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MOHAMMAD RAFIQ, C.J & KUMARI SAVITRI RATHO, J.

WRIT APPEAL NO.165 OF 2020
(Arising out of judgment dated 17.2.2020 passed in W.P.(C) No.1523 of 2000)

RAJIV KUMAR PARIDA .....Appellant

.V.

STATE OF ODISHA & ORS. .....Respondents

(A) ORISSA GRAMA PANCHAYAT ACT,1964 – Section 115 – Provision under for suspension of Sarapanch – Suspension order passed on the basis of a complaint made by the husband of defeated candidate – Writ petition by Sarapanch challenging the order of suspension allowed – Writ appeal by the husband of the defeated candidate – Plea that the learned Single judge has not considered the case properly – Held, plea unfounded – Order of single judge upheld.

"On examination of records in the light of settled proposition of law, we have found that there is indeed no such material to justify formation of the opinion by the State Government as to the existence of the circumstances that respondent no.7-writ petitioner wilfully violated the provision of Section 19 of the Act and therefore the conclusion arrived at by the State Government in the impugned order that her further continuation as Sarpanch of Kotsahi Gram Panchayat would be detrimental to the interest of the inhabitants of the Gram Panchayat, appears to be wholly unfounded. It must therefore be held that the impugned order passed by Government having been passed without the formation of the requisite opinion, suffers from the vice of non-application of mind, and amounts to colourable exercise of power. On reading of Section 115(2) of the Act, we are inclined to hold that though the power to place an elected Sarpanch or Naib Sarpanch under suspension is vested in the State Government, but this provision postulates the requirement of recording reasons in writing to suspend the Sarpanch or Naib Sarpanch, as the case may be, from the office, pending initiation of the proceeding under sub-section (1) of Section 115. Clearly, first and foremost, a duty has been cast on the State Government to form an opinion that circumstances exist to show that the Sarpanch or Naib Sarpanch, has wilfully (i) omitted or refused to carry out or has violated the provisions of the Act and the rules or orders made thereunder or (ii) has abused the powers, rights and privileges vested in him or (iii) has acted in a manner prejudicial to the interest of the inhabitants of the Gram. All these three requirements of Sub-section (1) of Section 115 are qualified by the term 'wilful'; namely; all or any of such three requirements of the Sub section (1) of Section 115 must be attributed to the Sarpanch or Naib Sarpanch, as the case may be, as a wilful act on his/her part. In the event any one or more of the three circumstances being attracted, yet another important condition incorporated in sub-section (1) of Section 115 is that the State Government should also be of the opinion that further continuance of such Sarpanch or Naib Sarpanch in the office would be detrimental to the interest of Grama

Panchayat or the inhabitants of Grama. All these requirements indicate the intention of the legislature that the power to place an elected representative of the Panchayati Raj Institution under suspension has to be used sparingly by the State Government, with utmost care and caution, only in appropriate cases, on the basis of the reliable and cogent material before it. In order to safeguard against abuse of such power, therefore, while conferring the discretionary power on the State Government, an additional condition has been incorporated in sub-section (2) of Section 115 of the Act by mandating it to record the reasons in writing for suspending a Sarpanch and Naib Sarpanch. Obviously, such reasons have to indicate that the State Government on objective consideration of materialhas satisfied itself about the existence of the above referred to pre-requisite conditions" (Paras 32 & 33)

(B) ORISSA GRAMA PANCHAYAT ACT,1964 – Section 115 – Provision under for suspension of Sarapanch – Suspension order passed on the basis of a complaint made by the husband of defeated candidate – Writ petition by Sarapanch challenging the order of suspension allowed – Writ appeal filed by the husband of the defeated candidate in absence of an appeal by the State – Whether can be entertained? – Held, No – Reasons indicated.

"Apart from the merits of the case, there is another reason why the appeal in the present case merits dismissal. The writ petition was filed by respondent No.7-writ petitioner. Even though the State Government was a party-respondent to the writ petition, they chose not to file counter affidavit. Thereafter, when the order of suspension was quashed, the State Government has decided not to challenge the impugned judgment by filing writ appeal. Under sub-section (3) of Section 115 of the Act, the State Government has been conferred with the power of revoking the order of suspension of Sarpanch or Naib Sarpanch at any time during the pendency of the proceeding under sub-section (1). The State Government having taken a conscious decision not to challenge the judgment of the learned Single Judge, can be taken to have accepted its correctness. The State Government, which has the power to revoke the order of suspension as per sub-section (3) of Section 115 of the Act, having taken a conscious decision not to assail the judgment of the learned Single Judge, the appeal filed at the instance of the complainant challenging the impugned judgment, even otherwise, should not be entertained." (*Para 39*)

Case Laws Relied on and Referred to :-

1. 62 (1986) CLT 548 : Tarini Tripathy .Vs. Collector, Koraput & Ors.
2. 1987 (II) OLR 407 : Ch. Srinivas .Vs. State.
3. 2016(II) OLR 707 : Sarat Ch. Mohanty .Vs. State of Orissa.
4. 1987(II) OLR 391 : Baikunthanath Mohanty .Vs. State of Orissa.
5. 2012 SCC Online Ori 52 : (2013)115 CLT 847 Smt. Bharati Pradhan .Vs. State of Odisha.
6. (2006) 1 SCC 275 : State of Orissa & Ors .Vs. Md. Illiyas.

7. 1990(I)OLR 44 : Lingaraj Sahu .Vs. State of Orissa.
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10. AIR 2000 Orissa 28 : Sukanta Bhoi .Vs. State of Orissa & Ors.
11. (2009)16 SCC : Ajit Singh & Anr. .Vs. Financial Commissioner and Secretary to Government & Anr.
12. AIR 1966 SC 1925 : G.Sadanandan .Vs. State of Kerala.
13. 2004(I) OLR 46 : Kulamani Mallick .Vs. The Collector, Puri and two Ors.
14. (2012) 4 SCC 407 : Ravi Yashwant Bhoir .Vs. Collector.

For Appellant : Mr. S.P.Mishra, Sr.Adv., M/s. P.K.Rath, S.K.Behera, P.Nayak, S.Das & S.Rath.

For Respondent: Mr. Ashok Kumar Parija, Adv. General, Mrs. Suman Patnaik, Addl. Gov. Adv., Mr. D.P.Dhal, Sr. Adv., Mr. B.S. Das Parida, S.K.Dash, S.Mohapatra, K.Mohanty & M.K.Agarwala.

JUDGMENT Date of Judgment :24.07.2020

PER: MOHAMMAD RAFIQ, C.J.

Appellant Rajiv Kumar Parida seeks to challenge the judgment dated 17.02.2020 passed by the learned Single Judge by which the writ petition filed by Smt. Manjubala Pradhan-respondent no.7, was allowed and the order of her suspension dated 26.09.2019 as the Sarpanch of Kotsahi Gram Panchayat, was quashed and set aside.

2. The case set up by respondent No.7 in the writ petition was that she was elected as Sarpanch of Kotsahi Gram Panchayat by defeating the wife of the present appellant-Rajiv Kumar Parida in the year 2017. Sri Rajiv Kumar Parida, opposite party no.7 in the Writ Petition bearing WPC No. 1523 of 2020, filed a complaint before the authorities including the Collector and District Magistrate, Balasore, making certain allegations against the respondent no.7-writ petitioner. The Collector and District Magistrate, Balasore entrusted the matter to the District Panchayat Officer, Balasore, opposite party no.4, for enquiry. When the matter was pending with the District Panchayat Officer, the present appellant-Rajiv Kumar Parida filed a writ petition, bearing WPC No. 23538 of 2017, before this Court, which was disposed of with a direction to the Collector and District Magistrate to decide his (appellant's) representation within a time frame. The Collector and District Magistrate thereupon required the District Panchayat Officer to expedite the enquiry and submit report, who submitted a detailed report on 29.12.2017 concluding therein that although all the works have been

completed, but proper procedures as per the Government guidelines, have not been followed. A show-cause notice was issued to the respondent no.7-writ petitioner-Sarpanch and also to the Panchayat Executive Officer, for not following the procedures and guidelines of the Government. The District Panchayat Officer also requested the Executive Engineer, RWSS to verify the ratio of population in number of TWS project taken up in the Gram Panchayat with reference to the existing tube wells.

3. That on the basis of the said report, a show-cause notice was issued to the respondent no.7-writ petitioner by the Collector and District Magistrate, Balasore to which she submitted a detailed reply on 5.5.2018. The District Panchayat Officer, Balasore-opposite party no.4 issued notice to the respondent no.7-writ petitioner to which she has submitted her reply on 15.5.2018 stating that she has already filed reply to show-cause notice issued against her on 6.2.2018, and further she has also submitted reply to the show-cause notice issued by the Collector, Balasore, both of which may be treated as reply to show-cause notice dated 15.05.2018. The Collector & District Magistrate, Balasore-opposite party no.3 vide his letter dated 26.9.2019 forwarded the matter to opposite party no.2-Additional Secretary to Government, Panchayati Raj & Drinking Water Department, Odisha for taking action against the respondent no.7-writ petitioner for wilfully violating the provisions of Section 19 of Odisha Grama Panchayat Act, 1964 (for short 'the Act'), who by invoking Sub-section (2) of Section 115 as well as Section 19 of the Act, placed the respondent no.7-writ petitioner-Sarpanch under suspension with immediate effect.

4. The writ petition was contested by the State Government, but without filing any counter affidavit. However, stand of the learned Additional Government Advocate appearing for the State before the learned Single Judge was that the Government having exercised the power under sub-section (2) of Section 115 of the Act, there remains very limited scope for this Court to interfere with the same. He submitted that outcome of the fact finding enquiry made by the Collector & District Magistrate clearly discloses that the respondent no.7-Sarpanch has wilfully violated the provisions of Section 19 of the Act and acted in a manner prejudicial to the interest of Grama.

5. Learned Single Judge relying on earlier judgments of this Court in **Tarini Tripathy vrs. Collector, Koraput & others** reported in **62 (1986) CLT 548** and **Ch. Srinivas Vrs. State** reported in **1987 (II) OLR 407** in paragraph 8 of the impugned judgment concluded thus :-

> "xxx xxx xxx xxx xxx xxx ……A plain reading being given to the above order, it appears that based on the report that the petitioner has wilfully violated the provision of Section 19 of the OGP Act, it is said that the petitioner has violated the provision of Section 19 of the OGP Act and her acting in a manner which is prejudicial to the interest of the Grama and as such her further contention as Sarpanch of Kotsahi Grama Panchayat is detrimental to the interest of the inhabitants of the said Grama Panchayat. But, there is no such note as to any such opinion to have been formed based upon the said report as to the existence of circumstances in the direction of wilful violation of the provision of Section 19 of the Act and the action in a manner prejudicial to the interest of the Grama in saying that the continuation of the petitioner as the Sarpanch is detrimental to the interest of the inhabitants of the Grama Panchayat. Furthermore, no reason has also been assigned. Therefore, the order of suspension of the petitioner who is the Sarpanch of Kotsahi Gram Panchayat as under Annexure-1 cannot be sustained in the eye of law."

6. We have heard Mr. S.P.Mishra, learned Senior Advocate along with Mr. P.K.Rath, S.K.Behera, P.Nayak, S.Das and S.Rath for the appellant, Mr. Ashok Kumar Parija, learned Advocate General for the State and Mr. D.P.Dhal, learned Senior Advocate for the respondent No.7-original writ petitioner.

7. Mr. S.P.Mishra, learned Senior Counsel appearing for the appellant Rajiv Kumar Parida, submitted that the order of suspension of the respondent no.7-writ petitioner-Sarpanch was passed by the State Government on the basis of the enquiry report of District Panchayat Officer wherein allegation of financial irregularities were found proved against her and the Panchayat Executive Officer. Paras 1,2,3 and 4 of the report make it clear that the Panchayat Secretary made payments to the contractors on the basis of the order passed by the respondent no.7-Sarpanch in respect of works of which payments were already made. On being confronted with this, the executant contractors in some cases have even refunded the amounts. All these payments were made in complete violation of Section 19 of the Act read with Rule 15(4) of The Odisha Gram Panchayat Rules, 2014 (for short 'the Rules') without following the provisions of law.

8. Learned Senior counsel argued that the Collector after receiving reply of the respondent no.7-writ petitioner to the show cause notice submitted his report to the Government. Accordingly, charges were framed against Respondent no.7 on allegations of financial irregularities as no document or vouchers were available on record. This is a clear case of misuse of power dealing with financial matters, amounting to dereliction of duty. It is

submitted that although learned Single Judge quoted Section 115 of the Act, but omitted to notice that this provision has been amended in the year 2004. Learned Single Judge has relied on the decision of this Court in **Tarini Tripathy** and **Ch.Srinivas** (supra), which are based on pre-amended Section 115 of the Act and have therefore no application to the present case. Learned Senior Counsel also submitted that Division Bench of this Court in **Sarat Ch. Mohanty vs. State of Orissa**, **2016(II) OLR 707** has also reiterated the same law by relying on previous judgment in **Tarini Tripathy**, **62 (1986) CLT 548** and **Baikunthanath Mohanty vrs. State of Orissa**, **1987(II) OLR 391**, but again without noticing the amendments in Section 115(1) and Section 115(2) of the Act. Therefore, ratio of the judgment of this Court in **Sarat Ch. Mohanty**, (supra) is also not applicable to the present case.

9. Mr. S.P.Mishra, learned Senior Counsel for the appellant submitted that the learned Single Judge has omitted to consider the judgment of the Single Bench of this Court in **Smt. Bharati Pradhan vs. State of Odisha**, 2012 SCC Online Ori 52: **(2013)115 CLT 847** wherein change of law has been noticed in paras 21 and 25 of the report and it has been held that the Government under Section 115(3) of the Act, has the power to revoke the suspension and it is open for the suspended Sarpanch to apply before the Government for revocation of the order of suspension. Learned Senior Counsel submitted that as there are allegation of financial irregularities and non-compliance of statutory provisions of law, if suspension is revoked, there is every possibility of the respondent no.7-Sarpanch tampering with the records. Since the charges have been framed in the present case against respondent No.7- writ petitioner-Sarpanch, it is open for her to file reply and the enquiry can be expedited. It is therefore prayed that the present Writ Appeal may be allowed and the impugned judgment may be set aside.

10. Learned Advocate General has adopted the arguments advanced by the learned Senior Counsel for the appellant. He however submitted that since the charge memo has already been served on the respondent no.7-writ petitioner, the authorities shall make an endeavour to conclude the enquiry in a time bound manner as may be directed by this Court and pass the final order.

11. Per contra, Mr. D.P.Dhal, learned Senior Counsel appearing for respondent No.7-writ petitioner submitted that in so far as the allegation that Palli Sabha was conducted on 14.9.2017 but notice thereof was issued on

6.9.2017, is concerned, the appellant-Rajiv Kumar Parida was himself present in the Palli Sabha and has also put his signature in the notice dated 6.9.2017. The Palli Sabha was attended by more than 200 people. Thus, the relevant guidelines were substantially followed and no prejudice has been caused to anyone. As regards the other allegations, even the District Panchayat Officer in his report has found that all the works were duly completed, but there was minor omission of certain procedures. It is contended that the Collector has disposed of the representation of the appellant-Rajib Kumar Parida without giving any opportunity of hearing to the respondent no.7-writ petitioner. His order is silent whether any opportunity was given to her even though she was arrayed as opposite party no.2 in that representation. The Collector and District Magistrate, Balasore illegally concluded in his notice dated 26.9.2019 that respondent No.7-writ petitioner has wilfully violated the provisions of the Act and rules whereas no such finding of wilful violation of the Act and Rules was recorded by the District Panchayat Officer in his report. There was thus no basis with either the Collector or the State Government to conclude that the action of respondent no.7-writ petitioner was prejudicial to the interest of the Grama and as such, her further continuance as Sarpanch of Kotsahi Gram Panchayat is detrimental to the interest of the inhabitants of the Grama Panchayat.

12. It is argued that as per the law laid down by the Supreme Court in **State of Orissa & others vs. Md. Illiyas**, reported in **(2006) 1 SCC 275**, in order to justify invocation of Section 115(1) of the Act, action complained of must have been wilfully done by the Sarpanch. According to report of the District Panchayat Officer, there was no wilful conduct of the respondent no.7-writ petitioner for abusing the power. It has been held by this Court in **Tarini Tripathy,** (supra) that Section 115 of the Act postulates three requirements, which have not been satisfied in the present case. It is contended that the Collector having formed an opinion without there being a finding in the report submitted by the District Panchayat Officer about wilful omission, minor procedural irregularity or lapse might not justify the conclusion that continuation of the respondent no.7-writ petitioner as Sarpanch would be detrimental to the interest of Gram Panchayat. The order of suspension has thus been mechanically passed without the due application of mind. Reliance has also been placed on the decision of **Baikunthanath Mohanty,** (supra).

13. We have given our thoughtful consideration to the rival submissions, gone through the cited precedents and examined the material on record.

14. Much has been argued on behalf of the appellant about the effect of amendment in Section 115 of the Act vide Notification No. 1040 dated 12.10.2004. It has been contended that the judgments of this Court in **Tarini Tripathy, Ch.Srivas** and **Baikunthanath Mohanty**, (supra), being based on pre-amended Section 115 of the Act, their ratio shall not apply to the present case. Since the judgment in **Sarat Ch. Mohanty vs. State of Orissa**, (supra) is founded on those judgments, ratio thereof would also not be applicable to the present case. Learned Single Judge has slipped into error of law by relying on those judgments.

15. In order to properly appreciate the provision contained in Section 115 of the Act, we shall have to trace its legislative history. Section 115 of the Act, 1964, as originally engrafted in the Act, which the Division Bench of this Court interpreted in **Tarini Tripathy**, (supra) was as under :-

> "S.115. Suspension and removal of Sarpanch, Naib Sarpanch and member-(1) If on the report of the Sub-divisional Officer, the Collector is of the opinion that circumstances exist to show that the Sarpanch or Naib Sarpanch of a Grama Panchayat wilfully omits or refuses to carry out or violates the provisions of this act or the rules or orders made thereunder or abuses the powers, rights and privileges vested in him or acts in a manner prejudicial to the interest of the inhabitants of the Grama and that the further continuance of such person in office would be detrimental to the interest of the Grama Panchayat or the inhabitants of the Grama, he may, by order, suspend the Sarpanch or Naib Sarpanch, as the case may be, from office and report the matter to the State Government.
>
> (2) The State Government, on the report of the Collector under Sub-section (1) shall, or if the State Government themselves are of the opinion that the circumstances specified in the said sub-section exist in relation to a Sarpanch or Naib Sarpanch, then on their own motion, may, after giving the person concerned a reasonable opportunity of showing cause, remove him from the office of Sarpanch or Naib Sarpanch, as the case may be.
>
> (3) In the case of Sarpanch or Naib-Sarpanch, if he is not already under suspension in pursuance of an order under Sub-section(1), the State Government may, pending the disposal of the proceedings before them under Sub-section (2), suspend the Sarpanch or Naib Sarpanch, as the case may be.
>
> (3-a) The State Government may at any time during the pendency of proceedings before them under Sub-section (2) revoke the order of suspension of a Sarpanch or Naib Sarpanch passed under Sub-section (1) or under Sub-section (3).

> (4) A Sarpanch or Naib Sarpanch on removal from office under Sub-section (2) shall also cease to be a member of the Grama Panchayat, and such person shall not be eligible for election as member for a period not exceeding four years as the State Government may specify.
>
> (5) The provisions of this section shall, so far as may be, apply in respect of any member of the Grama Panchayat not being a Sarpanch or Naib Sarpanch; provided that no such member shall be liable to be placed under suspension under the said provision.
>
> (6) (a) Whenever the Collector is of the opinion that the Sarpanch of a Grama Panchayat has failed in convening any meeting of the Grama Panchayat within a period of three continuous months he may, after making such enquiry as he deems fit, by order, remove the Sarpanch from Office and may also declare him not to be eligible for election as member for a period not exceeding one year as he may specify in his order, and on such order being made the Sarpanch shall cease to be a member of the Grama Panchayat.
>
> (b) Nothing contained in the preceding sub-sections shall apply in respect of a default as specified above.

16. The aforequoted Sub-section (1) of Section 115 was later amended vide Orissa Gram Panchayat Amendment Act No. 9 of 1991 promulgated by notification dated 2nd May, 1991 and for the words "on the report of the Sub-Divisional Officer, the Collector", the words "the Collector on an enquiry or inspection made by him or on the report of the Sub-Divisional Officer" were substituted. The amended Sub-section (1) of the Section 115 of the Act thereafter read as under:-

> "Section 115. Suspension and removal of Sarpanch, Naib-Sarpanch and member- (1) If the Collector on an enquiry or inspection made by him or on the report of Sub-Divisional Officer, is of the opinion that circumstances exist to show that the Sarpanch or Naib Sarpanch of a Grama Panchayat wilfully omits or refuses to carry out or violates the provisions of this Act or the rules or orders made thereunder or abuses the powers, rights and privileges vested in him or acts in a manner prejudicial to the interest of the inhabitants of the Grama and that the further continuance of such person in office would be detrimental to the interest of the Grama Panchayat or the inhabitants of the Grama, he may, by order, suspend the Sarpanch or Naib Sarpanch, as the case may be, from office and report the matter to the State Government.

17. Later on, by retaining sub-sections (4) to (6) of Section 115 of the Act in their original form, sub-section (1), (2) and (3) and (3a) were substituted by new sub-section (1), (2) and (3) vide Orissa Grama Panchayat Amendment Act, 2004 (Orissa Act 9 of 2004) vide Notification no. 1040 dated 12.10.2004, which now read as under:-

> "S.115. Suspension and removal of Sarpanch, Naib Sarpanch and member- (1) If the State Government, on the basis of a report of the Collector or the Project Director, District Rural Development Agency, or suo motu are of the opinion that circumstances exist to show that the Sarpanch or Naib Sarpanch of a Grama Panchayat wilfully omits or refuses to carry out or violates the provisions of this Act or the rules or orders made thereunder or abuses the powers, rights and privileges vested in him or acts in a manner prejudicial to the interest of the inhabitants of the Grama and that the further continuance of such person in office would be detrimental to the interest of the Grama Panchayat or the inhabitants of the Grama, they may after giving the person concerned a reasonable opportunity of showing cause, remove him from the office of Sarpanch or Naib Sarpanch, as the case may be.
>
> (2) The State Government may, pending initiation of the proceeding on the basis of their opinion under Sub-section (1), by order, for reasons to be recorded in writing, suspend the Sarpanch or Naib Sarpanch, as the case may be, from the office.
>
> (3) The State Government, at any time during the pendency of proceeding under Sub-section (1), revoke the order of suspension of a Sarpanch or Naib Sarpanch passed under Sub-section (2).

