd. and it is shown to have been prepared by one Priyanka Bhatta, Asst. Manager (RS) and checked by Rajneesh Kumar, Chief Manager (RS) and approved by N.P. Singh, General Manager (Geomatics). Since the status of the structures given in Annexure-1 to the report is based on satellite imagery of 13th November 2010, without the satellite imagery of that particular date which is the primary evidence pinpointing the status of the plots of the opposite party no.4, we are inclined to accept the status report of structures stated to have been prepared basing on such imagery. Though in the said map of 2013, it is mentioned that J53 is the existing structure as on 13.11.2010 and its identification point and 269A are the new structures on plots constructed after 13.11.2010 upto 14.01.2013 but the basis for arriving at such conclusion is not mentioned in it. In the absence of production of the authenticated satellite imagery of November 2010 of the plots of the opp. party no.4 in the respective writ petitions, it would not be proper to accept the reports furnished under Annexure-11 series and on that basis to deprive the opposite party no.4 the compensation and other benefits. The survey team of the learned Claims Commission made the survey and prepared the measurement sheet of the house/structure standing over the plots of opp. party no.4 and accordingly the compensation has been assessed. Even though the officers of the petitioner company were present at the time of survey but they have raised no objection either relating to the measurement or to the age of the structures. At a belated stage, a plea has been taken by the petitioner company that the house/structure of the opposite party no.4 was

constructed after the cut-off date in September 2010 basing only on the report of CMPDI as per the satellite imagery. We are of the humble view that from such reports, it is very difficult to hold that the constructions were made by the opposite party no.4 of the respective writ petitions after the cut-off date and fraudulent means were adopted by them to get the new structure measured. During course of argument, we specifically asked the learned counsel for the petitioner company to produce the authenticated satellite imagery of 13th November 2010 of village Siarmal indicating the status of the plots of the opp. party no.4 in the respective writ petitions basing on which Annexure-11 series was prepared but the learned counsel for the petitioner failed to produce the same.

The reasons assigned by the learned Claims Commission in the impugned order dated 19.08.2016 in rejecting the petitions filed by the petitioner company for modification/recall of the earlier order passed by the Commission appears to be correct and there is no illegality or perversity in the same. We also find no infirmity in the compensation roll prepared under Annexure-3 and therefore, in view of the ratio laid down by the Constitution Bench of the Hon'ble Supreme Court in the case of **Syed Yakoob -Vrs.- K.S. Radhakrishnan reported in A.I.R. 1964 S.C. 477** regarding the limits of the jurisdiction of this Court in issuing a writ of certiorari under Article 226 of the Constitution of India, we are not inclined to accept the prayer made in these writ petitions. Accordingly, both the writ petitions being devoid of merits stand dismissed.

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2020 (II) ILR - CUT- 197

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

W.P.(C) NO. 21858 OF 2017

JADUNATH SAHU .....Petitioner

.Vs.

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

(A) INTERPRETATION OF STATUES – The Orissa High Court (Appointment of Staff) Rules, 1963 and The Orissa High Court (Conditions of Service of Staff) Rules, 1963 came to be repealed by

2015 Rules – The explanation to Rule 1 of 2015 Rules provided that nothing in the Rules shall adversely affect any person who was a member of service on the date of coming into force of the Rules – Claim of promotion on the basis of repealed Rules – Whether can be accepted? – Held, No – Interpretation of Rules – Held, the legislative intent behind the explanation which opens with the words 'nothing in these Rules' is clear and it shows a purpose that any method of appointment, recruitment or selection process to a particular post provided in a different manner in the new Rules which a person is already holding as per the repealed Rules shall not adversely affect him – This construction is consistent with the purpose of explanation and it will be preferred as against any other construction.

"It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. Unless a statute conferring the power to make rules provides for the making of rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. 2015 Rules nowhere either expressly or by necessary implication made to have a retrospective operation. It will have prospective effect and will not adversely affect any person who is a member of the service as on 28.02.2015 and already holding a particular post as per the repealed Rules even if for that particular post, a different method of appointment, recruitment or selection process is provided in the new Rules. For example, even if a higher educational qualification has been prescribed for a particular post as per the new Rules, the person already holding that post having lesser educational qualification appointed on the basis of the repealed Rules shall not be adversely affected. In other words, he cannot be reverted back to any other post lower in rank which matches his educational qualification. However after the new Rules came into force, for the next promotional post, the procedure should be governed as per the new Rules and educational qualification etc. as prescribed for such higher post should be adhered to and that is how the explanation to Rule 1 requires to be interpreted. If the contention of the learned counsel for the petitioner that by virtue of explanation, the case of promotion of the petitioner to the next higher post shall also not be affected adversely on the ground of lack of minimum educational qualification for such higher post is accepted, then the repealing provision as provided in Rule 21 of 2015 Rules would be meaningless. In the said Rule, a saving clause has been provided which states that in spite of the repeal of two Rules of 1963, any order or appointment made, action taken or things done under the Rules, Regulations, instructions or Orders so repealed shall be deemed to have been made, taken or done under 2015 Rules. A saving clause is used to preserve from destruction of certain rights or privileges already existing. It saves or safeguards all the rights the party previously had, not that it gives him any new rights. In view of such saving clause as provided in Rule 21, the contention raised by the learned counsel for the petitioner that even though the petitioner is lacking educational qualification for the post of Additional Principal Secretary as per the new Rules, he is entitled to be given promotion is virtually keeping the old repealed Rules in an active condition for the purpose of promotion which is not permissible." *(Para 7)*

(B) SERVICE – Promotion to the post of Addl. Principal Secretary – Eligibility criteria – A person holding the post of Senior Secretary to the Hon'ble Judges at least having one year experience as such and

having Bachelor's degree in any discipline from a recognized University or such other qualification equivalent thereto and having good knowledge in Hindi and English can be considered for the post of Additional Principal Secretary provided that according to the opinion of the Hon'ble Chief Justice, he is a fit person to hold such post – Petitioner not found suitable – Mere claim that he was senior in the gradation list than the person given promotion is of no consequence as a person holding the post of Senior Secretary cannot be automatically promoted to that post basing on his seniority as per the gradation list since as per the mode of recruitment, such promotion is to be based on the merit with due regard to seniority and suitability – Decision of DPC is held to be legal and justified.

"*Therefore, a person holding the post of Senior Secretary to the Hon'ble Judges at least having one year experience as such and having Bachelor's degree in any discipline from a recognized University or such other qualification equivalent thereto and having good knowledge in Hindi and English can be considered for the post of Additional Principal Secretary provided that according to the opinion of the Hon'ble Chief Justice, he is a fit person to hold such post. A person holding the post of Senior Secretary cannot be automatically promoted to that post basing on his seniority as per the gradation list since as per the mode of recruitment, such promotion is to be based on the merit with due regard to seniority and suitability. A Senior Secretary in the top of the gradation list may not be given automatic promotion to the post of Additional Principal Secretary, if he lacks merit or found to be not suitable to hold such post. Similarly a Senior Secretary in the top of the gradation list may not be given automatic promotion to the post of Additional Principal Secretary even though he is having minimum educational qualification and good knowledge in Hindi and English, if according to the opinion of the Hon'ble Chief Justice, he is not a fit person to hold such post."* *(Para 7)*

(C) SERVICE LAW – Promotion – Negative equality – Plea that in some other posts, where the minimum educational qualification has been prescribed has been deviated by the DPC at a subsequent stage and promotion has been given – Plea based on negative equality – Effect of – Held, not acceptable – Reasons indicated.

"Law is well settled that a party cannot claim that since something wrong has been done in another case, direction should be given for doing another wrong. It would not be setting a wrong right but would be perpetuating another wrong. In such matters, there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution of India cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs at par. It is also the settled legal proposition that Article 14 of the Constitution does not envisage a negative equality. Even if in some cases, promotions have been made by dispensing with any requirements or relaxing any of the provisions of the Rules on account of some administrative exigencies in view of the special power lies with the Hon'ble Chief Justice, that does not confer any right on the petitioner." *(Para 8)*

Case Laws Relied on and Referred to :-

1. (1998) 4 SCC 202 : Rajasthan Public Service Commission .Vs. Chanan Ram.
2. (2011) 6 SCC 725 : Deepak Agarwal .Vs. State of Uttar Pradesh.
3. (2017) 3 SCC 646 : State of Tripura .Vs. Nikhil Ranjan Chakraborty.
4. 2020 SCC Online SC 124 : D. Raghu .Vs. R. Basaveswarudu.
5. (1993) 3 SCC 499 : Union of India .Vs. Hindustan Development Corporation.
6. (2006) 8 SCC 381 : Ram Parvesh Singh .Vs. State of Bihar.
7. (2014) 11 SCC 547 : Registrar General, High Court of Madras .Vs. R. Gandhi.
8. (2007) 8 SCC 533 : Valsala Kumari Devi M. .Vs. Director, Higher Secondary Education.
9. A.I.R. 1996 S.C. 540 : Sneh Prabha .Vs. State of U.P.
10. (1997) 1 SCC 35 : Secretary, Jaipur Development Authority .Vs. Daulat Mal Jain
11. (1997) 3 SCC 321 : State of Haryana -.Vs. Ram Kumar Mann.
12. A.I.R. 1997 S.C. 3801 : Faridabad C.T. Scan Center .Vs. D.G. Health Services.
13. A.I.R. 1999 S.C. 1347 : Jalandhar Improvement Trust .Vs. Sampuran Singh.
14. A.I.R. 2003 S.C. 3983 : Union of India .Vs. International Trading Co.
15. A.I.R. 2006 S.C. 1142 : Kastha Niwarak G.S.S. Maryadit, Indore .Vs. President, Indore Development Authority.

For Petitioner : Mr. Sameer Kumar Das
For Opp. Parties : Mr. Jyoti Prakash Patnaik, Addl. Govt. Adv.
: Mr. Biswa Bihari Mohanty

JUDGMENT Date of Judgment: 29.04.2020

S. K. SAHOO, J.

The petitioner Jadunath Sahu has filed this writ petition seeking for a direction to quash the proceedings of the Departmental Promotion Committee (hereafter 'DPC') held on 15.07.2016 for promotion to the post of Additional Principal Secretary and the consequential promotional notification in favour of opposite party no.4 Prasanta Hrudaya Palai vide Annexure-3 and for a further direction directing the opposite party no.2 Registrar (Judicial) of this Court to promote him (petitioner) to the post of Additional Principal Secretary from the date his junior (opposite party no.4) was promoted w.e.f. 20.07.2016 and grant all the consequential service and financial benefits from that date and for a further direction directing the opposite parties nos.1 to 3 to re-fix his pension and other pensionary dues in such higher scale of pay and cadre pay in the promotional post of Additional Principal Secretary and to pay the differential arrears on such calculation within a stipulated period with interest @ 8% per annum.

2. The case of the petitioner, in short, is that he was having qualification of Intermediate in Arts with shorthand and typewriting and in a due process of selection, he was appointed as a Junior Stenographer in the judgeship of Cuttack district on 07.04.1982. In response to an advertisement issued by this Court for appointment of Senior Stenographer, he faced the interview and was selected and joined as Senior Stenographer on 25.11.1986. Thereafter he was promoted to the post of Personal Assistant on 10.05.1989 and while continuing in such post, he became a confirmed Government employee on 01.12.1995 and then he was promoted to the post of Secretary on 12.06.2006 and Senior Secretary on 03.11.2012.

It is the further case of the petitioner that two posts of Additional Principal Secretary fell vacant and in order to fill up such posts, file was processed and a meeting of DPC was convened on 15.07.2016 and all the four Senior Secretaries available in the feeder cadre including the petitioner and the opposite party no.4 were called to attend the DPC. After the meeting was convened, the DPC recommended the names of one Kailash Chandra Pati whose position was serial no.1 in the gradation list as well as the opposite party no.4 Prasanta Hrudaya Palai whose position was serial no.4 in that list for promotion. The DPC did not consider the case of the petitioner as well as one Sri P.C. Pradhan who were senior to the opposite party no.4 as per the gradation list and accordingly, notifications were issued on 20.07.2017 promoting Kailash Chandra Pati and the opposite party no.4 to the post of Additional Principal Secretary. The DPC found the petitioner as well as Sri P.C. Pradhan lacking in minimum educational qualification i.e. Bachelor's degree required for that post as per the High Court of Orissa (Appointment of Staff and Conditions of Service) Rules, 2015 (hereafter '2015 Rules').

It is the further case of the petitioner that he had more than thirty one years of service as on the date of holding of last DPC on 15.07.2016 and there was no adverse entry or remark entered in his service record and no adverse remark was ever communicated to him. Being the serial no.2 in the gradation list of Senior Secretaries in the establishment of this Court till 15.07.2016, he had a legitimate expectation for promotion to the post of Additional Principal Secretary as there were two vacancies in that post. He submitted a representation to the Hon'ble Chief Justice through the Registrar (Judicial) on 25.08.2016 indicating his grievances and to consider his case for promotion and to restore his seniority from the date his junior (opposite party no.4) got the promotion.

It is the further case of the petitioner that prior to the 2015 Rules, the Orissa High Court (Appointment of Staff and Conditions of Service) Rules, 1963 (hereafter '1963 Rules') was in force and the entry qualification for appointment to the post of Junior Stenographer/Senior Stenographer was matriculate with shorthand and typewriting. The amended 2015 Rules came into force vide notification dated 25.02.2015 and as per the amended Rules, the qualification for appointment to the Steno cadre was prescribed as Bachelor's degree in any discipline with stenography. So far as the promotion to the post of Additional Principal Secretary is concerned, the minimum qualification prescribed is Bachelor's degree in any discipline from a recognised University or such other qualification equivalent thereto having good knowledge in Hindi and English and he must be a fit person to hold the post in the opinion of the Hon'ble Chief Justice and minimum experience of one year as Senior Secretary to the Hon'ble Judges. The mode of promotion was prescribed as 'by promotion from the post of Senior Secretary basing on merit with due regard to seniority and suitability'. It has been specifically stated in the new 2015 Rules as per Rule-1 under the heading of '*Explanation*' that nothing in that Rules shall adversely affect any person, who was a member of the service on the date of coming into force of these Rules.

It is the further case of the petitioner that he entered into the service of the Court's establishment prior to the coming of 2015 Rules into force and the subsequent eligibility qualification in the entry grade or for promotion to the cadre of Additional Principal Secretary cannot be made applicable to him. The petitioner highlighted the cases of Raghunath Sahoo and Akshaya Kumar Dhal having the qualification of I.A. and I.Com respectively to have been given promotion to the post of Senior Secretary vide notifications dated 31.03.2017. According to the petitioner, the decision taken by the authorities is against the basic principle of law with regard to parity as under the same set of Rules i.e. 2015 Rules, the claim of the petitioner was rejected whereas the cases of Raghunath Sahoo and Akshaya Kumar Dhal were considered for promotion without having Bachelor's degree. The petitioner further highlighted the cases of Mahendra Kumar Routray and Bijay Kumar Sahoo, Section Officers of the Court to have been promoted to the cadre of Superintendent in the Court's establishment even though they were having Intermediate qualification to their credit. According to the petitioner, the DPC has bypassed the Rules and adopted a novel practice and procedure beyond the Rules for promotion to the post of Additional Principal Secretary

from amongst the Senior Secretaries by promoting the junior over the petitioner who had an unblemished service record. The decision taken by the DPC on dated 15.07.2016 by misinterpreting 2015 Rules needs reconsideration in the light of decision taken in the DPC on dated 31.03.2017 for promotion to the post of Senior Secretary. According to the petitioner, though he has retired from Government service w.e.f. 31.05.2017 but his representations dated 25.08.2016 and 11.04.2017 vide Annexures-3 and 6 have not been considered and due to his non-promotion, he has suffered mentally and financially.

3. On behalf of the opposite party no.2 Registrar (Judicial) of this Court, counter affidavit was filed wherein a stand has been taken that the notifications dated 20.07.2016 promoting the opposite party no.4 and another to the post of Additional Principal Secretary were issued in terms of the recommendation made by the DPC held on 16.07.2016 strictly in compliance of the recruitment Rules in vogue and the action of the opposite party no.2 was legal, valid and justified. The DPC after interviewing the petitioner and giving its due consideration to the service records of the petitioner did not find him suitable on comparative merit vis-a-vis opposite party no.4 for promotion to the cadre of Additional Principal Secretary and as such recommended the case of the opposite party no.4 and another for promotion. It is stated that Rule 21 of 2015 Rules has clearly stipulated about the repeal of 1963 Rules and therefore, the provisions of the repealed Rules did not survive to be acted upon or to confer any right on anybody or to lay down the criteria for promotion or procedure for the purpose. It is stated that promotion to the higher post is based on merit with due regard to seniority as per the provisions envisaged in Rule 13 of the 2015 Rules read with criteria fixed under the Odisha Civil Services (Criteria for Promotion) Rules, 1992 and not on the basis of entries in CCRs alone. An employee having good CCRs without any adverse entry therein cannot claim automatic promotion as other eligibility criteria are required for such promotion. The case of the petitioner is covered under the 2015 Rules and in view of Rule 21 of the said Rules, old qualification requirement for promotion cannot continue ignoring the new as prescribed in the Appendix to the 2015 Rules. An employee cannot remain immune from the new Rules relating to qualification requirement for promotion to the higher post. The DPC found the petitioner was having lack of requisite educational qualification and therefore unsuitable for promotion. The proceeding of the DPC held on 16.07.2016 was placed before the Hon’ble Chief Justice who approved the recommendations on 19.07.2016 and

ordered that candidates at serial nos. 1 and 4 be promoted to the post of Additional Principal Secretary against the newly created vacancies in the Court's establishment as per the merit. It is stated that an employee coming within the zone of consideration has a right to be considered for promotion but he cannot ipso facto claim promotion to the post. The representations of the petitioner are pending awaiting the result of this writ petition. DPC after perusal of CCRs, antecedents, service records, performance of the employees in the cadre of Senior Secretary including the petitioner in the interview and considering the comparative merit and suitability of all such candidates, recommended the names of candidates at serial nos. 1 and 4 in the gradation list for promotion in accordance with the provisions of the Rules. The petitioner did not possess the minimum educational qualification as required under the 2015 Rules for which he was not found suitable for promotion. It is stated that the result of subsequent DPC held for promotion to the cadre of Senior Secretary wherein the incumbents having Intermediate qualification were given promotion to the post of Senior Secretary under the same Rules has no relevance to the case in hand and the same is not comparable with the decision taken by the DPC giving promotion to the opposite party no.4 and another to the cadre of Additional Principal Secretary which is a key post in the Court's establishment and its qualification is different from that prescribed for the post of Senior Secretary. It is stated that the promotion given in favour of the opposite party no.4 was with due approval of the Hon'ble Chief Justice. The criteria regarding the educational qualification for promotion to the post of Addl. Principal Secretary and that for promotion to the cadre of Senior Secretary, as per rules are distinctly different. For promotion to the cadre of Additional Principal Secretary, a candidate should not only possess a Bachelor's degree and have good knowledge in Hindi and English, but he should also be a fit person in the opinion of the Hon'ble Chief Justice to hold such post whereas for promotion to the post of Senior Secretary, a candidate is only required to possess a Bachelor's degree. It is further stated in the counter affidavit that the incumbents in the cadre of Secretary were promoted to the cadre of Senior Secretary basing upon the principle of merit with due regard to seniority and suitability by the DPC whereas the opposite party no.4 and another were promoted to the cadre of Additional Principal Secretary not only after they were adjudged suitable by the DPC basing upon the principle of merit with due regard to seniority and suitability but also after they were found fit in the opinion of the Hon'ble Chief Justice to hold such post.

4. The opposite party no.4 filed his counter affidavit wherein it is stated that the post of Additional Principal Secretary is the promotional post of which post of Senior Secretary is the feeder post/grade as per the recruitment Rules in vogue. 1963 Rules came to be repealed by 2015 Rules and in the later Rules, the post of Additional Principal Secretary has been prescribed as a post to be filled up only by way of promotion and the eligibility criteria has been prescribed as Bachelor's degree or equivalent qualification and having good knowledge in Hindi and English and a person who is fit to hold the post in the opinion of the Hon'ble Chief Justice besides the experience requirement of at least one year as Senior Secretary. It is stated that while 2015 Rules was in vogue, a DPC for filing up three posts of Addl. Principal Secretary was held on 15.07.2016 and the criteria for promotion as prescribed under Rule 13(a) being merit with due regard to seniority and suitability was considered by the DPC and the cases of all the Senior Secretaries who had put in experience of more than one year was taken into account and the DPC recommended two persons namely Kailash Chandra Pati and the opposite party no.4 for promotion and placed the recommendation for approval of the Hon'ble Chief Justice in compliance of the Rules. The opposite party no.4 was comparatively found to be fit and more meritorious than the petitioner irrespective of his higher seniority position in the gradation list of Senior Secretaries prepared. It is further stated that the merit being the primary criteria for promotion but not seniority, the petitioner was adjudged as not fit for such promotion by the DPC while DPC found the opposite party no.4 as fit or suitable for such promotion against the post of Additional Principal Secretary. The petitioner lacked the requisite qualification prescribed in 2015 Rules. It is further stated that in view of Rule 21 of 2015 Rules, the contentions advanced by the petitioner basing on the explanation appended to Rule 1 of 2015 Rules is misconceived and unsustainable. Since all the provisions of 1963 Rules stood repealed specifically w.e.f. 28.02.2015, the said Rules and prescription therein stood obliterated/abrogated/wiped out wholly i.e. protanto repeal. It is stated that the explanation clause to Rule 1 of 2015 Rules cannot be allowed to make Rule 21 and its effect meaningless.

5. Mr. Sameer Kumar Das, learned counsel for the petitioner contended that while 1963 Rules was in vogue, the post of Additional Principal Secretary was introduced to the cadre of hierarchy of the Stenographer/Secretarial Staff in order to give them an opportunity for promotion in their service career and no additional educational qualification was attached to such post. The new cadre posts were filled up by way of

promotion from the feeder cadre of Senior Secretary and the educational qualification available as prescribed to the post continued to the higher post. The Senior Secretaries who have I.A/I.Sc/I.Com qualification to their credit on acquiring required number of experience were to be given promotion to the next higher post up to the post of Principal Secretary. It is argued that the petitioner who was an Intermediate in Arts had the legitimate expectation to reach the higher post in course of his employment with selfsame qualification as he had an unblemished service records. It is argued that even though as per 2015 Rules, the minimum entry level qualification in the cadre strength of Junior Stenographer up to the Senior Principal Secretary is Bachelor's degree in any discipline with other qualifications but in view of the explanation to Rule 1 of 2015 Rules, the new additional qualification in the entry level i.e. Bachelor's degree will not affect a person already in service. In other words, according to him, the existing employees who did not possess Bachelor's degree to their credit but continued in different ranks either in the Secretarial cadre or in the Ministerial cadre can get the promotion to the next higher rank. It is contended that even though as per the gradation list, the petitioner was above the opposite party no.4 but only on the ground of lack of educational qualification, the case of the petitioner was not considered for promotion by the DPC which is quite unreasonable and illegal. The learned counsel submitted that another DPC was convened to give promotion to the post of Senior Secretary from the Secretaries and even though as per 2015 Rules, the minimum educational qualification for such higher post was Bachelor's degree but in its meeting dated 31.03.2017, the DPC recommended two Secretaries namely Sri Raghunath Sahu and Sri Akhaya Kumar Dhal, who were having educational qualification I.A./I.Com. respectively to the post of Senior Secretaries and accordingly, they were given promotion to the post of Senior Secretaries on 31.03.2017. It is argued that the petitioner has been discriminated and debarred from getting the promotion only on the ground of lack of requisite qualification and the same violates the fundamental rights of the petitioner guaranteed under Articles 14 and 16 of the Constitution of India. While concluding his argument, the learned counsel submitted that since the petitioner has retired in the meantime even if the writ petition is allowed, the petitioner will only get some financial benefits and the opposite party no.4 will not be affected as such.

Sri Jyoti Prakash Patnaik, learned Additional Government Advocate for the State as well as Mr. Biswa Bihari Mohanty, learned counsel for the opposite party no.4 supported the decision taken by the DPC as well as the

respective stand taken in their counter affidavits and contended that after the coming into force of 2015 Rules, the petitioner who was having no requisite educational qualification for the post of Additional Principal Secretary could not have been selected for such post and therefore, the decision taken by the DPC was perfectly justified and the recommendation made by the DPC was also considered by the Hon'ble Chief Justice who accepted such recommendation and therefore, there is no merit in the writ petition which should be dismissed.

6. Adverting to the contentions raised by the learned counsel for the respective parties, the following undisputed facts are borne out of the record:

(i) The petitioner was having educational qualification of Intermediate in Arts and he was holding the post of Senior Secretary since 03.11.2012;

(ii) As per the gradation list, the petitioner was senior to the opposite party no.4 when the DPC was held on 15.07.2016 to consider the case of promotion of Senior Secretaries to the post of Additional Principal Secretary;

(iii) Hon'ble Chief Justice in exercise of his power conferred under Article 229 of the Constitution of India in supersession of the 1963 Rules brought 2015 Rules, which was notified in the Official Gazette on 28.02.2015.

(iv) The minimum qualification for the post of Additional Principal Secretary was prescribed for the first time in 2015 Rules and such a post was required to be filled up by way of promotion from the feeder cadre of Senior Secretary;

(v) As per 2015 Rules, the minimum educational qualification for the post of Additional Principal Secretary is Bachelor's degree in any discipline from a recognized University or such other qualification equivalent thereto;

(vi) The DPC considered the cases of persons available in the cadre of Senior Secretary for promotion and the name of the opposite party no.4 was recommended for promotion even though he was junior to the petitioner as per the gradation list;

(vii) The petitioner was not found suitable for promotion to the post of Additional Principal Secretary mainly on the ground of lack of minimum educational qualification.

7. The Orissa High Court (Appointment of Staff) Rules, 1963 and The Orissa High Court (Conditions of Service of Staff) Rules, 1963 came to be

repealed by 2015 Rules. The *explanation* to Rule 1 of 2015 Rules provided that nothing in the Rules shall adversely affect any person who was a member of service on the date of coming into force of the Rules.

The *explanation* to Rule 1 of 2015 Rules which is relevant for the case is quoted herein below:

> "*Explanation*:- Nothing in these Rules shall adversely affect any person who was a member of the service on the date of coming into force of these Rules."

The legislative intent behind the *explanation* which opens with the words 'nothing in these Rules' is clear and it shows a purpose that any method of appointment, recruitment or selection process to a particular post provided in a different manner in the new Rules which a person is already holding as per the repealed Rules shall not adversely affect him. This construction is consistent with the purpose of *explanation* and it will be preferred as against any other construction.

It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. Unless a statute conferring the power to make rules provides for the making of rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. 2015 Rules nowhere either expressly or by necessary implication made to have a retrospective operation. It will have prospective effect and will not adversely affect any person who is a member of the service as on 28.02.2015 and already holding a particular post as per the repealed Rules even if for that particular post, a different method of appointment, recruitment or selection process is provided in the new Rules. For example, even if a higher educational qualification has been prescribed for a particular post as per the new Rules, the person already holding that post having lesser educational qualification appointed on the basis of the repealed Rules shall not be adversely affected. In other words, he cannot be reverted back to any other post lower in rank which matches his educational qualification. However after the new Rules came into force, for the next promotional post, the procedure should be governed as per the new Rules and educational qualification etc. as prescribed for such higher post should be adhered to and that is how the *explanation* to Rule 1 requires to be interpreted. If the contention of the learned counsel for the petitioner that by virtue of *explanation*, the case of promotion of the petitioner to the next higher post

shall also not be affected adversely on the ground of lack of minimum educational qualification for such higher post is accepted, then the repealing provision as provided in Rule 21 of 2015 Rules would be meaningless. In the said Rule, a saving clause has been provided which states that in spite of the repeal of two Rules of 1963, any order or appointment made, action taken or things done under the Rules, Regulations, instructions or Orders so repealed shall be deemed to have been made, taken or done under 2015 Rules. A saving clause is used to preserve from destruction of certain rights or privileges already existing. It saves or safeguards all the rights the party previously had, not that it gives him any new rights. In view of such saving clause as provided in Rule 21, the contention raised by the learned counsel for the petitioner that even though the petitioner is lacking educational qualification for the post of Additional Principal Secretary as per the new Rules, he is entitled to be given promotion is virtually keeping the old repealed Rules in an active condition for the purpose of promotion which is not permissible.

It is not in dispute that while 1963 Rules was in vogue, the post of Additional Principal Secretary was created on 21.11.2011 by way of up-gradation of one post of Senior Secretary as per notification issued by Government of Odisha, Home Department which has been concurred by the Finance Department. No additional educational qualification was also attached to such post then. However when 2015 Rules came into force by repealing 1963 Rules, minimum qualification, experience and specific mode of recruitment were provided for such post. Two posts in the Steno Cadre were further upgraded as Additional Principal Secretary on 26.02.2016 as per the notification issued by the Government of Odisha, Home Department which was concurred by the Finance Department. Thus any promotion to those posts thereafter would be governed under the new Rules and not under the repealed Rules.

In the case of **Rajasthan Public Service Commission -Vrs.- Chanan Ram reported in (1998) 4 SCC 202**, it is held that it is the rules which are prevalent at the time when the consideration took place for promotion would be applicable.

In the case of **Deepak Agarwal -Vrs.- State of Uttar Pradesh reported in (2011) 6 Supreme Court Cases 725**, it is held as follows:

> "26. It is by now a settled proposition of law that a candidate has the right to be considered in the light of the existing rules, which implies the 'rule in force' on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates. Unless, of course, the applicable rule, as in ***Y.V. Rangaiah's case*** **[(1983) 3 Supreme Court Cases 284]** lays down any particular time frame, within which the selection process is to be completed. In the present case, consideration for promotion took place after the amendment came into operation. Thus, it cannot be accepted that any accrued or vested right of the appellants have been taken away by the amendment."

In the case of **State of Tripura -Vrs.- Nikhil Ranjan Chakraborty reported in (2017) 3 Supreme Court Cases 646**, it is held as follows:-

> "9. The law is thus clear that a candidate has the right to be considered in the light of the existing rules, namely, "rules in force on the date" the consideration takes place and that there is no rule of absolute application that vacancies must invariably be filled by the law existing on the date when they arose. As against the case of total exclusion and absolute deprivation of a chance to be considered as in Deepak Agarwal (supra), in the instant case certain additional posts have been included in the feeder cadre, thereby expanding the zone of consideration. It is not as if the writ petitioners or similarly situated candidates were totally excluded. At best, they now had to compete with some more candidates. In any case, since there was no accrued right nor was there any mandate that vacancies must be filled invariably by the law existing on the date when the vacancy arose, the State was well within its rights to stipulate that the vacancies be filled in accordance with the Rules as amended...."

In the case of **D. Raghu -Vrs.- R. Basaveswarudu reported in 2020 SCC Online SC 124**, the Hon'ble Supreme Court held as follows:-

> "106. But the High Court was not right in directing filling-up of vacancies prior to 07.12.2002, based on the 1979 Rules, as after the 2003 Rules came into force, going by the intention of the Authority, the right to promotion would be based on the new Rules, even if the vacancies arose prior to the new Rules."

In view of the ratio laid down in the above decisions, merely because the petitioner was having qualification of Intermediate in Arts and an unblemished service record and had the expectation to reach the higher post in course of his employment with the self-same qualification, he cannot be given promotion to such post as the new Rules provided minimum qualification, inter alia, Bachelor's degree in any discipline from a recognised University.

Coming to the point of *legitimate expectation* of the petitioner as contended by the learned counsel for the petitioner, in the case of **Union of India -Vrs.- Hindustan Development Corporation reported in (1993) 3 Supreme Court Cases 499**, it is held that

> "28.....For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."

In the case of **Ram Parvesh Singh -Vrs.- State of Bihar reported in (2006) 8 Supreme Court Cases 381**, the Hon'ble Supreme Court held as follows:

> "15. What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such.....A legitimate expectation, even when made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bonafide reason given by the decision-maker, may be sufficient to negative the 'legitimate expectation'."

There is nothing to show that the decision taken by the DPC as per 2015 Rules was arbitrary, unreasonable, discriminatory, unfair, biased, gross abuse of power or in violation of principles of natural justice. The doctrine of legitimate expectation ordinarily would not have any application when the legislature has enacted a statute. Thus the plea of legitimate expectation does not appear to be of any assistance to the petitioner.

1963 Rules and 2015 Rules cannot run simultaneously and the provisions contained in the 1963 Rules would have to give way to the new Rules in the matter of method of appointment, recruitment, promotion etc. and only exception would be that the persons who were already occupying a

particular post shall not be affected adversely by coming into force of the new Rules and they would continue to hold the said post even though as per new Rules, higher educational qualification has been prescribed to hold such post. That is the true spirit of the *explanation* to Rule 1 as well as the proviso to Rule 21 of 2015 Rules.

As per the 2015 Rules, the post of Additional Principal Secretary is a Group 'A' post which appears in Rule 3 as category 17 under the heading of 'Classification of Posts'. As per Rule 4, this category of post shall be filled up by way of promotion from the staff of the High Court of Orissa from the feeder post/cadre, subject to requisite qualification and experience as prescribed in Appendix-I of the Rules. Serial No.17 of Appendix 1 to the said Rules prescribes, inter alia, minimum educational qualification, experience and mode of recruitment to such post which is as follows:-

> **(i)** Bachelor's degree in any discipline from a recognized University or such other qualification equivalent thereto, having good knowledge in Hindi and English and is a fit person to hold the post in the opinion of the Hon'ble Chief Justice;
>
> **(ii)** He should have at least one year experience as Senior Secretary to the Hon'ble Judges;
>
> **(iii)** Such post is to be filled up by promotion from the post of Senior Secretary basing on the merit with due regard to seniority and suitability.

Therefore, a person holding the post of Senior Secretary to the Hon'ble Judges at least having one year experience as such and having Bachelor's degree in any discipline from a recognized University or such other qualification equivalent thereto and having good knowledge in Hindi and English can be considered for the post of Additional Principal Secretary provided that according to the opinion of the Hon'ble Chief Justice, he is a fit person to hold such post. A person holding the post of Senior Secretary cannot be automatically promoted to that post basing on his seniority as per the gradation list since as per the mode of recruitment, such promotion is to be based on the merit with due regard to seniority and suitability. A Senior Secretary in the top of the gradation list may not be given automatic promotion to the post of Additional Principal Secretary, if he lacks merit or found to be not suitable to hold such post. Similarly a Senior Secretary in the top of the gradation list may not be given automatic promotion to the post of Additional Principal Secretary even though he is having minimum educational qualification and good knowledge in Hindi and English, if according to the opinion of the Hon'ble Chief Justice, he is not a fit person to hold such post.

Rule 13 of 2015 Rules states that promotions to the various posts in the High Court service shall be made by the appointing authority basing on the merit with due regard to the seniority and suitability as per the provisions specified in Column (8) of Appendix 1. In the case of **Registrar General, High Court of Madras -Vrs.- R. Gandhi reported in (2014) 11 Supreme Court Cases 547**, it is held that eligibility is a matter of fact whereas suitability is a matter of opinion. Suitability cannot be a subject matter of judicial review. In the case of **Valsala Kumari Devi M. -Vrs.- Director, Higher Secondary Education reported in (2007) 8 Supreme Court Cases 533**, it is held that the expression 'suitability' means that a person to be appointed shall be legally eligible and 'eligible' should be taken to mean 'fit to be chosen'.

Rule 13(e) of 2015 Rules states that the Hon'ble Chief Justice may, in case of a suitable and highly deserving candidate or class of candidates and for exigency, dispense with all or any of the requirements as prescribed under that Rule. Similarly Rule 20 of 2015 Rules permits the Hon'ble Chief Justice to relax or dispense with any of the provision of the Rules in case of administrative exigency for the reasons to be recorded in writing and by passing an order to that effect.

In the case in hand, even though the case of the petitioner who was in serial no.2 as per the gradation list was placed before the DPC along with other three Senior Secretaries but it was found that the petitioner was lacking minimum educational qualification to hold the post of Additional Principal Secretary and therefore, apart from recommending the name of the person who was in serial no.1, the name of opposite party no.4 who was in serial no.4 as per the gradation list was also recommended. The person who was in serial no.3 was not recommended on the similar ground like that of the petitioner. When the recommendation of the DPC was placed before the Hon'ble Chief Justice, he also did not think it proper to relax the provision of educational qualification exercising his power under Rule 20 of 2015 Rules rather found the persons recommended by the DPC to be the fit persons to hold such post and therefore, it cannot be said that at any level, any illegality has been committed to the case of the petitioner in not recommending his name for promotion or not selecting him for such post. According to our humble view, even though seniority is one of the criteria apart from the service records but other requirements cannot be given a go-bye while considering someone to the next higher post. There is no dispute that at the

level of Additional Principal Secretary, a person should have good knowledge in Hindi and English as he is supposed to deal with the Registry of the Hon'ble Supreme Court as well as other High Courts and deal with many important files and therefore, discretion has been left with the Hon'ble Chief Justice to place the fittest person in such post who was having necessary qualification and eligibility criteria and in appropriate cases, he has also got the power of relaxation as provided under Rule 20 of 2015 Rules. The DPC seems to have perused the CCR, antecedents, service records and performance of the candidates in the cadre of Senior Secretary and after taking their interview, considered the comparative merit and suitability of all the four candidates and accordingly recommended the name of person who was at serial no.1 and also of the opposite party no.4. We find no flaw in such recommendation.

8. The contention of the learned counsel for the petitioner that in some other posts, where the minimum educational qualification has been prescribed has been deviated by the DPC at a subsequent stage and promotion has been given is based on *negative equality* which is not acceptable.

Law is well settled that a party cannot claim that since something wrong has been done in another case, direction should be given for doing another wrong. It would not be setting a wrong right but would be perpetuating another wrong. In such matters, there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution of India cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs at par. It is also the settled legal proposition that Article 14 of the Constitution does not envisage a negative equality. Even if in some cases, promotions have been made by dispensing with any requirements or relaxing any of the provisions of the Rules on account of some administrative exigencies in view of the special power lies with the Hon'ble Chief Justice, that does not confer any right on the petitioner. (**Ref: Sneh Prabha -Vrs.- State of U.P. : A.I.R. 1996 S.C. 540**, **Secretary, Jaipur Development Authority -Vrs.- Daulat Mal Jain : (1997) 1 Supreme Court Cases 35**, **State of Haryana -Vrs.- Ram Kumar Mann : (1997) 3 Supreme Court Cases 321**, **Faridabad C.T. Scan Center -Vrs.- D.G. Health Services : A.I.R. 1997 S.C. 3801**, **Jalandhar Improvement Trust -Vrs.- Sampuran Singh : A.I.R. 1999 S.C.**

1347, **Union of India -Vrs.- International Trading Co. : A.I.R. 2003 S.C. 3983**, **Kastha Niwarak G.S.S. Maryadit, Indore -Vrs.- President, Indore Development Authority : A.I.R. 2006 S.C. 1142**).

The post of Additional Principal Secretary was created vide Govt. of Odisha, Home Department letter no. 48045 dated 21.11.2011. Two posts were further upgraded vide Govt. of Odisha, Home Department letter no. 7733 dated 26.02.2016. Thus the total cadre strength became three. It seems that prior to the promotion to the post of Additional Principal Secretary in the case in hand, four persons namely, Purna Chandra Chhatoi, Tulasi Prasad Raiguru, Shyam Sundar Dey and Bibhuti Bhusan Pati were promoted to the post of Additional Principal Secretary as per the Orissa High Court (Appointment of Staff) Rules, 1963 and the Orissa High Court (Conditions of Service of Staff) Rules, 1963 at different point of time. Except Purna Chandra Chhatoi, all the three others were having Bachelor's degree. After 2015 Rules came into force, apart from the opposite party no.4 who was having qualification of B.Com., LL.B., the other person promoted in this case was Kailash Chandra Pati who was having qualification of B.A., LL.B. Therefore, after 2015 Rules came into force, there is no deviation to the requirement of minimum educational qualification as has been prescribed in such Rules for the said post.

9. In view of the foregoing discussions, we are of the humble view that the proceedings of DPC held on 15.07.2016 for promotion to the post of Additional Principal Secretary and the promotion notification in favour of opposite party no.4 vide Annexure-3 was quite legal, valid and justified. We are also of the view that the petitioner was rightly not promoted to the post of Additional Principal Secretary in view of lack of eligibility criteria prescribed for such post as per 2015 Rules and therefore, he is not entitled to get any service and financial benefits attached to that post. Accordingly, the writ petition being devoid of merits stands dismissed.

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2020 (II) ILR - CUT- 215

DR. B.R. SARANGI, J.

CRLMP NO. 829 OF 2017

KUNJA BIHARI PATRA .....Petitioner

.Vs.

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

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 – Writ petition seeking quashing of order passed under section 156(3) of Cr.P.C directing police to investigate about a complaint alleging offence under section 418 and 420 of Indian Penal Code – Plea of the petitioner that since there has been dishonour of cheque the complainant can file complaint under section 138 of N.I. Act, but not under IPC – Further plea that the Magistrate without making an inquiry under section 202 Cr.P.C should not have directed the investigation by the police – Plea of OP that the petition under Article 226 is not maintainable in view of section 482 of Cr. P.C – Pleas considered – Held, the Magistrate is well within its jurisdiction to pass order under Section 156 (3).

"If the learned Magistrate has exercised power directing the police to make an investigation under Section 156(3) Cr.P.C., it cannot be said that before issuance of such direction an enquiry has to be conducted under Section 202 Cr.P.C. by the Magistrate himself only. The provision contained under Section 202 Cr.P.C. is ample clear that the Magistrate can postpone issue of process, if he thinks that enquiry ought to have been done prior to issuance of such process. But this is not a case where postpone of issuance of process is in question. Rather, on the basis of the complaint, the Magistrate was prima facie satisfied that a cognizable case is made out and thereby directed the police authority to register the FIR and cause investigation. That is well within its jurisdiction, and therefore it cannot be said that any illegality or irregularity has been committed by the Magistrate in issuing such direction, so as to warrant interference by this Court."

(B) NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 – Dishonour of Cheque – Complainant filed complaint case alleging commission of offence under sections 418 and 420 of IPC – Plea that no case can be filed under IPC if cheque bounces due to insufficient of funds – Whether such a plea can be accepted – Held, No.

"In view of the above analysis and applying the rulings of the apex Court, referred to above, to the present context, it is made clear that an accusation of commission of offence under Section 138 of N.I. Act cannot preclude the complainant to initiate a proceedings against accused persons under Sections 418, 420 read with Section 34 of IPC if ingredients of such offence are attracted. As such, the case under the N.I. Act can only be initiated by filing complaint, but in a case under the IPC, such a condition is not necessary. But in the case at hand when opposite party no.2-complainant lodged an FIR in the concerned police station, the same was not registered, therefore, there was no other way open to opposite party no.2-complainant than to approach the Magistrate by filing complaint case, who, in turn directed the police to register the complaint as FIR under Section 156(3) of Cr.P.C. and conduct investigation. In view of such position, no illegality or irregularity has been committed by the learned S.D.J.M., Angul by passing the order impugned." *{Para 11)*

Case Laws Relied on and Referred to :-

1. 70 (1990) CLT 788 : Radharaman Sahu .Vs. Trilochan Nanda
2. AIR 2008 SC 251 : Inder Mohan Goswami .Vs. State of Uttaranchal.
3. 2012 (7) SCC 621 : Sangeetaben Mahendrabhai Patel .Vs. State of Gujarat.
4. AIR 2019 SC 5268 : Dr. Lakshman .Vs. State of Karnataka.

For Petitioner : M/s. S. Pattanaik, S, Mohanty, B. Moharana and A. Barik,

For Opp. Parties : Mr. G.N. Rout, Addl. Standing Counsel
M/s. P.K. Mohapatra, S. Mohanty & A. Mohapatra,

JUDGMENT Date of Hearing : 07.02.2020 : Date of Judgment : 11.02.2020

DR. B.R. SARANGI, J.

The petitioner, being accused no.1 in ICC Case No.217 of 2016 pending in the Court of learned S.D.J.M., Angul, has filed this application seeking to quash order dated 17.12.2016, by which direction has been given to IIC, Angul Police Station for registration of the case and causing investigation as per the provisions contained in Section 156(3) of Cr.P.C.

2. Brief facts of the case, as revealed from the complaint petition filed by opposite party no.2, as complainant before the Court below, are as follows:-

Opposite party no.2-complainant named and styled as "M/s. Jaydurga Transport" is a proprietorship firm and the owner of heavy earth moving equipment. Petitioner-accused no.1 is the owner of "Hindustan Machinary", a sub-contractor of accused no.2, who is the contractor of Railway authority and was awarded with the contract work of doubling the railway track/earth work from Handapa to Nakchi railway line, along with other contract work. During course of business, petitioner-accused no.1, along with other accused persons, approached opposite party no.2-complainant for supply of its heavy earth moving equipment for construction of doubling railway track work from Handapa to Nakchi on hire basis. After due negotiation amongst the parties, opposite party no.2-complainant engaged its Tata Hitachi 200 (chain mounting) and three numbers of Haiwa on hourly/monthly hire basis from 24.04.2016 under the accused persons in the said work.

2.1 After completion of the work and after adjustment of advance paid by accused persons, on 15.07.2016, it was settled/calculated amongst the parties that a sum of Rs.8,11,585/- is due upon accused persons. On that date, petitioner-accused no.1 issued a post dated cheque bearing no. 567298 of

ICICI Bank, Bhubaneswar Branch in favour of opposite party no.2-complainant mentioning the date as 05.08.2016 for a sum of Rs.8,00,000/- towards full and final payment. As per commitment of petitioner-accused no.1, on 02.11.2016 the said cheque was deposited by opposite party no.2-complainant with his banker, i.e., Bank of Baroda, Angul Branch, Angul, but it was returned by the Branch Manager on 03.11.2016 due to "insufficient fund" in the account of petitioner-accused no.1. Accordingly, opposite party no.2-complainant, on 03.11.2016, issued a demand notice to petitioner-accused no.1 through its advocate making therein a demand for payment of the aforesaid cheque amount of Rs.8,00,000/- within 15 days from the date of its receipt. But even after receipt of said notice on 07.11.2016, since petitioner-accused no.1 did not take any steps, it was evident that petitioner-accused no.1 had a clear intention to deceive and cheat opposite party no.2-complainant by misappropriating its fund. Petitioner-accused no.1 had dishonest intention, right from the beginning, i.e., from the time of approach for supply of heavy earth moving equipment till issue of cheque in favour of opposite party no.2-complainant, to cheat and cause wrongful loss to opposite party no.2-complainant and wrongful gain for themselves and with such intention they had done the above act. In other words, petitioner- accused no.1, in connivance with other accused persons, had intentionally issued the said cheque to deceive and cheat opposite party no.2-complainant.

2.2 In view of commission of such fraudulent act by accused persons, and after bouncing of cheque in question, opposite party no.2-complainant lodged FIR at Angul Police Station, which straightaway refused to accept the same and directed opposite party no.2-complainant to approach the Court. As a consequence thereof, opposite party no.2-complainant filed ICC Case No. 217 of 2016 before the learned SDJM, Angul with a prayer to send the complaint to IIC, Angul Police Station to treat the same as FIR under Section 156(3) of Cr.P.C. and investigate into the case under Sections 418 and 420 of IPC and to submit final form after completion of investigation. Learned SDJM, Angul, vide order dated 17.12.2016, forwarded the original complaint to IIC, Angul P.S. for its registration as FIR and causing investigation, as per the provisions of Section 156(3) of the Cr.P.C., with the further direction to intimate the Court the fact of registration of such P.S. case number and the progress of investigation. Consequentially, IIC, Angul P.S. registered the complaint as Angul P.S. Case No. 177 dated 31.03.2017 under Sections 418, 420 and 34 of IPC against accused persons, including the petitioner-accused no.1. Hence this application.

3. Mr. S.Pattnaik, learned counsel appearing for the petitioner-accused no.1 strenuously urged that on the basis of factual matrix, it may be a case under Section 138 of N.I. Act, because of dishonor of the cheque/ instrument for insufficiency of funds, but not a case under Sections 418, 420 read with 34 of IPC. It is contended that the learned Magistrate has committed error while invoking jurisdiction under Section 156(3) of Cr.P.C., inasmuch as he has not made enquiry under Section 202 of Cr.P.C., and without making such enquiry sent the complaint petition to IIC, Angul P.S. to register the same as FIR and cause investigation, which cannot sustain in the eye of law. Thereby, the order impugned dated 17.12.2016 cannot sustain in the eye of law and the same has to be quashed, including the consequential criminal proceeding. It is further contended that the "complaint" within the meaning of Section 2(d) of the Cr.P.C. and also the complaint within the meaning of Section 142 of the N.I. Act is different from each other. Hence, the Court below has no jurisdiction to pass an order directing for investigation by the police under the provisions of Section 156(3) of the Cr.P.C.

It is further contended that cheating has been defined under Section 415 of IPC. As such, there was no intention of petitioner-accused no.1 to deceive opposite party no.2-complainant. Had the cheque been placed in the bank on the date mentioned therein, there would not have been insufficiency of funds. As the cheque in question was presented on a subsequent date and due to insufficiency of funds it was returned, it cannot be construed that petitioner-accused no.1 had tried to deceive opposite party no.2-complainant so as to attract the provisions of Sections 417 and 420 of IPC. It is thus contended that the transaction, being purely civil in nature, the jurisdiction of the criminal Court could not have been invoked and more so, the basic requirements of Sections 417 and 420 of IPC are absent and as such, the proceeding is a malicious one and there is bleak chance of ultimate conviction and thereby, before taking cognizance, the Court should ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurize the accused. Therefore, he seeks for interference of this Court by filing the present application.

To substantiate his contention, he has relied upon the judgment of this Court in ***Radharaman Sahu v. Trilochan Nanda,*** 70 (1990) CLT 788, as well as of the apex Court in ***Inder Mohan Goswami v. State of Uttaranchal,*** AIR 2008 SC 251.

4. Mr. P.K. Mohapatra, learned counsel for opposite party no.2-complainant contended that on the basis of the factual matrix of the case, in hand, it is clearly evident that accused persons have tried to deceive opposite party no.2-complainant in not paying the amount which had been settled having entered into a contract between the parties. As such, the cheque in question issued by petitioner-accused no.1, on being presented before the bank, having been returned due to insufficient fund, clearly attracts the offence under Section 138 of N.I. Act, but that by itself cannot preclude opposite party no.2-complainant to file complaint petition for investigation under Section 156(3) of Cr.P.C. by registering the same as FIR. On the basis of the fact gathered from the complaint petition, if a case under Section 420 is made out, the proceeding under Section 138 of N.I. Act may be distinct from that of the criminal proceeding, simultaneously both the proceedings can be initiated against the person who tried to deceive opposite party no.2-complainant. Thereby, on the basis of the complaint lodged before the learned S.D.J.M, Angul, if direction has been given to register the same as FIR and to cause investigation, no illegality or irregularity has been committed rather the same is in consonance with the provisions of law. A further contention is raised, that there is breach of contract and for that different remedies are available under the law, but fact remains the conduct of the parties has to be taken note of by the Court. As such, having satisfied with the complaint lodged by the opposite party no.2-complainant, the Court below, on being prima facie satisfied that a case under Sections, 417, 420 read with Sec. 34 of IPC is made out, forwarded the complaint, vide order impugned, with the direction to register the same as FIR and cause investigation into the allegations, that itself cannot be said to be illegal and on that basis the proceeding so initiated should not be quashed.

To substantiate such contention he has relied upon the judgments of the apex Court in ***Sangeetaben Mahendrabhai Patel v. State of Gujarat,*** 2012 (7) SCC 621 and ***Dr. Lakshman V. State of Karnataka,*** AIR 2019 SC 5268.

It is further contended that in the judgment of ***Dr. Lakshman*** (supra), the judgment in ***Inder Mohan Goswami*** (supra) referred to by learned counsel appearing for petitioner-accused no.1, has been taken note of. Thereby, the contention raised by learned counsel for the petitioner-accused no.1 cannot have any justification and accordingly prays for dismissal of the present writ petition. It is further contended that if the petitioner-accused no.1 wants to quash the proceeding, instead of invoking jurisdiction under Articles

226 and 227 of the Constitution of India, he should have filed application under Section 482 of the Cr.P.C. When adequate remedies are provided under Section 482 Cr.P.C., instead of availing the same, the petitioner-accused no.1 should not have taken recourse to the present proceeding which cannot sustain in the eye of law.

5. This Court heard Mr. S. Pattanaik, learned counsel for the petitioner-accused no.1 and Mr. P.K. Mohapatra, learned counsel for opposite party no.2-complainant and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. On the basis of the pleadings available on record and in view of the contention raised by Mr. S. Pattanaik, learned counsel for the petitioner-accused no.1 that without conducting enquiry under Section 202 Cr.P.C. the Court below should not have directed for investigation under Section 156 (3) Cr.P.C., for just and proper adjudication of the case, Section 156 and 202 Cr.P.C. are quoted below:-

> ***"Sec. 156:- Police officer's power to investigate cognizable case.***
>
> *(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.*
>
> *(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.*
>
> *(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned."*
>
> *"**202. Postponement of issue of process.-***
>
> *(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:*
>
> ***Provided** that no such direction for investigation shall be made, -*
>
> *(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or*

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

***Provided** that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.*

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

On perusal of the aforementioned provisions, it would be evident that under Section 202 Cr.P.C., any Magistrate on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, postpone the issue of process against the accused, or either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

7. In view of such provision, the Magistrate may either he himself inquire into the case or direct an investigation to be made by the police authority or by such other person as he thinks fit. If the learned Magistrate has exercised power directing the police to make an investigation under Section 156(3) Cr.P.C., it cannot be said that before issuance of such direction an enquiry has to be conducted under Section 202 Cr.P.C. by the Magistrate himself only. The provision contained under Section 202 Cr.P.C. is ample clear that the Magistrate can postpone issue of process, if he thinks that enquiry ought to have been done prior to issuance of such process. But this is not a case where postpone of issuance of process is in question. Rather, on the basis of the complaint, the Magistrate was prima facie satisfied that a cognizable case is made out and thereby directed the police authority to register the FIR and cause investigation. That is well within its jurisdiction, and therefore it cannot be said that any illegality or irregularity has been committed by the Magistrate in issuing such direction, so as to warrant interference by this Court.

8. On the basis of the factual matrix of the case, the provisions of Section 138 of N.I. Act may be attracted, because the cheque, which was given by the petitioner-accused no.1 to opposite party no.2-complainant, was

returned as there was insufficient fund. In addition to the same, if on the basis of the factual matrix prima facie it is satisfied that the petitioner-accused no.1 had tried to deceive opposite party no.2-complainant in the entire transaction, then in that case criminal proceeding can also be initiated against the accused persons.

9. In ***Dr. Lakshman*** (supra), the apex Court in paragraphs-9 and 10 observed as follows:

> *"9. It is not seriously disputed by the parties with regard to the entering of the agreements for procuring the land in favour of the appellant in Ballur Village, Anekal Taluk, Bangalore Urban District and respondents have received the amount of Rs.9 crores by way of demand drafts and cheques. It is the specific case of the appellant that there are schedules mentioned to the agreements as per which respondents have agreed to procure the land covered by Survey Nos.115 and 117 of Ballur Village apart from other lands. In a petition under Section 482, Cr.P.C. it is fairly well settled that it is not permissible for the High Court to record any findings, wherever there are factual disputes. Merely on the ground that there is no pagination in the Schedule, the High Court has disbelieved such Schedule to the Agreements. It is the specific case of the appellant that the lands covered by Survey Nos.115 and 117 of Ballur Village were sold even prior to the first agreement, as such respondents have committed an act of cheating. It is also the specific case of the appellant that two cheques were issued by respondents-accused by way of security for the amount of Rs.9 crores which is advance but the account of such cheques was closed even prior to entering into the Agreement itself. The second complaint filed by the appellant is self-explanatory and he is forcefully made to sign the sale deed which were executed subsequently for the lands covered by Survey Nos.115 and 117 of Ballur Village. Mere filing of the suits for recovery of the money and complaint filed under Section 138 of the N.I. Act by itself is no ground to quash the proceedings in the complaints filed by the appellant herein. When cheating and criminal conspiracy are alleged against the accused, for advancing a huge sum of Rs.9 crores, it is a matter which is to be tried, but at the same time the High Court has entered into the disputed area, at the stage of considering the petitions filed under Section 482, Cr.P.C. It is fairly well settled that power under Section 482 Cr.P.C. is to be exercised sparingly when the case is not made out for the offences alleged on the reading of the complaint itself or in cases where such complaint is filed by way of abuse of the process. Whether any Schedules were appended to the agreement or not, a finding is required to be recorded after full fledged trial. Further, as the contract is for the purpose of procuring the land, as such the same is of civil nature, as held by the High Court, is also no ground for quashing. Though the contract is of civil nature, if there is an element of cheating and fraud it is always open for a party in a contract, to prosecute the other side for the offences alleged. Equally, mere filing of a suit or complaint filed under Section 138 of the N.I. Act, 1881 by itself is no ground to quash the proceedings. While considering the petition under Section 482 of Cr.P.C., we are of the view that the High Court also committed an error that there is a novation of the contract in view of the subsequent agreement entered into on 08.11.2012. Whether there is novation of contract or not and the effect of such entering into the contract is a matter which is required to be considered only after trial but not at the stage of considering the application under Section 482, Cr.P.C.*

> *10. Learned senior counsel Sri R. Basant appearing for the accused, in support of his case, relied on the judgment of this Court in the case of S.W. Palanitkar and Ors. vs. State of Bihar and Anr.1 and submitted that every breach of contract may not result in a penal offence, but in the very same judgment, this Court has held that breach of trust with mens rea gives rise to a criminal prosecution as well. In a given case, whether there is any mens rea on the part of the accused or not is a matter which is required to be considered having regard to the facts and circumstances of the case and contents of the complaint etc. In the case on hand, it is clearly alleged that even before entering into the agreement dated 26.09.2012, lands were already sold to third party, which were agreed to be procured in favour of the appellant. Not only that, it is the specific allegation of the complainant that the cheques were issued towards security from the account which was also closed much earlier to the date of Agreement itself. Learned counsel also relied on judgment in the case of Anil Mahajan vs. Bhor Industries Ltd. and Anr. but in the very same judgment it is also held that where there exists a fraudulent and dishonest intention at the time of the commission of the offence, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. In another case relied on by the learned counsel, viz., Inder Mohan Goswami and Anr. vs. State of Uttaranchal and Ors. this Court has reiterated the scope of power of the High Court under Section 482 Cr.P.C. Having regard to the facts of the case, we are of the view that the said judgments relied on by the learned counsel would not support the case of the respondents. It is also to be noticed that in the complaint filed in P.C.R.No.14420 of 2015, investigation has been completed and chargesheet was also filed on 22nd December 2015."*

By so discussing, the apex Court held that the High Court has committed an error in allowing the petitions filed under Section 482 Cr.P.C. by the respondents-accused. Thereby, allowed the criminal appeals and set aside the impugned common order dated 28.04.2017 passed by the High Court of Karnataka at Bengaluru. Applying the same analogy to the present context, this is not proper stage where the proceeding so initiated has to be quashed either in exercise of power under Section 226 of the Constitution of India or even under Section 482 Cr.P.C. Rather, the Magistrate is well justified in directing the police authority to register the complaint petition as FIR under Section 156(3) Cr.P.C. and cause investigation into the matter. In the aforementioned judgment of ***Dr. Laksman***, the judgment of the apex Court in ***Inder Mohan Goswami*** (supra), which has been referred to by learned counsel for the petitioner-accused no.1, has also been taken note of and despite taking note of such judgment, the apex Court has passed the order as mentioned above.

10. In ***Sangeetaben Mahendrabhai Patel*** (supra), the apex Court in paragraphs 27 and 28 thereof held as follows:

> ***"27.*** *This Court held: (A.A. Mulla case [(1996) 11 SCC 606 : 1997 SCC (Cri) 305 : AIR 1997 SC 1441] , SCC pp. 613-14, para 22)*

> *"22. After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the respective parties, it appears to us that the ingredients of the offences for which the appellants were charged in the first trial are entirely different. The second trial with which we are concerned in this appeal, envisages a different fact situation and the enquiry for finding out facts constituting offences under the Customs Act and the Gold (Control) Act in the second trial is of a different nature. … Not only the ingredients of offences in the previous and the second trial are different, the factual foundation of the first trial and such foundation for the second trial is also not indented (sic). Accordingly, the second trial was not barred under Section 403 CrPC of 1898 as alleged by the appellants."* *(emphasis added)*

> *"**28.** In Union of India v. Sunil Kumar Sarkar [(2001) 3 SCC 414 : 2001 SCC (L&S) 600 : AIR 2001 SC 1092] , this Court considered the argument that if the punishment had already been imposed for court-martial proceedings, the proceedings under the Central Rules dealing with disciplinary aspect and misconduct cannot be held as it would amount to double jeopardy violating the provisions of Article 20(2) of the Constitution. The Court explained that the court-martial proceedings deal with the penal aspect of the misconduct while the proceedings under the Central Rules deal with the disciplinary aspect of the misconduct. The two proceedings do not overlap at all and, therefore, there was no question of attracting the doctrine of double jeopardy. While deciding the said case, the Court placed reliance upon its earlier judgment in R. Viswan v. Union of India [(1983) 3 SCC 401 : 1983 SCC (L&S) 405 : AIR 1983 SC 658]."*

11. In view of the above analysis and applying the rulings of the apex Court, referred to above, to the present context, it is made clear that an accusation of commission of offence under Section 138 of N.I. Act cannot preclude the complainant to initiate a proceedings against accused persons under Sections 418, 420 read with Section 34 of IPC if ingredients of such offence are attracted. As such, the case under the N.I. Act can only be initiated by filing complaint, but in a case under the IPC, such a condition is not necessary. But in the case at hand when opposite party no.2-complainant lodged an FIR in the concerned police station, the same was not registered, therefore, there was no other way open to opposite party no.2-complainant than to approach the Magistrate by filing complaint case, who, in turn directed the police to register the complaint as FIR under Section 156(3) of Cr.P.C. and conduct investigation. In view of such position, no illegality or irregularity has been committed by the learned S.D.J.M., Angul by passing the order impugned.

12. Much reliance has been placed by learned counsel for the petitioner on the judgment of this Court in ***Radharaman Sahu*** (supra). But as is evident

the said case has been decided on its own facts and circumstances, which are different from the present case, and thus is of no help to the petitioner. Similarly, as has been already discussed, the judgment in ***Inder Mohan Goswami*** (supra), which has been referred to by learned counsel for the petitioner, having been taken note of by the apex Court in ***Dr. Laksman*** (supra), is also in no way helpful to the petitioner.

13. In view of the law laid down by the apex Court, as discussed above, at this stage this Court is not inclined to set aside the order dated 17.12.2016 passed by the learned S.D.J.M., Angul in ICC Case No. 217 of 2016 nor quash the consequential proceeding in G.R. Case No.468 of 2017 pending in the Court of learned S.D.J.M., Angul. Thereby, the CRLMP is devoid of merit and the same is accordingly dismissed. No order to costs.

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2020 (II) ILR - CUT- 226

DR. B.R. SARANGI, J.

W.P.(C) NO. 7772, 2943 OF 2016,
W.P.(C) NO. 19582 & 21884 OF 2015

BINODINI BARAD .....Petitioner

.Vs.

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

W.P.(C) No. 2943 of 2016 & W.P.(C) No.19582 of 2015

NETRAMANI ROUTRAY .....Petitioner

.Vs.