18. Comparison of the original sub-section (1) of Section 115 with the sub-section (1) amended in 1991 shows that both of them dealt with suspension and empowered the Collector to pass the order of suspension, with the only difference that while in the former, he would act on the report of Sub-Divisional Officer but in the later, the Collector, apart from acting on the report of the Sub-Divisional Officer, could himself make an enquiry or inspection and pass the order of suspension on that basis. Thus, Sub-section (1) of Section 115, as per original provision considered in **Tarini Tripathy,** (supra) empowered the Collector also to place Sarpanch or Naib Sarpanch of a Gram Panchayat under suspension on arriving at the satisfaction that if he or she "wilfully omits or refuses to carry out or violates the provisions of this Act or the rules or orders made thereunder or abuses the powers, rights, and privileges vested in him or acts in a manner prejudicial to the interest of the inhabitants of the Gram and that the further continuance of such person in office would be detrimental to the interest of the Gram Panchayat or the inhabitants of the Gram". While unamended sub-section (2) of Section 115 provided for removal of Sarpanch or Naib Sarpanch after giving a reasonable opportunity of showing cause, Sub-section (3) of Section 115, both before and after amendment in 1991, provided that if the Sarpanch or Naib Sarpanch, has not already been placed under suspension pursuant to the order

of the Collector passed under Section 115(1) of the Act, the State Government may pending disposal of the proceedings under sub-section (2), place the Sarpanch or Naib Naib Sarpanch under suspension. But the amendment notified on 12.10.2004 has taken away that power from the Collector. Now as per Section 115(2) of the Act, the State Government may pending disposal of the proceedings before it under Sub-section (1), by order, for the reasons to be recorded in writing, suspend the Sarpanch or Naib Sarpanch, as the case may be, from office.

19. The Division Bench of this Court in **Tarini Tripathy,** (supra) while dealing with sub-section (1) of Section 115 held that if on the report of the Sub-divisional Officer the Collector is of the opinion that circumstances exist to show that the Sarpanch or Naib Sarpanch of a Grama Panchayat wilfully omits or refuses to carry out or violates the provisions of this Act or the rules or orders made thereunder or abuses the powers, rights and privileges vested in him or acts in a manner prejudicial to the interest of the inhabitants of the Grama and that the further continuance of such person in office would be detrimental to the interest of the Grama Panchayat or the inhabitants of the Grama, he may, by order, suspend the Sarpanch or Naib Sarpanch, as the case may be, from office and report the matter to the State Government. It was held that Section 115 postulates the following as the three requirements:

> (a) a report from the concerned Sub-divisional Officer,
>
> (b) satisfaction of the Collector on the basis of the report that circumstances exist to show that the Sarpanch or the Naib Sarpanch has wilfully omitted or refused to carry out or violated the provisions of the Act, or the rules or orders made thereunder, or abused the powers, rights and privileges vested in him or acted in a manner prejudicial to the interest of the inhabitants of the Grama; and
>
> (c) his further satisfaction that the further continuance of the elected representative in office would be detrimental to the interest of the Grama Panchayat or the inhabitants of the Grama.

20. The position of law according to Section 115(1) operating now is that if the State Government on the basis of the report of the Collector or the Project Director, District Rural Development Agency, or suo motu, is of the opinion that circumstances exist to show that the Sarpanch or Naib Sarpanch of a Gram Panchayat "wilfully omits or refuses to carry out or violates the provisions of this Act or the rules or orders made thereunder or abuses the powers, rights and privileges vested in him or acts in a manner prejudicial to the interest of the inhabitants of the Grama and that the further continuance of

such person in office would be detrimental to the interest of the Grama Panchayat or the inhabitants of the Grama", it may after giving the person concerned a reasonable opportunity of showing cause, remove him/her from the office of Sarpanch or Naib Sarpanch, as the case may be. Sub-section (2) of Section 115 now provides that the State Government may, pending initiation of the proceeding on the basis of its opinion under Sub-section (1), by order, for reasons to be recorded in writing, suspend the Sarpanch or Naib Sarpanch, as the case may be, from the office. Earlier, suspension was envisaged both in its Sub-section (1) and Sub-section (3) and removal in sub-section (2), but now in the scheme of the amended Section 115 after 2004, sub-section (1) deals with removal and sub-section (2) with suspension. The amendment of 2004 has thus brought two significant changes that (i) now only the State Government would be competent to pass the order of suspension and (ii) in doing so, it has been mandatorily required to record reasons. The object for which reasons are required to be recorded would be wholly defeated if it were held that the requirement was anything but mandatory. Obviously, reasons that are required to be recorded for suspending Sarpanch or Naib Sarpanch, should satisfy the parameters already enumerated in originally enacted sub-section (1) of Section 115 of the Act which have now been retained in exactly the same form even after amendment in 2004 in Sub-section (1) of Section 115 for removal. Sub-section (2) of Section 115 of the Act now provides that the State Government may, pending initiation of the proceeding on the basis of its opinion under Sub-section (1), by order, for reasons to be recorded in writing, suspend the Sarpanch or Naib Sarpanch. What therefore can be deduced from this is that parameters enumerated in sub-section (1) of Section 115, both before and after amendment of 2004, were/are valid for both removal and suspension. While in the case of suspension, the competent authority is required to record only prima facie satisfaction on those very parameters reflecting gravity of allegations which may justify extreme step of suspension, in the case of removal, a categorical finding is required to be recorded on the charges against Sarpanch or Naib Sarpanch, on the basis of cogent and reliable evidence produced in the enquiry proceedings, with certain definiteness. Difference therefore is of only stage and degree but the parameters that are required to be taken into consideration both, either for arriving at prima facie satisfaction for the purpose of passing an order of suspension, or for recording a definite finding for removal of Sarpanch or Naib Sarpanch, remain the same.

21. In view of analysis of Section 115 from the perspective of legislative history, two significant changes brought in that provision after amendment, from what it was when **Tarini Tripathy**, (supra) are that (i) while withdrawing the power from the Collector to suspend the Sarpanch or Naib Sarpanch, now that power has been conferred on the State Government which it can exercise on the basis of report of the Collector or Project Director, DRDA or suo motu and (ii) the State Government has been by Sub-section (2) of Section 115 of the Act, ordained to record reasons in writing for the purpose of an order of suspension. Whether or not to place the Sarpanch or Naib Sarpanch under suspension is the discretion of the State Government, but once it decides to pass the order of suspension, it is mandatorily required to record reasons in writing on the basis of its opinion under Sub-section (1). Sub-section (2) of Section 115 thus makes those very parameters, which were culled out by **Tarini Tripathy** (supra), as relevant considerations for the State Government to record reasons in writing. The ratio of **Tarini Tripathy**, (supra) thus continues to govern the field, there being no change in the basic parameters of law that are required to be adhered to, for placing a Sarpanch or Naib Sarpanch, under suspension.

22. In **Baikunthanath Mohanty**, (supra) the Division Bench of this Court further reiterated the aforesaid view by adding one more dimension by observing that legislature in its wisdom has in Section 115(1) deliberately used the word 'wilful' in Section 115(1). Therefore, the Collector must not only be of the opinion that the Sarpanch or the Naib Sarpanch, as the case may be, has omitted or refused to carry out or violated the provisions of the Act, the Rules or the orders made thereunder and abused and acted in a manner prejudicial to the interest of the inhabitants of the Grama Panchayat or the Grama, but he should also form an opinion that the Sarpanch or Naib Sarpanch **wilfully** omitted, refused, violated the provisions of the Act or the Rules or **wilfully** abused the rights, and privileges vested in him or **wilfully** acted in a manner prejudicial to the interest of the inhabitants of the Gram Panchayat or the Grama unless it is found that he did so wilfully the provision would not be attracted. ***(emphasis supplied)***

23. In the case of **Ch. Srinivas**, (supra) while discussing the aforementioned two judgments in **Tarini Tripathy,** (supra) and **Baikunthanath Mohanty**, (supra) this Court held that since existence of the circumstances enumerated in Section 115 is a condition fundamental for making of an opinion, the existence of the circumstances, if questioned, has

to be proved at least prima facie. It is not sufficient to merely assert that the circumstances exist, giving no clue to what they are because the circumstances must be such as may lead to conclusions with certain definiteness. In **Lingaraj Sahu vs. State of Orissa, 1990(I)OLR 44** and **Jagatram Patel vrs State of Orissa, 79(1995) CLT 324** and also in **Baikunthanath Mohanty**, (supra) this Court followed the ratio of **Tarini Tripathy**, (supra). In a later judgment, Division Bench of this Court in **Pradeep Kumar Karji vs. Collector, Rayagada & others, 1998(II)OLR 348,** while relying on the decision of **Tarini Tripathy**, (supra) and **Baikunthanath Mohanty, (**supra), again reiterated that the circumstances for passing an order of suspension, contained in Sub-section (1) of Section 115 of the Act must not only be present, but the Collector should also be satisfied that the alleged delinquency is wilful, and additionally held that the infraction by way of acts or omissions must be wilful and not accidental or negligent or involuntary but intentional, deliberate, calculated and conscious, with full knowledge of legal consequences following therefrom.

24. In **Sukanta Bhoi vs. State of Orissa & ors, AIR 2000 Orissa 28** where the order of suspension of Sarpanch was challenged, the Collector did not record any finding nor did he come to the conclusion that the alleged delinquency was willful. The Division Bench in that case, while holding that although it was not necessary to provide opportunity of hearing before passing the order under sub-section(1) of Section 115 of the Act, quashed the order of suspension. This Court in a recent Division Bench judgment in **Sarat Chandra Mohanty,** (supra) revisited all its previous decisions dealing with Section 115 of the Act including **Tarini Tripathy**, (supra) and **Baikunthanath Mohanty**, (supra) and reiterated the same law as to the necessity of recording of requisite satisfaction as a condition for passing the order of suspension and held that not only the three essential requirements, as postulated by Sub-section (1) of Section 115, must be present but the Collector should also be satisfied that the alleged delinquency was willful. It was held that the Collector has passed the impugned order of suspension without following the due procedure as envisaged in Subsections (1) and (2) of Section 115 of the OGP Act. Accordingly, the Court quashed and set aside the order of suspension.

25. The Supreme Court in the case of **State of Orissa & others vs. Md. Illiyas,** (supra) while dealing with the case of suspension of a Sarpanch under Section 115(1) of the Act considered the true import of the word

'wilful' by holding that an Act is said to be 'wilful;' if it is intentional, conscious and deliberate. The following excerpt from para-10 of the judgment is apt to quote:-

> "10. The expression 'wilful' excludes casual, accidental, bona fide or unintentional acts or genuine inability. It is to be noted that a wilful act does not encompass accidental, involuntary, or negligent. It must be intentional, deliberate, calculated and conscious with full knowledge of legal consequences flowing therefrom. The expression 'wilful' means an act done with a bad purpose, with an evil motive."

26. We have to now in the light of the discussed case law examine as to whether the learned Single Judge was justified in quashing the order of suspension. Perusal of the impugned judgment reveals that the learned Single Judge concluded that the impugned order of suspension was passed on the report of the Collector that the petitioner has wilfully violated the provision of Section 19 of the Act and acted in a manner which is prejudicial to the interest of the Grama and that her further continuation as Sarpanch of Kotsahi Grama Panchayat is detrimental to the interest of the inhabitants of the said Grama Panchayat. It was held that there is no such finding about any such opinion having been formed based upon the said report as to the existence of circumstances regarding wilful violation of the provision of Section 19 of the Act. Learned Single Judge held that such opinion has not been formed by the Government on the report of the Collector as to the existence of circumstances in the direction of wilful violation of the provision of Section 19 of the Act by the writ petitioner or that her actions were in any manner prejudicial to the interest of the Grama to say that continuation of the Sarpanch was detrimental to the interest of the inhabitants of the Grama Panchayat.

27. In order to test the correctness of such finding, we have perused the finding recorded in the enquiry report by the District Panchayat Officer, which reads as follows:-

> "In view of the above it is found that the works have been completed but proper procedure as per Government guideline has not been followed. Hence, a show cause may be issued to Sarpanch and PEO for not following due procedure and guidelines issued by the Government and the Executive Engineer, RWSS may kindly be requested to verify the ratio of population in no. of TWS project taken up in the GP with reference to the existing tube wells."

28. The Collector served a notice on the respondent No.7-writ petitioner on 6.2.2018 to which she submitted a reply under Annexure-3 to the writ appeal. The Collector thereafter again while considering the representation of the appellant herein pursuant to the order of this Court dated 27.11.2017 served a show cause notice on the respondent no.7-writ petitioner. The Collector then by order dated 5.5.2018 (Annexure-4 to the writ appeal) decided the said representation, in most part of which he has relied on the conclusion of the District Panchayat Officer in his report that every work was duly executed by the Gram Panchayat but referred to Rule 4 of the Rules to say that notice of 15 days was required to be given in the Grama for conducting meeting of Palli Sabha, but in the present case, the Sarpanch has violated the provisions as mentioned above. The Collector held that it was the duty of the PEO to apprise the Sarpanch regarding the provisions for issue of notice to conduct Palli Sabha. Since the PEO has committed irregularities , he is liable to be punished under Rule 15(4) of OCS (CC&A) Rules, 1962. In conclusion, the Collector in the aforesaid order has declined to interfere with the matter by observing that project works have already been completed.

29. Subsequently, the District Panchayat Officer on 14.5.2018 has issued another show-cause notice to the respondent no.7-writ petitioner vide Annexure-5 to the writ appeal for violation of the provision of the Act and the Rule, 2014, for conducting Palli Sabha by not giving clear 15 days notice for selection of VLL and inclusion of previously executed works in annual action plan of 14th CFC and 4th SFC for the financial year 2017-18. But the show-cause notice does not allege that the petitioner has wilfully violated any of the aforementioned provisions or wilfully committed any illegalities in completing all the project. The Collector on that basis forwarded the matter to the Government vide letter dated 26.9.2019 under Annexure-5 to the writ petition and Annexure-7 to the writ appeal. In the last part of the letter, the Collector has stated thus :-

> " In view of the above facts, it shows that, the Sarpanch Kotsahi GP have wilfully violated the provision of the Act and Rules, abused the power, right and privileges vested in him and further continuance in office would be detrimental to the interest of the Gram Panchayat.
>
> Therefore, in enclosing herewith the show-cause notice issued to the Sarpanch Kotsahi GP, it is requested to take action as OG Rule and the Acts.".

30. It would be evident from the aforequoted portion of the letter that it was here for the first time that the Collector used the word 'wilfully' by

observing that the Sarpanch has wilfully violated the provision of the Act and Rules, abused the power, right and privileges vested in him and further that her continuance in office would be detrimental to the interest of the Gram Panchayat. Undeniably, the Collector in doing so relied on the report of the District Panchayat Officer and the show cause notice served on respondent no.7-writ petitioner by the District Panchayat Officer. In the report, neither any such finding has been recorded by the District Panchayat Officer that the Sarpanch wilfully violated the provisions of the Act and the Rules or wilfully abused the power, right and privileges vested in her nor has it been stated that her further continuance in the office would be detrimental to the interest of the Gram Panchayat. This was not even so alleged in the show cause served upon her. In the facts like these, learned Single Judge was perfectly justified in concluding that there is no specific finding for any such opinion to be formed, based upon the said report as to the existence of circumstances in the direction of wilful violation of the provision of section 19 of the Act and about the action of the respondent no.7-Sarpanch in any manner being prejudicial to the interest of the Grama in saying that the continuation of the respondent no.7-writ petitioner as Sarpanch was detrimental to the interest of the inhabitants of the Grama Panchayat.

31. The Supreme Court in **Ajit Singh and another vrs. Financial Commissioner and Secretary to Government and another, (2009)16 SCC 308** while dealing with the case of suspension of a Sarpanch under the provision of Section 51(1)(a) of Haryana Panchayati Raj Act, 1994 held that such provision requires as a precondition about the forming of an opinion that the charge made or proceeding taken against the Sarpanch or Naib Sarpanch is likely to embarrass him in the discharge of his duties or it involves moral turpitude or defect of character. The show cause notice only required the appellants to explain why they should not be suspended. The order seems to proceed upon the basis that the show-cause notice, which had been served upon the appellants before the passing of the impugned order contained the likelihood of embarrassment in the discharge of duties because of the registration of the criminal case against them. The Supreme Court held that formation of that opinion was absent in the impugned order and that such an averment was made in the show-cause notice was not enough. The opinion that was contemplated in the relevant provision as a pre-condition of suspension not having been formed, the impugned order of suspension was quashed.

32. On examination of records in the light of settled proposition of law, we have found that there is indeed no such material to justify formation of the opinion by the State Government as to the existence of the circumstances that respondent no.7-writ petitioner wilfully violated the provision of Section 19 of the Act and therefore the conclusion arrived at by the State Government in the impugned order that her further continuation as Sarpanch of Kotsahi Gram Panchayat would be detrimental to the interest of the inhabitants of the Gram Panchayat, appears to be wholly unfounded. It must therefore be held that the impugned order passed by Government having been passed without the formation of the requisite opinion, suffers from the vice of non-application of mind, and amounts to colourable exercise of power.

33. On reading of Section 115(2) of the Act, we are inclined to hold that though the power to place an elected Sarpanch or Naib Sarpanch under suspension is vested in the State Government, but this provision postulates the requirement of recording reasons in writing to suspend the Sarpanch or Naib Sarpanch, as the case may be, from the office, pending initiation of the proceeding under sub-section (1) of Section 115. Clearly, first and foremost, a duty has been cast on the State Government to form an opinion that circumstances exist to show that the Sarpanch or Naib Sarpanch, has wilfully (i) omitted or refused to carry out or has violated the provisions of the Act and the rules or orders made thereunder or (ii) has abused the powers, rights and privileges vested in him or (iii) has acted in a manner prejudicial to the interest of the inhabitants of the Gram. All these three requirements of Sub-section (1) of Section 115 are qualified by the term 'wilful'; namely; all or any of such three requirements of the Sub section (1) of Section 115 must be attributed to the Sarpanch or Naib Sarpanch, as the case may be, as a wilful act on his/her part. In the event any one or more of the three circumstances being attracted, yet another important condition incorporated in sub-section (1) of Section 115 is that the State Government should also be of the opinion that further continuance of such Sarpanch or Naib Sarpanch in the office would be detrimental to the interest of Grama Panchayat or the inhabitants of Grama. All these requirements indicate the intention of the legislature that the power to place an elected representative of the Panchayati Raj Institution under suspension has to be used sparingly by the State Government, with utmost care and caution, only in appropriate cases, on the basis of the reliable and cogent material before it. In order to safeguard against abuse of such power, therefore, while conferring the discretionary power on the State Government, an additional condition has been incorporated in sub-section (2)

of Section 115 of the Act by mandating it to record the reasons in writing for suspending a Sarpanch and Naib Sarpanch. Obviously, such reasons have to indicate that the State Government on objective consideration of material has satisfied itself about the existence of the above referred to pre-requisite conditions.

34. We may state at the cost of repetition observe that the Government at the stage of passing an order of suspension under sub-section (2) of Section 115 is only required to record its tentative or prima facie satisfaction on the parameters enumerated in sub-section (1) of Section 115 of on the basis of allegations against the Sarpanch or the Naib Sarpanch, as the case may be, although such allegations may even be disproved in the full-fledged enquiry proceeding. But the reasons given in the order of suspension should be specific and clear and not vague and cryptic. Requirement of recording reasons cannot be taken as satisfied by merely matching the language of the suspension order with the phraseology used in Section 115(1). This Court in exercise of power of judicial review, while examining the challenge to an order of suspension, can scrutinize the record to find out whether the reason given therein is an empty formality or is actually supported by material on record. The material taken into consideration to form the requisite opinion should support such satisfaction.

35. Constitutional status has been conferred on the Panchayati Raj Institution by amending the Constitution(Seventy Third Amendment) vide Act, 1992 w.e.f. 24.4.1993 Part IX has been thereby inserted in the Constitution of India. This is aimed at providing complete autonomy to Panchayati Raj Institutions as a basic democratic unit of a local self government at the grassroot level. Provisions contained in Part IX of the Constitution, more particularly Article 243G, confers various powers, authority and responsibilities on Panchayats. Therefore, the term of the representatives elected to such Panchayati Raj Institution cannot be allowed to be curtained without strict adherence to safeguards engrafted in the relevant statute i.e. Section 115 of the Act. The Constitution Bench in **G.Sadanandan vs. State of Kerala, AIR 1966 SC 1925** held that if all the safeguards provided under the statute are not observed and an order having serious consequences is passed without proper application of mind, having a casual approach to the matter, the same can be characterized as having been passed mala fide, and thus, is liable to be quashed.

36. Panchayati Raj system is the base of the pyramid of democracy. Faith in and commitment to democracy gets strengthened or eroded from what people perceive. Allowing such elected representatives to be placed under suspension in an arbitrary and whimsical manner would certainly erode the democracy at the grassroot level through the Panchayati Raj system. Suspension of an elected Sarpanch, though by itself is not a penalty, but it is drastic action which certainly causes hardship to the person concerned. It has serious effect on the public life of the elected representative as it lowers down his/her status in the society. The Legislature has consciously provided for adherence to all the aforestated conditions to guard against the abuse of such power, for it was conscious of the fact that it was dealing with an elected representative to a democratically elected Panchayati Raj Institution which could have the effect of curtailing the prescribed period for which he or she was elected by popular vote. As the word 'may' has been used in the sub-section, a discretion has been given to the State Government and such discretion has to be exercised as per the safeguards lend in Section 115(1) and (2). We are therefore inclined to observe that even if the power of suspension has been conferred on the State Government, such power should not be exercised in a routine or mechanical manner. This Court can take judicial cognizance of the fact that, as in the present case, complaints in many such cases are filed due to political rivalry. Mere initiation of proceedings under Section 115(1) of the Act, without anything more, does not justify invocation of such extreme power, for charges may be disproved also. It is therefore not necessary that in every case where proceedings of removal of Sarpanch or the Naib Sarpanch are initiated under sub-section (1) of Section 115 of the Act, order of suspension should invariably be passed. Unless the allegations are grave and serious enough to attract the parameters envisages in Section 115(1) of the Act, suspension should be avoided.

37. We may at this juncture usually refer to following observations from an old judgment of the Division Bench of this Court in **Kulamani Mallick – vrs- The Collector, Puri and two others**, **2004(I) OLR 46;**

> "Suspension of an elected representative is indeed a drastic action and should not be taken recourse to cursorily and in a mechanical manner. Having vested the power with the Executive to suspend an elected representative, the Legislature has provided safeguards against arbitrary exercise of the same. Therefore, while bringing the tenure of an elected representative to an end either temporarily or prematurely, utmost care and circumspection should be exercised. Right of an elected representative to continue in his office for the full tenure, should not be lightly tinkered with by the Collector.