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

A) WORDS AND PHRASES – "Functus officio" – Meaning – Held, a Latin phrase, which means "no longer having power or jurisdiction" (because the power has been exercised), an arbitrator who has delivered his award becomes functus officio, i.e., he no longer has power or jurisdiction – Plural is functi officio – A quashi-judicial authority will become functus officio only when its order is pronounced, or published/notified or communicated to the party concerned. (Para 12)

(B) WORDS AND PHRASES – The "Person aggrieved" – Definition – Broadly speaking, a party or person is aggrieved by a decision when, it

only operates directly ad injuriously upon his personal, pecuniary and proprietary rights. (Para 16)

(C) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Dispute relating to appointment of Anganwadi worker – Case filed before the State Commissioner for Persons with Disability – Commissioner dealt with the case and passed orders – Jurisdiction of the Commissioner in the matter of appointment of Anganwadi Worker questioned – Held, the State Commissioner for Persons with Disability has no jurisdiction.

"In other words, so far as disability part is concerned, the State Commissioner for Persons with Disability may have jurisdiction, but for selection and disengagement of Anganwadi Worker, it has no jurisdiction (Para 31)

Case Laws Relied on and Referred to :-

1. (2013) 7 SCC 182 : Geetaben Ratilal Patel .Vs. District Primary Education Officer.
2. (2008) 8 SCC 92 : State Bank of India .Vs. S.N. Goyal.
3. (1995) 2 SCC 689 : Babua Ram .Vs. State of U.P.
4. (1998) 4 SCC 447 : Gopabandhu Biswal .Vs. Krishna Chandra Mohanty.
5. AIR 1973 Ori 217 : Santosh Kumar Agarwalla .Vs. State of Orissa.
6. 1976 2 All ER 865 (HL) : Fairmount Investments Ltd. .Vs. Secy of State for Environment,
7. 1977 3 All ER 452 (DC & CA): R. .Vs. Secy. of State for Home Affairs, ex p. Hosenball, Geoffrey Lane, LJ.
8. AIR 1970 SC 150 (1969) 2 SCC 262 : A.K. Kraipak and others .Vs. Union of India.
9. AIR 1978 SC 597 (1978) 1 SCC 248 : Maneka Gandhi .Vs. Union of India.
10. AIR 1981 SC 818 : Swadeshi Cotton Mills .Vs. Union of India.
11. (1998) 8 SCC 194Basudeo Tiwary .Vs. Sido Kanhu University & Ors.
12. (2008) 16 SCC 276 : Nagarjuna Construction Company Limited .Vs. Government of Andhra Pradesh.
13. AIR 2009 SC 2375 : Uma Nath Panday and others .Vs. State of U.P. & Ors.

W.P.(C) NO. 7772 OF 2016 & 21884 OF 2015

For Petitioner : M/s. S. Mohanty & P.C. Moharana.

For Opp. Parties : Addl. Govt. Adv. [O.Ps. No.1 to 6] & Mr. A. Tripathy [O.P. No.7]

W.P.(C) NO. 2943 OF 2016 & 19582 OF 2015

For Petitioner : Mr. A. Tripathy.

For Opp. Parties : Addl. Govt. Adv. [O.Ps. No.1 to 3 in W.P.(C) No. 19582 of 2015 & O.Ps. No. 1 to 6 in W.P.(C) No. 2943 of 2016]

M/s. S. Mohanty and P.C. Moharana, [O.P. No. 4 in W.P.(C) No. 19582 of 2015 & O.P. No. 7 in W.P.(C) No. 2943 of 2016]

JUDGMENT Date of Hearing : 19.02.2020 : Date of Judgment : 25.02.2020

DR. B.R. SARANGI, J.

All the above noted writ petitions, having been filed challenging selection and engagement of Anganwadi Worker in respect of Barangagadia-II Anganwadi Centre of Champapedi G.P. under Ranpur ICDS Project of Dist- Nayagarh, were heard together and are disposed of by this common judgment.

2. For better appreciation, the factual matrix of W.P.(C) No. 7772 of 2016 is referred to and taken into consideration.

Pursuant to notification dated 21.12.2010 issued by the C.D.P.O., Ranpur for engagement of Anganwadi Worker in respect of Barangagadia-II Anganwadi Centre of Champapedi G.P. under Ranpur ICDS Project of Dist-Nayagarh, the petitioners, namely, Binodini Barad and Netramani Routray along with others, submitted their candidature in the prescribed format with all testimonial. The selection committee constituted under the chairmanship of the Sub-Collector, Nayagarh in its meeting held on 18.05.2011 drew a select list, in which Mamata Jena, having secured 63.73% of marks, stood first position; Binodini Barad, having secured 63.06% of marks, stood 2nd position; and Netramani Routray, having secured 60.87 % of marks, stood 3rd position. Challenging the said selection of Mamata Jena, Netramani Routray preferred Anganwadi Appeal No. 16 of 2011 before the Addl. District Magistrate, Nayagarh, who, vide order dated 21.02.2012, allowed the appeal and directed to prepare a fresh merit list for Barangagadia-II Anganwadi Centre. Challenging the order dated 21.02.2012 passed in Anganwadi Appeal No. 16 of 2011, Mamata Jena preferred W.P.(C) No. 5366 of 2012 and this Court, vide order dated 09.03.2015, dismissed the writ petition and vacated the interim order passed on 09.02.2015 relying upon the report furnished by the District Medical Board, Nayagarh. Consequence thereof, as per direction given by the Addl. District Magistrate, Nayagarh, a fresh merit list was prepared by the selection committee on 04.07.2015 placing Netramani Routray at serial no.1, having secured 65.28 % of marks, Binodini Barad at serial no.2, having secured 63.05% of marks, and Mamata Jena at serial no.3 having secured 58.73% of marks.

2.1 On 10.05.2012, vide letter no. 8413, the Government of Odisha in Women and Child Development Department clarified that extra optional

subject shall not be taken into account for calculation of percentage of marks in the matriculation examination of a candidate at the time of selection of Anganwadi Worker. The fresh selection list, which was prepared by the selection committee on 04.07.2015, had not taken into consideration the clarification made on 10.05.2012. In any case, challenging the said selection and engagement of Netramani Routray, Binodini Barad in Case No. SCPD-215/2015 approached the State Commissioner for Persons with Disabilities who, upon hearing, vide order dated 15.09.2015 directed to disengage Netramani Routray and to take steps to engage Binodini Barad in the post of Anganwadi Worker against the notification dated 21.12.2010. Netramani Routray, challenging the order dated 15.09.2015 passed by the State Commissioner for Persons with Disability, filed W.P.(C) No.19582 of 2015 contending that she was not a party before the State Commissioner for Persons with Disability and without giving her opportunity of hearing the order of disengagement was passed. It was further urged that the State Commissioner for Persons with Disability had no jurisdiction to entertain the case of Anganwadi Worker and accordingly referred matter to the Women and Child Development Department asking the Commissioner to intervene and redress the grievance of complainant- Binodini Barad so that her right for engagement in the post of Anganwadi Worker against the notification dated 21.11.2010 can be protected. This Court, vide order dated 05.11.2015, directed that no coercive steps shall be taken in pursuance of order dated 15.09.2015 passed in SCPD-215/2015. As a consequence thereof, Netramani Routray, who had been selected by the selection committee and engaged as Anganwadi Worker, was allowed to continue as such.

2.2 At that point of time, the CDPO, Ranpur moved the Addl. District Magistrate, Nayagarh for reconsideration of order dated 21.02.2012 passed in Anganwadi Appeal No. 16 of 2011 filed by Netramani Routray and to take a suitable action in view of order dated 15.09.2015 passed by the State Commissioner for Persons with Disability in case No. SCPD 215/2015. Consequentially, the order dated 21.02.2012 passed in Anganwadi Appeal No. 16/2011 was recalled and set aside by the Addl. District Magistrate, Nayagarh on 23.12.2015 and direction was given to the CDPO, Ranpur to take fresh decision as per the provisions of law and orders of higher Courts. In pursuance thereof, proceedings of selection committee was held on 18.03.2016 and a fresh panel list of candidates of Barangagadia-II Anganwadi Centre was prepared excluding the extra optional marks secured by Netramani Routray in HSC Examination, and Binodini Barad was selected

as Anganwadi Worker securing highest marks in the panel list, and selection of Netramani Routray was also cancelled by the selection committee. Accordingly, the CDPO, Ranpur was advised to disengage Netramani Routray and to issue engagement order in favour of Binodini Barad with immediate effect. As a consequence thereof, vide order dated 21.03.2016, the C.D.P.O., Ranpur disengaged Netramani Routray from the post and in her place engaged Binodini Barad as Anganwadi Worker. Aggrieved thereby, Netramani Routray had preferred W.P.(C) No. 19582 of 2015, in which operation of order dated 15.09.2015 passed by the State Commissioner for Persons with Disability was stayed. During continuance of that interim order, as the action was taken in consonance with the order dated 15.09.2015 passed by the State Commissioner for Persons with Disability which resulted in disengagement of Netramani Routray, she filed a contempt petition before this Court in CONTC No. 499 of 2016, wherein notice was issued on 11.04.2016. On getting such notice, the CDPO, Ranpur allowed Netramani Routray to continue as Anganwadi Worker and passed the impugned order dated 23.04.2016 in Annexure-11.

3. Mr. S. Mohaty, learned counsel appearing for the petitioner-Binodini Barad contended that the selection of Netramani Routray was done without taking into consideration the clarification issued by the Government, vide letter dated 10.05.2012, wherein it was specifically indicated that extra optional subject shall not be taken into account for calculation of percentage of marks in the matriculation examination of a candidate at the time of selection of Anganwadi Worker. If the said guideline is adhered to, then Netramani Routray could not have been selected and placed at serial no. 1 by the selection committee. It is further contended that as per the guidelines issued by the Government, preference should be given to a physically challenged candidate. The same has not been adhered to, even though Binodini Barad is a physically challenged candidate and, therefore, she approached the State Commissioner for Persons with Disability, who, on consideration of her application, passed an order on 15.09.2015 setting aside the selection of Netramani Routray and directed for selection of Binodini Barad taking into consideration her physical disability. Thereby, she seeks for quashing of order dated 23.04.2016 passed by the CDPO, Ranput in Annexure-11, by which Netramani Routray was allowed to continue by virtue of the interim order dated 05.11.2015 passed by this Court in W.P.(C) No. 19582 of 2015. To substantiate his contention he has relied upon the judgment of the apex Court in ***Geetaben Ratilal Patel v. District Primary Education Officer***, (2013) 7 SCC 182.

4. Mr. A. Tripathy, learned counsel appearing for the petitioner-Netramani Routray contended that the select list, which was prepared on 18.05.2011 wherein Mamata Jena stood first, was challenged by Netrmani Routray before the Addl. District Magistrate, Nayagarh in Anganwadi Appeal No. 16 of 2011, which was allowed vide order dated 21.02.2012 and direction was given to prepare a fresh select list. Accordingly, a fresh selection list was prepared, wherein Netramani Routray stood first. As a consequence thereof, she was given engagement and had been continuing as Anganwadi Worker. The order dated 21.02.2012 passed by the Addl. District Magistrate in Anganwadi Appeal No. 16 of 2011 was challenged by Mamata Jena before this Court in W.P.(C) No. 5366 of 2012 and the same having been dismissed, the order dated 21.02.2012 reached finality. At no point of time, Binodini Barad had challenged the order dated 21.02.2012 passed by the Addl. District Magistrate in Anganwadi Appeal No. 16 of 2011. Therefore, pursuant to said order, if a fresh selection list was prepared, wherein Netramani Routray was placed at serial no.1 having secured highest percentage of marks and the same having acted upon, no illegality or irregularity has been committed by the authority in engaging Netramani Routray as Anganwadi Worker. More so, if Binodini Barad, in any case, is affected by the selection of Netramani Routray, she should have preferred Anganwadi Appeal before the Addl. District Magistrate and, as such, she has not preferred any appeal with regard to fresh selection made by the selection committee in compliance of order dated 21.02.2012 passed in Anganwadi Appeal No. 16 of 2011, which has been made confirmed by this Court vide order dated 09.03.2015 passed in W.P.(C) No. 5366 of 2012. It is further contended that Binodini Barad, instead of approaching proper forum, she approached the State Commissioner for Persons with Disability in Case No. SCPD-215/2015, wherein Netramani Routray was not made a party. As such, the State Commissioner for Persons with Disability passed an order on 15.09.2015, without giving opportunity of hearing to Netramani Routray. As a consequence thereof, Netramani Routray filed W.P.(C) No. 1852 of 2015, wherein this Court passed an interim order on 05.11.2015 staying operation of order dated 15.09.2015. It is further contended that once the order passed by the State Commissioner for Persons with Disability had been stayed, the Addl. District Magistrate, in an appeal filed by the CDPO should not have recalled the order dated 21.02.2012 passed in Anganwadi Appeal No. 16 of 2011, which had already been confirmed by order dated 09.03.2015 passed in W.P.(C) No. 5366 of 2012. It is further contended that the State Commissioner for Persons with Disability, having no jurisdiction with regard

to selection of Anganwadi Worker, issued direction for engagement of Binodini Barad disengaging Netramani Routray, pursuant to order dated 21.03.2016 in Annexure-10, which cannot sustain in the eye of law.

5. Learned Addl. Government Advocate appearing for the State opposite parties admitted the factual matrix mentioned above and contended that pursuant to order passed by the State Commissioner for Persons with Disability the order dated 21.02.2012 passed by the Addl. District Magistrate, Nayagarh in Anganwadi Appeal No. 16 of 2011 was modified and another order was passed on 23.12.2015. Therefore, it cannot be said that any illegality or irregularity has been committed by the authority in passing the order impugned. Furthermore, it had not been brought to notice of the authority that the order passed by the State Commissioner for Persons with Disability had been stayed by this Court. Therefore, the order passed on 21.03.2016 in Annexure-10 disengaging Netramani Routray and engaging Binodini Barad has not been given effect to by the impugned order dated 23.04.2016. Consequentially, Netramani Routray has been allowed to continue as Anganwadi Worker till disposal of W.P.(C) No. 19582 of 2015, which is subject matter of challenge in W.P.(C) No. 7772 of 2016 filed by the Binodini Barad.

6. This Court heard Mr. S. Pattanaik, learned counsel for the petitioner-Binodini Barad in W.P.(C) No. 7772 of 2016 and W.P.(C) No. 21884 of 2015; Mr. A. Tripathy, learned counsel appearing for the petitioner-Netramani Routray in W.P.(C) No.19582 of 2015 and W.P.(C) No. 2943 of 2016; and learned Addl. Government Advocate for the State in all the writ petitions, and perused the records. 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.

7. Factual matrix, as delineated above, is not in dispute. W.P.(C) No. 7772 of 2016, which has been filed by Binodini Barad, emanates from order dated 15.09.2015 passed by the State Commissioner for Persons with Disability in Case No. SCPD-215/2015 and its consequential order dated 23.12.2015 passed by the Addl. District Magistrate, Nayagarh in Anganwadi Appeal No. 16 of 2011, and decision taken by the selection committee in its meeting dated 18.03.2016, by which Netramani Routray, who was engaged as Anganwadi Worker in respect of Barangagadia-II Anganwadi Centre, was disengaged from her service and Binodini Barad was engaged in her place with immediate effect by order dated 21.03.2016, and consequential order

dated 23.04.2016 has been passed allowing Netramani Routray as Anganwadi Worker till disposal of W.P.(C) No. 19582 of 2015.

8. It is worthwhile to recapitulate that in pursuance of advertisement dated 21.12.2010 issued by the CDPO, Ranpur, the petitioners, along with others, submitted their candidature. Consequentially, select list was prepared, wherein Mamata Jena was placed at first position, Binodini Barad at 2nd position and Netramani Routray at 3rd position. Such select list was challenged by Netramani Routray before the Addl. District Magistrate, Nayagarh in Anganwadi Appeal No. 16 of 2011, which was allowed vide order dated 21.02.2012 with a direction to prepare fresh select list. Pursuant thereto, a fresh select list was prepared wherein Netramani Routray stood at serial no.1, Binodini Barad stood at serial no.2 and Mamata Jena stood at serial no.3. Said order dated 21.02.2012 of the Addl. District Magistrate, Nayagarh was challenged by Mamata Jena before this Court in W.P.(C) No. 5366 of 2012, which was dismissed on 09.03.2015 by confirming the order dated 21.02.2012 passed by the Addl. District Magistrate, Nayagarh in Anganwadi Appeal No.16 of 2011. Thereby, the order passed by the Addl. District Magistrate, Nayagarh dated 21.02.2012 reached finality. As a consequence thereof, Netramani Routray was given engagement as Anganwadi Worker and, as such, she had been continuing in the post since 2011. But fact remains, without impleading Netramani Routray as party, Binodini Barad, in Case No. SCPD-215/2015, approached the State Commissioner for Persons with Disability, who passed an order on 15.09.2015 in favour of Binodini Barad. Consequentially, the CDPO, Ranpur filed an application for recalling order dated 21.02.2012 passed in Anganwadi Appeal No. 16 of 2011. But, by virtue of order dated 09.03.2015 passed by this Court in dismissing W.P.(C) No. 5366 of 2012 filed by Mamata Jena, the order dated 21.02.2012 passed by the Addl. District Magistrate, Nayagarh in Anganwadi Appeal No. 16 of 2011 had reached finality. Thereby, the CDPO had no scope to move at a belated stage either to recall or modify the order dated 21.02.2012 passed in Anganwadi Appeal No. 16 of 2011, which had reached finality in view of dismissal of W.P.(C) No. 5366 of 2012, wherein the CDPO was a party to the proceeding.

9. The order passed by the State Commissioner for Persons with Disability in Case No. SCPD-215/2015 was subjected to challenge before this Court in W.P.(C) No. 19582 of 2015 at the instance of Netramani Routray and this Court on 05.11.2015 passed an interim order staying operation of the

order passed by the State Commissioner for Persons with Disability. When the said interim order was continuing, the CDPO could not have passed order dated 21.03.2016 in Annexure-10 disengaging Netramani Routray as Anganwadi Worker and engaging Binodini Barad as Anganwadi Worker with immediate effect. As a result, CONTC No. 499 of 2016 was filed by Netramani Routray and on receipt of notice of contempt on 01.04.2016, Netramani Routray was allowed to continue till disposal of W.P.(C) No. 19582 of 2015, vide order dated 23.04.2016 in Annexure-11, which is subject matter of challenge in W.P.(C) No. 7772 of 2016 filed by Binodini Barad.

10. Binodini Barad has also filed W.P.(C) No.21884 of 2015 seeking implementation of order dated 15.09.2015 passed by the State Commissioner for Persons with Disability in Case No. SCPD-215/2015. Since the said order dated 15.09.2015 has been complied by passing order dated 21.03.2016 in Annexure-10 of W.P.(C) No. 7772 of 2016 by recalling the order dated 21.02.2012 passed in Anganwadi Appeal No. 16 of 2011, W.P.(C) No.21884 of 2015 has become infructuous and is liable to be dismissed.

11. Netramani Routray has filed W.P.(C) No. 2943 of 2016 seeking to quash order dated 23.12.2015 passed by the Addl. District Magistrate, Nayagarh in Anganwadi Appeal No. 16 of 2011, by which its earlier order dated 21.02.2012 was recalled and set aside and direction was given to the CDPO, Ranpur to take fresh decision as per the provisions of law and orders of higher Courts. The order dated 23.12.2015 was passed by the Addl. District Magistrate, Nayagarh at the behest of the CDPO, Ranpur, who moved for reconsideration of the order dated 21.02.2012 passed in Anganwadi Appeal No. 16 of 2011 filed by the Netramani Routray and to take a suitable action in view of the order dated 15.09.2015 passed by the State Commissioner for Persons with Disability in Case No. SCPD-215/2015. The order dated 21.02.2012 was passed by the Addl. District Magistrate, Nayagarh on the appeal preferred by Netramani Routray with regard to selection of Mamata Jena as Anganwadi Worker in respect of Barangagadia-II Anganwadi Centre. Pursuant to order dated 21.02.2012 passed by the Addl. District Magistrate, Nayagarh, a fresh merit list was prepared in which Netramani Routray stood at serial no.1. The said order dated 21.02.2012, which was challenged by Mamata Jena before this Court in W.P.(C) No. 5366 of 2012, reached finality, in view of order dated 09.03.2015 whereby the said writ petition was dismissed, and the CDPO, Ranpur, being a party to the said proceeding, did not challenge the said order before the higher forum.

But subsequently, the CDPO, Ranpur could not have moved for reconsideration of order dated 21.02.2012 and the Addl. District Magistrate, Nayagarh should not have modified the order dated 21.02.2012, particularly when the same had reached finality, in view of dismissal of W.P.(C) No. 5366 of 2012 vide order dated 09.03.2015. Thereby, the Addl. District Magistrate, Nayagarh has acted contrary to the order passed by this Court, which amounts to violation of the interim order passed by this Court, which was continuing, and liable for contempt of this Court. Furthermore, the Addl. District Magistrate, Nayagarh had become functus officio, after disposal of Anganwadi Appeal No. 16 of 2011 vide order dated 21.02.2012, and once an authority became functus officio, it should not have reconsidered the matter and consequentially recalled the order passed earlier, which amounts to reviewing its own order, which is not permissible unless statute specifically prescribes.

12. "Functus officio" is a Latin phrase, which means "no longer having power or jurisdiction" (because the power has been exercised), an arbitrator who has delivered his award becomes functus officio, i.e., he no longer has power or jurisdiction. Plural is functi officio.

13. In ***State Bank of India v. S.N. Goyal,*** (2008) 8 SCC 92, a quashi-judicial authority will become functus officio only when its order is pronounced, or published/notified or communicated to the party concerned.

14. Once the order dated 21.02.2012 passed by the Addl. District Magistrate, Nayagarh had been acted upon and reached finality, in view of dismissal of W.P.(C) No. 5366 of 2012, the Addl. District Magistrate, Nayagarh could not have passed order dated 23.12.2015, as because he had no jurisdiction to reconsider the order dated 21.02.2012 passed in Anganwadi Appeal No. 16 of 2011 filed by Netramani Routray. Thus, order dated 23.12.2015 passed by the Addl. District Magistrate, Nayagarh is liable to quashed and is accordingly quashed.

15. In W.P.(C) No. 19582 of 2015, Netramani Routray has challenged the order dated 15.09.2015 passed by the State Commissioner for Persons with Disability in Case No. SCPD-215/2015. On perusal of the said order it reveals that Netramani Routray was not a party to the said proceeding and, as such, a complaint was lodged by Binodini Barad, by which she sought disengagement of Netramani Routray as Anganwadi Worker. This fact is borne out from the extract of the said order which reads thus:-

"The complainant filed memo of hazira. Ms. Brahmotri Mishra the CDPO, Ranpur also filed memo of hazira."

When the State Commissioner for Persons with Disability considered the complaint filed by Binodini Barad, the person aggrieved, namely, Netramani Routray should have been given opportunity of hearing in the matter.

16. The "Person aggrieved" broadly speaking, a party or person is aggrieved by a decision when, it only operates directly ad injuriously upon his personal, pecuniary and proprietary rights.

17. In ***Babua Ram v. State of U.P.,*** (1995) 2 SCC 689, the apex Court held that the person aggrieved, in this context, would mean a person who had suffered legal injury or ne who has been unjustly deprived or denied of something, which he would be interested to obtain in wrongful affection of his title to compensation.

18. In ***Gopabandhu Biswal v. Krishna Chandra Mohanty,*** (1998) 4 SCC 447, the apex court held the words mean a person directly affected by the impugned action or order. Only persons who are directly and immediately affected by the impugned order can be considered as "parties aggrieved" under Section 22(3)(f) of the Administrative Tribunal Act, 1985 read with Order 47 Rule 1 of Civil Procedure Code.

19. In ***Santosh Kumar Agarwalla v. State of Orissa,*** AIR 1973 Ori 217, the apex court held the words 'person aggrieved' do include a person who has a genuine grievance because an order has been made which prejudicially affects his interest.

20. In view of such position, Netramani Routray, being a person aggrieved, has not been given opportunity of hearing in the matter. Thereby, there is non-compliance of principle of natural justice.

21. 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.

22. ***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".*

23. 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.

24. 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 unarguable truth". "Natural justice" by Paul Jackson, 2nd Ed., page-1. In course of time, judges nurtured in the traditions of British jurisprudence, often invoked it in conjunction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". "Natural justice" was considered as "that part of natural law which relates to the administration of justice."*

25. 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

26. 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."

27. 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.

28. 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*".

29. In view of the fact and law discussed above, it is made clear that if the State Commissioner for Persons with Disability had considered the complaint filed by Binodini Barad, which affects the rights of Netramani Routray, then she should have been given opportunity of hearing being a person aggrieved. For non-giving of such opportunity of hearing to Netramani Routrary, the order so passed on 15.09.2016 in Case No. SCPD-215/2015 cannot sustain in the eye of law and the same is liable to quashed and hereby quashed.

30. Reliance has been placed by Mr. S. Mohanty, learned counsel appearing for petitioner-Binodini Barad on ***Geetaben Ratilal Patel*** (supra), which has been decided by the apex Court on its own facts and circumstances. The factual matrix of this case is different from that case. The ratio decided therein may not be applicable to the present context, particularly when in the instant case opportunity of hearing has not been given to Netramani Routray. As such the above judgment is distinguishable.

31. Considering the case from other angel, as per the revised guidelines issued by the Government for selection of Anganwadi Worker, for an aggrieved party remedy is available for preferring appeal before the appropriate forum. In the event Netramani Routray was selected by the selection committee and she was engaged as Anganwadi Worker, then

Binodini Barad has got remedy under the guidelines to prefer appeal before the appropriate forum against such selection and engagement of Netramani Routray. Instead of preferring appeal challenging the selection of Netramani Routray before the appropriate forum, Binodini Barad had moved the State Commissioner for Persons with Disability by filing Case No.SCPD-215/2015, which had no jurisdiction to entertain a case of the present nature. In other words, so far as disability part is concerned, the State Commissioner for Persons with Disability may have jurisdiction, but for selection and disengagement of Anganwadi Worker, it has no jurisdiction. Therefore, this Court is of the considered view that the action taken pursuant to order dated 15.09.2015 passed by the State Commissioner for Persons with Disability by passing order dated 21.03.2016 in Annexure-10 cannot also sustain in the eye of law. Thereby, the order dated 21.03.2016 disengaging Netramani Routray and engaging Binodini Barad is to be quashed and hereby quashed.

32. In view of order dated 05.11.2015 passed in W.P.(C) No. 19582 of 2015, the order dated 15.09.2015 having been quashed, Netramani Routray has been allowed to continue in the post of Anganwadi Worker of Barangagadia-II Anganwadi Centre.

33. In view of the detailed discussions made in forgoing paragraphs, W.P.(C) No. 19582 of 2015 and W.P.(C) No. 2943 of 2016 filed by Netramani Routray are hereby allowed and W.P.(C) No. 21884 of 2015 and W.P.(C) No. 7772 of 2016 filed by Binodini Barad are hereby dismissed. No order as to costs.

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2020 (II) ILR - CUT- 239

DR. B.R.SARANGI, J.

W.P.(C) NO.14060 OF 2020

SANTOSH KUMAR SAHOO .....Petitioner

.Vs.

SECRETARY, STATE TRANSPORT AUTHORITY, ODISHA, CUTTACK & ANR. .....Opp. Parties

(A) MOTOR VEHICLES ACT, 1988 – Section 68 read with various rules/provisions of "the Odisha Motor Vehicles Rules, 1993" – Renewal of permanent permit – Writ petition challenging the order passed in

appeal by the State Transport Appellate Tribunal directing the State Transport Authority to reconsider the application of the petitioner for renewal of permanent permit, and also consequential rejection of request made for clarification of the aforesaid judgment – Petitioner was aggrieved by the ordering portion of the appellate judgment to the extent directing "S.T.A., Odisha," instead of "Secretary, S.T.A., Odisha – Plea considered with reference to various provisions of the Act and Rules – Held, power has been vested with the State Transport Authority to grant renewal of permanent permit issued in respect of a vehicle.

"Keeping in view the above mentioned law laid down by the apex Court in various judicial pronouncements, this Court is of the considered view that if STAT has passed judgment in consonance with the statutory provisions contained under M.V. Act and Rules framed thereunder remitting the matter back to STA for fresh consideration of the application for renewal of permanent permit, it cannot be said that the same is illegal so as to cause interference by this Court. Needless to say that under Rule-52, power has been vested to the STA for renewal of permits and that itself is statutory one." *(Para 18)*

(B) CONSTITUTION OF INDIA, 1950, – Articles 226 and 227 – Writ jurisdiction of High Court to interfere with the order of the State Transport Appellate Tribunal – Held, if power is being exercised under Article 226 of the Constitution of India invoking the writ jurisdiction in the nature of certiorari, Court is to find out that there is an error of law apparent on the face of record and not every error either of law or fact which can be corrected by the appellate or revisional authority and more particularly, the writ of certiorari is not meant to take the place of appeal. It lies where the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of law which it was meant to administer. (Para 21)

Case Laws Relied on and Referred to :-

1. (1880) 5 AC 214 : House of Lord in Julius .Vs. Lord Bishop of Oxford.
2. AIR 1936 PC 253 (2) : Nazir Ahmad .Vs. King-Emperor.
3. AIR 1952 SC 16 : Commissioner of Police, Bombay .Vs. Gordhandas Bhanji.
4. AIR 1973 SC 855 : Sirsi Municipality .Vs. Cecelia Francis Tellis.
5. AIR 1975 SC 1331 : Sukhdev Singh .Vs. Bhagat Ram.
6. AIR 2004 SC 1377 : Sultan Sadik .Vs. Sanjay Raj Subba.
7. AIR 1988 SC 876 : General Commanding-in-Chief .Vs. Dr. Subhash Chandra Yadav.
8. AIR 1955 SC 233 : Hari Vishnu Kamath .Vs. Syed Ahmed Ishaque.
9. AIR 1958 SC 1240 : Nagendra Nath Bora .Vs. Commr. of Hills Division.
10. AIR 1958 SC 845 : Sewpujanrai Indrasaurai Ltd. .Vs. Collector of Customs.

For Petitioner : Mr. M.B. Rao
For Opp.parties : Mr. B.K. Sharma, Standing Counsel,Transport Department.

JUDGMENT Date of Judgment : 11.06.2020

DR. B.R.SARANGI, J.

The petitioner, who is the owner of a bus bearing registration number OR-05 P 5148, has filed this writ petition challenging a part of the direction contained in the judgment dated 06.03.2020 passed by the State Transport Appellate Tribunal, Odisha, Cuttack in M.V. Appeal No. 03 of 2020 in Annexure-1, whereby the appellate authority, while allowing the appeal, directed the State Transport Authority to reconsider the application of the petitioner for renewal of permanent permit, and also consequential rejection of request made for clarification of the aforesaid judgment vide order dated 30.05.2020 in Annexure-3.

2. The factual matrix of the case, in hand, is that the petitioner is the owner of a bus bearing registration no. OR-05 P 5148 and possessing a stage carriage permanent permit bearing no.SC/PP/05/94/13 for the route from Kamaladiha to Cuttack via Narasinghpur, Saragaon and back. The said permanent permit was valid till 11.11.2018. As the petitioner was under treatment from 25.10.2018 to 10.12.2019, he could not apply for renewal of permanent permit well within the time stipulated, as prescribed under the Act and Rules. But subsequently, he applied for renewal on 11.12.2019, which was rejected by the State Transport Authority, Odisha on 20.01.2020.

2.1 Challenging the order dated 20.01.2020 rejecting renewal of permanent permit, the petitioner preferred M.V. Appeal No.03 of 2020 before the State Transport Appellate Tribunal (STAT), Odisha, Cuttack and, after due adjudication, the tribunal allowed the appeal vide its judgment dated 06.03.2020 in Annexure-1 with the following order:-

"ORDER

The appeal is allowed on contest against the Respondent without cost.

The matter is remitted back to the S.T.A., Odisha, Cuttack for fresh consideration of the application of the appellant for renewal of his P.P. within one month from the date of receipt of the Judgment.

A free copy of the judgment be supplied to the learned A.S.T. (Tr.).