> On perusal of the order of suspension, vide Annexure-4, it clearly reveals that the reasons given are vague, cryptic and do not satisfy the mandatory requirements of Section 115 of the Orissa Grama Panchayat Act. While alleging that the Sarpanch violated the provisions of Orissa Grama Panchayat Act and the Rules thereunder, it is not specified as to which provision of the Act or Rules he violated. Similarly, specific allegations with regard to wilful abuse of powers, right and privileges vested in him have not been specified. Without stating the specific instances with regard to the violation of the provisions of the Act and Rules or without nomenclaturing the specific actions or omissions as wilful abuse of powers and/or rights or privileges, we feel, an elected Sarpanch cannot be suspended on vague assertions.
>
> Though there is no dispute in the legal proposition that a Sarapanch can be suspended in exercise of power under Section 115 of Grama Panchayat Act, Law is well settled that if the Collector intends to ascribe any imputation, the same should be specific, clear and not vague."

38. In **Raghuwar Dayal v. the State of Haryana**, C.W.P. 5409 of 1999 decided on 28.5.1999, the Punjab and Hariyana High Court, speaking through Hon'ble Mr. Justice G.S.Singhvi (as His Lordship then was), observed that the power of suspending an elected representative should not be exercised casually by the administrative authorities. Some of the observations made in that decision are apt to quote:-

> " Before concluding, we wish to emphasise that the executive authorities who are entrusted with the power to suspend or remove the elected representatives of the local bodies like Municipalities and Gram Panchayats must bear in mind that those who win the confidence and trust of the people through the process of elections and occupy public positions are often made targets of vilification campaign by the opposite group(s). In a majority of cases, the allegations of commission of irregularities are made. If the power of suspension and/or removal of the elected representatives is exercised liberally in such cases, then the mandate of the people will be indirectly frustrated, a situation which will not be good for the health of the democracy at the grass root level. It will be doing greater harm than good to the institution of local bodies. Therefore, unless the allegations of financial irregularities or gross misconduct are found proved, the authorities concerned must exercise restraint and as and even in those cases in which it becomes imperative to exercise the power of suspension or removal, cogent reasons must not only be recorded but must be communicated to the affected person. In our considered view, the elected representatives cannot be treated worst than the government employees in whose cases the requirement of passing a reasoned order has been consistently insisted by the Courts in the last 40 years."

39. Apart from the merits of the case, there is another reason why the appeal in the present case merits dismissal. The writ petition was filed by respondent No.7-writ petitioner. Even though the State Government was a party-respondent to the writ petition, they chose not to file counter affidavit. Thereafter, when the order of suspension was quashed, the State Government has decided not to challenge the impugned judgment by filing writ appeal. Under sub-section (3) of Section 115 of the Act, the State Government has been conferred with the power of revoking the order of suspension of Sarpanch or Naib Sarpanch at any time during the pendency of the proceeding under sub-section (1). The State Government having taken a conscious decision not to challenge the judgment of the learned Single Judge, can be taken to have accepted its correctness. The State Government, which has the power to revoke the order of suspension as per sub-section (3) of Section 115 of the Act, having taken a conscious decision not to assail the judgment of the learned Single Judge, the appeal filed at the instance of the complainant challenging the impugned judgment, even otherwise, should not be entertained.

40. The Division Bench of Rajasthan High Court in the case of **Surendra Kumar Garg & ors. Vs. The State of Rajasthan & Ors., RLW 2005(1) Raj. 478** was dealing with the similar argument where allegation against the elected lady Sarpanch was that she indulged in forgery and preparation of forged documents. Considering the question of locus standi of the complainant, the Division Bench in para 6 of the judgment held as under:-

> "6. So far as the ground of locus standi is concerned, it may be mentioned that once the complaint is made, the business of the complainant is over. He is no more person to make any interference as the complaint is the subject matter of enquiry between the party concerned and the Government and no one has a right to make an interference. The complainant is only an informer and the business has been completed by the appellants, while making complaint against the respondent no.3 and they have no interest left in the matter to get acquaintance with the further development of the proceedings. Apart from that, the State Government has always inherent jurisdiction to revoke its earlier order in view of the subsequent events taking place in the matter. In this connection, reference of Bharat Kumar vs. The State of Rajasthan & others, 2000 (2) WLC(Raj.)270 and Mahadev Prasad Yadav vs. State of Rajasthan & Ors, RLR 1990(1) 157 may be made."

41. We may in this connection usefully refer to the judgment of the Supreme Court in **Ravi Yashwant Bhoir vs. Collector, (2012) 4 SCC 407.**

In paragraphs 58 and 59 of the report of that judgment; their Lordships observed thus:-

> "58. Shri Chintaman RaghunathGharat, ex-President was the complainant, thus, at the most, he could lead evidence as a witness. He could not claim the status of an adversarial litigant. The complainant cannot be the party to the lis. A legal right is an averment of entitlement arising out of law. In fact, it is a benefit conferred upon a person by the rule of law. Thus, a person who suffers from legal injury can only challenge the act or omission. There may be some harm or loss that may not be wrongful in the eye of law because if may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called *damnum sine injuria*.
>
> 59. The complainant has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. In case he has no legal peg for a justiciable claim to hang on, he cannot be heard as a party in a lis. A fanciful or sentimental grievance may not be sufficient to confer a locus standi to sue upon the individual. There must be injuria or a legal grievance which can be appreciated and not a *statpro ratione voluntas reasons* i.e. a claim devoid of reasons.

42. In view of afore discussed position of law, it must be held that role of the appellant is merely that of an informer or relator, who brought the act of commission or omission of the respondent-Sarpanch to the notice of the State Government or its authorities. Even if the Government, acting on the complaint of the appellant, has initiated proceedings against the respondent-Sarpanch for her removal and placed her under suspension, he can have no further role to play in the matter except perhaps as a witness in enquiry proceedings. Once the enquiry proceedings begin, it is a matter between the Government and the respondent-Sarpanch. But the appellant cannot be considered as a necessary party in a legal proceeding where such Sarpanch would challenge the order of her suspension nor would he have any *locus standi* to challenge the decision of the State Government to revoke the order of suspension.

43. In the light of foregoing discussion, we do not find any merit in this appeal, which is accordingly dismissed, with no order as to costs.

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2020 (II) ILR - CUT- 344

MOHAMMAD RAFIQ, C.J & S. PUJAHARI, J.

WRIT PETITION (PIL) NO.12430 OF 2020

ANANGA KUMAR OTTA .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition (PIL) – Prayer to issue a writ directing the appropriate Government authorities to frame Rules/Guidelines and take steps for ameliorating the problems of persons infected/affected by COVID-19, so as to ensure that they are not stigmatized or victimized – Pleas considered with reference to right to privacy – Principles – Discussed and directions issued.

"Before addressing the contention of the parties, it would be apposite to mention here that maintaining confidentiality of the information of a patient that comes to the knowledge of the treating doctors during the course of treatment or otherwise, is an ethical code of the Hippocratic Oath. Basing on the same, the International Code of Medical Ethics has also laid down that a physician shall preserve absolute confidentiality on all he knows about his patient even after the patient has died. In India, the information of a patient details that has been received by the Medical Professionals during the exercise of their profession is protected by the Code of Professional Conduct made by the Medical Council of India under Section 33(m) read with Section 20-A of the Indian Medical Council Act, 1956. The relevant provision of the Code of Medical Ethics that has been made by the Indian Medical Council Act, inter-alia, provides not to disclose the secret of a patient that have been learnt in the exercise of their profession with the exception of disclosure of the same in the Court of law under the orders of the Presiding Judge, before the Regulation made in this regard made in 2002. So, the patient has a right to confidentiality and privacy of the information about the details provided by him. The patient as such has right to privacy with regard to their personal details. Right to privacy is one of facets human rights, has since been recognized in different International & Regional Convention on human rights. But, the aforesaid right of privacy is not an absolute one as seen from Article 8 of the European Convention on human rights which defines the right to privacy as follows:- "(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of rights and freedoms of others." The right to privacy is also implicit in the fundamental right under Article 21 of the Constitution, i.e., right to life

and liberty though not absolute, is the view of the Apex Court in Rajagopal vrs. State of Tamil Nadu, reported in (1994) 6 SCC 632. In the case of Mr. 'X' vrs. Hospital 'Z', reported in (1998) 8 SCC 296, the Apex Court dealing with a case for claim of damages made by the appellant „X" against hospital „Z" for disclosure of information relating to his HIV+ status by the Hospital „Z" unauthorisedly when before donation of blood by him to a patient, he was found to be HIV+, which resulted in his marriage being called off and social opprobrium, the Supreme Court taking note of the aforesaid Convention on human rights with regard to right to privacy as well as view of the Supreme Court as aforesaid, so also the Code on Ethics as prescribed by the Indian Medical Council, then have held as follows:- "Right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution relating to the Fundamental Rights read with the Directive Principles of State Policy. Right of privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political. Doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of privacy which may sometimes lead to the clash of one person"s "right to be let alone" with another person"s right to be informed. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

(Para 11)

Case Laws Relied on and Referred to :-

1. (1994) 6 SCC 632 : Rajagopal Vs. State of Tamil Nadu.
2. (1998) 8 SCC 296 : Mr. 'X' vrs. Hospital 'Z'.
3. (2017) 10 SCC 1 : K.S. Puttaswamy & Anr Vs. Union of India & Ors.
4. AIR 1954 S.C. 300 : M.P. Sharma Vs. Satish Chandra.
5. (1994) 6 SCC 632 : Rajagopal Vs. State of Tamil Nadu.

For Petitioner : Susanta Kumar Dash, S. Das, N.K. Das,A. Sahoo, P. Das & S. Mohanty.

For Opp.Parties : Mr. A.K. Parija, Adv. General & Mr. M.S. Sahoo, A.G.A.

JUDGMENT Date of Judgment : 16.07.2020

PER: S. PUJAHARI, J.

Heard Mr.S.K.Dash, learned counsel for the petitioner and Mr. A.K.Parija, learned Advocate General appearing for the State-opposite parties through Video Conferencing mode.

2. This writ petition has been preferred by Ananga Kumar Otta, an Advocate of Orissa High Court Bar Association, by way of Public Interest Litigation, with a prayer to issue a writ in the nature of Mandamus directing

the appropriate authority to take stern action against the persons for whose connivance or negligence, the identity of persons infected/affected by Corona virus (COVID-19) could be divulged and accordingly, prayed to direct the appropriate Government authorities to frame Rules/Guidelines and take steps for ameliorating the problems of persons infected/affected by COVID-19, so as to ensure that they are not stigmatized or victimized.

3. The petitioner in this writ petition had given several instances of stigmatization and harassment of Covid-19 patients throughout the country for disclosure of the identity. Furthermore, he has also given instances where the Government of Orissa itself in one of the cases under Bhubaneswar Municipal Corporation had disclosed the identity of a COVID-19 patient in utter disregard to the norms prescribed in this regard as well as the disclosure of the identity of thirteen persons in WhatsApp message, a popular social media platform, in the district of Kendrapara by a third party, but no action against the person making such disclosure has been taken by the Government. Pleading the aforesaid in detail, the petitioner has made the payer in the writ petition, as stated earlier.

4. This Court while issuing notice vide order dated 28.05.2020 directed the opposite party-State to ensure that identity of any person, who is admitted to Covid centres-any Government Hospital/private Hospital or any Quarantine centre in the State, found infected with Corona virus (COVID-19) is not disclosed/publicized either in any intradepartmental communication or in any media platform including social media and without delay, the learned Advocate General assured the Court that necessary steps shall be taken to ensure compliance of the guidelines issued by the Government of India and the order of this Court to secure the aforesaid purpose.

5. In the counter affidavit filed, the State of Orissa has pleaded that it is not divulging the names of the persons who are infected with COVID-19 and the State Government has come up with a policy of non-disclosure of the identity of the COVID-19 patients which is being strictly followed keeping in mind the interest of such patients. Vide such guideline dated 18.3.2019 the Government of Orissa in the Health & Family Welfare Department has instructed all the Collectors, District Magistrates and Municipal Commissioners that no person other than the Medical Superintendent or person duly authorized by him, shall speak to the media regarding persons who are under treatment and isolation for COVID-19. So also it has been

directed that under no circumstances, the name, exact address and telephone number of the person under treatment for COVID-19 shall be disclosed. Keeping in view such guidelines the officials of the State Government are maintaining a strict protocol in protecting the identity of the persons who have been affected by COVID-19. However, it has been admitted in the counter affidavit that identity of the 5th corona virus infected patient in Bhubaneswar was disclosed, but according to the State, such disclosure was made with the sole intention of safeguarding the public who would have come in contract with COVID -19 infected person and in order to enable the authorities to trace out the people who have actually come in contact with the said infected person. That happened at a very early stage when the person concerned was fifth Covid patient in the State. So far as other allegations with regard to disclosure of names of thirteen COVID-19 patients in Kendrapara district are concerned, the same has not come in the knowledge of the authorities as it has not been reported to the Collector, Kendrapara in any manner.

6. On 4.6.2020 an additional affidavit was filed by the petitioner indicting the victimization and stigmatization of the persons who have come from outside i.e. ostracisation in the hands of the people of their locality and the village which has been reported in the newspapers i.e. "The Statesman" at Annexure-3 and the news item published in the newspaper and "The New Indian Express" at Annexure-4, stating that one person was forced to remain in quarantine in his car in Sanakhemundi block in the district of Ganjam. So also, he supplied the information i.e. snapshots of the WhatsApp message regarding disclosure of identity of 13 infected persons in a sealed cover to the learned Advocate General.

7. The learned Advocate General on that date made a submission that on the aforesaid information given in the additional affidavit shall be examined and the needful shall be done and as such following order was passed on 4.6.2020.

> "Heard Mr. S.K. Dash, learned counsel for the petitioner and Mr. A.K. Parija, learned Advocate General appearing for the State opposite parties.
>
> In the context of the order passed by this Court on 28.05.2020, learned Advocate General has submitted that already in sub-clause-vi of clause-3 of the Odisha COVID-19 Regulations, 2020, it has been stipulated that no person, other than the Medical Superintendent or person duly authorized by him, shall speak to the media regarding persons who are under treatment and isolation. Under no circumstances, the name, exact address and telephone number of the persons shall be disclosed.

> As regards the instance given by the petitioner in para-6 of the writ petition about the disclosure of the identity of the patients who tested positive of corona virus by Bhubaneswar Municipal Corporation, learned Advocate General submitted that Bhubaneswar Municipal Corporation, vide order dated 02.04.2020, disclosed the identity of such persons who the sole intention of safeguarding the public, for the purpose of tracing out the people who come in contact with them. That happened at the early stage when the person concerned was the 5th corona virus patient discovered. But thereafter, the State Government has been strictly following the guidelines provided in the Odisha COVID-19 Regulations, 2020 to ensure that identity of any person, who test positive of corona virus or under treatment or in isolation in quarantine centre or otherwise, is not disclosed.
>
> Learned counsel for the petitioner at this stage invited attention of the Court towards the pleadings in para-16 of the writ petition where it is alleged that identity of 13 persons in the district of Kendrapara of the State was disclosed in the WhatsApp message, a popular social media platform, received by father of a victim. He has deliberately not given the name of such persons in pleadings but has handed over a screenshot of such WhatsApp message to learned Advocate General. It is submitted that the State Government is not taking adequate steps to ensure that the people, who test positive or who come from outside and in quarantine, are not stigmatized and victimized. In this respect, the petitioner has today filed a specific affidavit giving such instances.
>
> Learned Advocate General submits that he shall have the WhatsApp message, which the learned counsel for the petitioner has provided in a sealed cover, and the instances of stigmatization and victimization given in the additional affidavit, examined and needful done.
>
> Call this matter on 25th June, 2020."

8. However, when the case is taken up today, learned Advocate General drew attention of the Court towards the counter affidavit filed to the allegations made in the additional affidavit regarding stigmatization of persons so also the WhatsApp message. In the said counter affidavit it has been admitted that allegation that the identity of thirteen infected persons in Kendrapara district was disclosed unauthorizedly by a third party, was found to be true and, as such, a case has been registered for violation of Epidemic Disease Act, 1987 vide Mahakalpada P.S. Case No.73 dated 22.6.2020 against the person concerned, namely, Nanda @ Bharat Chandra Routray son of Trilochan Routray for such unauthorized disclosure of the COVID-19 patients and investigation is going on. So far as the stigmatization and ostracisation of the persons from the community with regard to newspaper report at Annexure-3 is concerned, it has been stated in the counter to the additional affidavit that the same is not based on verified information.

Furthermore, pertaining to the incident of quarantine in car and social boycott in Sanakhemundi block, it has been averred that the person concerned, who had come to his native place from the State of Bihar on 21.5.2020, was on arrival advised by the concerned Anganwadi Workers to remain at the nearest institutional quarantine centre because he was unable to produce the discharge certificate from any institutional quarantine centre or any COVID negative report as claimed by him. However, he denied and decided to remain in his car in quarantine. Thereafter on the intervention of the IIC, Patapur Police Station, he remained in institutional quarantine for seven days and completed his seven days institutional quarantine on 28.5.2020. After completing his quarantine period, he received a financial incentive of Rs.1000/- and the balance of Rs.1000/- was provided to him after completing his home quarantine.

Furthermore, in the above counter affidavit, the State of Odisha has also been mentioned that it has on 3.4.2020 framed the Odisha COVID-19 Regulations, 2020 and as per the Regulation 3 (ix) thereof, no person other than the Medical Superintendent or person duly authorized by him, shall speak to the media regarding persons who are under treatment and isolation and the name, exact address and telephone number of the persons shall not be disclosed, but in exceptional circumstances affecting public health and safety, the name and details of such person(s) may be disclosed, with approval of Government. So also, it has been pleaded therein that Regulation-4 of the said Regulation prohibits spread of any unauthenticated information and/or rumors regarding COVID-19 and if any person/institution/organization is found indulging in such activity, it will be treated as a punishable offence under this Regulations and also any other provision of law. In addition to the same, the Regulations also provide any person wilfully violating the orders of the public authorities issued in relation to COVID-19 shall be prosecuted under the provisions of the Disaster Management Act, 2005 and Section 188 of the Indian Penal Code. Furthermore, in the said counter affidavit it has also been pleaded that various Information Education Communication activities have been undertaken by the Government of Odisha for awareness of the people to prevent COVID-19 related social stigma, i.e., audio-visual clip has been prepared and sent for telecast in various media platforms, the same content has been broadcasted in audio mode in All India Radio and all FM channels and community radios, a cartoon play has been designed and disseminated in social media, advertisement in print media is being published by I&PR Department, Government of Odisha on social stigma and awareness

about the social stigma attached to COVID-19 and adverse effect of social stigma and sensitization against the discrimination have been incorporated in training module for health care workers and others.

9. During the course of hearing, drawing the attention of the Court towards to the disadvantages regarding disclosure of identity of COVID-19 infected persons and persons in quarantine, particularly suffering of the persons infected / died of Covid-19 infection and their family members including Covid Warriors fighting to arrest the spread of the disease putting their lives at risk, learned counsel for the petitioner urged this Court to issue necessary directions to the State not to disclose the identity and details of the persons infected or in quarantine in public and also in the intra-departmental communication in any circumstances as there is risk of pilferage of such personal detail and ensure for non-disclosure of such identity in print and electronic or social medial and also to proceed against the persons making the same public.

10. In response, learned Advocate General appearing for the opposite party-State submits that the Government of Odisha in Health and Family Welfare Department vide Notification No.9570 dated 03.04.2020 (copy of which has been annexed as Annexure-A/2) has formulated necessary regulations under the Epidemic Disease Act, 1897 wherein the aforesaid submission of the petitioner to prevent disclosure of identity has been sufficiently taken care of. The State Government is meticulously following the mandate of the Regulation to prevent the unauthorized disclosure of the information with regard to Covid-19 patients and persons in quarantine centre and shall also proceed against the persons guilty of violation of such Regulations with the exception that the State Government in exceptional cases in the interest of public health, i.e., particularly to prevent the arrest of the spread of Covid-19 Pandemic, should have the liberty to disclose such identity. Furthermore, it is also submitted by the learned Advocate General that so far as Covid Warriors such as, Doctors, Nurses, Para medical staff, Asha Karmies, Anganwadi workers and police personnel and other Government servants, engaged in the treatment of persons infected and assigned duties to contain the spread of Covid-19 in the State, if lay their lives being infected during discharge of their duties, as the same is a sacrifice in the service of the Nation, there should be no bar in publishing / disclosing their names, inasmuch as the same is done by the State Government, with the prior consent of his legal representative, for a noble purpose, i.e., to

extending them State honour in their funeral in presence of Higher Officers of the District Administration, such as, Collector and Superintendent of Police concerned and also appropriately rehabilitate their family/dependant including compensation in appropriate cases. In addition, an exgratia amount is paid to his/her family. This is meant to boost the moral of the other Covid-19 warriors, who are engaged in fighting to arrest of spread of the Pandemic putting their lives at risk, inasmuch as the same would make them feel that the State is there to appropriately honour their sacrifice and take care of their dependants, if their lives are sacrificed in discharge of the duty. Since the State is strictly following the protocol and the regulation in this regard, and there is no deviation from the protocol, and whenever there is any deviation, the same is strictly dealt with as per the Regulation in the manner known to law, this writ petition may be disposed of recording the aforesaid submission of him, submits the learned Advocate General appearing for the opposite party-State.

11. Before addressing the contention of the parties, it would be apposite to mention here that maintaining confidentiality of the information of a patient that comes to the knowledge of the treating doctors during the course of treatment or otherwise, is an ethical code of the Hippocratic Oath. Basing on the same, the International Code of Medical Ethics has also laid down that a physician shall preserve absolute confidentiality on all he knows about his patient even after the patient has died. In India, the information of a patient details that has been received by the Medical Professionals during the exercise of their profession is protected by the Code of Professional Conduct made by the Medical Council of India under Section 33(m) read with Section 20-A of the Indian Medical Council Act, 1956. The relevant provision of the Code of Medical Ethics that has been made by the Indian Medical Council Act, inter-alia, provides not to disclose the secret of a patient that have been learnt in the exercise of their profession with the exception of disclosure of the same in the Court of law under the orders of the Presiding Judge, before the Regulation made in this regard made in 2002. So, the patient has a right to confidentiality and privacy of the information about the details provided by him. The patients as such has right to privacy with regard to their personal details. Right to privacy is one of facets human rights, has since been recognized in different International & Regional Convention on human rights. But, the aforesaid right of privacy is not an absolute one as seen from Article 8 of the European Convention on human rights which defines the right to privacy as follows:-

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of rights and freedoms of others."