Sd/-
State Transport Appellate Tribunal, Orissa, Cuttack, 06/03/2020"

2.2 Even though the appeal preferred by the petitioner was allowed and the matter was remitted back to STA, Odisha, Cuttack for fresh consideration of the application of the petitioner for renewal of permanent permit, but the petitioner was aggrieved by the ordering portion of the said judgment to the extent directing "S.T.A., Odisha," instead of "Secretary, S.T.A., Odisha. Therefore, he filed an application on 18.03.2020 for correction in Annexure-2, in paragraph-3 whereof it was specifically pleaded as under:-

> *"That while doing so, in the ordering portion, instead of Secretary, STA, Odisha, STA, STA has been mentioned inadvertently due to typographical omission inasmuch as the impugned order was passed by the Secretary, STA, Odisha. Moreover, no relief has been claimed against STA in the appeal itself."*

But the STAT considered the said application and rejected the claim of the petitioner with the following order:-

> *"Hence, there is no inadvertent omission of the word "Secretary", in between the words "back to the " and "S.T.A.,* Odisha*" in the ordering portion of the judgment. No typographical error is made by omitting the word "Secretary", in between the words "back to the" and "S.T.A., Odisha" in the ordering portion of the Judgment.*
>
> *Thus, the petition filed by the appellant-petition to insert the word "Secretary", in between the words "back to the" and "S.T.A., Odisha" in the ordering portion of the Judgment is rejected being devoid of merit."*
>
> Hence, this application.

3. Mr. M.B. Rao, learned counsel for the petitioner reiterated the contentions raised before the State Appellate Tribunal and contended that even though the appellate authority has allowed the appeal, but remitted the matter back to the STA, Odisha, Cuttack, instead of Secretary, STA, Cuttack, for fresh consideration. It is contended that the STAT, while remitting the matter back to STA, Odisha, lost sight of the proceedings of 193rd meeting of the STA, Odisha held on 12.11.1992 at 10.30 AM in the chamber of Transport Commissioner-cum-Chairman STA, Odisha wherein under Clause-B(vi) powers have been delegated to the Secretary to renew or refuse to renew Stage Carriage permits where there is no arrear tax and penalty (including arrear in dispute) in respect of the vehicle covered by the permit and to attach conditions to the permits thus renewed. Therefore, the typographical error crept in the order portion of the judgment in not inserting the word "Secretary" in between the words "back to the" and "S.T.A., Odisha, Cuttack", in view of delegation of power made by the competent

authority, the judgment should be corrected to that extent only indicating that the matter is remitted "back to the Secretary, STA, Odisha" instead of "STA, Odisha, Cuttack". This being the error apparent on the face of the record, this Court, in exercise of the power conferred under Article 226 of the Constitution of India, may rectify the same.

4. Mr. B.K. Sharma, learned Standing Counsel for the Transport Department argued with vehemence indicating that the STA constituted under the Statute and it has been vested with power to grant renewal of permit in the event the application is made in writing. Thereby, the STA is the competent authority to consider renewal of permanent permit applied by the petitioner, instead of the Secretary, STA, and contended that no error has been committed by the appellate tribunal in passing the order impugned and even otherwise there is also no error in the ordering portion of the order itself so as to warrant interference of this Court, hence prays for dismissal of the writ petition.

5. This Court heard Mr. M.B. Rao, learned counsel for the petitioner and Mr. B.K. Sharma, learned Standing Counsel for Transport Department. Since it is a writ of certiorari and all documents are available on record itself, without calling for counter affidavit, the matter has been heard and disposed of at the stage of admission with the consent of learned counsel appearing for the parties.

6. There is no factual dispute in the present case and, as such, the petitioner has pleaded in paragraph-4 of the writ petition to the following effect:-

> *"..... It is extremely relevant to mention here that the petitioner is not at all aggrieved by the Judgment dated 06.03.2020 passed by the opposite party no.2 as such but is dissatisfied with the ordering portion of the said Judgment."*

In view of such position, essentially the petitioner is not aggrieved by the impugned judgment dated 06.03.2020 passed by the STAT, but is apparently dissatisfied with the ordering portion thereof to the extent that direction has been given to the "STA, Odisha, Cuttack", instead of "Secretary, STA, Odisha, Cuttack" for fresh consideration of the application of the petitioner for renewal of his permanent permit.

7. For just and proper adjudication of the case, in hand, the relevant provisions of the Motor Vehicles Act, 1988 are extracted hereunder:-

"***Section 68. Transport Authorities –*** *(1) The State Government shall, by notification in the Official Gazette, constitute for the State a State Transport Authority to exercise and discharge the powers and functions specified in sub-section (3), and shall in like manner constitute Regional Transport Authorities to exercise and discharge throughout such areas (in this Chapter referred to as regions) as may be specified in the notification, in respect of each Regional Transport Authority; the powers and functions conferred by or under this Chapter on such Authorities:*

Provided that in the Union territories, the Administrator may abstain from constituting any Regional Transport Authority.

(2) A State Transport Authority or a Regional Transport Authority shall consist of a Chairman who has had judicial experience or experience as an appellate or a revisional authority or as an adjudicating authority competent to pass any order or take any decision under any law and in the case of a State Transport Authority, such other persons (whether officials or not), not being more than four and, in the case of a Regional Transport Authority, such other persons (whether officials or not), not being more than two, as the State Government may think fit to appoint; but no person who has any financial interest whether as proprietor, employee or otherwise in any transport undertaking shall be appointed, or continue to be, a member of a State or Regional Transport Authority, and, if any person being a member of any such Authority acquires a financial interest in any transport undertaking, he shall within four weeks of so doing, give notice in writing to the State Government of the acquisition of such interest and shall vacate office:

Provided that nothing in this sub-section shall prevent any of the members of the State Transport Authority or a Regional Transport Authority, as the case may be, to preside over a meeting of such Authority during the absence of the Chairman, notwithstanding that such member does not possess judicial experience or experience as an appellate or a revisional authority or as an adjudicating authority competent to pass any order or take any decision under any law:

Provided further that the State Government may,—

(i) where it considers necessary or expedient so to do, constitute the State Transport Authority or a Regional Transport Authority for any region so as to consist of only one member who shall be an official with judicial experience or experience as an appellate or a revisional authority or as an adjudicating authority competent to pass any order or take any decision under any law;

(ii) by rules made in this behalf, provide for the transaction of business of such authorities in the absence of the Chairman or any other member and specify the circumstances under which, and the manner in which, such business could be so transacted:

Provided also that nothing in this sub-section shall be construed as debarring an official (other than an official connected directly with the management or operation of a transport undertaking) from being appointed or continuing as a member of any

such authority merely by reason of the fact that the Government employing the official has, or acquires, any financial interest in a transport undertaking.

(3) The State Transport Authority and every Regional Transport Authority shall give effect to any directions issued under section 67 and the State Transport Authority shall, subject to such directions and save as otherwise provided by or under this Act, exercise and discharge throughout the State the following powers and functions, namely:—

(a) to co-ordinate and regulate the activities and policies of the Regional Transport Authorities, if any, of the State;

(b) to perform the duties of a Regional Transport Authority where there is no such Authority and, if it thinks fit or if so required by a Regional Transport Authority, to perform those duties in respect of any route common to two or more regions;

(c) to settle all disputes and decide all matters on which differences of opinion arise between Regional Transport Authorities; and

[(ca) Government to formulate routes for plying stage carriages;]

(d) to discharge such other functions as may be prescribed.

(4) For the purpose of exercising and discharging the powers and functions specified in sub-section (3), a State Transport Authority may, subject to such conditions as may be prescribed, issue directions to any Regional Transport Authority, and the Regional Transport Authority shall, in the discharge of its functions under this Act, give effect to and be guided by such directions.

(5) The State Transport Authority and any Regional Transport Authority, if authorised in this behalf by rules made under section 96, may delegate such of its powers and functions to such authority or person subject to such restrictions, limitations and conditions as may be prescribed by the said rules."

The aforesaid provisions, on a careful reading, would indicate that the State Transport Authority has been constituted to exercise and discharge the powers and functions throughout such areas assigned to it. The manner of constitution of such State Transport Authority has also been provided in the aforementioned provisions.

8. In exercise of power conferred by Sections 28, 65, 96, 111 and 138 of the Motor Vehicles Act, 1988, the State Government has framed a Rule, called "the Odisha Motor Vehicles Rules, 1993"**.** Sub-rule (i) of Rule 2 thereof defines "Secretary, State Transport Authority", which reads as follows;

"***Secretary, State Transport Authority****" means an Officers appointed as such by the State Government to exercise the powers, discharge the duties and perform the*

> *functions of the Secretary of the State Transport Authority provided under these rules and includes Special Secretary/Additional Secretary/Assistant Secretary/Additional Assistant Secretary. Additional Commissioner, Transport, shall function as Special Secretary, State Transport Authority and Additional/ Assistant Regional Transport Officers posted to Check gates shall function as Additional/Assistant Secretary, State Transport Authority;"*

A bare reading of the above quoted provisions would indicate that Secretary, State Transport Authority means an officer appointed by the State Government to exercise the powers, discharge the duty and perform the functions of the Secretary of the State Transport Authority provided under these rules and includes Special Secretary/Additional Secretary/ Assistant Secretary/Additional Assistant Secretary.

9. Chapter-IV of the Rules, 1993 deals with control of transport vehicles. "Transport vehicle" has been defined under sub-section (47) of Section 2 of the Act, 1988 to mean:-

> *"(47). "**transport vehicle**" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle."*

The above mentioned definition includes "public service vehicle", which has been defined under sub-section (35) of Section 2 of the Act, 1988 to mean:-

> *"(35). "**public service vehicle**" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage."*

Similarly, the definition of "public service vehicle" includes "stage carriages", which has been defined under sub-section (40) of Section-2 of the Act, 1988, to mean:-

> *"(40). "**stage carriages**" means a motor vehicle constructed or adapted to carry more than six passengers excluding the driver for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey."*

The analysis of entire definitions, as made above, would clearly indicate that "stage carriages" comes under "transport vehicles" and Chapter-IV of the Rules, 1993 deals with the control of transport vehicles.

10. Rule 41, which deals with delegation of powers by the State Transport Authority, reads as follows:

*"**1. Delegation of powers by the State Transport Authority-** (1) The State Transport Authority may, by general or special resolution recorded in its Proceedings, delegate:*

(a) to its Chairman or Secretary.

(i). its powers under Section 72, Section 74, Section 76, Section 79, sub-section (9) of section 88 and sub-section (12) of section 88, respectively to grant with or without modification or the application or to refuse to grant a stage carriage permit, a contract carriage permit; a private service vehicle permit, a goods carriage permit, a tourist vehicle permit and a national permit; and to attach conditions to such permit and to very such conditions;

(ii) its powers to grant a permit to a private motor vehicle adapted to carry more than nine person s excluding the driver;

(iii) its powers under Sub-sec. (1) of Sec.88 to countersign or to refuse to countersign a permit, to attach conditions to the permit thus countersigned and to revoke a counter signature of permit.

(iv) to exercise the powers of the Regional Transport Authority in the circumstances specified in sub-section (3) of section 68, which may be delegated under rule 42 to its Chairman or Secretary or any other officer to the condition specified in the said rule;

(b) to its Chairman or Secretary or any other officer not being below the rank of Assistant Secretary-

(i) its powers to approve time table of stage carriage permit;

(ii) its powers under sub-section (2) of section 81 to renew or to refuse to renew all kinds of permit other than a temporary permit or a special permit:

(iii) its powers under sub-section (1) and sub-section (2) of section 87 to grant a temporary permit provided that such powers may also be delegated to the Additional Secretary or Assistant Secretary or Additional Assistant Secretary posted at the checkgate;

(iv) its powers under sub-section (8) of section 88 to grant a special permit;

(v) its powers under section 83 to permit replacement of the vehicle by another;

(vi) its power under sub-section (1) and sub-section (3) of section 82 to transfer or to refuse to transfer a permit from one person to another;

(vii) ts power to renew or refuse to renew countersignature of all kinds of permit ;

(viii) its power to issue a duplicate permit;

(ix) its powers to issue permit to the State Transport undertaking under sub-section (1) of section 103 or to any person under the proviso to section 104 in respect of a notified route or a notified area;

(x) its powers to pass order as contemplated by sub-section (2) of section 103 for the purpose of giving effect to the approved scheme in respect of a notified route or notified area;

(xi) its powers under sub-section (1) of section 86 and sub-section (4) of section 88 to suspend a permit or a countersignature of permit and to recover from the permit holder the sum of money agreed upon in accordance with sub-section (5) of section 86:

Provided that while passing the order to recover form a permit holder the sum of money agreed upon in accordance with sub-section (5) of the section 86, the person authorised shall specify there in the compounding money payable by the permit holder in case he agrees for composition, the date by which the permit holder is to intimate acceptance of composition and the date by which the composition money shall be remitted and receipt produced; and in determining the sum of money to be recovered in lieu of suspension of permits shall have regard to the nature, gravity and frequency of the offence committed, the quantum of punishment that would otherwise have been imposed and the earning capacity of the vehicle with reference to the nature of the road and passenger capacity in the case of stage carriage, daily mileage of the vehicle and hire charges, if any, in respect of other class of transport vehicles:

Provided further that the amount so recoverable in lieu of suspension of permits shall in no case be less than the amount specified the government by notification under section 200 for composition of the offence.

(2) Notwithstanding any delegation made in favour of the Secretary or any other officer in pursuance of sub-rule (1).

(i) The Chairman may call for any record relating to such matter, powers for disposal whereof has been delegated to the Secretary or any other officer, and dispose of the matter;

(ii) subject to the orders of the Chairman under clause (i.e.if any, Secretary may also exercise similar powers in the relation to such matter, power for disposal whereof has been delegated to any other officer subordinate to him;

(iii) any other officer subordinate to the Secretary may refer any matter, powers disposal whereof has been delegated to him, to the Secretary for disposal; and

(iv) the Secretary may refer, any such matter either referred to him for disposal by any other officer subordinate to him under clause (iii) or any other matter which are to be disposed of by him under the delegation made in pursuance of sub-rule (1) to the Chairman for disposal;

(3) The State Transport Authority, may for the prompt and convenient dispatch of its business, by a general or special resolution, delegate to its Chairman, its powers to give effect to any direction issued under section 67 by the State Government and to exercise and discharge the powers by and functions provided in sub-sections (3) and (4) of section 68.

> *(4) Notwithstanding anything contained in sub-rules (1) and (2), the State Transport Authority may give general instructions as to the manner in which the delegates shall exercise the powers delegated to them.*
>
> *(5) The Secretary of the State Transport Authority shall place before the Authority a Statement of the actions taken by the various officers to whom powers have been delegated in pursuance of such delegation in the next meeting."*

In view of the provisions contained in sub-rule (b)(ii) of Rule 41, power has been delegated to the Secretary or any other officer to renew or to refuse to renew all kinds of permit other than a temporary permit or a special permit as prescribed under Sub-Sec.(2) of Sec. 81 itself. Therefore, with this delegation of power either of the Chairman or Secretary or any other officer not below the rank of Assistant Secretary can renew the permit granted in favour of the permit holder save and except mentioned in the said provision.

11. Rule 52 of the Rules, which deals with renewal of permits, reads as follows:

> *"**52. Renewal of permits:** (1) Application for the renewal of a permit shall be made in writing to the State/Regional Transport Authority by which the permit was issued with in the time specified in sub-section (2) of section 81 and shall be accompanied by Part A of the permit and the fees prescribed in rule 48:*
>
> *Provided that the State/Regional Transport Authority may entertain an application for renewal of the permit made after the time referred to above as per the enabling provisions of sub-section (3) of section 81.*
>
> *(2) On receipt of the application, the State/Regional Transport Authority may call for such further particulars or documents as it may consider to be necessary.*
>
> *(3) The State/Regional Transport Authority renewing a permit shall call upon the holder to produce Part A thereof, and shall endorse Parts A and B accordingly and shall return them to the holder."*
>
> *(Emphasis supplied)*

The above mentioned provisions, if carefully read, would indicate that the application for the renewal of a permit shall be made in writing to the State/ Regional Transport Authority by which the permit was issued within the time specified in sub-section (2) of section 81 provided that the State/Regional Transport Authority may entertain an application for renewal of the permit made after the time prescribed in Sub-Rule (1) of Rule 51 as per the enabling provisions of sub-section (3) of Section 81. Therefore, under these rules, it is the State Transport Authority, which is competent to renew the permanent permit issued in respect of a vehicle, unless the power is so delegated under

Rule 41(b)(ii) either to Chairman or Secretary or any other officer not below the rank of Assistant Secretary. But, in view of the specific statutory provision, power has been vested with the State Transport Authority to grant renewal of permanent permit issued in respect of a vehicle.

12. In the case of ***House of Lord in Julius v. Lord Bishop of Oxford***, (1880) 5 AC 214, it was observed as under:-

> *"There may be something in the nature of thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."*

13. In ***Nazir Ahmad v. King-Emperor***, AIR 1936 PC 253 (2), it was held as follows:

> *"Whether a Magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which applies is that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."*

14. Taking note of the above mentioned observation, the apex Court in ***Commissioner of Police, Bombay v. Gordhandas Bhanji***, AIR 1952 SC 16, the apex Court held as under:-

> *"Public authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order….. An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor it be evaded, performance of it can be compelled."*

15. In ***Sirsi Municipality v. Cecelia Francis Tellis,*** AIR 1973 SC 855, the apex Court observed that "the ratio is that the rules or the regulations are binding on the authorities."

16. In ***Sukhdev Singh v. Bhagat Ram***, AIR 1975 SC 1331, the apex Court held as follows:-

> *"The statutory authorities cannot deviate from the conditions of service.* ***Any deviation will be enforced by legal sanction of declaration by Courts to invalidate actions in violation of rules and regulations.*** *The existence of rules and regulations under statute*

> *is to ensure regular conduct with a distinctive attitude to that conduct as a standard. The statutory regulations in the cases under consideration give the employees a statutory status and impose restrictions on the employer and the employee with no option to vary the conditions……In cases of statutory bodies there is no personal element whatsoever because of the impersonal character of statutory bodies……..**the element of public employment or service and the support of statute require observance of rules and regulations.** Failure to observe requirements by statutory bodies is enforced by Courts by declaring (action) in violation of rules and regulations to be void. The Court has repeatedly observed that whenever a man's rights are affected by decision taken under statutory powers, the Court would presume the existence of a duty to **observe the rules of natural justice and compliance with rules and regulations imposed by statute.**"*

17. In ***Sultan Sadik v. Sanjay Raj Subba***, AIR 2004 SC 1377, the apex Court held as follows:-

> *"Whenever any action of the authority is in violation of the provisions of the statute or the action is constitutionally illegal, it cannot claim any sanctity in law, and there is no obligation on the part of the Court to sanctify such an illegal act. Wherever the statutory provision is ignored, the Court cannot become a silent spectator to such an illegal act, and it becomes the solemn duty of the Court to deal with the persons violating the law with heavy hands."*

18. Keeping in view the above mentioned law laid down by the apex Court in various judicial pronouncements, this Court is of the considered view that if STAT has passed judgment in consonance with the statutory provisions contained under M.V. Act and Rules framed thereunder remitting the matter back to STA for fresh consideration of the application for renewal of permanent permit, it cannot be said that the same is illegal so as to cause interference by this Court. Needless to say that under Rule-52, power has been vested to the STA for renewal of permits and that itself is statutory one.

19. In ***General Commanding-in-Chief v. Dr. Subhash Chandra Yadav***, AIR 1988 SC 876, the apex Court held as follows:-

> *"Rules framed under the provisions of a statute form part of the statute and the Rules have statutory force. A rule can have the effect of a statutory provision provided (i) it confirms to the provisions of the statute under which it is framed; and (ii) it must come within the scope and purview of the rule making power of the statutory authority framing the rule."*

20. Therefore, the Orissa MV Rules, 1993, having been framed in exercise of power conferred by Sections 28, 65, 96, 111 and 138 of the Motor Vehicles Act, 1988, it has got its statutory force. Thereby, if Rule 52 prescribes that it is the State Transport Authority, which is competent to grant

renewal of permit, direction given by the STAT cannot be said to be illegal nor can it be said that there is an error apparent on the face of record.

21. Now, coming to the jurisdiction of the Court to interfere with the order of the State Transport Appellate Tribunal, if power is being exercised under Article 226 of the Constitution of India invoking the writ jurisdiction in the nature of certiorari, this Court is to find out that there is an error of law apparent on the face of record and not every error either of law or fact which can be corrected by the appellate or revisional authority and more particularly, the writ of certiorari is not meant to take the place of appeal. It lies where the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of law which it was meant to administer.

22. In ***Hari Vishnu Kamath v. Syed Ahmed Ishaque***, AIR 1955 SC 233, a Constitution Bench of seven learned Judges of the apex Court has laid down the following propositions as well settled and beyond the dispute:

> *"(1) For correcting errors of jurisdiction as when an inferior Court or Tribunal acts, without jurisdiction or in excess of it or fails to exercise it.*
>
> *(2) When the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving any opportunity to the parties to be heard or violates the principles of natural justice.*
>
> *(3) The Court issuing a writ of Certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous.*
>
> *(4) An error in the decision or determination itself may also be amenable to writ of Certiorari, if it is a manifest error apparent on the face of the proceedings, e.g., when it is based in clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by Certiorari but not mere wrong decision."*

23. In ***Nagendra Nath Bora v. Commr. of Hills Division, AIR 1958 SC 1240,*** the apex Court held as follows:

> *"The jurisdiction under Article 226 of the Constitution is limited to seeing that the judicial or quasi-judicial tribunals or administrative bodies exercising quasi-judicial powers do not exercise their powers in excess of their statutory jurisdiction, but correctly administer the law within the ambit of the statute creating them or entrusting those functions to them. In other words, its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. Mere formal or technical errors, even though of law, will not be sufficient to attract this extraordinary jurisdiction"*

24. In ***Sewpujanrai Indrasaurai Ltd. v. Collector of Customs***, AIR 1958 SC 845, the apex Court held that broadly speaking an essential feature of a writ of Certiorari is that the control which is exercised through it over judicial or quasi-judicial tribunals or bodies, is not in an appellate but supervisory capacity.

25. Keeping the abovementioned parameters in view and applying the same to the present context, this Court is of the considered view that STAT is well justified in directing the STA, Odisha, Cuttack to decide to grant of renewal of permanent permit to the petitioner. The claim as made by the petitioner that direction be issued to the Secretary, STA, Odisha by modifying the impugned judgment, cannot have any justification at this stage, in view of the fact that admittedly power has been vested under Rule-52 of 1993 Rules with the STA, Odisha, Cutack for renewal of permanent permit, unless the power is so delegated under Rule 41(b)(ii) either to the Chairman or Secretary or any other officer not below the rank of Assistant Secretary. Thereby, this Court does not find any error apparent on the face of record to have been committed by the STAT, Odisha, Cuttack while disposing of M.V. Appeal No.03 of 2020 vide judgment dated 06.03.2020 and subsequent order rejecting the petitioner for insertion of the word "Secretary" vide Annexure-3 dated 30.05.2020 to decide the question of renewal.

26. In the result, the writ petition merits no consideration and the same is hereby dismissed. However, there shall be no order as to cost.

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2020 (II) ILR - CUT- 253

D. DASH, J.

W.P.(C) NO. 3926 OF 2017

BIBHUTI BHUSAN SAHANI ……..Petitioner

.V.

AUTHORISED OFFICER-CUM ASST. CONSERVATOR OF FORESTS & ANR. …….For Opp. Parties

ORISSA FOREST ACT, 1972 – Section 56 – Confiscation Proceeding – Allegation of transporting of palm sizes without transit permit under the Odisha Timber and other Forest Produce Transit Rules, 1980 –

Order of confiscation passed – Confirmed in appeal by the District Judge – Writ petition – Plea raised that Rule 5 of the Odisha Timber and other Forest Produce Transit Rules, 1980 provides the list of cases where no transit permit under the rule- 4 is required and Rule-4 says that except those cases described under rule-5, transit permit stands as the necessity for the purpose of transportation of forest produce – Clause-(j) of sub-rule-1 of rule-5 provides that no transit permit shall be required to cover the transit of timber and firewood obtained from those species mentioned in Schedule-III in the area mentioned against each – Under Sl. no.18 of Schedule-III, the Palm Trees (Borassus flabllifer) finds mention as an exempted specie for its transportation in the State – Held, there has been no commission of forest offence in transporting the palm sizes without Transit Permit under the Odisha Forest Produce Transit Rules, 1980 and thus there cannot be any finding that there has been contravention of the provision of rule 4 of the said Rules – Orders set aside.

For the Petitioner : Rabinarayan Nayak, Nrimal Kumar Sen & Chitrabati Sethy
For the Opp. Parties: Addl. Govt. Adv.

ORDER Date of Order: 05.03.2020

D. DASH, J.

The petitioner by filing this application has invoked the jurisdiction of this Court under Article 227 of the Constitution in impeaching the judgment dated 19.01.2017 passed by the learned District Judge, Jajpur in FAO No. 43 of 2015 in the matter of an appeal under section 56 (2-e) of the Orissa Forest Act, 1972.

By the above order, in the appeal filed by the present petitioner assailing the order dated 28.02.2015 passed by the Authorized Officer, Cuttack Forest Division in OR Case No.14 of 2014-15 having been confirmed; the appeal has thus been dismissed. The vehicle (truck) bearing Registration No. OR-05-W-7468 belonging to the petitioner with the loaded timbers have been confiscated. The finding of the Authorized Officer that in transportation of the loaded timbers (palm hand sawn sizes) in the truck, forest offences have been committed and the truck has thus been used for commission of the forest offence, has been upheld in the appeal.

2. Facts giving rise to the proceeding are as under:-

On 11.06.2014, the truck bearing Registration No. OR-05-W-7468 having the load of the palm sizes was proceeding. It was detained by the

Foresters and the Guards attached to Byre Forest Range. The driver of the truck on being asked failed to produce any document in support of said transportation of the palm sizes. The forest officials found the palm sizes to be hand sawn and without any hammer mark. On checking, in total 912 numbers of hand sawn palm sizes were found to have been loaded in the truck. So the truck as well as palm sizes were seized and the proceeding for confiscation under section 56 of the Act was initiated.

3. The case of the petitioner is that he had engaged his truck under "Tarini Transport" of Jagatpur in the district of Cuttack and due to the illness of the permanent driver during the relevant period, another driver had been temporarily engaged. The truck in question was transporting fertilizer to Khamar and after unloading the fertilizer there, the driver was in search of one load for the down trip. The driver having got an offer for the down trip, informed the petitioner that one Prafulla Kumar Jena wanted to transport the palm sizes from Dhenkanal to Soro in the district of Balasore in his truck in the return trip. The petitioner then instructed the driver to verify the papers relating to the palm sizes and directed that only finding the permit for transportation of said timbers, he should allow those to be loaded and transport the same.

It is the further case of the petitioner that on 11.6.2014, the said driver of the truck informed him about the transportation of palm sizes and that the owner of the palm sizes had shown him a permit. It is said that the driver with his little knowledge had found the existence of due permit for such transportation of palm sizes to Soro and that was primarily by placing reliance on the words and believing the owner-cum-loader of the palm sizes in good faith.

4. The Authorized Officer in the enquiry initiated for confiscation of the vehicle and seized palm sizes as provided under section 56 of the Odisha Forest Act having recorded the evidence of seven witnesses from the side of the prosecution and the two witnesses from the side of the petitioner who are the petitioner himself and the concerned driver, upon discussion of their evidence has finally returned the finding that forest offence under section 56 of the Act and under sub-rule (1) and (2) of rule 4 of the Odisha Timber and Other Forest Produce Transit Rules, 1980 punishable under rule 21 of the said rule has been committed by using the said truck. It may be stated here that section 56 of the Odisha Forest Act, 1972 does neither define any offence nor prescribe any punishment for any such offence. It concerns with

the penalty of confiscation of the vehicle etc. used for commission of any forest offence. Similarly, only rule 21 of the Odisha Timber and other Forest Produce Transit Rules, 1980 is the penal rule prescribing punishment for contravention of rule 4 of said rule in transporting the forest produce other than those excepted under rule 5 of the said rules without the Transit Permit issued by the Authority.

The confiscation order having been passed; on being moved the appellate court has negated the contentions raised by the petitioner that no such forest offence/s has been committed by using the truck in question and that on the face on record, it was without the knowledge or connivance of the petitioner or the knowledge or connivance of the agent i.e. the driver and that all such reasonable and necessary precautionary measures in that regard had been taken. Accordingly, the appeal having been dismissed, the petitioner has filed the instant application.

5. Learned counsel for the petitioner submitted that the allegation stands that by transportation of the palm sizes by the said truck, forest offence has been committed. It was his submission that although the order of confiscation passed by the Authorized Officer is based on the finding that palm sizes were being illegally transported in the said truck without any authority i.e. the Transit Permit, nowhere in the entire order, it has been indicated in clear terms as to the same whether amounts to commission of offence under rule-21 of the Odisha Timber and other Forest Produce Transit Rules, 1980 or not. He submitted that the appellate court simply saying that the palm sizes are forest produce as the same comes under the definition of section-2(j) of the Odisha Forest Act, 1972, by a cryptic order has dismissed the appeal again without stating as to what offence it amounts to by such transporation. According to him, for the transportation of the palm sizes within the State of Odisha, no transit permit under Odisha Timber and other Forest Produce Transit Rules, 1980 is required and that is an exempted specie under clause-(j) of sub-rule -1 of rule-5 read with Schedule-III, as finds mention at serial no.18 of the said rules. He therefore, submitted that the orders of confiscation of the vehicle as well as the palm sizes are vulnerable.

6. Learned counsel for the State did not refute the submission of the learned counsel for the petitioner to the extent that sub-rule-1 of rule-5 of the Odisha Timber and other Forest Produce Transit Rules in its clause-(j) exempts the requirement of transit permit for transportation of certain species as mentioned in Schedule-III in the areas mentioned against each.

7. Keeping in view the submissions made, the order passed by the Authorized Officer as well as the lower appellate court being gone through; it is seen that neither the Authorized Officer nor the learned District Judge has in clear terms said that by user of the said truck bearing registration No.OR-05W-7468 which forest offence/s has/have been committed. The Authorized Officer when says that such transportation is without the required Transit Permit, he has not bestowed his attention to the facts as to whether under clause-(j) of sub-rule-1 of rule-5 of the Odisha Timber and other Forest Produce Transit Rules, 1980 in so far as the timbers which were being transported in the truck, if at all, there was any requirement of Transit Permit.

The learned District Judge in one paragraph at the end has assigned all the reasons for disposal of the appeal. Having carefully gone through the said paragraph, this Court finds that the learned District Judge has neither properly approached into the matter nor has examined the matter on hand as to what offence it amounts to by such transportation. The expressions in that paragraph are such that this Court is even unable to properly sum it up in saying as to what the appellate court has meant thereby. Therefore, it is felt apposite to reproduce the relevant paragraph of the judgment of the learned District Judge which run as under:-

> "On going though the case record, it is found that the driver Prakash Behera and the helper confess their guilty for transporting the said palm timber without any document for which the Forest Officer seized the same. While the proceeding in OR Case No. 14D of 2014-15 was going on before the Authorized Officer neither the driver or its owner (appellant) produce the so called permit in question for transportation of the said palm logs by above Truck. As discussed above, the palm logs comes under the definition of forest produce and the appellant fails to produce any document or receipt to prove that the said palm logs were used logs and brought from private land. Hence a presumption can be drawn that the said 912 pieces of palm had sawn sizes came under forest produce and the same were illegally possessed and transported by the Truck in question without valid permit. So this Court did not find any illegality and impropriety in the order passed by the Authorized Officer by confiscating the Truck in question. The order of confiscation of the offending vehicle stands to reason and needs no interference. Hence, it is ordered."

The above paragraph reveals that the appellate court has not at all applied his mind to the matter and having confused the matter even is not in a position to ascertain that in the factual settings of the case what finding is necessary for the imposition of extreme penalty of the confiscation of the vehicle.

8. Admittedly, in the present case, the palm sizes were being transported in the truck from Parjanga in the district of Dhenkanal to Soro in the district of Balasore i.e. within the State. Rule5 of the Odisha Timber and other Forest Produce Transit Rules, 1980 provides the list of cases where no transit permit under the rule-4 is required. Rule-4 says that except those cases described under rule-5, transit permit stands as the necessity for the purpose of transportation of forest produce. Clause-(j) of sub-rule-1 of rule-5 provides that no transit permit shall be required to cover the transit of timber and firewood obtained from those species mentioned in Schedule-III in the area mentioned against each. Under Sl. no.18 of Schedule-III, the Palm Trees (Borassus flabllifer) finds mention as an exempted specie for its transportation in the State. So, there has been no commission of forest offence in transporting the palm sizes without Transit Permit under the Odisha Forest Produce Transit Rules, 1980 and thus there cannot be any finding that there has been contravention of the provision of rule 4 of the said Rules.

9. For the aforesaid, this Court even accepting the prosecution case in entirety, finds that the truck in question has not been used in commission of any such forest offences as for the transportation of palm sizes within the State, no such transit permit under the Odisha Timber and other Forest Produce Transit Rules, 1980 was then required. The Authorized Officer as well as the learned District Judge are thus found to have fallen in error in directing the confiscation of the truck as well as palm sizes carried therein. Accordingly, it is held that the order passed by the learned District Judge, Jajpur in FAO No. 43 of 2015 as well as the order dated 28.02.2015 passed by the Authorized Officer, Cuttack Forest Division in O.R. Case No. 14D of 2014-15 are unsustainable, which are hereby set aside.

10. In the result, the application stands allowed.

The truck bearing registration no. OR-05W-7468 along with the palm sizes seized in connection with O.R. Case No. 14D of 2014-15 be forthwith released in favour of the petitioner.

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2020 (II) ILR - CUT- 259

D. DASH, J.

CRLREV NO. 401 OF 2018

MANOJRANJAN NAYAK ……..Petitioner

.V.

STATE OF ODISHA ……..Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 397 read with section 401 – Revision – Offence under sections 304/308/285 IPC and under section 17 of the Orissa Fire Services Act – Charge sheet filed – Cognizance taken, process issued – Fire broke out in the ICU of a Hospital causing loss of life of patients and damaged properties – Petitioner is the president of the Institution – Plea that the role of the petitioner is not at all there in the management of the Medical College and Hospital and is restricted to the policy making with reference to the academic affairs and not with regard to other affairs of the Hospital – Prayer for exercise of revisional jurisdiction to quash the order – Scope and ambit of Section 397 – Held, an order directing issuance of process is an intermediate or quasi-final order and therefore, the revisional jurisdiction under Section 397 Cr.P.C can be exercised against the said order. (Para 17)

Case Laws Relied on and Referred to :-

1. (2012) 9 SCC 460 : Amit Kapoor Vs. Ramesh Chander & Anr.
2. (1998) 5 SCC 749 : Pepsi Foods Ltd. Vs. Special Judicial Magistrate.
3. (1977) 4 SCC 137 : Amar Nath and Others Vs. State of Haryana & Anr.
4. (2013) 15 SCC 624 : Urmila Devi Vs. Yudhvir Singh.

For the Petitioner : M/s. A.K. Parija (Sr. Adv.), S.P. Sarangi, B. Sahu, T. Patanaik, V. Mohapatra, P.K. Dash, D.K. Das.

For the Opp. Party : Mr. S.K. Nayak, Addl. Govt. Adv.

JUDGMENT Date of Hearing : 12.03.2019 : Date of Judgment: 05.04.2019

D. DASH, J.

The petitioner by filing this revision under section 397 read with section 401 of the Code of Criminal Procedure, 1973 has prayed for examination of the legality and propriety of an order dated 21.03.2018 passed by the learned Sub-Divisional Judicial Magistrate, Bhubaneswar in C.T. No. 4604 of 2016 arising out of Khandagiri P.S. Case No. 518 of 2016 and to set aside the same.

2. The facts relevant for the purpose are the followings:-

On 17.10.2016 evening, there took place an unfortunate incident at the Intensive Care Unit (ICU) of Institute of Medical Science and SUM Hospital located at Khandagiri area of the city of Bhubaneswar, when all of a sudden fire broke out and spreaded causing loss of life of patients who were then being treated therein as also loss and damage to the properties. The death toll is stated to have stood at twenty two at the end. The Officer who was there at around 07.32 P.M. in the Fire Control Room, Bhubaneswar received a message about the outbreak of fire at the Hospital. The Officer-in-Charge of Secretariat Fire Service was then directed to attend that emergency. Pursuant to the above, two Fire Fighting Units with a Sky Life of Bhubaneswar Fire Station and three Firefighting Units of OFDRA, Baramunda, Bhubaneswar arriving at the spot started the firefighting and rescue operation. The first floor of the Hospital building was found to have been engulfed with fire. The ICU and Dialysis wards having come under the impact of fire and dense smoke having been filled, they deployed Fire Fighters, used breathing apparatus sets for evacuating the patients. Large number of patients having been affected were evacuated by breaking the glasses of the window pans. Those patients rescued in the operation were carried in available ambulances and admitted in other hospitals of the city. The Fire Fighting Operation continued for quite some time and around 10.00 P.M., the situation being brought under control, the fire fighting as also the rescue operation came to a halt.

The Fire Officer, Central Range, Bhubaneswar on 18.10.2016 around 4.00 P.M. lodged a report at Khandagiri Police Station leading to the registration of Khandagiri P.S. Case No. 518 of 2016 for offence under sections 304/308/285/34 IPC.

3. The FIR finds mention of the features then noticed during the preliminary investigation at the level of the Fire Protection Personnels and the inferences drawn therefrom. According to that, it is said that fire occurred in the store room situated in between the ICU and the Dialysis Ward for electric short circuit. The Air Condition Duct lying there in the store room caught fire immediately due to the intensity of the flame and those being got burnt, dense smoke got sucked into the Air-Conditioning System which then at a considerable velocity got spreaded to other areas like ICU, Dialysis Ward and adjoining rooms through the Air Conditioning Vents.

The allegations have been made against the "Sum Hospital Authority" that fire audit of the hospital being conducted in the year 2013, some shortcomings being noticed, though had been intimated to the Hospital Authority for compliance, those had not been complied with in order to ensure safety of life and property before issue of fire safety certificate. The 'Sum Hospital Authority' were implicated as the accused persons and so shown in the relevant coloumn in the F.I.R.

4. On completion of investigation, the Investigating Officer has submitted charge sheet placing the following persons for trial for commission of offence under sections 304/308/285 IPC and under section 17 of the Orissa Fire Services Act:-

(i) Dr. Pushparaj Samantasinhar (Medical Supdt.),
(ii) Amlya Kumar Sahoo (Executive Engineer),
(iii) Malay Kumar Sahoo (Junior Engineer- Electrical)
(iv) Sankesh Kumar Das (Fire Safety Officer)
(v) Manoj Ranjan Nayak (President, SOA University)

5. Upon receipt of the same, learned Magistrate on 21.03.2018 has passed the order which has been quoted in verbatim.

> "Charge-sheet No. 103 dated 21.03.2018 under section 304/308/285 IPC and under section 17 of the Orissa Fire Services Act against the accused persons namely, Dr. Pushparaj Samantasinhar, Amlya Kumar Sahoo, Malay Kumar Sahoo, Sankesh Kumar Das and Manoj Ranjan Nayak is received. Perused the F.I.R., CDs, 161 Cr.P.C. and other connected papers from the I.O. available on record, this Court is satisfied that prima facie of the offence under section 304/308/285 IPC and under section 17 of the Orissa Fire Services Act is well made out. Hence, cognizance of offence under section 304/308/285 IPC and under section 17 of the Orissa Fire Services Act is taken as per section 109(b) of the Cr.P.C. to proceed against accused person (s). The accused persons of court bail. Issued summons to the accused person fixing on 25.06.2018 for appearance. The case record be handed over to dealing assistant for preparation of P.P. forthwith."

The above order is assailed in this revision by the petitioner who has been issued with the process to face the proceeding for above offences.

6. Mr. A.K. Parija, learned Senior Counsel submitted that the petitioner and others arraigned as accused in the case had earlier moved this Court carrying an application under section 482 Cr.P.C. which was numbered as CRLMC No. 224 of 2017, with a prayer to quash the FIR complaining that

the FIR allegation even being so taken though do not at all make out a case under section 304 and 328 IPC, yet the case has been registered for those offences without any rhyme and reason only to harass. He submitted that this Court while disposing the same, on the basis of the allegations as laid directed that the case be taken up for commission of offence under section 304-A IPC and investigation be made. While doing so, it was left open for the Investigating Authority to proceed for any other offence even under those which had been indicated therein, in case sufficient material in support of fulfillment of ingredients for those offences come to surface.

He next submitted that said order being not at all taken into consideration, the investigating authority has mechanically placed the charge-sheet for the same offences under section 304/308/285/34 IPC read with section 17 of Orissa Fire Services Act when absolutely no material in support of those offences has come to light which was the specific direction of this Court so as to proceed for those offences. He submitted that in view of the earlier order and as per law, the investigation authority was obligated to so indicate as to the availability and collection of the materials for placing the charge sheet for all those offences. So, it is said that without even minimum application of mind, the charge-sheet has been filed.

He further submitted that the learned Magistrate while passing the non-speaking order of taking cognizance of those offences has also done so; that without any application of mind as is required for the purpose and in a mechanical and slipshod manner has passed the order taking cognizance of offences particularly under sections 304/308 IPC. According to him, as it appears, the court below has also not kept in view the order of this court and as if being not even aware of the same has passed the order.

His second limb of submission was that under any circumstance, the order of issuing the process particularly against the petitioner who is not attached to the Hospital that too, in presence of other named and designated personnels, without any such material to so implicate him in the happening of the incident either directly or indirectly is not sustainable and this petitioner with his admitted relationship, positioning and work arena in presence of specific managerial personnel/employees entrusted with the job having the nexus and to look after the fire safety measures of the Medical College and Hospital, being directed to appear in the case to face the proceeding is illegal and improper.

According to him, the role of the petitioner who is an academician, is not at all there in the management of the Medical College and Hospital and is restricted to the policy making with reference to the academic affairs and not with regard to other affairs of the Hospital which is attached to the Medical College as is required for the College which is a non-profit making hospital.

He further submitted that, this petitioner ought not to have been arraigned in the case by issuance of process even upon acceptance of the entire prosecution allegations on their face value. He submitted that this petitioner is the President of the Trust which runs the Medical College and Hospital as well as other Institutes under the umbrella of Trust, 'Sikhya 'O' Anusandhan', "deemed to be University". He submitted that the Medical Superintendent, Executive Engineer (Electrical), Junior Engineer (Electrical) and Fire Safety Officer with his assistants who are involved in the day to day affair and management of the Medical College and Hospital in so far as their field of work is concerned; especially as to safety of life of persons and properties etc and to the extent of maintenance of fire safety equipments in place have been arraigned as accused and the allegation stands that despite the points raised during the fire audit in the year 2013 asking for their rectification and compliance, those have not been taken care of and had those been followed, this fire tragedy either would not have taken place or could have been avoided or its magnitude would have been lesser, and so it is alleged that the incident was also on account of negligence on the part of the "Hospital Authority" and inadequate maintenance of the Fire Safety installments.

He submitted that this petitioner thus is in no way associated in the Hospital building's work as also all such infrastructural activities including the maintenance of the building, fittings, fixtures and all such machineries running through electrical connections or otherwise and electrical fittings etc and the officials as well as other employees with specified jobs in that light have been entrusted with all such acts to be done and performed as their duty and thus to say that this petitioner is liable for the offence which might have arisen for their non-performance of duty properly or for the negligence in performing their duty is not correct and under no circumstance, this petitioner as the President of the Trust-SOA can be criminally made liable even by applying the doctrine of vicarious liability. He submitted that here this petitioner is not the employer and it is the Trust which is 'juridical person' is the employer of those persons in-charge of the Hospital building entrusted

with the performance of the job in taking care of everything including the safety etc. to life and property and as in that status, it is said that the petitioner had once made the correspondence with the Authority in requesting them to conduct Fire Audit way back on 18.07.2009, when admittedly as per the documents collected, all other correspondences since then have been made by the officials and other employees associated with the said running of the Hospital, he has been arraigned as an accused. He thus submitted that in so far as first letter, said to have been given by the petitioner requesting for a Fire Audit, the deficiencies pointed out then to him in the audit report dated 30.07.2009 have been met and that has been stated in the correspondence dated 05.04.2013 made by the Fire Prevention Officer when some more measures were suggested which are said to have not been complied with. It was submitted that after setting the request long back in the year 2009, everything have been done by the concerned persons concerned with the work and in fact the deficiencies under that report have been met. In the absence of any such material suggestive of the fact that such suggestions given in the year 2013 were brought to the knowledge of the petitioner or that such non-response to the suggestions given in the year 2013 were under the command or order of this petitioner, he cannot be attributed to have played any role in the matter of non-compliance, if any, and also cannot be held vicariously liable which may in the worst case arise against the Trust-Employer which is not arraigned as an accused. His submission was that the Trust having not been made an accused, the prosecution against the petitioner as its President cannot go on. He submitted that the FIR when shows the case to have been registered against Hospital Authority, this petitioner being the President of the Trust and this Hospital being one of its units/organs, he is not liable to be proceeded against for the criminal action as not even having any remote nexus with the negligence or omission if any, in connection with the incident. He thus submitted that the learned Magistrate's order issuing process against this petitioner to face the criminal proceeding merely because he has just been shown as an accused in the relevant column in the charge sheet amounts to an illegality and the order to that effect suffers from the vice of non-application of judicial mind and as such is liable to be set aside.

7. Mr. S.K. Nayak, learned Additional Standing Counsel submitted all in favour of the order under examination.

It was his submission that in view of the non-collection of any material during investigation and non availability of the same to show about

the compliance of all those deficiencies pointed out during that fire audit of the Hospital held last, the offence under section 304 and 308 of the IPC are prima facie made out. He next submitted that the petitioner being the head of the Trust under whose control this Institution is running and under the umbrella of which all the institutions stand guided; he cannot wriggle out of the criminal liability for the said incident. He submitted that even in the absence of his direct involvement in the matter of infrastructural activities, their maintenance etc which have the concern with the safety of life as well as the property of all concerned, the doctrine of vicarious liability being applicable, the petitioner's prima facie liability for the offences comes in.

According to him, the stage is too premature to appreciate the submissions advanced by the learned Senior Counsel for the petitioner and those would only arise in the trial for consideration and decision. It was submitted that the Trust being the employer and the petitioner being its President representing the Trust, for such actions of the employees leading to the commission of offence, he cannot escape from the liability on criminal side when he is ordained by virtue of his position as such to oversee that all such aspects having the nexus with the safety and security of human life and property and ensure that the deficiencies are properly met.

He submitted that though in the charge sheet, it has not been indicated as to on what materials such offence under section304 IPC and 308 IPC are founded upon, that however in view of death of patients in the tragedy is of no significance further when the petitioner has all such scope to point out those deficiencies during framing of charge or in the trial in the final round.

8. Before proceeding to address the submission of the learned Senior Counsel for the petitioner, it would be proper to take note of the scope of jurisdiction under section 397 read with section 401 of the Cr.P.C.

In case of *Amit Kapoor vs. Ramesh Chander and another*; (2012) 9 SCC 460:-

> "19. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction,

particularly, with regard to quashing of charge either in exercise of jurisdiction under section 397 or Section 482 of the Code or together, as the case may be:

1) Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercise in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

2) The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent persons can ever reach such a conclusion and whether the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

3) The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

4) Where the exercise of such power is absolutely essential to prevent patent Miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

5) where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bare is intended to provide specific protection to an accused.

6) The court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

7) The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

8) Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

9) Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

10) It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

11) Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

12) In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

13) Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

14. Where the charge-sheet report under section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

15) Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist. {Ref:- State of West Bengal and Ors. V. Swapan Kumar Guha and Ors.:AIR 1982 SC 949; Madhavrao Jiwaji Rao Scindia and Anr. V. Sambhajirao Chandrojirao Angre and Ors.: AIR 1988 SC 709; Janata Dal v. H.S. Chowdhary and Ors.: AIR 1993 SC 892; Mr. Rupan Deol Bajaj and Anr. V. Kanwar Pal Singh Gill and Ors.: AIR 1996 SC 309; G. Sagar Suri and Anr. V. State of U.P. and Ors.: AIR 2000 SC 754; Ajay Mitra v. State of M.P.: AIR 2003 SC 1069;M/s. Pepsi Foods Limited and Anr. V. Special Judicial Magistrate and Ors.: AIR 1988 SC 128; State of U.P. v. O.P. Sharma: (1996) 7 SCC 705; Ganesh Narayan Hegde v. S. Bangarappa and Ors: (1995) 4 SCC 41; Zundu Pharmaceutical works Limited v. Mohd. Sharaful Haque and Ors.: AIR 2005 SC 9; M/s. Medchl Chemicals and Pharma (P) Limited v. Biological E. Limited and Ors.:AIR 2000 SC 1896 Shakson Belthissor v. State of Kerala and Anr. (2009) 14 SCC 466; V.V.S. Rama Sharma and Ors. V. State of U.P. and Ors.: (2009) 7 SCC 234; Chunduru Siva Ram Krishna and Anr. V. Peddi Ravindra Babu and Anr.: (2009) 11 SCC 203; Sheo Nandan Paswan v. State of Bihar and Ors.: AIR 1987 SC 877; State of Bihar and Anr. V. P.P. Sharma and Anr.: AIR 1991 SC 1260; Lalmuni Devi (Smt.) v. State of Bihar and Ors.: (2001) 2 SCC 17; M. Krishnan v. Vijay Singh and Anr.: (2001) 8 SCC 645; Savita v. State of Rajasthan: (2005) 12 SCC 338; and S.M. Datta v. State of Gujarat and Anr.: (2001) 7 SCC 659}."

9. In the case at hand, the FIR for the said incident was registered against the "Hospital Authority" being so shown as the accused in the

relevant column meant for that. The gist of the accusations as indicated in the charge sheet is that:-

> "Under the above circumstances, it is crystal clear that there was the incident inside the Medicine ICU and Dalysis ward of SUM Hospital, Bhubaneswar and there was loss of 23 nos. of human lives. The instructions imparted bny the Fire Prevention Wing, Orissa and Fire Audit Team on the fire safety of the Hospital were not complied by the Hospital Authorities. The Hospital Authorities were well known that if they do not fulfill the shortcomings of the fire safety measure as pointed out by the Fire Audit Team, it may endanger the life of patients as well as the properties of the hospital. Thus, the Hospital Authorities knowingly and negligently omitted the instructions to guard against the probable danger to human life from fire. So, there is sufficient evidence U/s. 304/308/285/34 of IPC and section 17 of the Orissa Fire Service Act, 1993 is well established against the accused persons namely, 1) Manoj Ranjan Nayak 2) Dr. Pusparaj Samantasinghar, 3) Amlya Kumar Sahoo, 4) Malay Kumar Sahoo and 5) Santosh Kumar Das, Fire Safety Officer of IMS & SUM Hospital, Bhubaneswar. Hence, I submitted Khandagiri P.S. C.S. No. 103 Dt. 21.03.2018 U/S. 304/308/285/34 IPC/ 17 of Orissa Fire Service Act, 1993 against them to face their trial in the court of law."

10. A careful reading of the above shows that the investigating authority is of the view that the Hospital Authority knowingly did not carry out the instructions to guard against the probable danger to human life from fire by taking no such step in complying the suggestive measures pointed out in the last fire audit in the year 2013 and having neglected in not doing so, they have committed the offences.

11. It appears that all such steps in making correspondences with the Authority of the State to cover up the deficiencies as pointed out during last Fire Audit of the year 2013 have been made by the concerned Authority attached to the said Medical College and Hospital. Those have been collected in course of investigation. The Registrar of the SOA University on 14.07.2016 had written a letter to the Inspector General of Police, Fire Services Odisha to issue 'No Objection Certificate' in view of compliance of all the suggestions given by them on 05.04.2013 concerning 2B+G+2 floors of Hospital Block and G+3 floors of Medical College and other buildings. The return correspondence is also with that Registrar asking further documents for grant of 'No Objection Certificate' to which he has responded.

12. In view of all the aforesaid, keeping in view the first limb of the submission of the learned Senior Counsel for the petitioner and the reply of learned Additional Standing Counsel, it needs be examined as to whether the

court below has committed any illegality or impropriety in passing the order of taking cognizance of offence under sections 304 and 308 IPC.

13. Admitted position is that in CRLMC No. 224 of 2017, this Court by order dated 22.08.2017 in seisin of a proceeding under section 482 Cr.P.C. to consider the prayer to quash the FIR in question upon examination of the contents, first of all has referred to the provision of section 299, 304 and 304-A IPC and then has carefully gone through the decision of the Apex Court in "*Shantibhai J. Vaghela and another vs. State of Gujarat and others*; (2012) 13 SCC 231 and found the facts of the case in hand as akin to the facts of the cited case in with respect to the allegations of negligence on the part of the Hospital Management in the matter of providing adequate fire safety measures, that ultimately resulted in the death of some persons due to fire accident caused by electrical short circuit. Taking note of the fact that there stands no allegation of commission of any positive act on the part of the hospital management as distinguished from silence, inaction or mere lapse or failure to provide adequate fire safety measures which is the principal allegation in the FIR, it had been said that no prima facie case is made out for culpable homicide not amounting to murder punishable under section 304 IPC and also section 308 IPC and therefore registration of FIR for offence under section 304 and 308 IPC having been held to be unsustainable, it was directed that the FIR be registered for offence under section 304-A IPC for investigation. This Court of course then had further clarified the same confining the view as to the stage as it was then with the materials as then available.

The relevant paras are as under:-

> "13. The facts of the instant case are almost akin to the facts of the case in Shantibhai (supra) with respect to the allegations of negligence on the part of the hospital management in the matter of providing adequate fire safety measures, that ultimately resulted in the death of some persons due to the fire accident caused by electrical short-circuit. In the FIR there is no allegation of commission of any positive act on the part of the hospital management as distinguished from silence, inaction or a mere lapse or failure to provide adequate fire safety measures which is the principal allegation in the FIR. As such prima facie it cannot make out a case of culpable homicide not amounting to murder punishable under section 304 and section 308 of the IPC.
>
> In the aforesaid circumstances, registration of the FIR in the present case for the offence under section 304 IPC and not for offence under section 304-A, IPC is unsustainable, and, therefore, this Court strikes off section 304, IPC from the FIR and directs for registration of offence punishable under section 304-A, IPC in its place and continue with investigation accordingly.

> 14. This direction however should not be understood to mean that the power of the Investigating Officer to submit charge-sheet under section 304, IPC, in case during investigation sufficient materials and evidence are gathered making out prima-facie a case of culpable homicide not amounting to murder, and also the power of the Court under section 216 or section 232 of the Code of Criminal Procedure is curtailed."

14. The judgment has been duly communicated and the Court below has received the same on 20.09.2017 and that has also been duly communicated to the Investigating Officer.

The investigating agency appears to have totally ignored the order. The case diary does not reveal that even any reference to that order has ever been made by the Investigating Officer. Pursuant to the order, there was never any rectification as to the registration of the FIR, as directed. The investigation having proceeded further at the end, charge sheet has been submitted for those two offences under section 304 and 308 IPC after noting that this Court has so directed to submit the Final Form. The narrations in the charge sheet do not reflect as to what are those materials which have been collected in the investigation in addition to those materials available while lodging the FIR and its registration as are sufficient for making out prima facie case of culpable homicide not amounting to murder and attempt to commit culpable homicide.

So in view of the earlier order not only that the Investigating Agency has not stated a single line with reference to any material so collected as to commission of any positive act on the part of the Hospital Management as distinguished from silence, inaction or a mere lapse or failure to provide adequate fire safety measures so as to prima facie make out a case of culpable homicide not amounting to murder punishable under section 304 IPC and under section 308 of the IPC to justify the action of submission of charge-sheet restoring to those provisions. The court below, as is crystal clear from the impugned order, has just gone to accept the charge sheet version as if being not aware of the earlier order of this Court in CRLMP No. 224 of 2017. It has also not provided any justification whatsoever with reference to the materials being collected in the investigation and taken into consideration so to infer for a moment that the court below has duly exercised the power as per law in taking cognizance of those offences. The court below has merely approved the action as proposed in the charge-sheet without any short of examination of the materials collected in course of investigation and referring to those.

It is worthwhile to point out that so as to be apprised of the detail developments as to filing of the charge sheet for offence under section 304/308 IPC, this Court by order dated 04.12.2018 had directed the 'State' (Prosecution) to file point wise note to the revision petition. Pursuant to that order, the learned counsel for the State upon receipt of the detail information from the Investigating Officer has filed the note on 11.01.2019.

It is stated that based on the version of patients examined during investigation who have stated about the lacuna of fire safety and prevention as on the active part of the Medical Authorities and the complainant, the charge sheet has been filed. When the version of the complainant was there from the beginning and such were the statements of the witnesses, the note is silent that based on what materials and in which way, prima facie case is made out for offence under section 304 and 308 IPC. The direction of this Court appears to have not at all been touched upon and rather thrown to the winds by Investigating agency in submitting the charge-sheet and so also by the court below, while passing the impugned order.

The intent or knowledge has to be the direct motivating force of the act for the grave and more serious charge of culpable homicide. Mere possibility of knowledge that death is a consequence of an act is inadequate to draw an inference as to the existence of requisite knowledge in the mind of the offender. A degree of certainty in the awareness of the individual as to the likelihood of death as a consequence of his act is a pre-requisites for imputation of requisite 'mensrea' in a case of culpable homicide. The Magistrate is not to take cognizance of offences on the mere ipse dixit of the prosecution even in the absence of any such material prima facie justifying those offences. The Magistrate has to apply his mind independently to the facts of the case based on uncontroverted materials placed in taking a view that a prima facie case stands for the offences to be taken cognizance. The legal proposition do not stand that the court is bound to take cognizance of a graver offence by way of abundant caution although the materials on record do not prima facie show the ingredients of the alleged graver offence. The duty is not ministerial and as like a post office.

In view of all the aforesaid, the order of the learned Magistrate taking cognizance of the offences under section 304 and 308 IPC do not stand to get the seal of approval in saying that there surfaces no such illegality or impropriety therein and as such said order as passed cannot be sustained.

15. Proceeding to address the second limb of the submission specifically as to the issuance of process against the petitioner, let us take note of the decision in so far as issuance of process in a criminal proceeding against a person is concerned. In case of ***Pepsi Foods Ltd. Vs. Special Judicial Magistrate; (1998) 5 SCC 749,*** it has been held:-

> "Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course.
>
> xx xx x xx
>
> The order of the Magistrate must reflect that he has applied his mind to the facts of the case and the law applicable thereto.
>
> xx xx x xx
>
> The complaint petition, given face value and taken to be correct in its entirety, should disclose an offence instead of being found to be an abuse of the process of the Court."

16. In summoning an accused, the merits and demerits of the case are not required to be examined so also as to whether the materials collected are adequate for supporting the conviction. The evaluation of the evidence for judging its merit is not the exercise required to be undertaken. The order of issuance of summon is based upon subject to the satisfaction of the Magistrate considering the police report and other documents and satisfying himself that there is sufficient ground for proceeding against the accused. The court must apply its mind to the allegations in the charge-sheet and evidence produced and accordingly satisfy itself as to the sufficiency of the ground to proceed against the accused so as to issue process against him.

17. Coming to the question of exercise of the revisional jurisdiction against order of issuance of process, it is profitable to refer to the case of ***Amar Nath and Others Vrs. State of Haryana and Another*** **(1977) 4 SCC 137**. It has been held therein that the term "interlocutory order" in Section 397(2) Cr.P.C. denotes orders of purely interim or temporary nature which do not decide or touch the important rights or liabilities of the parties and any order which substantially affects the right of the parties cannot be said to be an 'interlocutory order'. ***In K.K. Patel and Another v. State of Gujarat and Another*** **(2000) 6 SCC 195**, this Court held as under:-

> "11. …….. It is now well-nigh settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage (vide *Amar Nath and Others v. State of Haryanaand Another* (1977) 4 SCC 137, *Madhu Limaye v. State*

of Maharashtra (1977) 4 SCC 551, *V.C. Shukla v. State* through CBI 1980 Supp. SCC 92 and *Rajendra Kumar Sitaram Pande and Others v. Uttam and Another* (1999) 3 SCC 134). The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code……".

24. Whether against the order of issuance of summons under Section 204 Cr.P.C., the aggrieved party can invoke revisional jurisdiction under Section 397 Cr.P.C. has been elaborately considered by this Court in ***Urmila Devi v. Yudhvir Singh* (2013) 15 SCC 624**. After referring to various judgments, it was held as under:-

"14. ……. On the other hand in the decision in *Rajendra Kumar Sitaram Pande and Others v. Uttam and Another* (1999) 3 SCC 134, this Court after referring to the earlier decisions in Amar Nath and Others v. State of Haryana and Another (1977) 4 SCC 137, *Madhu Limaye v. State of Maharashtra* (1977) 4 SCC 551 and V.C. Shukla v. State through CBI 1980 Supp. SCC 92 held as under in para 6: (*Rajendra Kumar Sitaram Pande* case , SCC pp. 136-37).

"6. … this Court has held that the term 'interlocutory order' used in the Code of Criminal Procedure has to be given a very liberal construction in favour of the accused in order to ensure complete fairness of the trial and the revisional power of the High Court or the Sessions Judge could be attracted if the order was not purely interlocutory but intermediate or quasi-final. This being the position of law, it would not be appropriate to hold that an order directing issuance of process is purely interlocutory and, therefore, the bar under sub-section (2) of Section 397 would apply. On the other hand, it must be held to be intermediate or quasi-final and, therefore, the revisional jurisdiction under Section 397 could be exercised against the same. The High Court, therefore, was not justified in coming to the conclusion that the Sessions Judge had no jurisdiction to interfere with the order in view of the bar under sub-section (2) of Section 397 of the Code."

This decision makes it clear that an order directing issuance of process is an intermediate or quasi-final order and therefore, the revisional jurisdiction under Section 397 CrPC can be exercised against the said order. This view was subsequently reiterated in ***K.K. Patel and Another v. State of Gujarat and Another* (2000) 6 SCC 195."**

25. After referring to various judgments, in *Urmila Devi*, this Court summarised the conclusion as under:-

"21. Having regard to the said categorical position stated by this Court in innumerable decisions resting with the decision in *Rajendra Kumar Sitaram Pande and Others v. Uttam Singh and Another* (1999) 3 SCC 134 as well as the decision in *K.K. Patel and Another v. State of Gujarat and Another* (2000) 6 SCC 195, it will be in order to state and declare the legal position as under: 21.1. The order issued by the Magistrate deciding to summon an accused in exercise of his power under

> Sections 200 to 204 CrPC would be an order of intermediatory or quasi-final in nature and not interlocutory in nature.
>
> 21.2. Since the said position viz. such an order is intermediatory order or quasi-final order, the revisionary jurisdiction provided under Section 397, either with the District Court or with the High Court can be worked out by the aggrieved party.
>
> 21.3. Such an order of a Magistrate deciding to issue process or summons to an accused in exercise of his power under Sections 200 to 204 Cr.P.C, can always be subject-matter of challenge under the inherent jurisdiction of the High Court under Section 482 Cr.P.C.
>
> 23. Therefore, the position has now come to rest to the effect that the revisional jurisdiction under Section 397 Cr.P.C. is available to the aggrieved party in challenging the order of the Magistrate, directing issuance of summons."
>
> In a catena of judgments, it has been held that the aggrieved party has the right to challenge the order of Magistrate directing issuance of summons.

18. The petitioner as is seen from the charge sheet has been placed for trial of the offences as above being taken as within the group and ambit of the 'Hospital Authority' being the President of the Trust whose one such unit is the Medical College and Hospital and that on 18.07.2009, upon a letter of request being given by the petitioner for grant of No Objection Certificate and to have the Fire Audit of the Hospital, the Authorities had visited the Hospital and had given the report on 30.07.2009. As to the compliance of the suggestive measures pointed out then, there is no complain and it is said that all such suggestions have been carried into execution. The Medical College and Hospital have their work force in different fields of work including officials manning the Departments with placement of personnels being designated to look after the infrastructural affairs and the fire safety measures. They have been arraigned as accused persons.