The right to privacy is also implicit in the fundamental right under Article 21 of the Constitution, i.e., right to life and liberty though not absolute, is the view of the Apex Court in ***Rajagopal vrs. State of Tamil Nadu,*** reported in (1994) 6 SCC 632. In the case of ***Mr. 'X' vrs. Hospital 'Z',*** reported in (1998) 8 SCC 296, the Apex Court dealing with a case for claim of damages made by the appellant 'X' against hospital 'Z' for disclosure of information relating to his HIV+ status by the Hospital 'Z' unauthorisedly when before donation of blood by him to a patient, he was found to be HIV+, which resulted in his marriage being called off and social opprobrium, the Supreme Court taking note of the aforesaid Convention on human rights with regard to right to privacy as well as view of the Supreme Court as aforesaid, so also the Code on Ethics as prescribed by the Indian Medical Council, then have held as follows:-

> "Right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution relating to the Fundamental Rights read with the Directive Principles of State Policy. Right of privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political. Doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of privacy which may sometimes lead to the clash of one person's "right to be let alone" with another person's right to be informed. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.
>
> Paras-21, 27 &28)
> [Quoted from Placitum]"

The Regulation 2.2 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 made after the aforesaid decision rendered in the case of ***Mr. X (supra),*** provides that defects in the disposition or character of patients observed during medical attendance should never be revealed unless their revelation is required by the laws. The same further

mentions that doctors can also reveal such information when there is a larger public good. The Union Ministry of Health had also released the Charter of Rights of Patients, 2017 which also recognizes the public interest exception to the right to confidentiality.

12. The Nine Judge Constitution Bench of the Apex Court in ***K.S. Puttaswamy and another vrs. Union of India and others,*** reported in (2017) 10 SCC 1, has held that right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution and as a part of the freedom guaranteed by Part-III of the Constitution, overruling the earlier decision rendered in the case of ***M.P. Sharma vrs. Satish Chandra,*** reported in AIR 1954 S.C. 300 (a Bench consisting of eight Judges) wherein it was held that right to privacy was not protected by the Constitution. The decision rendered in the case of ***Mr. X (supra)*** has been affirmed by the Apex Court in the case of ***K.S. Puttaswamy (supra)***. Hence, the aforesaid right to privacy with regard to the personal details though implicit in Article 21 of the Constitution, but not absolute one and can be subject to reasonable restrictions. However, the Apex Court in the case of ***K.S. Puttaswamy (supra)*** have held that the interference in such right to privacy can only be justified if the same is passed the three-prong tests, i.e., (i) the action is sanctioned by law; (ii) the action is aimed at achieving a legitimate aim; and (iii) the action is necessary and proportionate for the achievement of that aim.

In order to tackle the social stigma attached with COVID-19, the Ministry of Health Family Welfare of the Government of India on their official Website-http://www.mohfw.gov.in has under the caption "Addressing Social Stigma Associated with COVID-19" has published the following advisory:-

> "**Addressing Social Stigma Associated with COVID-19**
>
> Public health emergencies during outbreak of communicable diseases may cause fear and anxiety leading to prejudices against people and communities, social isolation and stigma. Such behavior may culminate into increased hostility, chaos and unnecessary social disruptions.
>
> Cases have been reported of people affected with COVID-19 as well as healthcare workers, sanitary workers and police, who are in the frontline for management of the outbreak, facing discrimination on account of heightened fear and misinformation about infection. Even those who have recovered from COVID-19

face such discrimination. Further, certain communities and areas are being labeled purely based on false reports floating in social media and elsewhere.

There is an urgent need to counter such prejudices and to rise as a community that is empowered with health literacy and responds appropriately in the face of this adversity.

In this regard, all responsible citizens are advised to understand that:

• Although COVID-19 is a highly contagious disease which spreads fast and can infect any one of us, we can protect ourselves through social distancing, washing our hands regularly and following sneezing / coughing etiquettes.

• Despite all precautions, if anybody catches the infection, it is not their fault. In situation of distress, the patient and the family need support and cooperation. It must be noted that the condition is curable and most people recover from it.

• Healthcare workers including doctors, nurses, and allied & healthcare professionals are rendering their services tirelessly to provide care and medical / clinical support in this situation of crisis. Sanitary workers and police are also doing selfless service and playing critical roles in addressing the challenge of COVID-19. They all deserve our support, praise and appreciation.

• All those directly involved in the management of COVID-19 are equipped with appropriate protective equipment to keep them safe from the infection.

• Targeting essential services providers and their families will weaken our fight against COVID-19 and can prove grievously detrimental for the entire nation.

As responsible citizens, we must observe following Do's and Don'ts:

Dos	Don'ts
• Appreciate efforts of people providing essential services and be supportive towards them and their families.	Never spread names or identity of those affected or under quarantine or their locality on the social media.
• Share only the authentic information available on the website of Ministry of Health and Family Welfare, Govt. of India or the World Health Organisation.	• Avoid spreading fear and panic.
• Cross check any information related to CoVID-19 from reliable sources before forwarding any messages on social media.	• Do not target healthcare and sanitary workers or police. They are there to help you.
• Share positive stories of those who have recovered from COVID-19.	• Do not label any community or area for spread of COVID-19.
	• Avoid addressing those under treatment as COVID victims. Address them as ''people recovering from COVID".

13. In the light of the aforesaid, when the arguments raised in this case by the learned counsel for the petitioner and the learned Advocate General appearing for the opposite party-State are addressed vis-à-vis the materials on record, it goes without saying that the State Government now has come up with the aforementioned regulation at Annexure-A/2 to prevent unauthorized disclosure of the identity of the Covid-19 infected persons as well as persons in Quarantine and also made the same to be punishable in the manner prescribed therein, leaving the discretion to the State to disclose the identity of such persons in exceptional circumstances of public health and safety; that too with the approval of the State Government. According to the learned Advocate General, to prevent the arrest of spreading of the Covid-19 virus in the State affecting the public in exceptional circumstances as mentioned in the Regulation after obtaining the approval of the Government the same is disclosed. As regards the disclosure of identity of deceased Covid Warriors, the same is done for the purpose, as contended by the learned Advocate General and that too with the consent of the family of the deceased Covid warriors. In such circumstances, though we are in agreement with the argument of the learned counsel for the petitioner that disclosure of the identity of such persons in Quarantine and also the persons infected in Covid-19 virus visits them and their family members with trauma, tribulations and also at a times leads to their ostracisation from the Society, so also a danger to their lives and limbs owing to unjustifiably perceived stigma attached to the disease, in the mind of large number of people but no blanket order, as prayed for prohibiting the State with regard to such disclosure of identity which is in their possession, more particularly when the State is not going to indiscriminately disclose the same, but reserves the right to disclose the same in the rare and exceptional circumstances mentioned in the Regulation, can be passed. However, the aforesaid personal details of the persons provided to the State being an informational privacy, protected under the right to privacy of them, being implicit in Article 21 of the Constitution, i.e., right to life and liberty, though not absolute and subjected to reasonable restriction, considering the adverse impact of such disclosure of identity of a patient and also persons in quarantine as well as their family members, as stated hereinbefore, we hope and trust that the State shall take further steps if not already taken to keep the personal information masked by applying appropriate method if not there, such as, providing code number for keeping the details in anonymity and keep utmost confidentiality of such information in different intradepartmental communication, as from the different instances brought to our notice, we have reason to believe that there is pilferage of the

personal details unauthorisedly in some cases by some persons. So also, we hope and trust that before disclosing the identity of Covid-19 infected persons or persons in quarantine in exceptional circumstances, as stated in the Regulation, to achieve the goal, the State shall also must take note the fact that the same is subject to scrutiny of triple test prescribed in the case of **Puttaswamy** (supra) before invasion of such right to privacy of the persons in quarantine / Covid-19 infected persons alive or dead.

14. So far as the unauthorized disclosure of the identity of Covid-19 patients in print and Electronic media is concerned, notice can also be taken to a decision of the Apex Court rendered in the case of ***Rajagopal vrs. State of Tamil Nadu,*** reported in (1994) 6 SCC 632 wherein the Apex Court dealing with right to privacy vis-à-vis the right of a Press under Article 19 of the Constitution, in paragraph-26 have held as follows:-

> "The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a 'right to be let alone'. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent – whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy."

The State has also in Regulation-4 made unauthorized disclosure of identity is a punishable offence of such personal details of the Covid-19 infected persons and also persons in quarantine. At the cost of repetition, it is mentioned that disclosure of such identity in Print and Electronic media, visits the persons infected alive or dead as well as the persons in quarantine and their family members with trauma and tribulations and at a times leading to ostracization, so also endanger their lives and limbs in view of the stigma attached to the disease in this Country. The same also does more harm to the health of the public in general as for the opprobrium as aforesaid, Covid-19 virus infected and persons who having come in contact with such persons, as such, required to be kept in quarantine, are not likely to come forward to disclose the same which shall contribute enormously in spread of the Pandemic Covid-19 virus, a great threat to the mankind. No doubt, the aforesaid public interest cannot be a ground to gag the freedom of the Press. But, for the reasons stated above, we hope and trust that the Press in this Country; both Print and Electronic Media, which is responsible one and shall

behave in a more responsible manner with regard to disclosure of identity and should not disclose the identity of such persons unauthorisedly.

15. So far as the disclosure about the Covid-19 patients in different social media platform by the unauthorized persons are concerned, since the State has already formulated the Regulations for the said purpose and also proceeding against such persons, we have, therefore, no manner of doubt that the State shall also proceed against such persons who are spreading rumour and/or unauthorized information with regard to Covid-19 infected persons alive or dead or persons in quarantine. However, for more effective implementation of the Regulation, the State must have vigil over spreading of such rumour and unauthorized information in the social media platforms and whenever it comes to their knowledge regarding such disclosure of names unauthorisedly and any rumour in the social platform, to proceed against such persons in the manner known to law.

So also, the awareness programme undertaken by the State to obliterate the stigmatization from the Society with regard to disease be also vigorously persuaded further to reach out the people of the State, which we feel, is highly essential to prevent the spread of the dangerous virus of Covid-19 and remove the stigma attached.

16. So far as the disclosure of identity of Covid-19 Warriors are concerned, since the Covid-19 Warriors who dies while coming in contact with the persons infected in Covid-19 during the discharge of their duties, there is no impediment on the part of the State Government to disclose their identity as the Government have decided to disclose the same to honour those warriors by extending State Honour in their funeral by the higher officers of the District Administration, such as, District Magistrate and Superintendent of Police concerned and also suitably rehabilitate their dependants, if any, and also compensate them by payment of ex gratia amount and the same is also done with the prior consent of legal representatives of such deceased Covid Warrior competent to consent and as the same is going to be done with an avowed object to boost the morale of the other Covid-19 warriors who are fighting to arrest the spread of the pandemic by putting their lives in danger, inasmuch as the same is a message to them that the State is alive to their such sacrifice and adequately take care of their dependants in the event they lay their lives in service of the Nation.

17. With the aforesaid order, this writ petition (P.I.L) stands disposed of.

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As lock-down period is continuing for COVID-19, learned counsel for the parties may utilize the soft copy of this order 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- 358

MOHAMMAD RAFIQ, C.J & DEBABRATA DASH, J.

WRIT PETITION (CIVIL) NO. 28643 OF 2019

M/S. MAA SARALA MULTIPURPOSE CO. LTD.
(THRO' ITS SECY. N.K.DASH) .....Petitioner

.Vs.

STEEL AUTHORITY OF INDIA & ANR. .....Opp. Parties

CONSTITUTION OF INDIA 1950 – Articles 226 and 227 – Writ petition – Tender matter – Challenge is made to the decision taken by the authority with regard to disposal of Ammonium Sulphate – Scope of interference by the court in a writ petition – Held, courts ought not to sit in appeal over the decisions of the executive authorities or instrumentalities and plausible decision need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon.

"It is settled that constitutional courts are concerned only with the lawfulness of a decision, and not its soundness.1 To place it differently, courts ought not to sit in appeal over the decisions of the executive authorities or instrumentalities and plausible decision need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon.2 Notice must be kept of the impact of overturning an executive decision and its impact on the larger public interest in the form. Caution, however, stands that the allegations of illegality, irrationality and procedural impropriety be not completely overlooked to assume jurisdiction and remedy such ills. Thus, it would only be the decision making process which would be the subject

of enquiry, and not the and result; save as may be necessary to guide determination of the former. Such conscious restraint is so necessary because judicial intervention by itself may affect in a manner leading to frustrate the very objective, besides time and money, which if unchecked would have problematic ramifications on many fronts. However, it is not desirable or practicable for courts to review the thousands of auctions conducted by executive authorities every day. Courts, therefore, are cognizant that often-a-times the private interest of a few can clash with public interest of the masses, and hence a requirement to demonstrate effect on 'public interest' has been evolved by the Court. It is, therefore, imperative that in addition to arbitrariness, illegality or discrimination under Article 14 or encroachment of freedom under Article 19(1)(g), public interest too must necessarily be demonstrated in seeking the remedy." *(Paras 9 &11)*

Case Laws Relied on and Referred to :-

1. (2016) 8 SCC 622 : Central Coal Field Ltd .Vs. SLL-SML (JV Consortium)
2. (2002) 2 SCC 617 : Air India Ltd. .Vs. Cochin International Airport Ltd.
3. (1994) 6 SCC 651 : Tata Cellular .Vs. Union of India.
4. (2007) 14 SCC 517 : Jagdish Mandal .Vs. State of Orissa.
5. 2014) 3 SCC 760 : Maa Binda Express Carrier .Vs. North-East Frontier Railway.

For Petitioner : Mr.S.S. Rao and Mr.B.K.Mohanty
For Opp. Parties : Mr.B.Dasmohapatra & Mr.B.N.Bhol, M/s.B.Moharana, Mr.D.Chhotray, Mr.S.Moharana & Mr. B.Mohanty.

JUDGMENT Date of Hearing: 13.07.2020: Date of Judgment: 20.07.2020

PER: DEBABRATA DASH, J.

This writ application has been filed by M/s.Maa Sarala Multipurpose Cooperative Society Limited registered under the Odisha Cooperative Society Act, 1962 with a prayer to issue writ of mandamus commanding the opposite parties to deliver the stock of 222.000 MT of Ammonium Sulphate as per Annexure-2; with further prayer to direct the opposite party no.2 to consider and dispose of the petitioner's representation dated 21.12.2019 under Annexure-5.

2. The Petitioner, a Registered Cooperative Society, carrying on the supply/sale of different such products including fertilizer to the farmers for their agricultural activities, participated in the e-auction made by the Steel Authority of India Limited, Rourkela Steel Plant, the opposite party no.1 through its service provider, i.e., Metal Junction Services Private Limited (for short, "MJSPL") for the purpose of sale of Ammonium Sulphate by depositing the required EMD of Rs.50,000/- The auction was finally

conducted in respect of different quantities of Ammonium Sulphate in phased manner. The petitioner's name appeared in the bid-sheet under rank-1 being the sole bidder in respect of 220.000 MT of Ammonium Sulphate under different phases as at Annexure-2.

It is stated that despite the fact that the petitioner was the successful bidder in respect of 222.000 MT of Ammonium Sulphate way back on 15.11.2019, there was no supply of the stock. When the matter stood thus, another open sale notice dated 19.12.2019 under Annexure-4 in respect of 7500.000 MT of Ammonium Sulphate was published by the opposite parties. Being apprehensive that in the open sale, the entire stock would be sold wholly to the detriment of the petitioner; in the subsequent auction, bid was given by the petitioner for purchase of small quantity of Ammonium Sulphate. It is further stated that the petitioner was all along ready and willing to lift the stock for purchase of which he was the successful bidder in the first auction held on 15.11.2019 by complying all such formalities and is now also ready and willing for the same. The petitioner, being the successful bidder in the first auction, has been unjustifiably deprived of enjoying the fruit of the same. The action of the opposite party in holding the 2nd auction is said to be arbitrary and illegal.

3. The opposite parties, in their counter affidavit, have admitted the fact that first auction for sale of Ammonium Sulphate of 620 Tonne (10T X 30 lots and 20 T X 16 lots) had been held through the service provider MJSPL and the bid price was fixed at Rs.10,800/- per tonne. It has been further stated that the participation in the said action conducted on 15.11.2019 through said service provider was such that there was no competition at all. The present petitioner, through its Secretary Sri Nalini Kanta Dash and one M/s. Maa Sarala Agro Care of which said Secretary of the petitioner-Cooperative Society is the proprietor, were the two participants. It is said that for each of the 46 lots of Ammonium Sulphate put to auction for sale, single bid had been offered and the auction price did not go upward the fixed bid price of Rs.10,800/- per tonne. It is said that it was not a competitive bidding of the lots and the price quoted by the petitioner as also by M/s.Maa Sarala Agro Care by its proprietor who happens to be the Secretary of the petitioner-Cooperative Society for 400 T and 200 T respectively was the same, i.e, the fixed bid price.

The opposite parties received an order dated 14.11.2019 passed by this Court in W.P.(C) No.21630 of 2019 which had been filed by All Odisha Fertilizer Wholesellers Association challenging the forward e-auction notice dated 7.11.2019 published by the opposite parties. That petitioner-Association (intervenor in the present proceeding) therein had expressed the apprehension that there may be breach of clause-3 of the Fertilizer (Inorganic, Organic or Mixed) Control Order, 1985 (in short, 'the Control Order') in that auction. This Court, while disposing the writ application, upon consideration of the submission and on going though clause-3 of the Control Order, had disposed of the writ application with an observation that the opposite parties would commit no breach of the said clause in any manner whatsoever.

Keeping in view the fact that in the said auction held on 15.11.2019, there was no competition and equitable distribution of the fertilizers to the registered dealers in the State of Odisha in consonance with the terms and conditions of the tender as also the fixed bid money was the quoted offer, the opposite parties finally cancelled the same and intimated said decision to the service provider through e-mail on 21.12.2019 under Annexure-C with a direction to refund the EMD to the parties. In view of that, no letter of acceptance (LOA) was issued to the petitioner. It is also stated that MJSPL had intimated the petitioner about cancellation of the said forward action held on 15.11.2019 with a request to seek the refund of EMD or otherwise, the same would stood reverted to the virtual account of the petitioner. This intimation was given by MJSPL through email dated 21.12.2019 under Annexure-D. Thereafter, open sale notice bearing no. MKTG/OS/AS/2020/406 dated 19.12.2019 under Annexure-E was issued for sale of 7500 MT of Ammonium Sulphate. In response to the same, one hundred and fifty-eight (158) applications were received from different registered fertilizer dealers from different parts of the State intending to purchase desired quantities of Ammonium Sulphate at their respective quoted rate. So, from out of the declared available quantity of Ammonium Sulphate, allotment was made to all the parties on pro rata basis against the applied quantity with minimum allocation of 40 Tonne. The petitioner-Cooperative Society again by depositing EMD participated in the said auction held pursuant to the notice dated 19.12.2019 and it had applied for allocation of 100 Tonne of Ammonium Sulphate. Finally, the petitioner-Cooperative Society has been allotted 40 Tonnes of Ammonium Sulphate at the rate of Rs.11,000/- per Tonne under that pro rata allotment to all the bidders. Said

application dated 4.1.2020 made by the petitioner, in response to the sale notice dated 19.12.2019 has been placed at Annexure-E and the lists of purchasers and the sale order dated 1.2.2020 issued in favour of different parties including the petitioner are placed at Annexure-F and G respectively.

When the matter was progressing further for delivery of stock to all those purchasers, the opposite parties received the interim order of stay of operation of notice dated 19.12.2019 passed by this Court on 28.1.2020 for which the distribution as per the said allocation to different persons has been put on hold.

4. The petitioner has also filed the rejoinder affidavit, which has been taken on record. The averments made therein are more or less repetitions of the case projected by the petitioner in the writ application. It has been asserted all throughout that there was no justification to take a decision for cancellation of the first auction wherein the petitioner was the participant and successful as none had then come forward to bid. The decision to cancel the first auction on the ground as averred in the counter affidavit filed by the opposite parties is said to be arbitrary and illegal and thus the second auction held is nonest in the eye of law.

5. Mr.B.K.Mohanty, learned counsel for the petitioner submitted that in the given facts and circumstances, it is a fit case for judicial review in annulling the second auction and for restoration of the result of the first auction in which the petitioner was the sole participant-bidder and as such successful. He further submitted that when no response has come towards the representation dated 19.12.2019 given by the petitioner, it is clear that there was no prior intimation to this petitioner about the cancellation of the first auction process and had it been so, there was no reason to hold on the representation without any reply to that effect. He further submitted that in W.P.(C) No.21630 of 2019, this Court had expressed the hope that there would be no breach of the provision of clause-3 of the Control Order. But then nothing is now said as to how in the first auction held on 15.11.2019, there was breach of the provisions contained in the said clause-3 of the Control Order. He submitted that the reason assigned for the cancellation of the first auction process is untenable in the eye of law and the cancellation of the first auction is arbitrary and illegal. He, therefore, contends that the petitioner being the successful bidder in respect of 222.000 MT of Ammonium Sulphate is entitled to be delivered with the same upon compliance of other required formalities which be accordingly, ordered.

6. Mr. B.Dasmohapatra, learned Counsel for the opposite parties submitted that the present case is not one where judicial review is permissible. He highlighted that the scope of writ jurisdiction in contractual dealings of the State or its instrumentality is extremely limited, and deference to commercial wisdom of the executive ought to be the norm. The decision making process was shown as not being illegal as there is no allegation of consideration of any extraneous matter or violation of any statute; nor irrational. The decision of cancellation of the first auction process and the resumption of the auction process afresh that too within a reasonable period is to have the equitable distribution of Ammonium Sulphate used as fertilizers by the farmers amongst the maximum number of registered fertilizer dealers of the State running their business in different places of the State so as to achieve the ultimate goal that the fertilizers reach to the maximum number of farmers all over the State in meeting their need, besides fetching better price for the opposite parties. The reasons are not such which would offend the sensibilities of a reasonable person; nor can be termed as arbitrary as substantial discretion on that score is allowed by the terms of the tender notice. The petitioner's participation in the tender process post cancellation of the first tender was contended to bind him from advancing any further judicial challenge to the said cancellation of the first auction and now its restoration at their instance is not permitted in law as the conduct and representation of the petitioner through said participation in the subsequent auction estopps the petitioner. He further contended that the very participation of 158 numbers of registered dealers in the second auction as against the participation of one person, i.e, the petitioner-Cooperative Society in the first auction for the part block clearly demonstrates that, had the first auction been upheld; there would have not at all been the equitable distribution of the fertilizers as amongst the registered fertilizer dealer in the State to cater the need of farmers all over the State and rather, there would have been the creation of 'Monopoly Raj' which is prohibited in law. He submitted that the first auction was not at all competitive and had not fetched the price as it ought to have been in public interest and that the element of equitable distribution of the fertilizers (Ammonium Sulphate) through out of the State amongst the registered dealers for being ultimately available for utilization by the farmers was clearly lacking. He further highlighted that in the first auction, the petitioner was the only participant and he had applied for the quantity as per its demand quoting the fixed bid price and similarly for some more stock, the proprietorship concern of the very Secretary of the petitioner-Cooperative Society was the participant. In the given facts and

circumstances; in the backdrops of the provisions contained in the relevant clauses of the Control Order, giving emphasis upon the fact that acceptance of the result of the first auction, would certainly stand on the way of achievement of one of the important object of equitable distribution of Ammonium Sulphate (fertilizers) to the registered dealers for the entire State for being available to the large number of farmers, he contended that the cancellation of the first tender is just and proper. The decision to cancel the same is well in order in public interest and cannot come within the purview of judicial review.