19. The allegation is as to the inaction in the matter of the suggestions for fire safety as pointed out during Fire Audit of the hospital conducted in the year 2013 by letter dated 05.04.2013. The prosecution case is that in the subsequent Fire Audit in the year 2013, some more suggestions being given, those were not taken care of and for said negligence on the part of the Hospital Authority coupled with inadequate maintenance of available fire safety installations; the incident took place.

All the above factual settings, when emanate from the materials placed by the prosecution in filing the charge-sheet, the learned Magistrate

was under legal obligation to keep those in mind in order to arrive at a satisfaction as to whether there are sufficient grounds for proceeding against the petitioner or not. Thus on that score also, the impugned order does not successfully pass through the laid down tests.

20. In the wake of all the aforesaid, the impugned order is set aside and the matter is remitted back to the court below for being dealt in accordance with law. Accordingly, the REVISION stands disposed of.

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2020 (II) ILR - CUT- 275

BISWANATH RATH, J.

C.M.P. NO.1062 OF 2019

BIRAT CHANDRA DAGARA .....Petitioner

.V.

ORISSA MANGANESE & MINERALS LTD. .....Opp. Party

ARBITRATION & CONCILIATION ACT, 1996 – Sections 34 & 36 – Provisions under – Enforcement of Arbitration Award by the decree holder – Award on the basis settlement – Judgment debtor filed application U/s. 47 of C.P.C. – Maintainability of such petition questioned – Held, there is no scope for entertaining such objection involving the execution proceeding particularly in absence of challenging the award U/s.34 of the Act.

Case Laws Relied on and Referred to :-

1. 2007 (2) Arb.LR 82(SC) : Special Deputy Collector (Land Acquisition), General, Hyderabad B. Chandra Reddy & Ors.
2. 2004(2) Arb.LR 469 : Krishna Kumar Mundhra Vs. Narendra Kumar Anchalia.
3. 2007 (Suppl.) Arb.LR 374 (Madras) : Sri Swaminathan Construction Vs. Thriunavukkarasu Dhanalakshmi Education & Charitable Trust & Ors
4. 2014(1) Arb.LR 134 (SC) : Kanpur Jal Sansthan & Anr Vs. Bapu Construction.
5. AIR 2001 SC 4010 : Union of India Vs. M/s.Popular Construction Co.
6. AIR 2012 Jharkhand 53 : Gaffar Khan Vs. Magma Shrachi Finance Ltd., Kolkata.
7. AIR 2003 GAUHATI 158 : M/s. Subhas Projects & Marketing Ltd. Vs. Assam Urban Water Supply and Sewerage Board.

For Petitioner : M/s. J.Patnaik, B.Mohanty, Sr. Adv., S.Patnaik, A.Patnaik, B.S.Rayaguru, S.Mohapatra & S.S.Pradhan

For Opp.Parties : M/s. R.K.Rath & R.K.Mohanty, Sr.Advs., A.K.Kanungo & S.K.Sahu

JUDGMENT Date of Hearing : 18.12.2019 : Date of Judgment : 07.01.2020

BISWANATH RATH, J.

This Civil Miscellaneous Petition involves a challenge to the order passed by the District Judge, Mayurbhanj at Baripada rejecting an application at the instance of the judgment-debtor objecting the executability of a decree / Arbitration Award between the parties.

2. The dispute involves here has a long career. Main dispute involves mining lease over an area of 618 hcts. at Suleipat in Mayurbhanj District executed originally infavour of one Shri Bajranglal Padia for a term of 30 years. Subsequently, the lease hold was transferred by said Padia to the petitioner, the judgment-debtor. The judgment-debtor and the opposite party, the decree-holder, who in the process entered into an agreement for raising of iron ore in the petitioner's Suleipat lease area from April, 2010, constituting a Joint Venture Company, establishment of a manufacturing plant and undertaking the renewal of mining and all statutory clearances at its own cost, with further condition to set up a manufacturing unit in the name of Joint Venture Company in the State of Odisha. It is while the matter continuing as such, a dispute arose between the judgment-debtor and the decree-holder involving a notice dated 29.10.2015 to the petitioner for invoking Arbitration Clause under the Joint Venture agreement for settlement of the dispute. Parties landed in dispute which ended in filing of SLP(C) Nos.13599/2016, 13803/2016 and 13824/2016 disposed of on 1.7.2016. Finally under the direction of the Hon'ble apex Court, Hon'ble Justice (Retd.) Vikramjit Bose was appointed as the sole Arbitrator to arbitrate the dispute between the parties. Consequent upon appointment of the sole Arbitrator at the instance of the Hon'ble apex Court, the arbitration proceeding was ultimately concluded with a settlement award on consent of both the parties and the arbitration award was consequently passed in terms of the settlement therein on 20.1.2018. Consequent upon passing of the award on settlement, the decree-holder initiated an execution proceeding bearing Execution Petition No.1/2019 under Section 36 of the Arbitration & Conciliation Act, 1996. Order being passed involving an application under

Section 151 of C.P.C. restraining the judgment-debtor from carrying out the mining operation, the judgment-debtor filed a petition to recall the same. Being aggrieved by the order of the District Judge, Mayurbhanj on the above application, the judgment-debtor carried a writ petition bearing W.P.(C) No.6353/2019 to this Court. This Court hearing the parties was pleased to set aside the order passed by the District Judge dated 7.3.2019 thereby remitting the matter this Court directed the District Judge, Mayurbhanj to re-dispose of the application dated 21.2.2019. This application was again disposed of by the order of the District Judge, Mayurbhanj. This time the decree-holder being aggrieved by the order of the District Judge filed W.P.(C) 7445/2019. The judgment-debtor also simultaneously being aggrieved by a portion of the same order filed W.P.(C) No.7537/2019 in this Court. In the meantime, one of the parties moved the Hon'ble apex Court in filing SLP, which was disposed of on 26.4.2019 requesting therein to the High Court to dispose of the pending writ petition as early as possible keeping in view the urgency involving the matter. Following the direction of the Hon'ble apex Court, this Court upon disposal of both the matters passed judgment on 9.7.2019 therein while setting aside the order dated 2.4.2019, this Court allowed revival of the order dated 7.2.2019. Involving the judgment dated 9.7.2019 in disposal of the above writ petitions, the judgment-debtor again filed S.L.P.(C) No.16647 of 2019 and the Hon'ble apex Court by order dated 2.8.2019 dismissed the SLP indicated herein above with direction to the District Judge to adjudicate and pass order in the execution proceeding. It is at this stage of the matter, the petitioner, judgment-debtor filed an application though having no nomenclature but appears to be an application in the guise of objection to the executability of the settlement award being passed by the sole Arbitrator. This application having been rejected by the District Judge, vide Annexure-1 gives rise to filing of the present C.M.P.

3. In advancing his argument, Sri A.Patnaik, learned counsel for the petitioner taking to the entire history involving the case in different rounds of litigation to this Court and also involving different rounds of litigation to the Hon'ble apex Court and also taking into some of the developments taken place in between in the matter of introduction of new provision, vide the Minerals (Other than Atomic and Hydro Carbons Energy Minerals) Concession Rules, 2016, further taking this Court to the objection so filed by the judgment-debtor before the District Judge, more particularly through the grounds 'A' to 'S' therein appearing in the additional affidavit dated 1.10.2019 filed in the present C.M.P., reiterated the stand taken in the court

below and attempted to submit that there has been no consideration of the case of the petitioner by the District Judge in the disposal of such objection. Further referring to the provision through the new Rules being an obstruction to work out the settlement award, Sri Patnaik, learned counsel for the petitioner, judgment-debtor contended that the execution proceeding since invalid, the objection filed at their instance should have been allowed. It is in the circumstance, Sri Patnaik sought for intervention of this Court in the impugned order at Annexure-1. Sri Patnaik, learned senior counsel, however submitted that for the compromise arbitral award, the judgment-debtor has no scope for filing application for setting aside such award under Section 34 of the Act, 1996.

4. To the contrary, Sri R.K.Rath, learned Senior Advocate also along with Sri R.K. Mohanty, learned Senior Advocate appearing for the opposite party, decree-holder while seriously contesting the challenge of the petitioner on the ground that for the restrictions involving Section 36 of the Arbitration & Conciliation Act, 1996, there was no question of entertaining any objection to the execution proceeding more particularly keeping in view that there is in fact no challenge to the settlement award under Section 34 of the Arbitration & Conciliation Act, 1934. Sri Rath, learned senior counsel for the opposite party taking this Court to the background involving the case contended that the petitioner on the selfsame ground has opposed the interim application before the District Judge. It is also contended that the grounds raised herein were also raised in the proceeding before the District Judge and considering the same injunction order having been passed, the petitioner came to this Court on two occasions and on both occasions, the petitioner has failed. The petitioner's move involving grant of injunction also on the same plea being considered by the Hon'ble apex Court in disposal of the SLP against the petitioner, there should not have been any further obstruction in the matter of hearing of the Section 36 application. For this conduct of the petitioner, Sri Rath, learned senior counsel contended that the petitioner is not showing any interest in the working out of the compromise award and on the other hand, is making deliberate attempt to block the hearing of the Section 36 proceeding, the execution proceeding somehow or other resulting in serious financial loss to the decree-holder. Sri Rath, learned senior counsel further referring to the decisions in ***Special Deputy Collector (Land Acquisition), General, Hyderabad vrs. B. Chandra Reddy & others*** : 2007 (2) Arb.LR 82(SC), ***Krishna Kumar Mundhra vrs. Narendra Kumar Anchalia*** : 2004(2) Arb.LR 469, ***Sri Swaminathan Construction vrs.***

Thriunavukkarasu Dhanalakshmi Education & Charitable Trust & others : 2007 (Suppl.) Arb.LR 374 (Madras), ***Kanpur Jal Sansthan & another vrs. Bapu Construction*** : 2014(1) Arb.LR 134 (SC), ***Union of India vrs. M/s.Popular Construction Co.*** : AIR 2001 SC 4010, ***Gaffar Khan vrs. Magma Shrachi Finance Ltd., Kolkata*** : AIR 2012 Jharkhand 53 & ***M/s. Subhas Projects & Marketing Ltd. vrs. Assam Urban Water Supply and Sewerage Board*** : AIR 2003 GAUHATI 158 and taking this Court to the relevant paragraphs therein contended that for the clear decisions of the Courts including the Hon'ble apex Court, law has been settled thereby debarring entertaining any objection in the guise of Section 47 of C.P.C. being entertained in the pending execution proceeding. Sri Rath, learned senior counsel, therefore, prayed for dismissal of the C.M.P. in confirmation of the order passed by the District Judge impugned herein.

5. Considering the rival contentions of the parties, this Court finds, the real controversy required to be considered here is for clear restriction in Section 36 of the Arbitration & Conciliation Act, 1996, if there is any scope for consideration of objection to the execution proceeding under Section 36 of the Act that too in absence of challenge to the award under Section 34 of the Act, 1996 ? Looking to the scope of objection to the party in opposition in the proceeding involving arbitration proceeding and for the restrictions imposed in Section 36 proceedings under the Arbitration and Conciliation Act, 1996, the only scope available to a party aggrieved to undertake the exercise of Section 34 and there is absolutely no scope to raise objection to the executability of the Arbitration Award, failure of which this Court finds, there will be no end to the Arbitration Proceeding ultimately bringing such an Act will be frustrated. Besides this Court also finds, the question raised by the petitioner being involved in the hearing of the injunction petition order involving which being confined by the Hon'ble apex Court, such question is no more available to be considered in the petition involved therein.

6. Considering the catena of decisions cited by the learned counsel for the opposite party, vide AIR 2001 SC 4010, AIR 2003 GAU 158, 2004(2) Arb.LR 469, 2007 (2) Arb.LR 82(SC), 2007 (Suppl.) Arb.LR 374, AIR 2012 Jharkhand 53 & 2014(1) Arb.LR 134 (SC) referred to herein above, this Court in 2004(2) Arb.LR 469 (Calcutta) finds, Hon'ble Calcutta High Court in paragraph nos.8 & 9 came to observe as follows :-

> "8. That apart, it appears from the decision dated 17th May, 2000 on the application under Section 34 of the Arbitration and Conciliation Act, 1996 that the question that

only two Arbitrators had conducted the Arbitration proceedings and that it was violative of Section 14(1)(a) of the Act were raised before the Court and were negatived. It also transpires from the decision dated 14th August, 2002 of the Division Bench in appeal preferred against the decision on the application under Section 34, that these questions were also gone into. The Special Leave Petition against the said decision of the Appeal Court also stood dismissed and the review thereafter was also rejected. Thus, it appears that these questions, which are now being sought to be raised, were already raised and decided in the Section 34 proceedings. That apart, the extent of judicial intervention has been circumscribed by Section 5 of the Act to the extent as provided in the Act itself. In other words, judicial intervention is prohibited except as provided for in the Act. Thus, the judicial intervention having been limited, the Court cannot interfere at any and every stage or on a ground other than those available in the Act itself. The Act of 1996 has been enacted in order to reduce the time and avoid the procedural hazards of an ordinary litigation before a Court. If we accept such a contention, in that event, the very purpose and object to replacing the 1940 Act by the 1996 Act would be infructuous or ineffective.

Section 47 CPC: Whether attracted ?

9. Be that as it may, the learned counsel has sought to bring in these questions within the scope and ambit of Section 47, CPC and he has contended, if the decree itself is a nullity or without jurisdiction, in that event, the Executing Court can go behind the decree. He relied on the decision of *Bhavan Vaja* v. *Solanki Hanuji Khodaji Mansang*, (1973) 2 SCC 40 : AIR 1972 SC 1371 and *Kiran Singh* v. *Chaman Paswan*, AIR 1954 SC 340. The principles laid down therein are accepted proposition with which there is no scope of any doubt. If the decree is a nullity or without jurisdiction, the said question can also be raised in the execution and the Executing Court can go behind the decree. This is a principle which is an exception to the principle that executing Court cannot go behind the decree. This proposition has not been disputed by Mr. Mitra. But the question remains whether these questions can be raised in a proceeding under Section 47 CPC in an execution of an Award in terms of Section 36 of the Act. In fact, the provisions contained in Section 34 of the Act of 1996 are somewhat similar to Section 47, CPC. Section 47 CPC renders the scope very wide and includes any and every dispute between the parties to be settled or resolved in the same proceedings and not by separate proceedings in the execution of the decree itself. Whereas Section 34 while providing for similar provision has restricted the grounds of challenge enumerated therein. It has not made the same open to any and every dispute between the parties. Section 34 also prescribes the grounds under which it can be challenged and after the question is decided, the Award becomes final in terms of Section 35. If no application under Section 34 is made, then after the expiration of the period limited the Award becomes enforceable in terms of Section 36, which also does not provide that the provisions of the Code as such would become applicable. Section 36 creates a fiction that it would be enforceable as if it were a decree of the Court within the scope of Order 21, CPC. This enforcement of the Award under Order 21, CPC would not attract the application of Section 47 CPC simply by reason of the expression used in Section 36. Section 36 cannot be read independent of the other provisions contained in the Act itself. All the provisions are to be reconciled with the other provisions of the Act. Section 36 cannot be read out of context and independent of the scheme of the Act. Reference to another statute does not attract application of such other statute to the

referring statute unless expressly provided for. A reference in a statute to another statute does not invite inconsistency in the referring statute. Any such reference, if made, has to be interpreted in the context in which the reference is made and not inconsistent with the provisions of the referring statute itself. If it brings inconsistency, then the same is to be avoided. If Section 47, CPC is to be attracted, then the restrictions provided in Section 34 of the Act would be redundant. It cannot be interpreted in the manner inconsistent with the provisions contained in the other part of the Act. That apart the finality of the decree under the Code is reached after the decision under Section 47, CPC, if raised. But the Legislature in its wisdom thought it fit to incorporate the scope similar to Section 47 CPC in Section 34 of the Act in order to bring finality before the decree becomes executable. Same procedure cannot be expected to be incorporated in a statute twice over. Legislature never intends repetition. At the same time, the object of the Act is directed towards speedy and hazard-free finality with a view to avoid long drawn procedure based on technicalities. Therefore, having regard to the provisions of Sections 4, 5, 12, 13, 16, 34 and 35, Section 36 cannot be interpreted in a manner inconsistent with any of those provisions to attract the provisions contained in the Code in its entirety. Therefore, in the application filed under the provisions of CPC for the purpose of execution of an Award, the Court cannot overlook the scope and ambit within which the Court is to execute the Award taking aid of the provisions for execution contained in the CPC not inconsistent with the provisions contained in the 1996 Act. Therefore, in my view, Section 47, CPC cannot be attracted despite the provisions contained in Section 36 in respect of an Award when the Award is sought to be executed thereunder."

In paragraphs-15 & 16 of 2007 (Suppl.) Arb.LR 374 (Madras) (DB), Hon'ble Madras High Court in its Madurai Bench observed as follows :-

"15. As regards the appointment of a person as an arbitrator, any challenge to his appointment can be made under Section 12 mainly on the ground of justifiable doubts as to his independence and impartiality. Section 13 provides the procedure of challenge to be made under Section 12. Section 16 of the Act prescribes the competence of the arbitral tribunal to rule on its own jurisdiction, such as the one in the case on hand, the very existence of the arbitration clause and the name of the arbitrator was raised as a preliminary issue by the 1st respondent herein. Under Section 21, unless and otherwise agreed to by the parties, the arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent. The arbitral proceedings would terminate on the passing of the award or in the circumstances specified under sub-section (2) of Section 32 of the Act. Under Section 34, a party to an arbitral proceedings has got a right to move the Court against an arbitral award and for setting aside such an award in accordance with sub-sections (2) and (3) of the said Section 34. Under Section 35 of the Act, an arbitral award would become final and binding on the parties and the same becomes enforceable after the expiry of the period specified under Section 34 for making an application to set aside the arbitral award. Thereafter, it can be enforced under the provisions of the Civil Procedure Code as if the award is a decree of the court. The only other mode by which a challenge can be made to the award is by filing an appeal as against an order declining to interfere with the award or to set aside the award by approaching the appellate forum as prescribed under Section 37 of the Act.

16. A conspectus reading of the above provisions makes it amply clear that having regard to the prohibition contained in Section 5, unless a party to an arbitral award challenges the award challenges the award in the manner set out in Section 34 of the Act or in the event of not getting a favourable order in such an application under Section 34 by filing an appeal under Section 37 of the Act, under no other mode it is permissible for a party to the arbitration award to seek for setting aside the same.

In paragraphs-16 of AIR 2001 SC 4010, Hon'ble apex Court observed as follows :-

16. Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application "in accordance with" that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that "where the time for making an application to set aside the arbitral award under Section 34 has expired … the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court". This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow" (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act."

In paragraph-8 of 2014(1) Arb.LR 134 (SC), Hon'ble apex Court observed as follows :-

"8. To appreciate the rivalised submissions raised at the bar we think it apt to refer to the scheme of the Act. Under the Act, after the award is passed by the arbitrator, an application for setting aside the arbitral award is permissible under Chapter VII relating to arbitration under Part I. Chapter VIII occurring in Part I provides about the finality and enforcement of arbitral awards. Sections 35 and 36 which occur in this chapter are reproduced below:

"35. **Finality of arbitral awards**- Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

36. **Enforcement**- Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (V of 1908) in the same manner as if it were a decree of the court."

In paragraph-7 of AIR 2012 Jharkhand 53, Hon'ble Jharkhand High Court observed as follows :-

> "7. Section 34 of the Act provides for setting aside the arbitral Award. A detail procedure is provided giving opportunity to the aggrieved party to challenge the Award. The said Act is a special Act and learned Court below ahs rightly held that in view of the said provision in the Special Act and the provisions for setting aside the Award under Section 34 of the said Act, an objection under Section 47 of C.P.C. on the ground covered by the provisions under Section 34 of the Arbitration and Conciliation Act, 1996, is not maintainable."

In paragraph-8 of AIR 2003 GAU 158, Hon'ble Gauhati High Court observed as follows :-

> "8. The law relating to the power of an executing court under the provisions of section 47 of the Code of Civil Procedure is well settled. The difficulty is not with regard to the principles of law, but with regard to the application of such principles. In view of the clear language of section 47 of the Code of Civil Procedure, it has always been understood that while the executing court cannot go behind the decree to determine its legality, objections regarding the validity of the decree has to be decided in an execution proceeding. However, such objections must appear on the face of the record and cannot be left to be determined by a long drawn process either of evidence or reasoning. The same principles of law would undoubtedly apply to the execution of an award under section 36 of the Act. It is also our considered view that the inhibitions that would operate upon the court while executing an award would be somewhat more in view of the provisions of section 34 of the Act. As section 34 of the Act has enumerated specific grounds on which an application for setting aside of an award may be filed, any such objection to the award on the grounds enumerated in section 34 cannot be allowed to be agitated or re-agitated while resisting the execution of the award. To that extent, the argument advanced by Mr. Markanda appearing on behalf of the revision petitioner is well founded, in the instant case no objection under section 34 of the Act was filed on behalf of the respondent Board. In such a situation to permit the respondent Board to raise the question of jurisdiction of the arbitral Tribunal to pass the interim award in question in its objections resisting the execution of the award, cannot be understood to be permissible in law. Such a course of action would render the provisions of section 34 virtually redundant. As evident from the subsequent facts of the case on which there is no dispute at the Bar, it appeals that the arbitral proceeding has now to recommence. The question or jurisdiction of the arbitral Tribunal which has not yet been decided, therefore, must be decided by the Tribunal itself and we are confident that this question if agitated by any party, would be brought to its logical conclusion by the Tribunal. However, entertainment of said question by the learned District Judge in an execution proceeding and in treating the conclusion reached by it as the foundation for its decision cannot be said to be corrective law."

7. From the above decisions, this Court finds, law has been fairly well settled in restricting objection to the execution proceeding in the trap of Section 47 of the C.P.C. This Court, therefore, answers the question framed

herein above in favour of the decree-holder thereby holding that there is no scope for entertaining such objection involving the execution proceeding particularly in absence of challenge to the award under Section 34 of the Act. From the submission of both sides and the records produced herein, this Court finds, there is admittedly a settlement award in the involvement of the sole Arbitrator being appointed by the Hon'ble apex Court. Further admittedly, there is also no appeal involving the arbitral award and the scope of the executing court being very very limited, it has also no scope to go behind the arbitral award. From the series of litigations, it appears, there is somehow or other attempt to block the execution proceeding from being concluded.

8. In the circumstance, this Court finds, there is no infirmity in the impugned order at Annexure-1, for which this Court while dismissing the Civil Misc. Petition directs the District Judge, Mayurbhanj to conclude the execution proceeding involved herein within a period of six weeks from the date of receipt of a copy of this order from either of the parties involved. Both parties are also directed to appear in the execution proceeding on 14th January, 2020. No cost.

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2020 (I) ILR - CUT- 284

BISWANATH RATH, J.

W.P.(C) NO. 296 OF 2006

SUKANTA KUMAR SARANGI .....Petitioner

.V.

M.D, ORISSA STATE FINANCIAL CORP., COLLEGE SQUARE, CUTTACK & ORS. .....Opp. Parties

SERVICE LAW – Voluntary Retirement Scheme (VRS) – Petitioner was an employee of OSFC – Filed an application for voluntary retirement on 30.09.2005 – Subsequently another application for withdrawal of the VRS was filed on 14.10.2005 – Petitioner allowed to work from 26.10.2005 to 31.10.2005, after that he was never allowed to work – Application for VRS was accepted on 24.10.2005 i.e. subsequent to the application for withdrawal of the application – As per clause 3.3 of the scheme, the decision for acceptance or rejection of the application

required to be conveyed within 30 days by the authority but no communication to that effect has been made – Action of the Authority challenged – Held, the action of the authority is bad – Direction issued to pay the wages along with the interest.

Case Laws Relied on and Referred to :-

1. (2003) 2 SCC 721 : Bank of India & Ors. Vs. O.P. Swarnakar & Ors.
2. (2016) 9 SCC 375 : Madhya Pradesh State Road Transport Corporation Vs. Manoj Kumar & Anr.
3. AIR 1969 SC 180 : Raj Kumar Vrs. Union of India.
4. (2003) 2 SCC 721 : Bank of India & Ors Vrs. O.P. Swarnakar & Ors.

For Petitioner : Mr. H.K. Mohanty, Mr. D.K. Pradhan & Mr. D.K. Mohapatra.

For Opp. Party : Mr. C. A. Rao, Mr. A.K. Rath & Mr. S.K. Behera.

JUDGMENT Date of Hearing & Judgment : 14.02.2020

BISWANATH RATH, J.

Heard Mr.H.K. Mohanty, learned counsel for the petitioner and Mr.C.A. Rao, learned Senior Counsel appearing for the opposite party nos.1 to 3.

2. This writ petition has been filed seeking a mandamus against the opposite parties to allow the petitioner to continue in service.

3. Background involving the case is that petitioner joined in the service of Orissa State Financial Corporation as a Collection Assistant on 01.04.1986. While continuing as such, he was promoted to the post of Assistant in the year 1998. It is alleged that when opposite party nos.1 and 2 along with other Senior Officers of the Corporation visited Dhenkanal and Angul Recovery Cell from the Head Office, petitioner and others were threatened to opt for voluntary retirement, which was stated to be floated very shortly and also intimated that they will otherwise be forced to ask for compulsory retirement. The Corporation floated the Voluntary Retirement Scheme (for short 'VRS') on 13.09.2005. Petitioner pursuant to such scheme applied to go under VRS by filing application on 30.09.2005. But finding no other source of livelihood and after due consultation with the family members, petitioner sought for withdrawal of the VRS application on 14.10.2005. It is alleged that after filing the application, it is based on request of the petitioner to withdraw his VRS application, petitioner was allowed to

work from 26.10.2005 to 31.10.2005, whereafter he has not been allowed to work, which gave rise for filing the present writ petition.

4. Sri Mohanty, learned counsel for the petitioner taking to the pleadings involving the writ petition as well as the documents brought to the notice of the Court through the Voluntary Retirement Scheme floated vide Annexure-1 series, the procedure of the Voluntary Retirement Scheme under Clause-3.0 reads as under:

> 3.0 Procedure:
>
> 3.1 The eligible employees who desires to seek Voluntary Retirement may apply unconditionally to the Managing Director of the Corporation through his/her Head of the Department or Branch Manager as the case may be, in the prescribed format.
>
> 3.2 The Date of acceptance of application for voluntary retirement by the competent authority shall be treated as the date of voluntary retirement.
>
> 3.3 The decision of the Managing Director regarding the acceptance/rejection of the V.R. application shall be communicated to the employee within 30 (thirty) days of submission of the application.

Taking cue from the above provision, Sri Mohanty, leaned counsel for the petitioner contended that even though petitioner has submitted an application to avail the benefit of Voluntary Retirement Scheme of the Corporation as envisaged under Annexure-1 series but before any decision being taken and any communication is made to the petitioner following the condition, i.e. Clause 3.3 of the Voluntary Retirement Scheme, petitioner submitted an application on 14.10.2005 opting to withdraw his VRS application.

5. Referring to the application at Annexure-4 series, Sri Mohanty, learned counsel for the petitioner to substantiate his claim submitted that the order of acceptance of VRS was passed on 24.10.2005, as reflected under Annexure-B to the counter affidavit, he thus contended that since the withdrawal application at the instance of the petitioner was filed on 14.10.2005, i.e. much before acceptance of VRS application by the Corporation, it is in the interest of justice the authority should have accepted the withdrawal application first rather than accepting the VRS application, which has already been requested for withdrawal prior to decision of the establishment on the same.

6. Taking through the decision in the case of ***Bank of India and others Vrs. O.P. Swarnakar and others***, reported in (2003) 2 SCC 721 and another

decision of the Hon'ble Apex Court in the case of ***Madhya Pradesh State Road Transport Corporation Vrs. Manoj Kumar and another***, reported in (2016) 9 SCC 375, Mr. Mohanty, learned counsel for the petitioner contended that for the application of both the judgments to the case of petitioner at hand, the writ petition should succeed.

7. In his opposition Mr.C.A. Rao, learned Senior counsel appearing for the OSFC referring to the VRS condition in the scheme vide Annexure-1 series taking this Court to the decision of the Authority vide Annexure-B to the counter affidavit contended that not only the request of the petitioner to avail the VRS benefit had been accepted by the establishment by passing appropriate order on 24.10.2005 but has already communicated the same to the petitioner as borne out from the decision for withdrawal of the VRS scheme made by the petitioner vide Annexure-B. Reading through the documents under Annexure-3 and the disclosure under Annexure-5 of the writ petition, counter affidavit as well as the writ petition respectively, Sri Rao, learned Senior Counsel attempted to demonstrate the case of the opposite party. For the disclosure at Annexure-5, Sri Rao submitted that it is apparent that the petitioner was already aware of the decision of the authority as clearly admitted by him through his letter dated 03.11.2005, Annexure-5. It is on the premises that there is already communication of the decision of the establishment to the petitioner. Sri Rao, learned Senior Counsel further contended that once the application of the petitioner opting VRS is accepted and decision of the authority has been communicated to the petitioner, there is cession of the employer and employee relationship and therefore no further request can be entertainable. Sri Rao, learned Senior Counsel in support of his contention has also cited two decisions. Referring to a decision of this Court in the case of ***Raj Kishore Sahu Vrs. State of Orissa and others,*** (W.P.(C) No.1108 of 2006, disposed of on 10.12.2009), for the common issue involving therein involving the petitioner here and the petitioner therein in deciding the case Sri Rao attempted to apply the said decision to the case at hand. Similarly, referring to the decision of the Hon'ble Apex Court in the case of ***Raj Kumar Vrs. Union of India***, reported in AIR 1969 SC 180, Sri Rao, learned Senior Counsel reading through paragraph-5 therein has also attempted to apply the ratio therein to the case at hand. In the above circumstances, Mr. Rao, learned Senior Counsel prayed this Court for dismissal of the writ petition for having no merit.

8. Considering the rival contentions of the parties, this Court finds there is no dispute that the OSFC has floated a Voluntary Retirement Scheme on

13.09.2005 appearing at Annexure-1 series. There is also no dispute that the petitioner in terms of the conditions therein applied for availing voluntary retirement by making application on 30.09.2005, vide Annexure-2. It is also not disputed that petitioner also applied for withdrawal of his VRS application by filing an application for withdrawal vide Annexure-4 on 14.10.2005. It is at this stage taking into consideration the documents through Annexure-B of the counter affidavit of Orissa State Financial Corporation Limited, this Court finds the decision of the authority accepting the VRS application of the petitioner was taken on 24.10.2005, which is admittedly after the petitioner filing his application for withdrawal of his VRS application on 14.10.2005. This apart this Court again finds that the petitioner was even allowed to work from 26.10.2005 till 31.10.2005. It is on this score alone this Court observes since the petitioner had already filed an application for withdrawal of the VRS application prior to the decision taken by the Orissa State Financial Corporation on 24.10.2005, the order accepting the VRS application of the petitioner subsequent to filing of application for withdrawal of the VRS application becomes bad.

9. Coming to the other grounds raised such as for the specific condition in the VRS application under Annexure-1 series vide Clause-3.3 for the provision in the VRS quoted at para-4 of this judgment, it was incumbent on the part of the Orissa State Financial Corporation to make communication of its decision of acceptance/rejection of the VRS application to the employee within thirty days of submission of the application. There being no material to establish that there is even any communication of the decisions of the authority on the petitioner, this Court finds mere filing of Annexure-B through the counter affidavit cannot be construed to be a communication of such decision to the petitioner.