7. Mr.B.Moharana, learned counsel for the intervenor adopted the submission advanced by the learned counsel for the opposite party nos.1 and 2.

8. In reply, Mr. Mohanty, learned counsel for the petitioner contended that the petitioner having participated in the second auction in view of the strong apprehension that it may be totally kept out of the field, that conduct and representation would not operate as estoppel to challenge the cancellation of the first tender which is ex-facie illegal.

9. In order to address the above rival submission, it would be apposite to take note of the principles of law governing the field as have been explored in depth by the Apex Court in catena of decisions.

It is settled that constitutional courts are concerned only with the lawfulness of a decision, and not its soundness.[1] To place it differently, courts ought not to sit in appeal over the decisions of the executive authorities or instrumentalities and plausible decision need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon.[2] Notice must be kept of the impact of overturning an executive decision and its impact on the larger public interest in the form. Caution, however, stands that the allegations of illegality, irrationality and procedural impropriety be not completely overlooked to assume jurisdiction and remedy such ills. Thus, it would only be the decision making process which would be the subject of enquiry, and not the and result; save as may be necessary to guide determination of the former.

10. The position of law has been succinctly summed up in ***Tata Cellular V. Union of India***[3] wherein it has been stated that:

*(**1**) (2016) 8 SCC 622 (**2**) (2002) 2 SCC 617 (**3**) (1994) 6 SCC 651*

"77…. Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

i) Illegality : This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesday unreasonableness.

(iii) Procedural impropriety.

In case of ***Jagdish Mandal V. State of Orissa***[4].

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

11. Such conscious restraint is so necessary because judicial intervention by itself may affect in a manner leading to frustrate the very objective, besides time and money, which if unchecked would have problematic ramifications on many fronts. However, it is not desirable or practicable for courts to review the thousands of auctions conducted by executive authorities every day. Courts, therefore, are cognizant that often-a-times the private interest of a few can clash with public interest of the masses, and hence a requirement to demonstrate effect on 'public interest' has been evolved by the Court.

(**4**) *(2007) 14 SCC 517*

It is, therefore, imperative that in addition to arbitrariness, illegality or discrimination under Article 14 or encroachment of freedom under Article 19(1)(g), public interest too must necessarily be demonstrated in seeking the remedy.

12. Adverting to the case in hand, admittedly in the first auction, the petitioner was the only participant for purchase of Ammonium Sulphate put for sale and for some other part, the concern owned by the Secretary of this petitioner-Cooperative Society was the sole participant. After the first auction, as it appears within a reasonable time, the opposite parties have taken the decision to cancel the same taking into account the views as to lack of competition, inequitable distribution and the bided price to be just the same as the fixed bid price as per the tender notice. The second auction then being ordered has also taken place and there has been participation of 158 persons including the petitioner in that and they are all the registered dealers having different areas of operations in different places of the State. The petitioner-Cooperative Society as well as the other proprietorship concern, both have their registered office in the district of Cuttack. While disposing W.P.(C) No.21630 of 2019, by order dated 14.11.2019, this Court had taken note of the provisions contained in caluse-3 of the Control Order. Given a reading to the said provision, makes it clear that the factor of equitable distribution of the fertilizers making its availability at fair price with a cap for the maximum for being sold by the dealers is of paramount importance.

We are thus not persuaded to take a view that there is a certain public interest at stake in the decision of cancellation of the first auction. Furthermore, the petitioner in the case has failed to demonstrate which public law right, it was claiming in support of the claim of annulment of the second auction. The main thrust of the case of the petitioner has been on the fact that it was the successful bidder in the first auction, but the fact also remains that the petitioner was the sole participant. The purpose of holding the auction by fixing the opening bid price was to provide a platform to maximum number of registered fertilizer dealers in giving the opportunity to purchase the fertilizer for their onward sale to farmers all over the State. However, being the sole participant in an auction does not bestow upon any entity, a public law entitlement in asserting the right of being so rewarded with.

13. In case of ***Maa Binda Express Carrier V. North-East Frontier Railway***,[5] it has been authoritatively said that:-

(5) (2014) 3 SCC 760

> "8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process."

Thus, in the instant case, it is clear that there was neither any public law right of the petitioner which was affected nor there was any public interest sought to be furthered for grant of the prayer as advanced in the writ application.

14. Lastly, we deem it necessary to deal with another fundamental hurdle standing on the way of the petitioner in assailing that the cancellation of the first auction by the opposite parties as arbitrary and illegal. The petitioner having participated in the first auction by depositing the required EMD, has again participated in the second auction by depositing the EMD as ordained therein. In view of that it cannot be said that the decision as to the cancellation of the first auction was not known to the petitioner as has been so averred in the writ application and strenuously argued by the learned counsel for the petitioner. At the same time, the averment of the petitioner that lest it would be totally out of scenario from purchasing the Ammonium Sulphate from the opposite parties; he was compelled to go for purchase of lesser quantity in the second auction, clearly contradicts the assertion of the petitioner that it was ignorant about the cancellation of the first auction. So, in our view, the petitioner is estopped by its conduct and representation from questioning the validity/legality of the cancellation of the first auction.

15. In the light of above discussion, the writ application is dismissed. No order as to cost. Consequentially, the interim order dated 28.01.2020 passed in I.A. No.18349 of 2019 does no more survive for operation in the field.

2020 (II) ILR - CUT- 368

MOHAMMAD RAFIQ, C.J & BISWANATH RATH, J.

W.P.(CRL) NO. 41 OF 2020

GUGU @ SUBASIS KHUNTIA ……..Petitioner

.V.

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

NATIONAL SECURITY ACT, 1980 – Section 3(3),12(1) & 13 – Detention under the Act – Nineteen cases against the detenu – Acquittal in some cases & in all other cases the detenu has been granted bail – Extension of detention order thrice – No cogent & relevant material to show that there is any apprehension of breach of public peace and safety – Non compliance of the mandatory provision of the section 10 of the Act – Violation of Art.21 & 22 of the Constitution of India pleaded – No steps have been taken to cancel the bail in the cases, where the detenu alleged to have committed similar type offence, rather action under the Act have been initiated – Action of the Authority challenged – Right to life and personal liberty raised – Held, all the three detention orders set aside.

Case Laws Relied on and Referred to :-

1. AIR 1986 SC 315 : Ramesh Yadav Vs. District Magistrate, Etah.
2. 1990(I) OLR 347 : Siba Lenka Vs. State of Orissa & Ors.
3. AIR 1952 SC 27 : Makhan Singh Vs. State of Punjab.
4. (1982) 1 SCC 271 : A.K. Roy Vs. Union of India & Ors.
5. A.I.R. 1952 SC 181 : Dattatraya Moreshwar Vs. The State of Bombay.
6. (1982) 1 SCC 271 : A.K. Roy Vs. Union of India & Ors.
7. (1989) 4 SCC 556 : Shafiq Ahmed Vs. District Magistrate, Meerut.

For petitioner : M/s. S.Mishra, R.Mishra, D.Swain, A.R.Sethi & D.Sahu.
For Opp. Parties : Mr. J.Katikia, Addl. Govt. Adv.
Mr. U.R.Jena, Central Govt. Counsel.

JUDGMENT Date of Hearing : 20.07.2020 : Date of Judgment : 27.07.2020

BISWANATH RATH, J.

This is an application involving National Security Act, 1980 (in short, "the Act") challenging therein the order dated 04.01.2020 (Annexure-4) and the order dated 10.02.2020 (Annexure-5) being passed by the Joint Secretary to Government in Home Department intimating thereby the detenu about rejection of his representation by the State Government being devoid of

merit thereby further indicating the approval of the extension of detention period of three months and in the subsequent order in exercise of power conferred under Section 12(1) read with Sections 3(3) and 13 of the Act extending the detention of the detenu for a period of six months instead of three months from the date of his detention under the orders of detention under the Act. By way of additional affidavit the petitioner filing the correspondence dated 05.05.2020 has also challenged the communication dated 05.05.2020 of the competent authority thereby extending detention period involving the petitioner from six months to nine months in exercise of their power under Section 12(1) read with Sections 3(3) and 13 of the Act.

2. Short background involving the case is that the petitioner was initially arrested and forwarded on 02.10.2019 for his alleged involvement under Sections 341/506/386/34 of I.P.C. involving Madhupatna P.S. Case No.150 dated 14.09.2019. While the matter stood thus, when the petitioner was in jail custody, O.P.3, Commissioner of Police, Police ommissionerate, Bhubaneswar-Cuttack, passed the order of detention under the Act involving the petitioner on 12.11.2019 directing thereby the detention of the detenu resulted taking into consideration his involvement in nineteen numbers of cases against the detenu as appearing at Annexure-1. The petitioner claimed that out of nineteen cases other than that of the Madhupatna P.S. Case No.150/2019, the detenu has already been acquitted in some cases by the competent court of law and in the rest cases, he has also been enlarged on bail by this Court as well as the subordinate court, as clearly borne from the order of detention passed by O.P.3. Consequent upon service of order of detention, vide Annexure-1, the petitioner filed his representation before O.P.1 on 05.12.2019 defending him from the charges. It is while the matter stood thus, vide order dated 18.12.2019, O.P.1 rejected the representation of the petitioner, as appearing at Annexure-3. In the meantime, O.P.1 issued another order dated 04.01.2020 with reference to the matter of detention of the detenu to the Advisory Board disclosing therein that the Board was of the opinion that there has been sufficient cause for his detention and the order was passed after giving opportunity of hearing to the detenu and further O.P.1 has confirmed the detention order and directed for continuation of the detenu at Choudwar Circle Jail for a period of three months from the date of his detention, as appearing at Annexure-4. The petitioner further pleaded that when three months detention order was to expire on 11.02.2020, on 10.02.2020 the competent authority passed another order thereby directing detention of the detenu for six months from the date of detention under the

Act instead of three months, as appearing at Annexure-5. During pendency of this petition, by filing additional affidavit the petitioner has also brought to the notice of this Court that while the matter stood thus, the competent authority has passed another order extending the detention of the petitioner from six months to nine months in exercise of power conferred by Section 12(1) read with Sections 3(3) & 13 of the Act communicated vide order dated 05.05.2020 appended to the additional affidavit at the instance of the petitioner.

3. All the three orders herein above have been assailed on the ground that extension of detention period from three months to six months involving the petitioner is completely unwarranted, as there has been no cogent and relevant material to show that there is any apprehension of breach of public peace and safety by the detenu. Further there has been also no compliance of the mandatory provision of Section 10 of the Act by not making further reference to the Advisory Board to ascertain and review before the extension orders being passed. The petitioner also alleged that though the provision mandates that the reference has to be made within three weeks, same has not been followed in the case of the petitioner. Further ground raised by the petitioner is that though a finding of fact was vested on the Advisory Board, which has to form an opinion on its satisfaction of existence of sufficient reason for preventive detention of the detenu and the Board has to ensure that by calling upon necessary material information to reach a conclusion of necessity of detention, it is claimed that in the present case, the Board has not undertaken such exercise and as such, the petitioner claims that the order of detention, vide Annexure-4 is not sustainable in the eye of law. On the same analogy, petitioner claimed that the further detention orders are also not getting any support of any sufficient opinion of the Advisory Board. Referring to the decision in the case of ***Additional Secretary to the Government of India and others vrs. Smt. Alka Subhash Gadia and another*** reported in 1992 (Supp.-1) SCC 496, the petitioner claimed that there is no valid reason to detain the petitioner and such conduct of the Authority presently affects the liberty of the detenu enshrined under Article 21 of the Constitution of India. It is also alleged that there is also violation of the mandate under Articles 22(4) to (7), as it requires a clear sanction of law or sufficient opinion of the Advisory Board to detain any person to custody for a period of more than three months. The petitioner also challenged the order of detention under the premises of directives of the Hon"ble apex Court in view of Covid-19 pandemic situation where the Hon"ble apex Court has

directed all the High Courts of the State to constitute high-power committee for granting interim bail to UT prisoners. The petitioner alleged that for the detention of the petitioner under the Act, the petitioner is unable to avail such scope.

4. It is in the premises, Sri S.Mishra, learned counsel for the petitioner on reiteration of the facts narrated herein above and the grounds of attack by the petitioner in the petition referring to the written note of argument also contended that the petitioner has been detained on mere apprehension and such detention remained contrary to the decision of the Hon‟ble apex Court. Learned counsel for the petitioner here relied on the decision of the Hon‟ble apex Court in the case of ***Ramesh Yadav vrs. District Magistrate, Etah,*** reported in AIR 1986 SC 315. The second limb of argument by Sri Mishra, learned counsel for the petitioner is that the subsequent extension of the detention for a period of six months and nine months is contrary to the Act for being violative of Article 22(4) of the Constitution of India. Sri Mishra, learned counsel for the petitioner also challenged the impugned orders under the premises that the competent authority while passing the impugned orders have only referred to the opinion and did not deal with the detailed report. It is alleged that the appropriate Government has failed in dealing with the proceeding of the Advisory Board and its orders simply based on opinion of the Board. Learned counsel for the petitioner claimed that the impugned orders are against settled law of this Court through ***Siba Lenka vrs. State of Orissa & others*** reported in 1990(I) OLR 347 where this Court has observed, in such proceedings the Authority has to peruse the proceedings of the Board. Confirmation of the report of the Board only on the basis of the report of the Advisory Board is not sufficient. It is in the above premises and in reference to the decision referred to herein above, Sri Mishra, learned counsel for the petitioner prayed for interference of this Court in the impugned orders and requested this Court for setting aside the orders dated 04.01.2020, 10.02.2020 and 05.05.2020 and set the petitioner at liberty forthwith.

5. To the contrary, the contesting O.P.3 in their response filed an affidavit on 04.06.2019 thereby contesting the application on the premises that the detention order is passed in the guise of constitutional safeguards to ensure that the Act is not abused. It is also claimed by O.P.3 that all the provisions enumerated in Sections 3 & 8 of the Act have been strictly followed and that there has been no infringement of constitutional right

guaranteed by Article 22 of the Constitution of India. In the process, the petitioner‟s detention order passed by the detaining authority on 19.12.2019 along with the report of the Superintendent of Sub-Jail, Bhubaneswar, vide Annexures-1 & 2 respectively was served on the detenu on time. The ground of detention was also served on the detenu on 24.12.2019 before completion of five days. It is also claimed that the petitioner has been provided with every opportunity provided under the special statute. It is claimed that the extension was done only after review of the situation and after observing his continuation to be a threat to public orders. It is also claimed that there is no provision for review of the detention orders by the Advisory Board at every stage and there is no precedence as such. While claiming that each of the provisions of the Act has been strictly followed, giving details of involvement of the petitioner creating law and order situation, O.P.3 through paragraph-5 attempted to demonstrate a strong case against the petitioner. In the process, O.P.3 requested for dismissal of the application for having no merit.

6. O.P.1 also filed counter affidavit, inter alia, containing therein that there is ample material available on record showing the detenu‟s antisocial criminal activities in different cases over a considerable period of time, which are also prejudicial to the interest of public at large. This O.P. claimed that when normal law of land failed to curb antisocial activities of the petitioner, there has been right implementation of the provision of the Act and the detention of the detenu is claimed to be legal, justified and in accordance with law. O.P.1 also claimed that there is no infirmity or illegality in passing the extension orders and thus claimed that the writ petition being not tenable in the eye of law has to be rejected. Giving a parawise comment to the claim and contention of the petitioner through several paragraphs, this O.P. attempted to demonstrate that the detention of the petitioner is in the public interest and there has been compliance of all provision required under the Act. It is also claimed that ample opportunity has been provided to the petitioner at every stage wherever required. In the above premises, O.P.1 also through counter affidavit attempted to justify the detention of the detenu.

7. In his opposition, Sri Katikia, learned Additional Government while taking this Court to the counter affidavit filed on behalf of the opposite party no.1 & 3 respectively attempted to justify the order of detention impugned herein and contended that there is no challenge to the parent order of detention dated 12.11.2019. There is no dispute that the Advisory Board

opined that "there lies sufficient cause for his detention". So far as allegation in relation to violation of provision at Article 22(4) of the Constitution of India is concerned, Sri Katikia, learned Additional Government Advocate submitted that every case of preventive detention should be placed before an Advisory Board, constituted U/s.9 of the Act and thereafter the Advisory Board in exercise of power U/s.11 is required to make a report giving its opinion regarding sufficient or insufficient cause for detention and then it is the duty of the appropriate Government to confirm the detention order for such period as it thinks fit. Sri Katikia stated that in the process a reference being made to the Advisory Board U/s.10 of the Act, the Advisory Board has given a report with his finding of reason for detention of the detenu. Consequent upon which the appropriate authority passed the order of detention. It is claimed by the State that for the constraint through the judgment of this Court dated 22.08.2019 passed in WP(CRL) No.43 of 2019 the appropriate Government initially passed the order of detention for three months from the date of detention under the Act and for the reasons mentioned there in subsequent orders of extension have been passed; firstly extending the detention from three months to six months and then by the order dated 5.05.2020 there is second extension of the detenu from six months to nine months.

8. Mr. Katikia, learned Additional Government Advocate taking this Court to the provision at Section 9, 10, 11, 12 & 13 of the National Security Act, 1980 attempted to demonstrate his above submissions. Referring to the judgments in the case of ***Makhan Singh*** *Vs.* ***State of Punjab*** as reported in AIR 1952 SC 27 and in the case of ***A.K. Roy*** *Vs.* ***Union of India & others*** as reported in(1982) 1 SCC 271, Mr. Katikia, learned Additional Government Advocate submitted that none of the actions of any of the authority involved herein is neither illegal nor improper so as to requiring interference of this Court. Finally Mr. Katikia, learned Additional Government Advocate submitted that all the required procedures have been followed herein and it is wrong to claim that personal liberty of the petitioner enshrined under Article 21 has been infringed.

9. Taking this Court to the judgments Mr. Katikia, learned Additional Government Advocate attempted to justify his submission and accordingly claimed for dismissal of the Writ Petition.

It may be apt here to mention that Mr. Katikia, learned Additional Government Advocate has also filed a written note of submission on behalf of the opposite party nos.1 & 3 giving disclosure of all the above.

10. Learned counsel for the opposite party no.4 submitting a written note of submission inter alia contended that as it appears, there is no grievance against the opposite party no.4. On reading of the averments through the Writ Petition it appears, the representation of the petitioner forwarded to the opposite party no.4 has been duly considered by the opposite party no.4 and has been rejected with a communication of the rejection order to the Superintendent, Circle Jail, Choudwar vide Wireless Message No.15030/09/2019 NSA dated 11.12.2019 with instruction to communicate the same to the detenu. Learned counsel for the opposite party no.4 also claimed to have complied with the statutory requirements required under the Act. It is on the premises that there is no allegation involving the opposite party no.4, opposite party no.4 claimed for dismissal of the Writ Petition.

11. From the pleadings of the parties this Court finds, the following relevant events have taken place on particular dates; petitioner was forwarded to Jail on 14.09.2019 for his involvement in offences U/s.341/506/386/34 of I.P.C vide P.S. Case No.150 dated 14.9.2019. On 12.11.2019 the petitioner was served with an order of detention under Sub-Section (2) of Section 3 of the Act (Annexure-1) while he was in Jail. On 5.12.2019 the petitioner submitted his representation (Annexure-2). On 18.12.2019 vide Annexure-3 the representation of the petitioner was rejected. Petitioner‟s case was referred to the Advisory Board on 22.11.2019 and on 31.12.2019 the State Advisory Board gave its opinion involving the petitioner‟s detention along with its detailed report. On 4.01.2020 vide Annexure-4 appropriate Government passed the order of detention for three months against the petitioner on acceptance of the opinion of the Advisory Board on 10.02.2020. Vide Annexure-5, the detention involving the petitioner got extended to another six months from the date of detention and during pendency of the Writ Petition there is another extension order on 5.05.2020 attached to the additional affidavit of the petitioner extending the detention of the petitioner from six months to nine months.

Taking into account the submissions of the respective parties recorded in several paragraphs hereinabove, the following questions fall for consideration by this Court:

(a) Whether the grounds taken by the opposite party no.3 that for the release of the detenu from judicial custody there will be fear and panic in the society and likely to act in a manner prejudicial to the public order is sufficient enough to detain a person under the National Security Act, 1980 ?

(b) Whether after obtaining permission from the Advisory Board and after passing the confirmation of the detention order vide Annexure-4, there was any necessity to take further opinion of the Advisory Board and also to give opportunity of filing representation to the detenu before passing of the extension orders dated 10.02.2020 and 5.05.2020 ?

For the intricacy involved herein, this Court first moves to decide the question no.(b). Giving attention to the narrations made herein, this Court moves to take into account the legal provisions available for the purpose. Provisions relevant for decision of this case at Sections 8, 9, 10, 11 & 12 of the National Security Act, 1980 read as follows :-

> "Grounds of order of detention to be disclosed to persons affected by the order.—
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> 8. When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government.
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> (2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.
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> 9. Constitution of Advisory Boards.—
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> (1) The Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards for the purposes of this Act.
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> (2) Every such Board shall consist of three persons who are, or have been, or are qualified to be appointed, as Judges of a High Court, and such persons shall be appointed by the appropriate Government.
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> (3) The appropriate Government shall appoint one of the members of the Advisory Board who is, or has been, a Judge of a High Court to be its Chairman, and in the case of a Union territory, the appointment to the Advisory Board of any person who is a Judge of the High Court of a State shall be with the previous approval of the State Government concerned.
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> 10. Reference to Advisory Board.—Save as otherwise expressly provided in this Act, in every case where a detention order has been made under this Act, the appropriate Government shall, within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by it under section 9, the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer mentioned in sub-section (3) of section 3, also the report by such officer under sub-section (4) of that section.

11. Procedure of Advisory Board.—

(1) The Advisory Board shall, after considering the materials placed before it and, after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned.

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

(3) When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board; and the proceedings of the Advisory Board and its report, excepting the part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

12. Action upon the report of the Advisory Board.—

(1) In any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

(2) In any case where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the detention of a person, the appropriate Government shall revoke the detention order and cause the person concerned to be released forthwith."