It is next reading the documents at Annexure-B to the counter affidavit of the opposite parties, this Court finds though the corresponding letter dated 24.10.2005 is addressed to the petitioner, namely, Sukanta Kumar Sarangi but the opposite party is unable to throw any light on the service of any such letter on the petitioner herein, except there is observation in the same letter that copy of this decision is communicated to the Joint General Manager, Finance Department/Branch DGM/Branch Manager, Angul for favour of information and necessary action. It is taking into consideration the letter at this stage vide Anneuxre-5 strongly relied upon by the learned Senior Counsel for the opposite parties to establish that under no stretch of

imagination it can be construed that petitioner had no intimation of the decision of the authorities on acceptance of VRS application of the petitioner, on perusal of letter dated 03.11.2005 since issued much subsequent to the decision of the authority on 24.10.2005 any observation made therein cannot be construed that petitioner was communicated with the decision at Annexure-B. Not only this, this Court here again finds even after so called acceptance letter dated 24.10.2005, the petitioner was allowed to work from 26.10.2005 to 31.10.2005. This Court here thus finds for allowing the petitioner to work even after their order, w.e.f. 26.10.2005 to 31.10.2005, there was no scope for the management to allow the petitioner to continue in his service. Thus, this Court finds the acceptance letter dated 24.10.2005 might be an afterthought. For the observation of this Court in the above paragraph that decision involving the VRS offer having been taken after receipt of the application for withdrawal on 24.10.2005 even after acceptance of the application for withdrawal of VRS application dated 14.10.2005, this Court reiterates its decision holding that the decision, vide Annexure-B of the counter affidavit is bad in law.

10. It is here taking into consideration the decision of the Hon'ble Apex Court in the case of ***Bank of India and others Vrs. O.P. Swarnakar and others***, reported in (2003) 2 SCC 721, this Court finds the Hon'ble Apex Court in Paragraphs-65 to 69, 99, 100 and 113 observe/held as follows:-

65) A proposal is made when one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of the other to such act or abstinence (See Section 2(a)). Herein the banks by reason of the scheme or otherwise have not expressed their willingness to do or abstain from doing anything with a view to obtaining assent of the employees to such act. It will bear repetition to state that not only the power of the bank to accept or reject such application is absolutely discretionary, it, as noticed hereinbefore, could also amend or rescind the scheme. The Scheme, therefore, cannot be said to be an offer which, on the acceptance by the employee, would fructify in a concluded contract.

66) The proposal of the employee when accepted by the Bank would constitute a promise within the meaning of Section 2(b) of the Act. Only then the promise becomes an enforceable contract. In the instant case the banks when floating the scheme did not signify that on the employees assenting thereto a concluded contract would come into being in terms whereof they would be permitted to retire voluntarily and get the benefits thereunder.

67) Furthermore, in terms of the said scheme no consideration passed so as to constitute an agreement. Once it is found that by giving their option under the scheme, the employees did not derive an enforceable right, the same in absence of

any consideration would be void in terms of Section 2(g) of the Contract Act as opposed to Section 2(h) thereof.

68) Furthermore, even by opting for the scheme as floated by the banks, no consideration is passed far less amounting to reciprocal promise.

69) Once it is found, as would appear from the position rendered by this court that the employees do not have an enforceable right upon making an option the same would be void in terms of Section 2(g) of the Contract Act as opposed to Section 2(h) thereof.

xxx xxx xxx xxx

99) In that case, thus, a resignation which was not in praesenti has been held to be capable of being withdrawn. It did not constitute a juristic act.

100) We may notice that in *Jai Ram v. Union of India* (AIR 1954 SC 584) it was held:

"It may be conceded that it is open to a servant, who has expressed a desire to retire from service and applied to his superior officer, to give him the requisite permission, to change his mind subsequently and ask for cancellation of the permission thus obtained; but, he can be allowed to do so as long as he continues in service and not after it has terminated."

xxx xxx xxx xxx

113) The submission of learned Attorney General that as soon as an offer is made by an employee, the same would amount to resignation in praesenti cannot be accepted. The scheme was in force for a fixed period. A decision by the authority was required to be taken and till a decision was taken, the jural relationship of employer and employee continued and the concerned employees would have been entitled to payment of all salaries and allowances etc. Thus it cannot be said to be a case where the offer was given in praesenti but the same would be prospective in nature keeping in view of the fact that it was come into force at a later date and that too subject to acceptance thereof by the employer. We, therefore, are of the opinion that the decisions of this Court, as referred to herein before, shall apply to the facts of the present case also."

For the support of law to the case at hand, for the declaration of this Court, the decision of the authority in acceptance of the VRS application vide Annexure-B is bad. This Court while allowing the writ petition directs the OSFC to treat the petitioner to be continuing in service all through. Since petitioner has been illegally prevented from discharging his duty, but however considering that petitioner has not worked all through, this Court directs the OSFC to pay the arrear wages to the petitioner minimum @50% of the salary for the period he was prevented to work.

It is at this stage, this Court also taking into consideration the interim direction of this Court during pendency of the writ petition directing the

opposite parties to pay him a sum of Rs.3,63,958/- without prejudice to the rights and contentions of the parties in the writ petition, the said amount if paid to the petitioner may be adjusted as against the entitlement made under the direction of this Court. The balance arrear amount shall be paid to the petitioner along with interest @7% all through. The entire amount shall be calculated by undertaking the exercise within a period of one month. Payment of balance amount be made to the petitioner within a period of fifteen days thereafter. With the above observation, the writ petition stands allowed. There shall be no order as to cost.

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2020 (II) ILR - CUT- 291

P. PATNAIK, J.

W.P.(C) NO. 17153 OF 2018

LOKESH KUMAR GUNJAN .....Petitioner.

.V.

M.D. & CEO ANDHRA BANK & ORS. ..... Opp.parties

SERVICE LAW – Promotion – Petitioner was a bank employee – Thrice appeared in promotional examination – But promotion denied – Reason of such denial was that, though the petitioner was able to secure the cut off mark but was unable to scored minimum cut off mark in the interview i.e 35% as per the Rule – Right to Promotion pleaded – Held, promotion is not a fundamental right – Right to be considered for promotion, however, is a fundamental right – Such a right brings within its purview an effective, purposeful and meaningful consideration – Suitability or otherwise of the candidate concerned, however, must be left at the hands of the DPC, but the same has to be determined in terms of the rules applicable therefore – Hence this court is not inclined to accede to the prayer of the petitioner and accordingly writ petition is dismissed.

For the Petitioner : Mr. Ravindra S. Garia
For Opp. Party : Mr.C.Ananda Rao & Sarat Kumar Behera

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

P.PATNAIK, J.

In the accompanying writ petition, the petitioner has inter alia sought for setting aside/quashing the promotion process and its resultant

Notification affecting the petitioner for years 2016, 2017 and 2018 by which the petitioner was denied promotion to MMGS-III. Further prayer is for a direction to the respondent Bank to declare the petitioner as successful and eligible for promotion to MMGS-III with effect from 01.04.2016 when he first became eligible for promotion to MMGS-III and to prohibit the opposite parties from taking any future adverse administrative action against the petitioner.

2. The brief facts as depicted in the writ application is that in pursuance of the advertisement issued by the Institute of Banking Personnel Selection (IBPS) the petitioner appeared in the written as well as interview and was finally selected for the post of Law Officer MMGS-II. In pursuance of the selection the petitioner joined the opposite party bank as Deputy Manager (Law) MM-II on promotion in the year 2013. After undergoing the training the petitioner was posted at different places. While continuing at Zonal Office, Coimbatore, the petitioner became eligible for promotion through merit channel of the opposite party Bank. The petitioner applied for promotion examination in 2016 through on-line mode. In the selection the petitioner qualified in the written examination and appeared for interview through video conferencing and was quite hopeful for selection but to his utter consternation his name did not find place in the merit list. It has been averred that though the petitioner secured 53.73 marks for the year 2016 which is over and above the cut off marks 53.40, the petitioner's case was not considered though 28 vacancies remained unfilled in the year 2016. Again the petitioner became eligible for promotion through merit channel and accordingly he applied for promotion for the year 2017 through on-line mode. But his case for promotion was not considered notwithstanding 123 vacancies which were left unfilled and no panel of wait listed candidates for MMGS-III was prepared by the Bank. Again in the year 2018 vacancies for promotion from MMGS-II to MMGS-III were declared by the opposite party Bank and the petitioner being eligible, applied for the same through on-line mode. Though the petitioner cleared the written examination conducted by the IBPS and was called for the interview, finally his name did not appear in the select list for the third consecutive years in the list of selected candidates though 16 vacancies were left unfilled in the year 2018. Being aggrieved by the non-selection for three consecutive years the petitioner preferred memorandum of appeal on 18.04.2018 to respondent No.2 and the said appeal was dismissed in a cryptic and unreasoned manner vide Annexure-5 to the writ application. Being aggrieved by the non-selection in the year

2016, 2017 and 2018 to MMGS-III, the petitioner has been constrained to approach this Court invoking the extraordinary jurisdiction of Article 226 of the Constitution of India for redressal of his grievance.

3. Mr.Ravindra S.Garia, learned counsel for the petitioner has submitted with vehemence that many juniors to the petitioner from scale II to scale-III have been promoted ignoring the seniority of the petitioner which is violative of Articles 14 and 16 of the Constitution of India. Learned counsel for the petitioner further submits that non-selection of the petitioner to the promotional post in MMGS-III Grade is due to arbitrary action of the opposite parties. The learned counsel for the petitioner has referred to the circular dated 31.03.2012 Annexure-8 to the counter affidavit which inter alia stipulates that the guidelines of the Government will form part of the policy and the learned counsel further submits that it has to be read in tandem with the Government of India, Ministry of Finance Department of Financial Service guidelines dated 14.03.2012 under Annexure-1 to the rejoinder affidavit which also refers to guidelines for promotion in public sector bank. Learned counsel has referred Clause 5(3) wherein the cut-off date for eligibility under clause 5.3 the minimum 75% marks in APAR for each of the years of service required for eligibility for promotion under merit channel fast track. Learned counsel for the petitioner in order to buttress his submission has referred to the decision reported in AIR 2010 SC 3714 Ramesh Kumar-v.-High Court of Delhi and others more particularly paragraphs-11 and 12. By referring the aforesaid decision, learned counsel for the petitioner submits that the selection criteria cannot be changed during the process of selection since as per the said decision change of criteria of section in the midst of selection process is not permissible. Learned counsel also submits that Annexure- B to the counter to the rejoinder affidavit filed on behalf of opposite parties refers to guidelines of the Government of India, Ministry of Finance, Department of financial Service dated 05.12.2011 which nowhere speaks about interview. Therefore, learned counsel for the petitioner submits that securing minimum percentage of marks in the interview thereby debarring the petitioner from the zone of consideration amounts to violation of rights of the petitioner to be considered for promotion from MMGS-II o MMGS-III.

4. Controverting the averments made in the writ application, a counter affidavit has been filed by the opposite arties wherein it has been submitted that the petitioner is an officer of the opposite party bank and is governed by

Andhra bank Officers' Service Regulations 1982, Andhra bank Officers' Conduct Regulations, 1981 and the Andhra Bank Officer Employees'(Discipline & appeal) Regulations, 1981. It has been further submitted that the opposite party Bank has a policy on promotion from MMGS-II to MMGS-III which has been circulated among all staff vide circular dated 31.03.2012. As per the Policy there are two channels for promotion from MMGS-II to III cadre viz.Normal/Seniority channel and Merit/Fast Track Channel. The promotion policy of the Bank has been annexed as Annexure-A to the counter affidavit. So far as promotion beyond 2016 is concerned promotions from MMGS-II to MMGS-III for the notified vacancies was 336 and total applicants received was 1084. In total 336 officers were selected by interchanging the vacancies from seniority to merit channel for promotion. The cut off arrived is as follows:

Cut off out of 100 marks	Seniority Channel	Merit Channel
Maximum	87.82	84.82
Minimum	67.64	57.30

In the above promotion process, the petitioner also participated under Merit channel and his candidature was considered for promotion along with other candidates. He was allowed to appear for the written test and thereafter for interview also. But, unfortunately, his name could not find place in the list of promoted candidates as he could not secure the required marks for selection. The marks secured by him, parameter wise, are given as follows:

TABLE

Details	Performance appraisal	Out of State Service	Written Test	Branch Manager ship/ Specialists **	Service beyond 5 years***	Interview	Total
Max marks	25	6	30	15/9	-	24	100
Marks secured	19.88	6	12.60	9	-	7.68	55.16

As per the policy, a candidate must secure minimum 35% marks in the interview otherwise, he/she shall be treated ineligible for promotion. In the instant case, the petitioner secured less than 35% in the interview and hence, he was treated as ineligible for promotion and finally, he was not promoted. In the process of promotion there were candidates who got more marks than that of the petitioner but still they were not selected because they

could not get the minimum marks specified either in the written examination or in the interview.

The promotion particulars of 2017 are as follows:

The Respondent Bank issued a circular bearing No.473 – Ref: 3/97, dated 18.03.2017, inviting applications, from all the eligible officers, for the promotions from MMGS-II to MMGS-III for the notified vacancies of 332. Out of these vacancies, 133 vacancies were identified under seniority channel and the remaining 199 were identified under Merit Channel. It is submitted that the total applications received were 625. After written test, 454 candidates were called for interview covering both the seniority and merit channels. Out of these candidates, 417 candidates only were attached for the interview and 37 remained absent. As per the Government of India Guidelines, the zone of consideration for promotion should be three times of the number of anticipated vacancies. However, in case required number of officers is not available, the zone of consideration is 1:2. Since there was no required number of eligible candidates available, only 209 candidates were selected for promotion. The interviews were conducted in the ratio of 1:2 because of shortage of required number of candidates. In seniority channel, the interview committee selected only 14 candidates and in merit channel, they selected 195 candidates. The remaining 123 vacancies were kept unfilled complying with the guidelines of the Government. The cut off arrived is as follows:

Cut off out of 100 marks	Seniority Channel	Merit Channel
Maximum	85.31	84.93
Minimum	63.75	53.40

In the above promotion process, the petitioner also participated under Merit channel and his candidature was considered for promotion along with other candidates. He was allowed to appear for the written test and thereafter for interview also. But, unfortunately, his name could not find place in the list of promoted candidates as he could not secure the required marks for selection. The marks secured by him, parameter wise are given as follows:

TABLE

Details	Performance appraisal	Out of State Service	Written Test	Branch Manager ship/ Specialists **	Service beyond 5 years***	Interview	Total
Max marks	25	6	30	15/9	-	24	100
Marks secured	19.83	6	18.90	9	-	6.96	60.69

The petitioner could not be selected in the promotion even though secured more marks than the minimum cut off, because as per the policy, a candidate must secure minimum 35% of marks in the interview otherwise, he/she shall be treated ineligible for promotion. In the instant case, the petitioner secured less than 35% in the interview hence, he was treated as ineligible for promotion and finally, he was not promoted. It is submitted supra that in the process of promotion there were candidates who got more marks than that of the petitioner but still they were not selected because they could not get the minimum marks specified either in the written examination or in the interview.

The promotion particulars of 2018 are as follows:

The respondent Bank issued a circular dated 01.01.2018 inviting applications from all eligible officers, for promotions from MMGS-II to MMGS-III for the notified vacancies of 312. Out of these vacancies, 125 vacancies were identified under Seniority channel and the remaining 187 were identified under Merit Channel. It is submitted that the total applications received were 578. After written test, 372 candidates were called for interview covering both the seniority and merit channels. Out of these candidates, 332 candidates only attended for the interview and 40 remained absent. Since there was no required number of eligible candidates available, only 296 candidates were selected for promotion. In seniority channel, the interview committee selected only 114 candidates and in merit channel, they selected 182 candidates. The remaining 36 vacancies were kept unfilled because of non-availability of eligible candidates. The cut ff arrived is as follows:

Cut off out of 100 marks	Seniority Channel	Merit Channel
Maximum	87.14	81.93
Minimum	45.20	41.80

In the above promotion process, the petitioner also participated under Merit channel and his candidature was considered for promotion along with other candidates. He was allowed to appear for the written test and thereafter for interview also. But unfortunately, his name could not find place in the list of promoted candidates as he could not secure the required arks for selection. The marks secured by him, parameter-wise are given below:

TABLE

Details	Performance appraisal	Out of State Service	Written Test	Branch Manager ship/ Specialists **	Service beyond 5 years***	Interview	Total
Max marks	25	6	30	15/9	-	24	100
Marks secured	19.83	6	18.90	9	-	6.968	60.69

It is respectfully submitted that the petitioner could not be selected in the promotion even though secured more marks than the minimum cut off, because as per the policy, a candidate must secure minimum of 35% marks in the interview otherwise, he/she shall be treated ineligible for promotion. In the instant case, the petitioner secured less than 35% in the interview and hence, he was treated as ineligible for promotion and finally, he was not promoted. It is submitted supra that in the process of promotion, there were candidates who got more marks than that of the petitioner but still they were not selected because they could not get the minimum marks specified either in the written examination or in the interview. Further, it may be relevant to mention that persons selected for the post do not acquire a right, even if vacancy exists. It is open to the Authority concerned to decide how many appointments shall be made.

A counter to rejoinder dated 25.11.2019 has been filed by the opposite parties wherein at paragraph-4 it is stated that the promotion policy dated 31.03.2012 of the opposite party Bank is based on the Government's guidelines dated 05.12.2011 which has superseded the Government's guidelines dated 14.03.2012 and thus the promotion policy of the opposite party Bank has no legal binding. The opposite party Bank refutes such contention and submits that as per regulation 17 of the Andhra Bank Officers' Service Regulations, 1982 (ABOSR) promotions to all grades of officers in the bank is made in accordance with the policy laid down by the Board from time to time, having regard to the guidelines of the Government, if any. During the year 2005, Ministry of Finance, Government of India had

formulated certain guidelines relating to Managerial Autonomy to Public Sector Banks and communicated the guidelines dated 22.02.2005 wherein Public Sector Banks were permitted to take their own decision with the approval of their Board on matters relating to Human Resources, including promotions. As per the guidelines, the Bank is free to formulate its policy on promotions and other HR issues.

The Department of Financial Services, Ministry of Finance, Government of India vide their letter dated 5th December,2011 had issued guidelines on the matter of promotions, in supersession of all earlier guidelines, with a direction that the same should be adopted uniformly by the public sector banks after approval by their respective boards. After receipt of the guidelines, they were approved by the opposite party Bank's Board vide its Resolution No.22 dated 02.02.2012. Since the Government guidelines dated 5.12.2011 had not specified with regard to appointment of vacancies between channels, allocation of marks etc., the opposite party Bank, after discussing with the majority officers' union All India Andhra Bank Officers' Federation, reached to an understanding to modify the policy of promotions. A note effecting modifications was placed before the Board for its approval and finally a Resolution No.39 dated 17.03.2012 was passed in this regard. After the resolution was passed a circular dated 31.03.2012 was circulated among staff members which is still in force. The Government of India issued fresh guidelines dated 14.03.2012 in supersession to its earlier guidelines dated 05.12.2011. It is contended by the petitioner that the circular of the opposite party Bank has no legal binding in view of 14.03.2012 guidelines of Government. The opposite party Bank refutes such contentions that submits that the bank is vested with the power to formulate its own promotion policy as per Government's letter dated 22.02.2005. As per this guidelines, the bank formulated a promotion policy dated 31.03.2012 Government guidelines dated 14.03.2012 were adopted by the bank vide its Board note dated 29.03.2012 which was passed vide Resolution No.4 dated 07.05.2012. The Bank is following all the guidelines of the Government whenever there is a change in the guidelines. At no point of time, the respondent Bank has deviated any of the guidelines issued by the government. The petitioner participated in promotion process held in the years 2016, 2017 and 2018. The guidelines framed in the year 2012 as mentioned above were continuing in force till date.

In paragraph-5 of the counter to the rejoinder it has been stated that there is no much change between the Government guidelines dated 05.12.2011 and 14.03.2012. Following are the paragraphs which were not available in the guidelines dated 05.12.2011.

> 5. (ii) All vacancies likely to arise in the financial year shall be taken into account for the purpose of promotion exercise. Vacancies due to deputation of officers for a period of one year and ore should be treated as a vacancy during the year.
>
> 7. (iv) The experience as Chairman of RRB would be treated as equivalent to experience as Regional/Circle Head.
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> 8. (iii) In case, the Specialist Officers joins at a Scale higher than Scale 1, the minimum service requirement para-4 of these Guidelines would be reckoned from the level at which they enter the service. For example, if an officer enters at Scale II, the minimum length of service for promotion from Scale IV to Scale V will be 9 years instead of 12 years.
>
> Amended 9(1) The zone of consideration for promotion should be strictly maintained at 1:3 ratio. In case fresh candidates equal to the number of anticipated vacancies are not available by keeping zone of consideration at 3 times the anticipated vacancies, the zone of consideration may be extended to 4 times the number of anticipated vacancies, with the prior approval of the Board.
>
> 9(ii) In case it is not possible for the Banks to fill all the posts under merit quota, the Banks may at their discretion, decide to fill the remaining posts under the normal/seniority channel.

The following paragraph was removed from para5(ii) of the guidelines dated 05.12.2011:

Officers recruited for specialized cadre would be required to have field experience in a branch or as branch had. In case of officers in specialized cadres, this requirement can be complied with over the next three years, beginning with 2013-14 when experience of one year, and two years for the year 2014-15 would be necessary.

It is reiterated that the above guidelines were approved vide opposite party Bank's Board Resolution No.4, dated 07.05.2012. The opposite party Bank circulated the changes made amongst the staff members vide its Circular dated 25.05.2012. The contention made by the petitioner with regard to the promotion policy of the bank is futile and false. The opposite party Bank has very much applied the guidelines of the Government dated 14.03.2012 adopted by the Board vide Resolution dated 07.05.2012 to the promotion process of 2016, 2017 and 2018 in which the petitioner had participated.

In paragraph-6 of the counter to the rejoinder it has been stated that the guidelines enumerated in guidelines dated 14.03.2012 are skeleton in nature and it is left to the discretion of the bank to form its own policy, exercising managerial powers vested with the Board, as per Government letter dated 22.02.2005. It is submitted earlier that the Bank after discussing with the majority union of officers framed its own policy of promotion dated 31.03.2012 after taking approval from the Board, in line with the Government guidelines amended from time to time. Even if the petitioner goes to the promotion policy of the bank microscopically, he may not find a single provision which is against the Government's guidelines. Minimum marks in the written test and interview are fixed in the promotion policy of the bank after discussing with the majority union and Board approval.

In paragraph-13 of the counter to the rejoinder it has been stated that there were candidates, securing more marks than the petitioner who are not selected. In the year 2016, under merit list, 243 candidates were not selected in which the number of the petitioner was 153 in the order. Similarly in the year 2017, 188 candidates were not selected in which the petitioner's number was 33. Further, in the year 2018 promotion year, 22 candidates were not selected wherein the petitioner's number was 7.

In the meantime, the petitioner has been imposed with penalty of compulsory retirement from services of the Bank vide order dated 16.11.2019 for his misconduct committed by him after due enquiry by following the principles of natural justice. Copy of the order of the disciplinary authority is annexed as Annexure-J to the counter to the rejoinder.

5. Learned counsel for the opposite party Bank apart from reiterating the averments made in the counter affidavit and counter to the rejoinder affidavit strenuously urged that mere eligibility for participating in the promotion process does not entitle anybody to get promoted to the next higher cadre automatically when a process of selection is involved. Learned counsel for the Bank has referred to various decisions of this Court as well as the Hon'ble apex Court reported in 109(2010) CLT 675 (Kunilata Dutta –vrs.-State of Orissa and others. Learned counsel for the opposite parties has referred to paragraph-12 of the said judgment. He has further referred to the decision reported in 1995 SC 1088 (Madan Lal and others-vr.-State of Jammu and Kashmir) Paragraphs 8 and 9. Again he has referred the decision reported in AIR 1998 SC 795 Union of India and another –vrs.-N.Chandra

Sekharan and others, para-13. Further, learned counsel for the opposite party has referred to the decision reported in AIR 2003 SC 4422 (K.Samantaray-vrs.-National Insurance Company Ltd.) Para-11. He has also referred to the decisions reported in (2008) 4 SCC 171 (Dhananjay Mallick & others-vrs.-Uttaranchal and others), decision reported in 2013(2) ESC 357 (SC) Chairman, Rusikulya Gramya Bank-Vrs. Biswamber Patra and others) Para-14 of the said judgment.

6. After hearing the learned counsel for the respective parties and on perusal of the record, the short question that remains to be determined is as to whether there has been breach of guidelines in so far as the promotion of the petitioner from MMGS-II to MMGS-III is concerned.

(i) It is relevant to refer to Annexure-A to the counter affidavit which envisages circular dated 31.03.2012. Required policy for promotion of officers from JMGS I to MMGS-II and MMGS II to MMGS-III has been mentioned. It is apposite to refer to Clause-vii and viii of the said circular which are as follows:

ii) The marks for interview shall be awarded by the interview committee constituted by the Chairman and Managing Director or Executive Director in the absence of the Chairman and Managing Director. Candidates have to secure a minimum of 35% marks in the interview. Otherwise, they shall be treated as ineligible for promotion.

iii) The marks obtained by the candidates for Performance Appraisal Reports, Branch Managership/Specialist. Out of State service, Educational Qualifications, Written Test, Seniority and interview shall be aggregated and arranged in the descending order to prepare the final merit list.

7. In Union of India and others-vrs.-Sangram Keshari Nayak (2007 (6) SCC 704), the Hon'ble Supreme Court has been pleased to hold that the right to be considered for promotion is a fundamental right and it involves effective, purposeful and meaningful consideration and the promotion can be denied only on the basis of valid Rules. The relevant part of the said judgment reads as under

"Promotion is not a fundamental right. Right to be considered for promotion, however, is a fundamental right. Such a right brings within its purview an effective, purposeful and meaningful consideration. Suitability or otherwise of the candidate concerned, however, must be left at the hands of

the DPC, but the same has to be determined in terms of the Rules applicable therefor.

8. It has also been disclosed in the counter to the rejoinder affidavit that candidates those who have secured more marks than the petitioner have not been selected. In the year 2016 under the merit list, 243 candidates were not selected in which the position of the petitioner was 153. Similarly in the year 2017, 188 candidates were not selected in which the petitioner's position was 33. Further in the year 2018, 22 candidates were not selected in which the petitioner's position was 7. In the decision of the Apex Court 2013(2) ESC 357 (SC) Chairman, Rusikulya Gramya Bank-vrs.-Biswambar Patra and others (supra) the Hon'ble apex Court has been pleased to hold in paragraph-14 of the said judgment "what should be the minimum necessary merit for promotion, is a matter that is decided by the management, having in mind the requirements of the post to which promotions are to be made. The employer respondent has the discretion to fix different minimum merit, for different categories of posts, subject to the relevant rules."

This Court has gone through meticulously the decisions cited by the learned counsel for the petitioner. There is absolutely no quarrel over the proposition of law as has been enunciated by the Hon'ble apex Court in the decision reported in (2010) 3 SCC 104, (Ramesh Kumar-vrs.-High Court of Delhi and others) cited by the learned counsel for the petitioner, but the ratio of the said decision is not even remotely applicable to the case in hand.

On the cumulative effect of the aforesaid facts, reasons and judicial pronouncements, this Court is not inclined to accede to the prayer of the petitioner. Resultantly, the writ petition being devoid of merit is dismissed.

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2020 (II) ILR - CUT- 302

B.P. ROUTRAY, J.

MACA NO. 392 OF 2015

B.M., ORIENTAL INSURANCE CO. LTD. BARGARH ……Appellant

.Vs.

DOLABATI HATI AND FIVE ORS. ……Respondents

MOTOR VEHICLE ACT, 1988 – Section 2 (21) – Whether holder of the LMV licence can drive the tractor? – Held, Yes.

Case Laws Relied on and Referred to :-

1. (2017) 8 SCC 590 : Sant lal Vs. Rajesh & Ors. Etc.
2. (2017) 14 SCC 663 : Mukund Dewangan Vs. Oriental Insurance Co. Ltd.
3. (2009) 6 SCC121 : Smt. Sarla Verma & Ors. Vs. Delhi Transport Corporation & Anr,
4. (2017) 16 SCC 680 : National Insurance Company Ltd. Vs. Pranay Sethi & Ors.

For Appellant : Mr. P.R. Sinha
For Respondents : Mr. S.K. Acharya

JUDGMENT Date of Hearing: 15.11.2019 : Date of Judgment : 29.06.2020

B.P. ROUTRAY, J.

The award dated 09.01.2015 passed by the learned A.D.J.-cum-3rd M.A.C.T., Bargarh (hereinafter, in short, called "the Tribunal") in M.A.C. No. 86/19/80 of 2011-14 has been assailed by the appellant-the Oriental Insurance Co. Ltd. (hereafter referred to as the "Insurance Company") in the present appeal.

2. Heard Mr. P.R. Sinha, learned counsel on behalf of the appellant and Mr. S.K. Acharya, learned counsel on behalf of the respondents 1 to 5.

3. The facts giving rise to this petition in brief are that, the aforesaid claim petition under Section 166 of the M.V. Act was filed by the present respondent Nos. 1 to 5 before the learned Tribunal claiming that the deceased Kamala Kanta @ Agadhu Hati died in a motor vehicle accident on 11.05.2011 pertaining to Dunguripali P.S. Case No. 56 dated 11.05.2011 corresponding to GR Case No. 72 of 2011 of the Court of learned J.M.F.C., S. Rampur. It was pleaded that the deceased was a labourer in the accused vehicle, which was a tractor attached with trolley and while the said vehicle was transporting sand by the direction of the owner, the respondent No.6 herein, for construction of his paddy go-down, due to rash and negligent driving of the driver the vehicle was capsized to the roadside over the deceased resulting death of the deceased. The petitioners before the Tribunal are the parents, two brothers and one sister of the deceased. The deceased was unmarried and a young man aged 24 years at the time of death.

4. The owner-respondent No. 6 denying his liability to the cause of the accident averred before the Tribunal that the deceased, while going down

from the trolley of the tractor was hit by a bus. Therefore he is not liable to pay compensation and in any case, as his vehicle was duly insured under a valid Insurance Policy effective during the period of accident and the driver was having a valid driving licence, the Insurance Company is liable to indemnify the compensation amount. It was also admitted by the owner that he had engaged the deceased and the driver for transportation of the sand in the said vehicle.

5. The Insurance Company (appellant herein) defended its case before the Tribunal to absolve it from the liability of pay the MV compensation stating that the driver of the vehicle being not having the valid license to drive the accused transport vehicle and even so, the deceased was being an occupant of the accused vehicle is not covered under the policy of insurance as a 3rd party.

6. Learned Tribunal, upon adjudicating the disputes, considering the documentary as well as oral evidence, and rival contentions of the both the opposite parties therein and altering the liability against the owner, directed the Insurance Company to indemnify the compensation and to pay a sum of Rs. 3,39,000/- (three lakh thirty nine thousand) in favour of the petitioners (respondent Nos. 1 to 5 herein) with accrued interest @ 6% per annum of the total awarded compensation from the date of filing of the petition i.e., from 06.09.2011 within a period of two month from the date of the order, failing which the Insurance Company directed to give penal interest @ 9% per annum from the date of order till realization.

7. While advancing its challenge, the appellant-Insurance Company reiterated its defense plea stating that the deceased being an occupant of the Tractor Trolley at the time of accident cannot be treated as a 3rd party and therefore, the respondents No. 1 to 5 are not entitled to compensation as awarded by the learned Tribunal. It is further asserted on behalf of the Company that the direction for paying the penal interest on default of payment is not sustainable in the eye of law.

8. Perusal of the record does not reveal any fault in fixing the liability on the owner in as much as the Insurance Company to indemnify the same for payment of compensation in favour of the claimants-respondents No. 1 to 5. Though the appellant Insurance Company is not disputing the manner of calculation of the compensation amount as determined by the learned Tribunal, but its contention is that the deceased is not covered as a 3rd party in respect of the accused-vehicle being he an occupant of the said vehicle. This contention

of the appellant is not found acceptable. It is for the reason that the vehicle i.e., the tractor trolley was indisputably a commercial vehicle and the deceased was working as labourer in the said vehicle and hence he cannot be treated as the mere occupant. It is further an undisputed fact that the owner of the vehicle had engaged the driver and the deceased-helper of the tractor trolley as his employee for transportation. Since the vehicle is a commercial one and the deceased was a paid labourer in respect of the same, he cannot be discarded from the purview of 3rd party to absolve the Insurance Company from its liability to indemnify the owner.