12. Looking to the factual scenario involved herein, this Court finds, there is no denial to the fact that the petitioner was detained under Sub-Section (2) of Section 3 of the Act on 12.11.2019 and following the provisions of Section 10 of the Act, the case of the petitioner was referred to the Advisory Board on 22.11.2019. The State Advisory Board submitted its opinion along with its report on 31.12.2019 leading to confirmation of the detention order and the order asking to detain the petitioner for a period of three months was passed on 4.01.2020. Up to this there appears, there is no violation of the provision under the National Security Act, 1980. Now for the allegation that before passing the extension orders on 10.02.2020 and 5.05.2020, the matter ought to have been again sent for the opinion of the Advisory Board, this Court

from the provision at Section 11 finds, the Advisory Board, shall, after considering the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned. It appears here that the opinion of the Advisory Board being given on 31.12.2019, provision requiring submission of the report within seven weeks has been complied with. For the provision at Section 12 after the report of the Advisory Board, if there is sufficient cause for detention, the appropriate Government is required to confirm the detention order and continue the detention of the petitioner for such period as it thinks fit. So from the provision at Section 12 (1), it becomes clear that it is for the appropriate Government to first confirm the detention order, in the event there is sufficient cause then to continue the detention of the person concerned as it thinks fit. For the involvement of subsequent detention order and looking to the questions framed hereinabove, as to whether in the event of subsequent detention order, it was necessary on the part of the competent authority to refer the matter to the Advisory Board for review for the provisions at Sections 11 & 12? This Court while disapproving the claim of the detenu in the above regard and observing that there is no necessity of further reference of matter of the detenu to the Advisory Board before the extension order being passed, takes into consideration some decisions of the Hon‟ble apex Court as herein below. Hon‟ble apex Court in the case of ***Dattatraya Moreshwar Vs. The State of Bombay and others*** as reported in A.I.R. 1952 SC 181 in paragraph-4 held as follows :

> **“**The Advisory Board again has got to express its opinion only on the point as to whether there is sufficient cause for detention of the person concerned. It is neither called upon nor is it competent to say anything regarding the period for which such person should be detained. Once the Advisory Board expresses its view that there is sufficient cause for detention at the date when it makes its report, what action is to be taken subsequently is left entirely to the appropriate Government and it can under section 11 (1) of the Act "confirm the detention order and continue the detention of the person concerned for such period as it thinks fit." In my opinion, the words "for such period as it thinks fit" presuppose and imply that after receipt of the report of the Advisory Board the detaining authority has to make up its mind as to whether the original order of detention should be confirmed and if so, for what further period the detention is to continue.”

Similarly in dealing with the case of ***A.K. Roy*** *Vs.* ***Union of India & Ors.*** and batch of cases, as reported in (1982) 1 SCC 271 the Hon‟ble apex Court in para 105 held as follows:

> "It is urged by Shri Jethmalani that the Advisory Board must decide two questions which are of primary importance to the detenu: one, whether there was sufficient cause for the detention of the person concerned and two, whether it is necessary to keep the person in detention any longer after the date of its report. We are unable to accept this contention. Section 11(2) of the Act provides specifically that the report of the Advisory Board shall specify its opinion "as to whether or not there is sufficient cause for the detention of the person concerned". This implies that the question to which the Advisory Board has to apply its mind is whether on the date of its report there is sufficient cause for the detention of the person. That inquiry necessarily involves the consideration of the question as to whether there was sufficient cause for the detention of the person when the order of detention was passed, but we see no justification for extending the jurisdiction of the Advisory Board to the consideration of the question as to whether it is necessary to continue the detention of the person beyond the date on which it submits its report or beyond the period of three months after the date of detention. The question as to whether there are any circumstances on the basis of which the detenu should be kept in detention after the Advisory Board submits its report, and how long, is for the detaining authority to decide and not for the Board. The question as regards the power of the Advisory Board in this behalf had come up for consideration before this Court in Puranlal Lakhanpal v. Union of India. While rejecting the argument that the words "such detention" which occur in Article 22(4)(a) of the Constitution mean detention for a period longer than three months, the majority held that the Advisory Board is not called upon to consider whether the detention should continue beyond the period of three months. In coming to that conclusion the majority relied upon the decision in Dattatraya Moreshwar Pangarkar v. State of Bombay in which Mukherjea, J., while dealing with a similar question, observed :
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> "The Advisory Board again has got to express its opinion only on the point as to whether there is sufficient cause for detention of the person concerned. It is neither called upon nor is it competent to say anything regarding the period for which such person should be detained. Once the Advisory Board expresses its view that there is sufficient cause for detention at the date when it makes its report, what action is to be taken subsequently is left entirely to the appropriate Government and it can under s. 11(1) of the Act confirm the detention order and continue detention of the person concerned for such period as it thinks fit."
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> The contention that the Board must determine the question as to whether the detention should continue after the date of its report must therefore fail. The duty and function of the Advisory Board is to determine whether there was sufficient cause for detention of the person concerned on the date on which the order of detention was passed and whether or not there is sufficient cause for the detention of that person on the date of its report."

On reading of both the aforesaid decisions it appears, the legal position involving the above aspect has been settled expressing that it is only after the Advisory Board‟s opinion a duty is cast on the appropriate Government to confirm the detention order and continue the detention of person concerned for such period as it thinks fit. This Court, therefore, observes, after the opinion and report of the Board, a power is already vested with appropriate Government to fix the period for which the detenu shall be detained. This Court is of the opinion that discretion lies to the appropriate Government to pass extension order without further reference of the matter to the Advisory Board for its further opinion. For the settled position of law this Court while accepting the submission of Sri Katikia, learned Additional Government Advocate answers the question (b) against the petitioner.

13. Now coming to the question number (a), this Court from the pleadings and the materials in the Writ Petition finds, the order of detention under Sub-Section (2) of Section 3 of the Act dated 12.11.2019 was based on a report of the Deputy Commissioner of Police, Cuttack dated 11.11.2019. On close scrutiny of the report stretching over 15 pages containing details of cases pending involving the petitioner numbering above 19, this Court finds, admittedly the petitioner is involved more than one & half dozen of cases. From the observation of the Deputy Commissioner of Police so far it relates to the reference to the case of the petitioner and the development therein, it appears, in item “KA” in Odia vernacular till “THA” also in Odia vernacular up to running page 54, the Deputy Commissioner of Police himself has observed that at least three cases have already been closed in favour of the petitioner and in rest of the cases the petitioner is already on bail with conditions fixed by the trial Court. From the case record involving such cases appended to the Writ Petition by the petitioner, it also appears, while releasing the petitioner on bail in most of the cases he has been asked to give undertaking not to involve himself in such offences and he has been released only after giving such undertakes. This Court, therefore, observes, the petitioner has been granted bail in different cases subject to specific undertakings. From the observation of the Deputy Commissioner of Police requiring petitioner‟s detention it appears, the petitioner is alleged to have been involved in similar type of offences as reported through at least two of the Case Diary vide General Diary No.20 dated 20.09.2019 and General Diary No.16 dated 22.09.2019. This Court here observes, in the event the petitioner commits similar offences in breach of conditions while releasing him on bail in several matters, nothing prevented the competent authority to

approach the Court undertaking such exercise for cancellation of bail and as such the competent authority should not have resorted to apply the provision of the National Security Act, 1980, object of which is to prevent the communal disharmony, social tensions, extremist activities, industrial unrest and increasing tendency on the part of various interested parties to engineer agitation on different issues, it was considered necessary that the law and order situation in the country is tackled in a most determined and effective way and/or in the case antisocial and antinational elements including secessionist, communal and pro-caste elements and also other elements who adversely influence and affect the services essential to the community by posing a grave challenge to the lawful authority and sometimes even hold the society to ransom. There is even no material forthcoming indicating any attempt for cancellation of bail involving the petitioner in any of the pending cases. There appears, there is serious lapse on the part of law and order at least in making an endeavour to prevent such commitance by the person like petitioner. For the opinion of this Court made hereinabove, none of the ingredients taken note hereinabove are satisfied in the case at hand involving detention of the petitioner. Article 21 provides that no person shall be deprived of his life or personal liberty except according to the procedure established by the law and the matters of preventive detention such as there is deprivation of liberty without trial and subsequent safeguards have been provided in Article 22 of the Constitution. When another person is detained pursuant to an order made under the another law providing for preventive detention, the authority needs to be more careful particularly keeping in view that individual liberty is a cherished right, one of the most valuable Fundamental Rights guaranteed by the Constitution to the citizens of the Country. On "liberty", William Shakespeare, the great play writer, has observed that "a man is master of his liberty". Benjamin Franklin goes even further and says that "any society that would give up a little liberty to gain a little security will deserve neither and lose both". For the constitutional mandates, there is utmost importance given to the life and personal liberty of individual since we believe, liberty is paramount essential to personal liberty of an individual leading to human dignity and human happiness.

It is important to take note of another decision, i.e., in the case of ***Shafiq Ahmed Vs. District Magistrate, Meerut*** as reported in (1989) 4 SCC 556 the Hon"ble apex Court observed as follows :-

> "In answer to this contention, on behalf of the Dist. Magistrate, Meerut, by an affidavit affirmed on 28th August, 1989 and filed in these proceedings, stated that

raids on the petitioner's premises for the service of the order dated 15.4.1988 were conducted. It was further stated that the respondent authorities had made all efforts to serve the order on the petitioner and for this purpose the house of the petitioner was raided on several occasions and a refer- ence was made to the general diary report, details whereof were extracted in the affidavit. The details indicate that in respect of the order dated 15.4.1988 the first raid was made in the house of the petitioner on 12th May, 1988, followed by eight other attempts up to the end of May, 1988 to arrest the petitioner but he was not available. There was, however, no attempt in the months of June, July, Au- gust' 88 but on 23, 25 & 29th September, 1988 three attempts were made and as such, it was stated on behalf of the respondents, the order could not be served before 2nd October, 1988. According to the District Magistrate, the respondent authorities did not leave any stone unturned to arrest the petitioner. It was, however, stated that from May, 1988 to September, 1988 the entire police force of Meerut City was extremely busy in maintaining law and order, but the petitioner was all along absconding in order to avoid the service of the order. The District Magistrate has further stated that during the period from May to September, 1988 great communal tension was prevailing in the Meerut City and a large number of people were arrested on account thereof. The question that requires consideration is, whether there was in ordinary delay. The detention under the Act is for the purpose of preventing persons from acting in any manner prejudicial to the maintenance of public order. Subsection (2) of section 3 of the Act authorizes the Central Govt. or the State Govt., if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State, it is found necessary then the person can be detained. Hence, there must be conduct relevant to the formation of the satisfaction having reasonable nexus with the action of the petitioner which are prejudicial to the maintenance of public order. Existence of materials relevant to the formation of the satisfaction and having rational nexus to the formation of the satisfaction that because of certain conduct "it is necessary" to make an order "detain- ing" such person, are subject to judicial review. Counsel for the petitioner contends that in the aforesaid facts and the circumstances if the conduct of the petitioner was such that it required preventive detention, not any punitive action, for the purpose of "preventing" the person concerned from doing things or indulging in activities which will jeopardise, hamper or affect maintenance of public order then there must be action in pursuance of the order of detention with promptitude. Delay, unexplained and not justified, by the circumstances and the exigencies of the situation, is indicative of the fact that the authorities concerned were not or could not have been satisfied that "preventive custody" of the person concerned was necessary to prevent him from acting in any manner prejudicial to the maintenance of public order. Whether there has been unreasonable delay, depends upon the facts and the circumstances of a particular situation. Preventive detention is a serious inroad into the freedom of individuals. Reasons, purposes and the manner of such detention must, therefore, be subject to closest scrutiny and examination by the courts. In the interest of public order, for the greater good of the community, it becomes imperative for the society to detain a person in order to prevent him and not merely to punish him from the threatened or contemplated or anticipated course of action. Satisfaction of the authorities based on conduct must precede action for

prevention. Satisfaction entails belief. Satisfaction and belief are subjective. Actions based on subjective satisfaction are objective indication of the existence of the subjective satisfaction. Action based on satisfaction should be with speed commensurate with the situation. Counsel for the petitioner submitted that in this case there was no material adduced on behalf of the Govt. indicating that the petitioner was "absconding". It was urged that there are no material at all to indicate that the petitioner was evading arrest or was absconding. It was submitted that section 7 of the Act gave power to the authorities to take action in case the persons were absconding and in case the order of detention cannot be executed. It is stated that in this case no warrant under section 7 of the Act has been issued in respect of his property or person. Hence, it was contended that the respondent was not justified in raising the plea that the petitioner was absconding. We are, however unable to accept this contention. If in a situation the person concerned is not available or cannot be served then the mere fact that the action under section 7 of the Act has not been taken, would not be a ground to say that the detention order was bad. Failure to take action, even if there was no scope for action under section 7 of the Act, would not be decisive or determinative of the question whether there was undue delay in serving the order of detention. Furthermore, in the facts of this case, as has been contended by the Government, the petitioner has no property, no property could be attached and as the Govt.'s case is that he was not available for arrest, no order under section 7 could have been possibly made. This, however, does not salvage the situation. The fact is that from 15th April, 1988 to 12th May, 1988 no attempt had been made to contact or arrest the petitioner. No explanation has been given for this. There is also no explanation why from 29th September, 1988 to 2nd October, 1988 no attempt had been made. It is, however, stated that from May to September, 1988 the 'entire police force' was extremely busy in controlling the situation. Hence, if the law and order was threatened and prejudiced, it was not the conduct of the petitioner but because of 'the inadequacy' or 'inability of the police force of Meerut City to control the situation. Therefore, the fact is that there was delay. The further fact is that the delay is unexplained or not warranted by the facts situation."

14. For the observations of this Court made hereinabove and the settled position of law this Court finds, there is no sufficient ground involving the detention orders dated 4.01.2020, 10.02.2020 & 5.05.2020, thus while answering issue no.(a) in favour of the petitioner and against the opposite parties this Court hereby set aside all the three detention orders with a direction to the competent authority to set the petitioner at liberty forthwith.

It is here observed that the petitioner was served with the order of detention on 12.11.2019 while he was in jail custody involving P.S. Case No.150 dated 14.09.2019. There is no material available on record as to whether in Madhupatna P.S. Case No.150/2019 the petitioner has been granted bail in the meantime or not? This Court, therefore, makes it clear that release of the petitioner involving the proceeding under the National Security Act, 1980 shall remain subject to his detention if not required otherwise.

15. The writ petition (criminal) succeeds.

2020 (II) ILR - CUT- 383

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

WRIT APPEAL NO. 558 OF 2019

SURESH CHANDRA MISHRA .....Appellant

.V.

STATE OF ODISHA & ANR. .....Respondents

SERVICE LAW – Govt. Servant – Charges under the Prevention of Corruption Act – Proved – Convicted, order of sentence passed – Appeal – Suspension of sentence – Dismissal – The following legal questions arose and was replied.

(i) Whether in view of availability of alternative remedy in the form of appeal against the impugned order of dismissal, the writ petition is maintainable?

Answer is yes – *Writ petition maintainable.*

(ii) When this Court suspended the sentence imposed by the learned trial Court in the appeal, whether the impugned order of dismissal vide Annexure-5 could have been passed ignoring the suspension order?

Answer is yes – *Therefore, when this Court has merely suspended the sentence imposed by the learned trial Court in the criminal appeal and the conviction continues to operate, we are of the view that there was no legal bar on the part of the disciplinary authority in passing the impugned order of dismissal vide Annexure-5.*

(iii) Whether the impugned order of dismissal could have been issued without giving any show cause notice to the appellant and not following the principles of natural justice?

Answer is yes – *Therefore, we are of the humble view that the impugned order of dismissal cannot be said to be unjustified, illegal or perverse merely because it was issued without giving any show cause notice to the appellant and not following the principles of natural justice.*

(iv) When Rule 18 of 1962 Rules states that where a penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge, the disciplinary authority may consider the circumstances of the case and then pass such orders as it deems fit, whether the impugned order could have been passed only on account of conviction in the corruption case?

Answer is yes – *Therefore, we are of the view that if the impugned order of dismissal is tested in the touchstone of Rule 18 of 1962 Rules, it is sustainable and we find no flaw in it.*

(v) Whether the impugned order of dismissal passed more than eight years after the conviction is sustainable?

Answer is yes – Reasons indicated.

Case Laws Relied on and Referred to :-

1. (2001) 6 SCC 584 : K.C. Sareen .Vs. C.B.I., Chandigarh.
2. 2013 (Supp.-I) OLR 736 : Surya Narayan Acharya .Vs.State of Orissa.
3. 1995 (3) SCC 377 : Deputy Director .Vs.S. Nagoor Meera.
4. (2014) 13 SCC 239 : Government of Andhra Pradesh .Vs. B. Jagjeevan Rao.
5. (2012) 12 SCC 384 : State of Maharashtra .Vs.Balakrishna Dattatrya Kumbhar.
6. A.I.R. 1977 S.C. 1132 : State of Uttar Pradesh .Vs.Indian Hume Pipe Co. Ltd.
7. (1998) 8 SCC 1 : Whirlpool Corporation .Vs.Registrar of Trade Marks.
8. (2007) 1 SCC 673 : Ravikant S. Patil .Vs.Sarvabhouma S. Bagali.
9. 1984 Supp SCC 241 : Union of India .Vs.G.M. Kokil.
10. (2005) 9 SCC 129 : State of Bihar .Vs.Bihar Rajya M.S.E.S.K.K. Mahasangh.
11. A.I.R. 1952 S.C. 369 : Aswini Kumar Ghosh .Vs.Arabinda Bose.
12. A.I.R. 1957 S.C. 657 : A.V. Fernandez -.Vs.State of Kerala.
13. 2011 (Supp.-II) OLR 848 : Prasant Kumar Sahoo .Vs.State of Orissa.
14. 2015 (II) OLR 480 : State of Orissa .Vs.Golekha Chandra Routray.
15. A.I.R. 1975 S.C. 2216 : Divisional Personnel Officer, Southern Railway .Vs.T.R. Challapan.
16. (1985) 3 SCC 398 : Union of India .Vs. Tulsiram Patel.
17. (1997)11 SCC 383 : Union of India (UOI) .Vs. V.K. Bhaskar.
18. (1997) 7 SCC 514 : Union of India (UOI) & Ors. .Vs. Ramesh Kum.

For Appellant : Mr. Goutam Mukherjee (Sr. Adv.)
Partha Mukherji, A.C. Panda, Ankita Mukherji
S. Sahoo, S. Panda, S.D. Ray, Mohit Agarwal
Soumya Priyadarsini.

For State : Mr. Jyoti Prakash Patnaik, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 29.04.2020

S.K. SAHOO, J.

The appellant Suresh Chandra Mishra has filed this appeal seeking to set aside the impugned order dated 30.09.2019 passed by the learned Single Judge in W.P.(C) No.17417 of 2019 wherein while declining to entertain the writ petition, liberty was granted to the appellant to approach the appropriate authority, if he is so advised. The appellant has further prayed to set aside the impugned order dated 07.09.2019 of his dismissal from Government service passed by the Disciplinary Authority and Director, Panchayati Raj & Drinking Water Department, Government of Odisha under Annexure-5.

2. The case of the appellant is that a vigilance case bearing Berhampur Vigilance P.S. Case No.04 dated 12.01.1994 for the offences under section 13(2) read with section 13(1)(c) of the Prevention of Corruption Act, 1988 and under sections 409/477-A/34 of the Indian Penal Code was instituted against him on the F.I.R. presented by the Inspector of Vigilance, Paralakhemundi before the S.P., Vigilance, Berhampur on the accusation of misappropriation of Government money amount to the tune of Rs.52,000/- (Rupees fifty two thousand only) of eleven beneficiaries by falsifying their accounts and preparing false records under the Integrated Rural Development Programme (in short 'IRDP') Scheme during the year 1991-92 while he was working as Progress Assistant, Raighar Block under the Department of Panchayati Raj and Drinking Water. In the meantime, the appellant was transferred from Raighar Block and he was working as Progress Assistant, Papadahandi Block of Nabarangpur district when the vigilance case was registered.

The appellant was charge sheeted and faced trial in the Court of learned Special Judge (Vigilance), Jeypore in G.R. Case No.04 of 1994(V)/T.R. No.14 of 2007 for offences punishable under section 13(2) read with section 13(1)(c) of the Prevention of Corruption Act, 1988 and sections 409/477-A/34 of the Indian Penal Code and vide judgment and order dated 04.01.2011, the learned trial Court found him guilty of the offences charged and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rs.5000/- (Rupees five thousand only), in default, to undergo R.I. for four months on each count.

The appellant challenged the said judgment and order passed by the learned Special Judge (Vigilance), Jeypore before this Court in CRLA No.59 of 2011 which was admitted and he was directed to be released on bail in Misc. Case No.136 of 2011 and the realization of fine amount imposed by the learned trial Court was directed to be stayed in Misc. Case No.137 of 2011 as per order dated 03.02.2011.

It is the further case of the appellant that the General Administration Department (Vigilance), Odisha vide letter dated 20.01.2011 intimated the Collector, Nabarangpur that the appellant has been convicted and his conviction order has not been stayed and thus he is liable for dismissal in terms of Rule 13 read with Rule 18(1) of the Odisha Civil Services (Classification, Control and Appeal) Rules, 1962 (hereafter '1962 Rules') and

accordingly requested to take appropriate action against him. The appellant filed an application for stay/suspension of conviction vide Misc. Case No.233 of 2011 in CRLA No.59 of 2011 and on 25.04.2011 this Court directed that the sentence imposed by the learned trial Court shall remain suspended during pendency of the appeal. The appellant intimated the order dated 25.04.2011 to the respondents and prayed that no coercive action be taken against him and accordingly, he was allowed to discharge his duties.

It is the further case of the appellant that though CRLA No.59 of 2011 is still subjudiced before this Court and all the interim orders passed in different Misc. Cases are also under operation, but then after eight years of passing of such interim orders, all of a sudden the respondent no.2 vide impugned letter dated 07.09.2019 (Annexure-5) dismissed the appellant from Government service with effect from the date of issuance of such order in terms of Rule 13 read with Rule 18(1) of 1962 Rules and as per Article 311 of the Constitution of India in view of the judgment dated 04.01.2011 of the learned trial Court relying on the observation made by the Hon'ble Supreme Court in the case of **K.C. Sareen -Vrs.- C.B.I., Chandigarh reported in (2001) 6 Supreme Court Cases 584**. The appellant challenged the dismissal order before this Court in W.P.(C) No.17417 of 2019 and accordingly, the learned Single Judge passed the impugned order dated 30.09.2019.

3. Mr. Goutam Mukherjee, learned Senior Advocate appearing for the appellant emphatically contended that the learned Single Judge has failed to consider that the impugned order dated 07.09.2019 (Annexure-5) is clearly contemptuous in the teeth of the order dated 25.04.2011 passed by this Court in Misc. Case No.233 of 2011 arising out of CRLA No.59 of 2011. This Court while considering the fact that the respondents are about to dismiss the appellant from service, examined the merits of the case and was prima facie satisfied that the appellant has every likelihood of success in the appeal and accordingly, suspended the sentence imposed by the learned trial Court on the appellant pending disposal of the appeal. He further contended that the impugned dismissal order dated 07.09.2019 vide Annexure-5 has been passed in gross violation of Article 311 of the Constitution of India and that to without considering the aforesaid order dated 25.04.2011 passed by this Court in Misc. Case No.233 of 2011 arising out of CRLA No.59 of 2011. There was no adverse report against the appellant after the order dated 25.04.2011 and even though General Administration (Vigilance) Department, Cuttack vide its letter dated 20.01.2011 intimated the Collector, Nabarangpur

to take action against the appellant in view of his conviction but for eight years, nothing was done and all of a sudden rising from deep slumber, the impugned dismissal letter was issued without giving any show cause notice to the appellant and in gross violation of principles of natural justice. According to Mr. Mukherjee, any order which imposes a liability upon a person and prejudicially affects him must be preceded with an opportunity to such person to put forth his case. In the instant case, the impugned order has been passed behind the back of the appellant rendering him remediless. He further contended that the learned Single Judge failed to realize that the impugned order does not satisfy any of the three criteria of Rule 18 of 1962 Rules, basing upon which the said order has been passed. He placed reliance in the case of **Surya Narayan Acharya -Vrs.- State of Orissa reported in 2013 (Supp.-I) Orissa Law Reviews 736.** While concluding his arguments, he submitted that since the impugned order of dismissal has been passed in gross violation of principles of natural justice, the alternative remedy, if any, to challenge such order, is not a bar in such cases to entertain the writ petition.

4. Mr. Jyoti Prakash Patnaik, learned Additional Government Advocate on the other hand submitted that the learned Single Judge has rightly held that the impugned order of dismissal is an appealable one. As per Rule 29 of 1962 Rules, where the penalty imposed as per Rule 13 is found to be excessive, the appellate authority has got power to set aside or reduce the penalty imposed. It is argued that an equally efficacious and statutory remedy is available under the relevant service rules and therefore, the appellant is in no way prejudiced by the impugned order passed by the learned Single Judge and as such there is no cause of action to file this writ appeal. He further argued that after the judgment and order of conviction was passed by the learned trial Court, the General Administration (Vigilance) Department, Cuttack vide its letter dated 20.01.2011 intimated the Collector, Nabarangpur about the same and citing the case of **K.C. Sareen** (supra) requested that appropriate action be taken against the appellant and ultimately, the appellant was dismissed from Government Service. He argued that delayed passing of the order of dismissal does not vitiate the same rather the appellant has enjoyed the service benefits during that period which he would not have got, had the dismissal order been passed early. According to Mr. Patnaik, though an application was filed by the appellant for stay/suspension of conviction but this Court suspended the sentence passed by the learned trial Court pending disposal of the appeal vide order dated 25.04.2011 in Misc. Case No. 233 of 2011 and not the conviction and as per the observation made in the case of

K.C. Sareen (supra), in the event of preference of appeal by the convicted public servant, sentences get suspended till the final orders on such appeal but the conviction continues in respect of such public servant and therefore, there is no illegality or perversity in passing the order of dismissal of the appellant from Government service. He placed reliance in the cases of **Deputy Director -Vrs.- S. Nagoor Meera reported in 1995 (3) Supreme Court Cases 377**, **Government of Andhra Pradesh -Vrs.- B. Jagjeevan Rao reported in (2014) 13 Supreme Court Cases 239**, **State of Maharashtra -Vrs.- Balakrishna Dattatrya Kumbhar reported in (2012) 12 Supreme Court Cases 384**.

5. The following undisputed factual aspects are noticed at the very threshold of discussion:

(i) The appellant was found guilty by the learned trial Court for offences punishable under section 13(2) read with section 13(1)(c) of the Prevention of Corruption Act, 1988 and sections 409/477-A/34 of the Indian Penal Code and sentenced accordingly;

(ii) The appellant preferred appeal before this Court in CRLA No.59 of 2011 which was admitted and he was directed to be released on bail and the realization of fine amount imposed by the learned trial Court was also directed to be stayed;

(iii) The appellant filed an application for stay/suspension of conviction in the criminal appeal and on 25.04.2011 this Court directed that the sentence imposed by the learned trial Court shall remain suspended during pendency of the appeal.

6. Adverting to the rival contentions raised at the Bar, the following points are required to be adjudicated:-

(i) Whether in view of availability of alternative remedy in the form of appeal against the impugned order of dismissal, the writ petition is maintainable?

(ii) When this Court suspended the sentence imposed by the learned trial Court in the appeal, whether the impugned order of dismissal vide Annexure-5 could have been passed ignoring the suspension order?

(iii) Whether the impugned order of dismissal could have been issued without giving any show cause notice to the appellant and not following the principles of natural justice?

(iv) When Rule 18 of 1962 Rules states that where a penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge, the disciplinary authority may consider the circumstances of the case and then pass such orders as it deems fit, whether the impugned order could have been passed only on account of conviction in the corruption case?

(v) Whether the impugned order of dismissal passed more than eight years after the conviction is sustainable?

Discussion on point no. (i):

It is not in dispute that the impugned order of dismissal is an appealable one and that is the sole ground for which the learned Single Judge was not inclined to entertain the writ petition. It is also not in dispute that as per Rule 29 of 1962 Rules, where the penalty imposed as per Rule 13 is found to be excessive, the appellate authority has got power to set aside or reduce the penalty imposed but it cannot be lost sight of the fact that the learned counsel for the appellant has raised certain vital points that the impugned order of dismissal has been passed in gross violation of principles of natural justice and that the satisfaction of the disciplinary authority as required to be arrived at before passing an order of dismissal as envisaged under Rule 18 is conspicuously absent in the order which goes to the root of the matter and that when this Court suspended the sentence imposed by the learned trial Court in the criminal appeal, the impugned order of dismissal basing on judgment and order of conviction is not legally sustainable.

In the case of **State of Uttar Pradesh -Vrs.- Indian Hume Pipe Co. Ltd. reported in A.I.R. 1977 S.C. 1132**, it is held that there is no rule of law that the High Court should not entertain a writ petition where an alternative remedy is available to a party. Where adjudication involved pure question of determination of law, the High Court may in its discretion entertain writ applications.

In the case of **Whirlpool Corporation -Vrs.- Registrar of Trade Marks reported in (1998) 8 Supreme Court Cases 1**, it is held that under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has discretion to entertain or not to entertain a writ petition. The alternative remedy is not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

In view of the ratio laid down by the Hon'ble Supreme Court and the points involved in the case, we are of the view that the learned Single Judge should have considered the same on merits and should not have relegated the matter to the appellate Court. We could have sent the matter back to the

learned Single Judge to adjudicate the points raised on merit but in order to cut short the time and avoid protracted litigation, we think it proper to decide the case ourselves on merits.

Discussion on point no. (ii):

The appellant filed an application for stay/suspension of conviction vide Misc. Case No.233 of 2011 in CRLA No.59 of 2011 and on 25.04.2011 this Court directed that the sentence imposed by the learned trial Court shall remain suspended during pendency of the appeal. Thus there is nothing in the order regarding stay or suspension of the operation of the order of conviction till the impugned order of dismissal was passed.

Suspension of execution of sentence and stay or suspension of the operation of the order of conviction under section 389 of the Code of Criminal Procedure is two different aspects altogether. The appellant though filed an application for stay/suspension of conviction but this Court directed for suspension of sentence.

The Hon'ble Supreme Court in the case of **K.C. Sareen** (supra) has indicated that ordinarily, the Superior Court should suspend the sentence of imprisonment in the matters relating to the offence under the P.C. Act unless the criminal appeal could be heard soon after filing. The Court pointed out the subtle distinction in the proposition for suspension of an order of conviction on one hand and that for suspension of sentence on the other. It is observed as follows:

> "11. The legal position, therefore, is this: though the power to suspend an order of conviction, apart from the order of sentence, is not alien to section 389(1) of the Code, its exercise should be limited to very exceptional cases.....No doubt when the appellate Court admits the appeal filed in challenge of the conviction and sentence for the offence under the P.C. Act, the Superior Court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the P.C. Act, dehors the sentence of imprisonment as a sequel thereto, is different matter.
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> 13.....If so, the legal position can be laid down that when conviction is on a corruption charge against a public servant, the appellate Court or the revisional Court should not suspend the order of conviction during the pendency of the appeal even if the sentence of imprisonment is suspended. It would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision."

In the case of **Ravikant S. Patil -Vrs.- Sarvabhouma S. Bagali reported in (2007) 1 Supreme Court Cases 673**, it is held that where the execution of the sentence is stayed, the conviction continues to operate.

In the case of **S. Nagoor Meera** (supra), the Hon'ble Supreme Court held as follows:-

> "8.....We are, therefore, of the opinion that taking proceedings for and passing orders of dismissal, removal or reduction in rank of a government servant who has been convicted by a criminal Court is not barred merely because the sentence or order is suspended by the appellate Court or on the ground that the said government servant-accused has been released on bail pending the appeal."

In the case of **B. Jagjeevan Rao** (supra), the Hon'ble Supreme Court held that conviction on the charge of corruption has to be viewed seriously and unless the conviction is annulled, an employer cannot be compelled to take an employee back in service.

In the case of **Balakrishna Dattatrya Kumbhar** (supra), the Hon'ble Supreme Court held that corruption is not only a punishable offence but also undermines human rights, indirectly violating them, and systematic corruption, is a human rights' violation in itself, as it leads to systematic economic crimes. The Court further held that the appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examine whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The Court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done.

Therefore, when this Court has merely suspended the sentence imposed by the learned trial Court in the criminal appeal and the conviction continues to operate, we are of the view that there was no legal bar on the part of the disciplinary authority in passing the impugned order of dismissal vide Annexure-5.

Discussion on point no. (iii):

It is not in dispute that the impugned order of dismissal has been issued without giving any show cause notice to the appellant and no principle of natural justice has been followed in passing such order.

Rule 13 of 1962 Rules deals with the nature of penalties that can be imposed on a Government servant for good and sufficient reasons and one of such penalties is dismissal from service which shall ordinarily be a disqualification for future employment. Though Rule 15 of the said Rules prescribes procedure for imposing such penalty but in view of Rule 18, the procedure may not be followed in certain cases. One of such case is where a penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge. In such case, the disciplinary authority can pass such orders as it deems fit after considering the circumstances of the case.

Rule 18 starts with a non-obstante clause with the words, "notwithstanding anything contained in Rules 15, 16 and 17". A non-obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found in the same enactment, that is to say, to avoid the operation and effect of all contrary provisions. (Ref: **Union of India -Vrs.- G.M. Kokil, 1984 Supp Supreme Court Cases 241**). Non-obstante clauses are to be regarded as clauses which remove all obstructions which might arise out of any of the other provisions of the Act in the way of the operation of the principal enacting provision to which the non-obstante clause is attached. (Ref: **State of Bihar -Vrs.- Bihar Rajya M.S.E.S.K.K. Mahasangh : (2005) 9 Supreme Court Cases 129**). While interpreting a provision containing a non-obstante clause, it should first be ascertained what the enacting part of the section provides, on a fair construction of the words used according to their natural and ordinary meaning, and the non-obstante clause is to be understood as operating to set aside as no longer valid anything contained in any other law which is inconsistent with the section containing the non-obstante clause. (Ref: **Aswini Kumar Ghosh -Vrs.- Arabinda Bose : A.I.R. 1952 S.C. 369**; **A.V. Fernandez -Vrs.- State of Kerala : A.I.R. 1957 S.C. 657**).

The appellant has been convicted under section 13(2) read with section 13(1)(c) of the Prevention of Corruption Act, 1988 and sections 409/477-A/34 of the Indian Penal Code by the learned trial Court and taking into account such conviction, the appellant was dismissed from Government service keeping in view the observation made by the Hon'ble Supreme Court in the case of **K.C. Sareen** (supra). The power vested under Rule 18 of 1962 Rules is unfettered and not restricted to the Rules 15, 16 and 17. On a conviction by a criminal Court, an employee may be discharged or removed

from service without following the principle of natural justice as enshrined in Rules 15, 16 and 17. (Ref: **2011 (Supp.-II) Orissa Law Reviews 848, Prasant Kumar Sahoo -Vrs.- State of Orissa**). Though clause (2) of Article 311 of the Constitution of India provides for holding an inquiry, informing of the charges and also giving a reasonable opportunity of hearing in respect of the charges to the person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State before dismissing or removing or reducing him in rank and to impose upon him any such penalty on the basis of evidence adduced during such inquiry only but the second proviso states that this clause shall not apply where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge. Thus no such inquiry is required to be conducted for the purposes of dismissal, removal or reduction in rank of the concerned person when the same relates to his conduct which led him to his conviction on a criminal charge. In the case of **State of Orissa -Vrs.- Golekha Chandra Routray reported in 2015 (II) Orissa Law Reviews 480**, it is held that non-obstante clause contained in Rule 18 of 1962 Rules having excluded the application of rules of procedure incorporating principle of natural justice, the case of dismissal on the ground of conduct leading to conviction on a criminal charge directly empowers the disciplinary authority to consider the circumstances of the case and pass such orders thereon as deem fit. Therefore, it is clear that the powers of considering the circumstances of the case are conferred upon the disciplinary authority and even if it is considered to be power coupled with duty, it nowhere prescribes recording of reasons or affording an opportunity of hearing to the delinquent. At the same time, what factors may go into consideration by the disciplinary authority are also not prescribed.

Therefore, we are of the humble view that the impugned order of dismissal cannot be said to be unjustified, illegal or perverse merely because it was issued without giving any show cause notice to the appellant and not following the principles of natural justice.

Discussion on point no. (iv):

Before entering into discussion on this point, let us now carefully examine the impugned order of dismissal dated 07.09.2019 vide Annexure-5. The operative portion of the order reads as follows:-

> "Therefore, in view of the judgment dated 04.01.2011 of the Hon'ble Special Judge, Vigilance, Jeypore, the convict Sri Suresh Chandra Mishra...is hereby

dismissed from Government service with effect from the date of issue of this order in terms of Rule 13 r/w Rule 18(1) of the OCS (CC & A) Rules, 1962 and as per Article 311 of the Constitution of India."

In the *first paragraph* of the impugned order of dismissal, it is mentioned on what accusation, the vigilance case was instituted against the appellant. In the *second paragraph*, it is mentioned under what offences the appellant was found guilty and what was the sentence imposed on him. In the *third paragraph*, it is mentioned about the law laid down by the Hon'ble Supreme Court in the ***K.C. Sareen***'s case (supra) in such matters. In the *fourth paragraph*, the order of dismissal has been passed in view of the conviction of the appellant.

In view of Rule 18 of 1962 Rules, where a penalty is proposed to be imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge, the disciplinary authority may consider the circumstances of the case and pass such orders thereon as it deems fit. Since the authority is empowered to impose any of the penalties mentioned in Rule 13 of 1962 Rules for good and sufficient reasons, the gravity of charge under which the Government servant was convicted and the circumstances of the case are to be considered.

Active application of the mind by the disciplinary authority after considering the entire circumstances of the case is necessary in order to decide the nature and extent of the penalty to be imposed on the delinquent employee on his conviction on a criminal charge. (Ref: **A.I.R. 1975 S.C. 2216, Divisional Personnel Officer, Southern Railway -Vrs.- T.R. Challapan**). A conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant and therefore, it is not mandatory to impose any of those major penalties. The disciplinary authority in order to determine whether the conduct of the government servant which has led to his conviction on a criminal charge warrants the imposition of a penalty, have to peruse the judgment of the criminal Court and consider all the facts and circumstances of the case. (Ref: **(1985) 3 Supreme Court Cases 398, Union of India -Vrs.- Tulsiram Patel**).

In the case of **Union of India (UOI) -Vrs.- V.K. Bhaskar reported in (1997)11 Supreme Court Cases 383** when a submission was raised that Rule 19(i) of the Central Civil Services (Classification, Control and Appeal)

Rules, 1965 (hereafter '1965 Rules') requires the disciplinary authority to consider the circumstances of the case and it cannot pass an order of dismissal or removal only for the reason that the employee had been convicted on a criminal charge, the Hon'ble Court held as follows:

> "7. We do not find any merit in this submission. The order of dismissal has to be read as a whole. If it is thus read, it would be found that in the *first paragraph* of the order the authority has referred to the fact of the respondent having been convicted on a criminal charge under Section 5(1)(c) read with Section 5(2) of the Prevention of Corruption Act, 1947 and Sections 409, 477-A and 120-B I.P.C. and his having been awarded the penalty of rigorous imprisonment for one year and a fine of Rs. 500 by the Special Judge, Jalandhar, on 17.5.1985. In the *second paragraph* of the said order the disciplinary authority has stated:
>
> "It is considered that the conduct of Shri Vinod Kumar Bhaskar which has led to his conviction is such as to render his further retention in the public service undesirable/the gravity of the charge is such as to warrant the imposition of a major penalty of misappropriation of a sum of Rs. 300 (approx.) along with other accused Man Singh, Jawala Das and Kewal Chander Kumar."
>
> 8. The said statement in the order of dismissal indicates that the disciplinary authority has applied its mind and after considering the conduct of the respondent which has led to his conviction on a criminal charge, has arrived at the conclusion that the said conduct was such as to render the further retention of the respondent in the public service undesirable. It cannot, therefore, be said that the order of dismissal was passed without the disciplinary authority applying its mind to the nature of the conduct of the respondent which led to his conviction on a criminal charge and which has rendered him undesirable to be retained in service."

While considering Rule 19 of 1965 Rules which is a parimateria provision like Rule 18 of 1962 Rules, wherein it is stated that notwithstanding anything contained in Rule 14 to Rule 18, where any penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit, the Hon'ble Supreme Court in the case of **Union of India (UOI) and Ors. -Vrs.- Ramesh Kum reported in (1997) 7 Supreme Court Cases 514** held as follows:-

> "6. A bare reading of Rule 19 shows that the disciplinary authority is empowered to take action against a government servant on the ground of misconduct which has led to his conviction on a criminal charge. The rules, however, do not provide that on suspension of execution of sentence by the appellate Court, the order of dismissal based on conviction stands obliterated and dismissed government servant

has to be treated under suspension till disposal of appeal by the appellate Court. The rules also do not provide the disciplinary authority to await disposal of the appeal by the appellate Court filed by a government servant for taking action against him on the ground of misconduct which has led to his conviction by a competent Court of law. Having regard to the provisions of the rules, the order dismissing the respondent from service on the ground of misconduct leading to his conviction by a competent Court of law has not lost its sting merely because a criminal appeal was filed by the respondent against his conviction and the appellate Court has suspended the execution of sentence and enlarged the respondent on bail. This matter may be examined from another angle. Under section 389 of the Code of Criminal Procedure, the appellate Court has power to suspend the execution of sentence and to release an accused on bail. When the appellate Court suspends the execution of sentence, and grants bail to an accused, the effect of the order is that sentence based on conviction is for the time being postponed, or kept in abeyance during the pendency of the appeal. In other words, by suspension of execution of sentence under section 389 Cr.P.C., an accused avoids undergoing sentence pending criminal appeal. However, the conviction continues and is not obliterated and if the conviction is not obliterated, any action taken against a government servant on a misconduct which led to his conviction by the Court of law does not lose its efficacy merely because appellate Court has suspended the execution of sentence..."

In the case of **S. Nagoor Meera** (supra), the Hon'ble Supreme Court held as follows:

"8. We need not, however, concern ourselves any more with the power of the appellate Court under the Code of Criminal Procedure for the reason that what is relevant for clause (a) of the second proviso to Article 311(2) is the "*conduct* which has led to his conviction on a criminal charge" and there can be no question of suspending the conduct.

xx xx xx xx

10. What is really relevant thus is the conduct of the government servant which has led to his conviction on a criminal charge. Now, in this case, the respondent has been found guilty of corruption by a criminal Court. Until the said conviction is set aside by the appellate or other higher court, it may not be advisable to retain such person in service. As stated above, if he succeeds in appeal or other proceeding, the matter can always be reviewed in such a manner that he suffers no prejudice."

Therefore, when the appellant has been found guilty of charges of corruption by the learned trial Court and the disciplinary authority discussed briefly the accusation against the appellant, the judgment and order of conviction and the sentence passed, the law laid down by the Hon'ble Supreme Court in such matters before passing the order of dismissal, it cannot be said that such order was passed merely on the ground of conviction even though in the last paragraph, such aspect has been highlighted. When

the authority was conscious what was the accusation, under what offences the appellant was found guilty and what sentence was imposed on him by the learned trial Court and why the Hon'ble Supreme Court has said that a public servant who is convicted of corruption charge should not be allowed to continue to hold public office, it cannot be said the order has been passed without application of mind to the nature of the conduct of the respondent which led to his conviction on a criminal charge. Even though the learned counsel for appellant submits that the order could have been written in a better and elaborate way, we are not inclined to set aside the order on that ground as we clearly see the reason behind passing of the dismissal order. The learned Additional Government Advocate produced the file relating to disciplinary proceeding against the appellant. It contains several notings including recommendation of the G.A. (Vigilance) Department, suggestion of the legal advisor and deliberation on the basis of the suspension order of sentence passed by this Court in the criminal appeal, preparation of draft speaking order of dismissal and its approval by the competent authority.

The factual scenario of **Surya Narayan Acharya** case (supra) on which reliance was placed by the learned counsel for the appellant is different. That was not a case where the petitioner was found guilty of the corruption charge. In that case, on receipt of a note from the Deputy Secretary to Government in General Administration Department, the disciplinary authority passed the order of dismissal against the petitioner who was found guilty by the trial Court under sections 304-B/498-A read with 34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act and the administrative file was found to be completely silent as to under what circumstances the order was passed.

Therefore, we are of the view that if the impugned order of dismissal is tested in the touchstone of Rule 18 of 1962 Rules, it is sustainable and we find no flaw in it.

Discussion on point no. (v):

In this case, the State Government took the decision to dismiss the appellant under Rule 18(1) of the 1962 Rules more than eight years after the date of conviction. The record produced by the learned Additional Government Advocate reveals that because of the interim orders passed by this Court, there were a lot of deliberations, inter-departmentally and ultimately the State Government took the decision to dismiss the appellant.

There is absence of any rule prescribing any period/limitation for passing such order. On account of delay in taking decision, the appellant is not prejudiced in any way rather he himself has enjoyed the service benefits even though the conduct of the appellant leading to his conviction in a corruption case affected public money. Even though no adverse report against the appellant was brought to our notice after the order of this Court dated 25.04.2011 in suspending the sentence, we are of the view that there was no bar on the part of the disciplinary authority to pass the impugned order of dismissal. The Hon'ble Supreme Court in the case of **K.C. Sareen** (supra) has observed that when a public servant who is convicted of corruption is allowed to continue to hold public office, it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person.