9. Regarding next contention of the appellant that, the driver has no valid license to drive the transport vehicle cannot also be taken as a valid ground in support of the Insurance Company, because as per the conditions of the license, the driver was authorized to drive a Light Motor Vehicle and it is the settled position of law that the tractor attached with the trolley was a transport vehicle of the category of light motor vehicle and a valid LMV licence holder can drive the tractor attached to the trolley. While considering this particular aspect of the matter, the Hon'ble Supreme Court in the case of ***Sant lal Vs. Rajesh & Ors. Etc****., reported in (2017) 8 SCC 590* has observed as under:

> "2. This Court has considered the question whether the holder of licence for light motor vehicle can drive tractor attached to the trolley carrying goods and also whether separate endorsement is required authorising him to drive such a transport vehicle?
>
> 3. We have answered the question that the driver having licence to drive light motor vehicle can drive such a transport vehicle of LMV class and there is no necessity to obtain separate endorsement, since tractor attached with the trolley was transport vehicle of the category of light motor vehicle. Hence, there was no breach of the conditions of the policy."

Further, a three Judge Bench of the Hon'ble Supreme Court in the case of ***Mukund Dewangan v. Oriental Insurance Co. Ltd., (2017) 14 SCC 663***, while elucidating the definition of " Light Motor Vehicle" under Section 2(21) of the Motor Vehicle Act, 1988, has held as follows:

> "30. The State Government has to maintain a register of motor vehicles under Rule 75 as provided in Form 41 which includes gross vehicle weight, unladen weight, etc. The Central Government has the power to frame rules under Section 27, inter alia, regarding minimum qualification, forms, and contents of the licences, etc. Thus, we are of the considered opinion that the definition of "light motor vehicle" under Section 2(21) of the Act includes transport vehicle of the class and weight defined therein. The transport vehicle or omnibus would be light motor vehicle, gross vehicle weight of which, and

also a motor car or tractor or roadroller, unladen weight of which, does not exceed 7500 kg, and can be driven by holder of licence to drive light motor vehicle and no separate endorsement is required to drive such transport vehicle."

In view of the above, as it is not disputed by the Insurance Company that the driver was holding a valid LMV licence, and since all other norms, coverage and terms and conditions are fulfilled, the Insurance Company cannot absolve itself from its liability.

10. To compute just compensation, the Tribunal has taken the income of the deceased at Rs.3000/- per month and deducted 50% from the same towards personal expenses as he was unmarried, making it Rs 18,000/- per annum and applied the multiplier 18 for the purpose. Such principles applied by the tribunal in computing the compensation is found to be just and proper and in consonance with the principles decided by the Hon'ble Apex Court in the cases of ***Smt. Sarla Verma & Ors. Vs. Delhi Transport Corporation &*** Anr, (2009) 6 SCC 121 and ***National Insurance Company Ltd. Vs. Pranay Sethi & Ors.,*** reported in (2017) 16 SCC 680.

11. Upon a fine scrutiny of the impugned award, no infirmity is seen either in the reasoning given by the learned-Tribunal while fixing liability on the Insurance Company to pay the compensation or the manner in computing the compensation. However, the part of direction concerning payment of default penal interest @ 9% per annum appears to be unreasonable and accordingly the same is waived.

12. In the result, the impugned award of the learned Tribunal is upheld, by waiving only the default payment of penal interest @9% per annum. It is made clear that rest of the directions issued by the Tribunal in the award remains unaltered. The Insurance Company is directed to comply the same as expeditiously as possible, preferably within a period of three months. With the aforesaid observations and direction, the appeal stands disposed of.

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2020 (II) ILR - CUT- 306

B.P. ROUTRAY, J.

CRLREV NO. 666 OF 2019

NITYANANDA MOHANTY …… ..Petitioner

.V.

STATE OF ODISHA (VIGILANCE) ……Opp. Party.

CODE OF CRIMINAL PROCEDURE, 1973 – Section 397 read with section 401 – Revision – Challenge is made to the order rejecting the petition seeking discharge – Petitioner while working as Collector involved in a case allegedly committing of offences under Sections 13(2)/13(1)(d) of the Prevention of Corruption Act and Sections 468/471/420/120B of the IPC – Plea that no prima facie case constituting the offences is made out against the petitioner – Whether can be accepted at the stage of discharge – Held, No – Reasons indicated.

"In the case at hand, besides other factual aspects, the primary factual aspects are that, for transportation of said food grains, whether the rate prescribed by the OCSC, Dhenkanal is applicable or the rate prescribed by the PR Department in the aforesaid letters? Secondly, whether there was any element of criminality in giving the work order to the particular contractor in the given rate for three consecutive occasions by accepting the hand quotations without adhering to proper procedure and thereby the contractor was favoured with undue gain? Of course, besides all other aspects as would be required by the learned trial court, these are the matters to be decided in course of trial and at this stage of the proceedings the same cannot be looked into in detail. Considering the entire fact situation of the case and the documents available on record, the charge does seem groundless as the materials found in course of investigation makes out a strong prima facie case against the accused persons to proceed for trial and therefore, no infirmity is seen in the impugned order of the trial court in refusing to discharge the petitioner." *(Paras 10 to 17)*

Case Laws Relied on and Referred to :-

1. (1986) 2 SCC 716 : R. S. Nayak Vs. A. R. Antulay
2. (1977) 4 SCC 39 : State of Bihar Vs. Ramesh Singh.
3. (2013) 11 SCC 476 : Sheoraj Singh Ahlawat Vs. State of U.P.
4. (1989) 1 SCC 715 : Stree Atyachar Virodhi Parishad Vs. Dilip Nathumal Chordia.
5. (2001) 4 SCC 333 : Smt. Om Wati Vs. State, through Delhi Admn.
6. (2019) 7 SCC 515 : State by Karnataka Lokayukta Vs. M.R.Hiremath.

For Petitioner : Mr.Sashibhusan Das
For Opp. Party : Mr. Sangram Das, Standing Counsel (Vig.)

JUDGMENT Date of Hearing: 16.01.2020 : Date of Judgment : 29.06.2020

B.P. ROUTRAY, J.

By way of this petition, petitioner has assailed the order dated 16.09.2019, passed by the learned Special Judge, Vigilance, Dhenkanal in T.R. Case No. 26/2017, refusing the prayer of the petitioner to discharge him from the alleged commission of offences under Sections 13(2)/13(1)(d) of the Prevention of Corruption Act (PC Act) and Sections 468/471/420/120B of the IPC.

2. Heard Mr. S. Das, learned counsel on behalf of the petitioner and Mr. S. Das, learned Standing Counsel on behalf of the opposite party-Vigilance Department.

3. The facts in nutshell is that, the present petitioner is one of the accused in the aforesaid Vigilance case. It has been alleged that, when the petitioner was the Collector, Dhenkanal during the period 2001-2002, he along with other two co-accused persons, namely, one Suryanarayan Das, who was the Project Director, DRDA, Dhenkanal and one Satyananda Balasamanta, the Transport Contractor, at that relevant point of time, have caused pecuniary loss to the State Exchequer. It is alleged that the petitioner and said P.D., DRDA have made excess payment of Rs.9,47,119/-(rupees nine lakhs forty seven thousand one hundred nineteen) to the said Transport Contractor and thereby illegally gained the contractor causing heavy pecuniary loss to the Exchequer of the State. The specific allegations against the petitioner are that he approved the higher rate proposed by the PD, DRDA for transportation of rice and wheat from the FCI Go-down, Dhenkanal to different Block Headquarters and Gram Panchayat (GP) Headquarters under the Food for Work Programme. As per charge sheet, the approved rate for transportation prescribed by the Odisha Civil Supply Corporation, Dhenkanal (hereinafter referred to as 'OCSC, Dhenkanal') was not adhered to by the petitioner for transportation of the said food grains and higher rate was paid to the said Contractor only by accepting the hand quotations given by the Contractor, without any bid having certain oblique motive.

4. It is urged on behalf of the petitioner that he was not named in the FIR, but the charge sheet has been submitted against him for the reason that he was the approving authority of the said contract. It is submitted that on three occasions i.e. in the month of March, May and September of the year 2001 work order had been given to the contractor for transportation of 1500 MT, 1440 MT and 2900 MT of food grains respectively, but on the first occasion i.e. in the month of March, the present petitioner was not the Collector, Dhenkanal as he joined as Collector, Dhenkanal on 7.5.2001. Therefore, the 1st rate was approved by the predecessor Collector of the petitioner and subsequently on the basis of that, on the recommendation of the PD, DRDA, the petitioner had approved the rate and signed the work orders in the month of May and September, 2001.

5. On the other hand, it is urged on behalf of the Vigilance Department that the Collector is the ultimate authority to finalise and approve the rate and the work order and it cannot merely be said that whatever the PD, DRDA suggested, simply the Collector has to accept it. In the instant case, the work orders have been issued and rate has been finalized by the petitioners and P.D., DRDA only

by collecting hand quotations without going for open tender though enough time was there on the last two occasions i.e. in the months of May and September, 2001 to follow the procedure for awarding the contract for transportation. Therefore, it is submitted that there are sufficient materials against the accused persons to proceed for commission of offences as charged against them.

6. The learned trial Court, upon consideration of the prayer of the petitioner to discharge him from the alleged charge of the aforesaid offences, rejected the same as no justifiable ground found in favour of the petitioner to discharge him.

7. Mr. S.Das, learned counsel for the petitioner submits that the court below has not applied its mind in passing the impugned order. It is submitted that the rate given to the Contractor was in terms of the guidelines issued by the Panchayati Raj Department of Odisha vide its letters dated 14.03.2001, 17.03.2001 and 13.09.2001. It is also submitted that no prima facie case constituting the offences under Sections 13(2) read with 13(1)(d) of the PC Act and Sections 468/471/420/120B of IPC is made out against the petitioner as the amount paid was as per the rate prescribed by the government in PR Department of Odisha.

8. Upon perusal of the impugned order and the documents filed in the revision petition, it is seen that the rate prescribed by the OCSC, Dhenkanal for transportation of food grains for the year 2001- 02 was Rs.3.80 per quintal for first 10 KM and Rs.0.18ps. for each subsequent Kms, plus Rs.2.00 extra per quintal over and above the rate to the storage agents. In the letters of the PR Department dated 14.03.2001, 17.03.2001 and 13.09.2001, it is mentioned that for transportation, payment of Sales Tax, handling and other incidental charges, a sum of Rs.50.00 per quintal may be paid to the District Manager, OSCSC Ltd. out of CRF/EAS/JGSY funds available at DRDA/Block/GP level for lifting of food grains and delivery at GP storage points. However, there was further instruction in the said letter that where the Collector experiences serious difficulties while lifting food grains through OCSSC Ltd., he may lift the same through concerned BDOs.

9. Charge sheet shows, during the course of inquiry it has come to the light that though a Cheque of Rs. 10.00 lakhs (ten lakhs) was given to the District Manager of OCSC, Dhenkanal on 22.03.2001 which was returned by him on 26.03.2001, but before that date, quotations had already been received by the PD, DRDA, Dhenkanal resulting issuance of work order under the approval of the then collector. Similarly, for the 2nd and 3rd occasion i.e. in the month of May and September, the same rate was given to the contractor.

It is also forthcoming from the charge sheet that, during the relevant time the Regional Truck Owner's association was charging the rate prescribed by the OCSC, Dhenkanal. Further the quotations of rates are hand procured being typed in one type machine. It is worthwhile to mention that on three occasions i.e. in the month of March, May and September of the year 2001 the same contractor was given the contract on the same rate for transportation of 1500 MT, 1440 MT and 2900 MT of food grains respectively. No doubt, it is a fact that the present petitioner was not the Collector, Dhenkanal in the month of March, 2001, but he is liable to show his bona fide for the last two transactions in the months of May and September, 2001.

10. The settled proposition of law on the point of discharge has been reiterated by the Hon'ble Apex Court in catena of decisions. In the case of In the case of ***R. S. Nayak vs. A. R. Antulay, reported in (1986) 2 SCC 716,*** *at paragraph* 43 of the report, the Apex Court has held as under:

> "43. ……. The Code contemplates discharge of the accused by the Court of Session under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on police report are dealt with in Section 245. The three sections contain somewhat different provisions in regard to discharge of the accused. Under Section 227, the trial Judge is required to discharge the accused if he "considers that there is not sufficient ground for proceeding against the accused". Obligation to discharge the accused under Section 239 arises when "the Magistrate considers the charge against the accused to be groundless". The power to discharge is exercisable under Section 245(1) when "the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction". It is a fact that Sections 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the Trial court is satisfied that a prima facie case is made out, charge has to be framed."

11. *The Apex Court in the case of* ***State of Bihar v. Ramesh Singh*****,** (1977) 4 SCC 39, at paragraph 4 has observed as under:

> **"4.** Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the

duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If "the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by Section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which— … (*b*) is exclusively triable by the Court, he shall frame in writing a charge against the accused", as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. It the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. ……."

12. *In the case of* ***Sheoraj Singh Ahlawat v. State of U.P.*****, (2013) 11 SCC 476,** the Supreme Court referring to its various earlier decisions, held as under:

"14. The ambit of Section 239 CrPC and the approach to be adopted by the Court while exercising the powers vested in it under the said provision fell for consideration of this Court in *Onkar Nath Mishra* v. *State (NCT of Delhi)* [(2008) 2 SCC 561 : (2008) 1 SCC (Cri) 507] . That too was a case in which a complaint under Sections 498- A and 406 read with Section 34 IPC was filed against the husband and parents-in-law of the complainant wife. The Magistrate had in that case discharged the accused under Section 239 CrPC, holding that the charge was groundless. The complainant questioned that order before the Revisional Court which directed the trial court to frame charges against the accused persons. The High Court having affirmed that order, the matter was brought up to this Court.

15. This Court partly allowed the appeal qua the parents-in-law while dismissing the same qua the husband. This Court explained the legal position and the approach to be adopted by the court at the stage of framing of charges or directing discharge in the following words: (*Onkar Nath case* [(2008) 2 SCC 561 : (2008) 1 SCC (Cri) 507] , SCC p. 565, para 11) .

> "11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, *taken at their face value*, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. *What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even* ***strong suspicion*** *founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence*."

16. Support for the above view was drawn by this Court from the earlier decisions rendered in *State of Karnataka* v. *L. Muniswamy* [(1977) 2 SCC 699 : 1977 SCC (Cri) 404 : 1977 Cri LJ 1125] , *State of Maharashtra* v. *Som Nath Thapa* [(1996) 4 SCC 659 : 1996 SCC (Cri) 820 : 1996 Cri LJ 2448] and *State of M.P.* v. *Mohanlal Soni* [(2000) 6 SCC 338 : 2000 SCC (Cri) 1110 : 2000 Cri LJ 3504] . In *Som Nath case* [(1996) 4 SCC 659 : 1996 SCC (Cri) 820 : 1996 Cri LJ 2448] the legal position was summed up as under: (SCC p. 671, para 32)

> "*32*. … if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused *might have* [**Ed.**: The words "might have" and "has" are emphasised in original.] committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused *has* [**Ed.**: The words "might have" and "has" are emphasised in original.] committed the offence. *It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage*." (emphasis supplied)

17. So also in *Mohanlal case* [(2000) 6 SCC 338 : 2000 SCC (Cri) 1110 : 2000 Cri LJ 3504] this Court referred to several previous decisions and held that the judicial opinion regarding the approach to be adopted for framing of charge is that such charges should be framed if the court prima facie finds that there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence as if to determine whether the material produced was sufficient to convict the accused. The following passage from the decision in *Mohanlal case* [(2000) 6 SCC 338 : 2000 SCC (Cri) 1110 : 2000 Cri LJ 3504] is in this regard apposite: (SCC p. 342, para 7)

> "*7*. The crystallised judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused.""

13. The Supreme Court in ***Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia,*** *(1989) 1 SCC 715* cautioned the High Courts to be loath in interfering at the stage of framing the charges against the accused. It was held that self-restraint on the part of the High Court should be the rule unless there is a glaring injustice staring the court in the face. The opinion on many matters can differ depending upon the person who views it. There may be as many opinions on a particular point, as there are courts but that would not justify the High Court to interdict the trial. Generally, it would be appropriate for the High Court to allow the trial to proceed.

14. Further, in the case of ***Smt. Om Wati Vs. State, through Delhi Admn., reported in (2001) 4 SCC 333***, the Apex Court has gone to the extent of observing that 'we would again remind the High Courts of their statutory obligation to not to interfere at the initial stage of framing the charges merely on hypothesis, imagination and far-fetched reasons which in law amount to interdicting the trial against the accused persons. Unscrupulous litigants should be discouraged from protracting the trial and preventing culmination of the criminal cases by having resort to uncalled for and unjustified litigation under the cloak of technicalities of law.'

15. The Hon'ble Supreme Court, in the case of ***State by Karnataka Lokayukta Vs. M.R.Hiremath, (*****2019) 7 SCC 515**, held that *"it is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence"*.

16. In the case at hand, besides other factual aspects, the primary factual aspects are that, for transportation of said food grains, whether the rate prescribed by the OCSC, Dhenkanal is applicable or the rate prescribed by the PR Department in the aforesaid letters? Secondly, whether there was any element of criminality in giving the work order to the particular contractor in the given rate for three consecutive occasions by accepting the hand quotations without adhearing to proper procedure and thereby the contractor was favoured with undue gain?

17. Of course, besides all other aspects as would be required by the learned trial court, these are the matters to be decided in course of trial and at

this stage of the proceedings the same cannot be looked into in detail. Considering the entire fact situation of the case and the documents available on record, the charge does seem groundless as the materials found in course of investigation makes out a strong prima facie case against the accused persons to proceed for trial and therefore, no infirmity is seen in the impugned order of the trial court in refusing to discharge the petitioner. In view of the above, the revision petition stands dismissed being devoid of any merit.

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2020 (II) ILR - CUT- 314

S.K. PANIGRAHI

BLAPL NO. 2418 OF 2020

SANJEET SANDHA …… Petitioner

.V.

STATE OF ODISHA ……Opp. Party

ODISHA VICTIM COMPENSATION SCHEME, 2017 – Offence under section 285 and 307 of IPC – Compensation to victim for burn injury – Scope and ambit – Discussed – Held, it is imperative that the Trial Courts, while deciding bail cases of this nature, should consider awarding a reasonable amount as an interim award so that the victims, especially hailing from poor and underprivileged classes, can utilise the said amount for the purpose of meeting their medical expenses.

Case Laws Relied on and Referred to :-

1. (1988) 4 SCC 551 : Hari Singh Vs. Sukhbir Singh,
2. 1995 SCC (1) 14 : Delhi Domestic Working Forum Vs. UOI
3. (1998)7 SCC 392 : State of Gujarat Vs. Hon'ble High Court of Gujarat
4. (2010) 6 SCC 230 : K.A. Abbas H.S.A Vs. Sabu Joseph
5. (2013) 6 SCC 770 : Ankush Shivaji Gaikwad Vs. State of Maharashtra
6. (2014) 5 SCC 252 : Mohd. Haroon Vs. Union of India
7. (2014) 1 ILR Cr.L.J. 202 : Abdul Rashid Vs. State of Odisha.

For Petitioner : Mr. B.R.Tripathy
For the Opp.Party: Mr. Jyoti Prakash Patra, (A.S.C.)

JUDGMENT Date of Hearing: 02.06.2020 : Date of Judgment: 10.06.2020

S.K. PANIGRAHI, J.

1. Dreadful crime challenges the belief in fundamental goodness of the society and if there is an understandable motive or response to some form of

provocations, we can't comprehend them as it falls beyond the bonds of moral acceptability which is aptly epitomized in the instant case. The petitioner in the present application under Section 439, Cr.P.C. seeks to get enlarged on bail as he is in custody in connection with a case booked under Sections 285, 307 of I.P.C., 1860 arising out of Rairakhol P.S. Case No.260 of 2019 corresponding G.R. Case No 575 of 2019 pending in the file of Ld. S.D.J.M., Rairakhol.

2. The brief factual matrix as set out in the FIR reveals that on 07.11.2019, the petitioner had borrowed the bike of one of the co-villagers named Radheshyam Pradhan to bring petrol in a bottle from the nearby petrol pump. Since the Petitioner failed to turn up for quite some time the said vehicle owner got worried and started looking for the Petitioner. Finally, he found the petitioner along with his bike and a bottle of petrol around 4:30 PM at Old Bank Chowk. The delayed return of the vehicle by the petitioner irked the owner of the vehicle which triggered a verbal squabble with the present petitioner. In the meantime, the injured (the nephew of the informant) who, was a bystander, tried to mitigate the dispute between the two like a Good Samaritan. Little did the Good Samaritan know that he was, in fact, trying to reason with the devil himself? Instead of being thankful to the victim, the Petitioner, without batting an eyelid and knowing fully well of the consequences of his action, splashed the petrol and hurriedly ran towards a nearby betel shop and snatched away a match box from the said betel shop of Sheta Behera, lit a match stick and tossed it at the victim. The entire upper body engulfed in fire and received scathing burn injury in the upper body part including head, neck, face and chest etc. Having done so, he vanished from the crime scene in a cowardly manner. The shocked passersby and locals immediately rushed to the victim's aid and attempted to douse the fire and took him to the nearby hospital.

3. The entire facts were succinctly narrated to the police by the uncle of the victim, Shri Sribanta Purohit, on the same day of occurrence i.e. on 07.11.2019 at 10:55 PM which culminated into registration of an F.I.R. against the present petitioner under Sections 285, 307 of I.P.C. vide Rairakhol P.S. Case No.260 of 2019.The monstrous act of the petitioner endangered victim's life which is recognized as a serious criminal act under criminal law of the land. The petitioner was taken into custody on 08.11.2019, thereafter he unsuccessfully moved a regular bail on 06.12.2019 before the learned S.D.J.M., Rairakhol. He, once again, invoked Section 439 of Cr. P.C. before the Addl. Sessions Judge, Rairakhol which was rejected vide order dated 27.02.2020.

4. Shri B.R. Tripathy, Ld. Counsel for the Petitioner vigorously contended that the petitioner is in no way involved in the commission of the alleged crime and has been falsely implicated. The petitioner has been arrayed as an accused sans proper investigation and evidence. The petitioner is a poor man and simply a victim of circumstances. He further states that the petitioner is the permanent resident of village Khandadhip P.S. Rairakhol, Dist.-Sambalpur, hence there is no possibility of absconding or fleeing from criminal justice administration. He further pleaded that the petitioner has been languishing in jail custody since 8.11.2019, therefore deserved to be enlarged on bail.

5. Per contra, Shri Jyoti Prakash Patra Ld. Addl. Standing Counsel for the State, pithily advanced his argument and stated that the most telling aspect of the instant case is that the Petitioner is an ill-tempered person. He had a preconceived plan to burn the victim with an intention to kill which boiled down to the commission of a heinous and brutish act leading to severe burn injuries. But as providence would have it and perhaps due to the good deeds of the victim, he survived and has lived to tell a rather gory tale. The Petitioner has not acted impulsively but he was fully aware of the consequences of his act. He further averred that there was a clear "mens rea" i.e. ‘the intention to kill’ at the time of committing the crime. He has shown scant regard for precious human life. In fact, the statement of the victim Harihar Purohit under Section 161 of the Code of Criminal Procedure which was corroborated by other witnesses with near unanimity in displaying that the Petitioner had threatened to kill him and translated into action in the present case. The statement of victim further reaffirmed that the Petitioner is known to be a man of frightening temper which resulted in grave fear among the other bystanders present on the spot.

6. A bare perusal of the up-to-date case Diary, Statements recorded under Section 161 of Cr.P.C., injury report and the arguments advanced by the parties, divulge that the accused/petitioner is in jail custody in connection with this case since 08.11.2019 for alleged commission of offences punishable u/s. 285/307 of IPC. He was alleged to have poured petrol on the body of informant’s nephew leading to severe burn injuries on the sensitive parts of his upper body. The injury report smacks burn injuries on his head, neck, face, left upper limbs, chest, left back of shoulder and clearly indicates that the victim has sustained about 30 to 35% (percent) of deep burn injuries which warranted hospitalization for more than 58 days in various hospitals. The medical opinion on the nature of the injury said to be grievous in nature.

7. In the meantime, the Final Report has been filed on 31.1.2020 with 13 P.W.s (including 2 seizure witnesses). Most of the P.W.s are chance witnesses who own shops/establishments in the vicinity of the crime spot. The statements of all the material witnesses crystalized into a common thread having four limbs namely: (a)that the Petitioner was fully aware of the consequences of his action;(b)He is known to be a hot headed person;(c)The person who were present near the crime spot being aware of the ill-tempered nature of the Petitioner; and(d)the injured victim had at no point time provoked or aided in provoking to do such 5 act, on the contrary, the victim has acted in good faith and showed good Samaritanism.

8. Amidst avalanche of physical and mental sufferings, the victim has to experience the grim scenario of our criminal justice system towards victims. The approach of the Indian criminal justice system is centripetally directed towards the concerns of the offender, his activities, his rights and his correctional needs but the rights of the victims often take a back seat. Some exceptional and progressive international movements and legal instruments in the past stressed on ameliorating the plights of the victims. The United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power,1985 has emphasized on the fact that crime is not just a mere violation of a criminal code but also it inflicts harm to victims in terms of economic loss, emotional suffering and physical or mental injury. Originally, the adversarial criminal justice system of our country was also not victim sensitive. The Government appointed Malimath Committee on Criminal Justice Reforms was uncharacteristically candid in its lamentation that *"people by and large have lost confidence in the criminal justice system ……..Victims feel ignored and crying for attention and justice"*[1] In its turn, the Committee concluded that the criminal justice administration will assume a new direction towards better and quicker justice once the rights of victims are recognized by law and restitution for loss of life, limb and property are provided for in the system."[2] The committee suggested quite a few changes to the Criminal Procedure Code to give the victim a prominent role.[3]

9. Amidst increasing concern for compensation to victims of crimes, Section 357A was inserted in the Code of Criminal Procedure in the year 2009. It was intended to reassure the victim that he or she is not forgotten in

1 Report of the Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs-Vol. I March 2003 (hereinafter referred to as "Malimath Committee Report"), 75., 2 Ibid at 271. ,3. The Malimath Committee largely concurred with the recommendations of Law Commission of India. See 152nd and 154th Reports of Law Commission of India.

the criminal justice system. Though the amendments in 2009, left the character of Section 357 unaltered, with the introduction of this Section, the Court is empowered to direct the State to pay compensation to the victim in such cases where the compensation awarded under Section 357 is inadequate for such rehabilitation, or where the case ends in acquittal or discharge but the victim has to be rehabilitated. Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or District Legal Services Authority to award him/her compensation. The scheme made way for an institutionalized payment of compensation to the victim by the state for any loss or injury caused to him by the offender. The responsibility has been imposed on the states to create and maintain a fund for the purpose. Despite the fact that the power stands vested in Courts under Section 357 and 357A of the Code, the provision have by and large faced selective institutional amnesia.

10. Besides, there are provisions in other legislations for payment of compensation to the victim,[4] either by the trial court or by specially set up claims' tribunal. The right to compensation was later interpreted by apex court as an integral part of right to life and liberty under Art. 21 of the Constitution.[5]

11. In similar vein, the State of Odisha in exercise of the powers conferred by the provisions of Section 357A has formulated the Odisha Victim Compensation Scheme, 2017.According to the said scheme, compensation for burn injury victims is awarded depending on the grievousness of injury and related factors like disfigurement of the face etc.

12. A bare perusal Section 357 A of the Code of Criminal Procedure, 1973 makes it clear that whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall be saddled with the responsibility of deciding the quantum of compensation to be awarded under the scheme. Theraison de'trefor such a reasoning is that if the Court comes across a fit case which shakes its conscience and if it opines that a citizen of the country has been let down by the State then as a measure of restitution as well as rehabilitation, it can order for appropriate compensation to be paid to the victim.

4. Under Section 5 of the Probation of Offenders Act, 1958 while releasing an accused on probation or admonition, the court may order the offender to pay compensation and cost to the victim.

5. In addition, Article 41 (Directive Principle of State Policy) and Article 51A (Fundamental Duties) of the Constitution cast a duty on the state to secure "the right to public assistance in cases of disablement and in other cases of undeserved want" and to "have compassion for living creatures" and "to develop humanism" respectively.

13. There has been a general reluctance on the part of courts to exercise the power under Section 357 to the benefit of the victims. The courts have limited themselves to award of sentences with no mention of compensation to victims thereby denying their basic right. In ***Hari Singh vs. Sukhbir Singh***,[6] the Hon'ble Supreme Court has lamented on the failure of the Courts in awarding compensation to the victims in terms of Section 357(1) of the Code of Criminal Procedure. The Court recommended to all Courts to invoke Section 357 of the Code of Criminal Procedure to sub-serve the ends of justice and held that:

> "…..Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. It is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way."

The apex Court in ***Delhi Domestic Working Forum v UOI***[7] has reaffirmed its concern through following words herein below:

> "It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings…."

Similar sentiment also found expression in ***State of Gujarat v Hon'ble High Court of Gujarat*** [8] with the following words:

> "Section 357 of the Criminal Procedure Code, 1973 provides some reliefs to the victims as the court is empowered to direct payment of compensation to any person for any loss or injury caused by the offence. But in practice the said provision has not proved to be of much effectiveness."

(1988) 4 SCC 551 : Hari Singh Vs. Sukhbir Singh, 1995 SCC (1) 14 : Delhi Domestic Working Forum Vs. UO, (1998) 7 SCC 392 : State of Gujarat Vs. Hon'ble High Court of Gujarat.

The above-mentioned views were further endorsed in ***K.A. Abbas H.S.A v. Sabu Joseph***[9]***, Ankush Shivaji Gaikwad v. State of Maharashtra***[10]***, Mohd. Haroon v. Union of India***[11]***, Abdul Rashid v. State of Odisha.***[12] In addition, in Ankush Shivaji Gaikwad (supra), the apex Court has categorically held that the trial court is duty bound to decide the issue of sentencing as well as victim compensation at the time of deciding the sentencing aspect of a criminal trial.

14. In the light of facts and circumstances, the present case appears to be a fit case for an order for compensation to the victim through Odisha State Legal Services Authority. The said authority must come to the aid of the victim by disbursing reasonable sum of money commensurate with his sufferings and medical expenses as payable under the Odisha Victim Compensation Scheme, 2017. Accordingly, this court directs the State legal Service Authority to pay the appropriate compensation to the victim within four weeks from today. It is further made clear that in the event the Petitioner is convicted in the present case, the trial court shall consider further compensation which could be recovered from the offender in addition to the aforesaid sum. In addition, it is directed that Ld. Trial Court shall conclude the trial as expeditiously as possible.

15. It is also imperative that the Trial Courts, while deciding bail cases of this nature, should consider awarding a reasonable amount as an interim award so that the victims, especially hailing from poor and underprivileged classes, can utilise the said amount for the purpose of meeting their medical expenses.

16. Considering the aforesaid discussion and taking into account the entirety of facts and circumstances of the case in hand, this Court is not inclined to release the accused Petitioner on bail. Accordingly, the bail petition filed on behalf of the accused/petitioner stands rejected.

17. It is, however, clarified that the above observations shall not come in the way of a fair trial before the Ld. Trial Court and it will proceed to decide the matter on its own merits, uninfluenced by any of the observation made hereinabove. The bail Application under Section 439 Cr.P.C. is accordingly dismissed. Let free copies of this judgment be made available to the State Legal Services Authority, District Legal Services Authority and the informant of the present case.

[9] (2010) 6 SCC 230 : K.A. Abbas H.S.A Vs. Sabu Joseph [10] (2013) 6 SCC 770 : Ankush Shivaji Gaikwad Vs. State of Maharashtra, [11] (2014) 5 SCC 252 : Mohd. Haroon Vs. Union of India & [12] (2014) 1 ILR Cr.L.J. 202 : Abdul Rashid Vs. State of Odisha.

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