7. In view of the foregoing discussions, we find no illegality or perversity in the impugned order of dismissal dated 07.09.2019 of the appellant from Government service. Accordingly, the writ appeal being devoid of merits, stands dismissed. No costs.

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2020 (II) ILR - CUT- 398

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

WRIT APPEAL NO. 305 OF 2019

ANINDITA MOHANTY ..... Appellant

.V.

THE SENIOR REGIONAL MANAGER, H.P. CO. LTD. BHUBANESWAR & ORS. .....Respondents

(A) THE ORISSA HIGH COURT ORDER, 1948 – Article 4 read with clause 10 of Letters Patent Act, 1992 – Appeal – Power of Division Bench – Scope of interference – Indicated.

"Let us first examine the power of the Division Bench while entertaining a Letters Patent appeal against the judgment/order of the Single Judge. This

writ appeal has been nomenclatured as an application under Article 4 of the Orissa High Court Order, 1948 read with clause 10 of the Letters Patent Act, 1992. Letters Patent of the Patna High Court has been made applicable to this Court by virtue of Orissa High Court Order, 1948. Letters Patent Appeal is an intra Court appeal where under the Letters Patent Bench, sitting as a Court of Correction, corrects its own orders in exercise of the same jurisdiction as vested in the Single Bench. ***(Ref: (1996) 3 Supreme Court Cases 52, Baddula Lakshmaiah -Vrs.- Shri Anjaneya Swami Temple)****. The Division Bench in Letters Patent Appeal should not disturb the finding of fact arrived at by the learned Single Judge of the Court unless it is shown to be based on no evidence, perverse, palpably unreasonable or inconsistent with any particular position in law. This scope of interference is within a narrow compass. Appellate jurisdiction under Letters Patent is really a corrective jurisdiction and it is used rarely only to correct errors, if any made.*

Thus a writ appeal is an appeal on principle where the legality and validity of the judgment and/or order of the Single Judge is tested and it can be set aside only when there is a patent error on the face of the record or the judgment is against established or settled principle of law. If two views are possible and a view, which is reasonable and logical, has been adopted by a Single Judge, the other view, howsoever appealing may be to the Division Bench; it is the view adopted by the Single Judge, which would, normally be allowed to prevail. If the discretion has been exercised by the Single Judge in good faith and after giving due weight to relevant matters and without being swayed away by irrelevant matters and if two views are possible on the question, then also the Division Bench in writ appeal should not interfere, even though it would have exercised its discretion in a different manner, were the case come initially before it. The exercise of discretion by the Single Judge should manifestly be wrong which would then give scope of interference to the Division Bench."

(B) CONSTITUTION OF INDIA, 1950 – Article 226 – Power under – Exercising of – Ambit and scope – Discussed.

"The High Court exercising extraordinary jurisdiction under Article 226 of the Constitution aims at securing a very speedy and efficacious remedy to a person, whose legal or constitutional right has been infringed. If all the elaborate and technical rules laid down in the Code of Civil Procedure are to be applied to the writ proceedings, the very object and purpose is likely to be defeated. In view of the conflicting opinions expressed by different Courts, Parliament by the Code of Civil Procedure (Amendment) Act, 1976 inserted an Explanation to section 141 of C.P.C. which deals with Miscellaneous Proceedings and it is mentioned therein that the expression "proceedings" in the said section does not include "any proceeding under Article 226 of the Constitution."

It is the settled law that the High Court in exercise of its power under Article 226 of the Constitution of India normally should not enter into the serious disputed questions of facts and render a finding on those facts. In the case of ***Popatrao Vyankatrao Patil -Vrs.- The State of Maharashtra reported in 2020 SCC OnLine SC 291****, it is held that even if there are disputed questions of fact which fall for consideration but if they do not require elaborate evidence to be adduced, the High Court is not precluded from entertaining a petition Under Article 226 of the Constitution. However, such a plenary power has to be exercised by the High Court in exceptional circumstances. The High Court would be justified in exercising such a power to the exclusion of other available remedies only when it finds that the action of the State or its instrumentality is arbitrary and unreasonable and, as such, violative of Article 14 of the Constitution of India."*

Case Laws Relied on and Referred to :-

1. 1996) 3 SCC 52 : Baddula Lakshmaiah .Vs. Shri Anjaneya Swami Temple
2. (2006) 13 SCC 449 : B. Venkatamuni .Vs. C.J. Ayodhya Ram Singh.
3. (2005) 6 SCC 243 : Umabai .Vs. Nilkanth Dhondiba Chavan.
4. (2016) 9 SCC 538 : Commissioner of Income Tax .Vs. Karnataka Planters Coffee Curing Work Pvt. Ltd.
5. A.I.R. 1965 S.C. 1153 : Gulabchand Chhotalal Parikh .Vs. State of Bombay.
6. A.I.R. 1965 S.C. 1150 : Devilal Modi .Vs. Sales Tax officer, Ratlam.
7. 2020 SCC OnLine SC 291: Popatrao Vyankatrao Patil .Vs. The State of Maharashtra.

For Appellant : Mr. Ramakant Mohanty (Sr. Adv.), Mr. Debakant Mohanty, Sumitra Mohanty, Animesh Mohanty,Swapnesh Mohanty, Dipankar Varadwaj,Kalyan Mohapatra.

For Respondents Nos. 1 and 2: : Mr.Goutam Mukherjee (Sr. Adv.), S. Patnaik, T.P. Paul, A.C. Panda, S. Sahoo Soumya Priyadarsini.

For Respondent No.3 : Sukanta Kumar Dalai, P.N. Swain S. Moharana & N. Routray.

JUDGMENT Date of Judgment: 29.04.2020

S.K. SAHOO, J.

In this writ appeal, the appellant Smt. Anindita Mohanty seeks to set aside the impugned order dated 19.06.2019 passed by the learned Single Judge in W.P.(C) No.569 of 2017 in rejecting the prayer made by the appellant (petitioner) in the writ petition to quash the fresh merit list dated 14.10.2016 vide Annexure-9 and to declare the decision of the respondent

no.1 Senior Regional Manager, Hindustan Petroleum Corporation Ltd., Bhubaneswar Regional Office under Annexure-13 as illegal and improper.

2. The case of the appellant is that on 14.07.2009 Hindustan Petroleum Corporation Ltd. (hereafter 'the HPCL') published an advertisement in the Odia Daily 'Sambad' for appointment of dealers for retail outlets, wherein at serial no.64, location for setting up Petrol/Diesel retail outlet was indicated to be within two kilometers of Harichandanpur on Naranapur-Brahmanipal Road in the district of Keonjhar. The appellant, the respondent no.3 Smt. Babita Prusty and three others participated by making appropriate applications. An interview was conducted on 19.09.2009 and the result was published. The respondent no.3 was declared selected in the selection process.

The appellant challenged the award of marks by the Selection Committee before this Court by filing W.P.(C) No.14367 of 2009 which was disposed of on 12.08.2010 with a direction to the Selection Committee to reconsider the claim of the appellant as well as the other claimants and award the marks in conformity with the guidelines and to take a decision within a period of three weeks. In compliance of the direction of this Court, on 24.05.2011 the marks were reassessed and published and again the respondent no.3 came out successful as she secured highest marks and accordingly, she was issued with a letter of intent of the proposed retail outlet dealership on 16.07.2011.

The appellant again filed another writ petition bearing W.P.(C) No.18768 of 2011 on 13.07.2011 challenging the revised marks awarded which was dismissed by the learned Single Judge by order dated 14.12.2015. The appellant preferred writ appeal bearing W.A. No.18 of 2016 challenging the order dated 14.12.2015 passed in W.P.(C) No.18768 of 2011. The writ appeal was allowed on 22.06.2016 and the order dated 14.12.2015 passed by the learned Single Judge was quashed and HPCL was directed to prepare a fresh merit list in accordance with the order dated 12.08.2010 passed in W.P.(C) No.14367 of 2009 as well as directions/observations made in the writ appeal preferably within a period of three months.

In compliance of the order dated 22.06.2016 passed in the aforesaid writ appeal, a fresh merit list was prepared on 14.10.2016 vide Annexure-9 wherein the respondent no.3 again came out successful securing highest marks. The appellant approached the Senior Regional Manager, HPCL on

23.10.2016 challenging the fresh merit list. The Senior Regional Manager, HPCL disposed of the representation of the appellant on 10.11.2016 justifying the merit list as valid. Thereafter, the appellant approached the Executive Engineer, Ghatagaon (R & B) Division on 15.11.2016 and sought clarification of the proposed site offered by the respondent no.3. On that day itself, the Executive Engineer (R & B) Division issued a letter declaring therein that the proposed site is more than two kilometers away from Harichandanpur and again he justified the stone installed nearby the proposed location indicating Harichandanpur at four kilometers is correct. On 13.01.2017 the appellant relying upon the letter of the Executive Engineer and challenging the distance factor so also challenging the fresh merit list approached this Court in W.P.(C) No.569 of 2017 which was disposed of by the impugned order dated 19.06.2019.

3. The case of the respondent no.3 Smt. Babita Prusty is that the HPCL published an advertisement on 14.07.2009 for opening of dealer owned retail outlet (open category) within location of two kilometers from Harichandanpur on Naranpur-Bramhanipal Road in the district of Keonjhar. An interview was conducted on 19.09.2009 where she herself, the appellant along with three others participated and she was declared successful as per the result published on the same day. She narrated in her counter affidavit as to how the appellant approached this Court on a number of occasions and how this Court as well as HPCL authorities dealt with such matter time to time.

4. The learned Single Judge in the impugned order first discussed the question whether a plea which was not taken in the earlier writ petition or in other words, the relief was not claimed, on the basis of certain factual aspects, can be taken in the subsequent writ petition. Referring to Rule 2 of Order II of the Code of Civil Procedure, 1908, the learned Single Judge has been pleased to hold that since the petitioner (appellant herein) has not raised the question of distance to be more than two kilometers of the site offered by the opposite party no.3 (respondent no.3 herein), she cannot agitate this new factual aspect in the subsequent litigation. The learned Single Judge then held that the matter is between two private individuals and there is no substantial amount of public interest involved in the litigation between the appellant and the respondent no.3 and accordingly held that there is no justification for the writ Court to enter into factual aspects of the litigation and accordingly dismissed the writ petition.

5. The respondents nos.1 and 2 filed their counter affidavit in the writ appeal wherein it is stated that the appellant filed W.P.(C) No.14367 of 2009 which was disposed of on 12.08.2010 with a direction to reconsider the claim of the appellant as well as the other claimants and award the marks in conformity with the guidelines and to take a decision within a period of three weeks which was complied with. The appellant again filed W.P.(C) No.18768 of 2011 challenging the revised marks awarded which was dismissed on 14.12.2015 by the learned Single Judge, against which the appellant preferred a writ appeal vide W.A. No.18 of 2016 which was allowed on 22.06.2016 and the order passed by the learned Single Judge was quashed and the respondent Corporation was directed to prepare merit list afresh in accordance with the directions issued in the order dated 12.08.2010 passed in W.P.(C) No.14367 of 2006, as well as directions/observations made in the writ appeal. Pursuant to the order passed in the aforesaid writ appeal, after the site inspection was carried out in respect of the applicants who have agreed/responded to the site inspection, marks were awarded afresh by the site inspection committee and after re-verification of records of all the candidates, a fresh merit list dated 08.09.2016 was prepared wherein the respondent no.3 was the first empanelled candidate and appellant was at serial no.4 which was communicated to the appellant vide letter dated 14.10.2016 (Annexure-9). The appellant vide letter dated 23.10.2016 raised a grievance against the fresh merit list prepared by the Evaluation Committee and a Senior officer in the rank of Deputy General Manager was appointed to investigate the points raised by the appellant and basing on the investigation report, the General Manager passed a speaking order dated 08.12.2016 stating that the complaint has not been substantiated. In the counter affidavit, it is further stated in detail as to how the marks have been awarded to different candidates under different headings. Justifying the impugned order of the learned Single Judge, it is stated that the respondent no.3 has been issued with the letter of intent and the retail outlet at advertised location Harichandanpur is being operated by her since 24.10.2019.

6. The respondent no.3 filed her counter affidavit to the writ appeal wherein it is stated that the appellant for the first time has challenged the candidature of the respondent no.3 on the ground of distance factor relying on a document issued by the Executive Engineer (R & B), Ghatogoan and also to quash the merit list which has been dealt with properly in the impugned order passed by the learned Single Judge. Several other new factual aspects have been highlighted which are not necessary to be considered in view of

the limited scope of the writ appeal. The document issued by the Executive Engineer (R & B), Ghatagaon is stated to have been issued with a malafide intention for the purpose of creating a fresh cause of action in favour of the appellant and it is highlighted as to how the contents of the document relating to the distance factor of the proposed location of the retail outlet from Harichandanpur as mentioned therein is defective.

7. Reply affidavit has been filed by the appellant to the counter affidavits of the respondents wherein it is stated that the appellant has been wrongly placed at 4th position in the merit list vide Annexure-9 and that the marks awarded to her is totally a wrong evaluation. In detail, it is mentioned as to how marks awarded by the Selection Committee were wrong. It is stated that valid and material points were raised by the appellant in her grievance petition (Annexure-10) while challenging the fresh merit list under Annexure-9 and also the marks awarded therein to the respective parties. However, none of those points were considered either by HPCL Company or by the learned Single Judge even though raised and pressed at every point of time. The learned Single Judge in the impugned judgment has not at all taken into account the valid grounds raised by the appellant challenging the fresh merit list and the marks awarded in Annexure-9. It is stated that the marks awarded to the respective parties by the Evaluation Committee have no consistency and the same are being changed every time to show undue favoritism to the respondent no.3 which would be evident on the face of the record. The marks awarded by the Selection Committee are not in consonance with the guidelines under Annexure-1. The Evaluation Committee has taken into account lis pendens developments and increased the marks awarded to the respondent no.3 substantially whereas the respondents are challenging the points raised by the appellant regarding distance factor on the ground that it was not earlier raised and is a lis pendens development. It is stated that the evidence on record establish that the offered site of the respondent no.3 is beyond 2 kms. and not in accordance with the advertisement which is proved by the letter of the Executive Engineer vide Anneuxre-13. It is stated that some extraneous things have been raised by the respondent no.3 at this stage in her counter affidavit to create confusion in the matter although it has got no relevance with the case. It is stated that the distance factor raised by the appellant in the writ petition is very important and ought to have been adjudicated which has not been done by the learned Single Judge and therefore, the impugned order is not sustainable in the eye of law.

8. Mr. Ramakant Mohanty, learned Senior Advocate appearing for the appellant emphatically contended that the proposed site offered by respondent no.3 for opening of the retail outlet was not within the specified distance as per the advertisement vide Annexure-1. Earlier the Division Bench in the writ appeal by entering into the factual disputes and after due consideration of the case of the respective parties was pleased to set aside the merit list prepared by the HPCL company and consequently directed to prepare a fresh merit list as per the guidelines. In that view of the matter when the appellant raised the distance factor plea, it should not have been discarded on the ground that she cannot agitate a new factual aspect in the subsequent litigation and that such a plea is forbidden in view of Order II Rule 2 of the Code of Civil Procedure. Mr. Mohanty placed reliance on Annexure-12 which is the letter of the Executive Engineer to substantiate that the offered site of the respondent no.3 was not within 2 kms. distance from the zero based point of Harichandanpur and therefore, her application should not have been entertained at all by HPCL. He emphasised that it was the duty and responsibility of the HPCL Company to examine the eligibility of respondent no.3 and also the distance of her offered site from Harichandanpur which was a mandatory requirement as per the advertisement. The HPCL Company cannot just give these criteria a go-bye to show undue favour to the respondent no.3 by going against its own terms and conditions fixed in the advertisement.

9. Mr. Goutam Mukherjee, learned Senior Advocate appearing for the respondents nos.1 and 2 on the other hand contended that the selection of dealership was done as per the information brochure of HPCL guidelines relating to appointment of dealers for retail outlets and the candidates were evaluated on various parameters i.e. land, finance, education, capability for business generation, age, experience, business acumen and personality. The appellant was placed at 4th position whereas the respondent no.3 was placed at 1st position on evaluation of the aforementioned parameters and accordingly the respondent no.3 was issued with the Letter of Intent and the retail outlet at advertised location of Harichandanpur is being operated by her since dated 24.10.2019.

10. Mr. Sukanta Kumar Dalai, learned counsel appearing for the respondent no.3 also contended that though since 2009 the appellant is approaching this Court but for the first time in W.P.(C) No.569 of 2017, she raised the distance factor relying on a document stated to have been issued by

the Executive Engineer (R & B), Ghatagaon in the district of Keonjhar. The zero based point of Harichandanpur at Gandhi Chhak has been arbitrarily fixed by the Executive Engineer and therefore, the document is nothing but a manufactured one for the present case only. According to Mr. Dalei, at the belated stage in the third round journey to this Court, the appellant cannot raise such a point which is an attempt to mislead this Court by giving such a fabricated document and rightly the learned Single Judge did not entertain such a point. While concluding, it is submitted that in the meantime, the petrol pump of the respondent no.3 has already become operational and serving the public cause and therefore, the writ appeal should be dismissed.

11. We have carefully considered the submissions advanced by the learned Counsel for the parties and perused the documents available on record.

Let us first examine the power of the Division Bench while entertaining a Letters Patent appeal against the judgment/order of the Single Judge. This writ appeal has been nomenclatured as an application under Article 4 of the Orissa High Court Order, 1948 read with clause 10 of the Letters Patent Act, 1992. Letters Patent of the Patna High Court has been made applicable to this Court by virtue of Orissa High Court Order, 1948. Letters Patent Appeal is an intra Court appeal where under the Letters Patent Bench, sitting as a Court of Correction, corrects its own orders in exercise of the same jurisdiction as vested in the Single Bench. **(Ref: (1996) 3 Supreme Court Cases 52, Baddula Lakshmaiah -Vrs.- Shri Anjaneya Swami Temple)**. The Division Bench in Letters Patent Appeal should not disturb the finding of fact arrived at by the learned Single Judge of the Court unless it is shown to be based on no evidence, perverse, palpably unreasonable or inconsistent with any particular position in law. This scope of interference is within a narrow compass. Appellate jurisdiction under Letters Patent is really a corrective jurisdiction and it is used rarely only to correct errors, if any made.

In the case of **B. Venkatamuni -Vrs.- C.J. Ayodhya Ram Singh reported in (2006) 13 Supreme Court Cases 449**, it is held that in an intra-court appeal, the Division Bench undoubtedly may be entitled to reappraise both questions of fact and law, but entertainment of a letters patent appeal is discretionary and normally the Division Bench would not, unless there exist cogent reasons, differ from a finding of fact arrived at by the Single Judge. Even a Court of first appeal which is the final Court of appeal on fact may

have to exercise some amount of restraint. Similar view was taken in the case of **Umabai -Vrs.- Nilkanth Dhondiba Chavan reported in (2005) 6 Supreme Court Cases 243**. In the case of **Commissioner of Income Tax - Vrs.- Karnataka Planters Coffee Curing Work Private Limited reported in (2016) 9 Supreme Court Cases 538**, it is held that the jurisdiction of the Division Bench in a writ appeal is primarily one of adjudication of questions of law. Findings of fact recorded concurrently by the authorities under the Act concerned (Income Tax Act) and also in the first round of the writ proceedings by the learned Single Judge are not to be lightly disturbed.

Thus a writ appeal is an appeal on principle where the legality and validity of the judgment and/or order of the Single Judge is tested and it can be set aside only when there is a patent error on the face of the record or the judgment is against established or settled principle of law. If two views are possible and a view, which is reasonable and logical, has been adopted by a Single Judge, the other view, howsoever appealing may be to the Division Bench; it is the view adopted by the Single Judge, which would, normally be allowed to prevail. If the discretion has been exercised by the Single Judge in good faith and after giving due weight to relevant matters and without being swayed away by irrelevant matters and if two views are possible on the question, then also the Division Bench in writ appeal should not interfere, even though it would have exercised its discretion in a different manner, were the case come initially before it. The exercise of discretion by the Single Judge should manifestly be wrong which would then give scope of interference to the Division Bench.

12. It is not in dispute that the learned Single Judge did not entertain the plea of distance factor raised by the appellant on the basis of letter dated 15.11.2016 by the Executive Engineer, Ghatagaon (R & B) Division on the ground that she cannot agitate a new factual aspect in the subsequent litigation. The Court relied upon the provision of Rule 2 of Order II of C.P.C. which states that the suit filed by the plaintiff shall include the whole of the claim and also the effect of relinquishment of part of claim and omission to sue for one of the several reliefs. This Rule which deals with *claim* or *relief* is not the issue in the case rather the issue is, if one of the grounds which is based on factual aspects though was available to the appellant was not taken for the claim or relief sought for in the earlier writ petition, can be taken in the subsequent writ petition relating to the same cause of action between the same parties? Moreover, in the case of **Gulabchand Chhotalal Parikh -**

Vrs.- State of Bombay reported in A.I.R. 1965 S.C. 1153, it is held that the provisions of Order II Rule 2 C.P.C. apply only to suits. Sub-rule (1) requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Sub-rule (2) then provides that where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portions so omitted or relinquished. By its very language, these provisions do not apply to the contents of a writ petition and consequently do not apply to the contents of subsequent suit.

In the case of **Devilal Modi -Vrs.- Sales Tax officer, Ratlam reported in A.I.R. 1965 S.C. 1150**, it has been observed that the rule of constructive res judicata postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding, which is based on the same cause of action and basically, this view is founded on the same considerations of public policy because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceedings after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy.

The High Court exercising extraordinary jurisdiction under Article 226 of the Constitution aims at securing a very speedy and efficacious remedy to a person, whose legal or constitutional right has been infringed. If all the elaborate and technical rules laid down in the Code of Civil Procedure are to be applied to the writ proceedings, the very object and purpose is likely to be defeated. In view of the conflicting opinions expressed by different Courts, Parliament by the Code of Civil Procedure (Amendment) Act, 1976 inserted an Explanation to section 141 of C.P.C. which deals with Miscellaneous Proceedings and it is mentioned therein that the expression "proceedings" in the said section does not include "any proceeding under Article 226 of the Constitution."

At the outset, Mr. Ramakant Mohanty, learned Senior Advocate fairly submitted that if the appellant is to succeed then it is only basing on the distance factor point. Let us now examine at what stage in which writ petition, the appellant raised the distance factor relating to the offered site of the respondent no.3 for the dealership for the proposed retail outlet for the

first time. The first writ filed by the appellant was W.P.(C) No. 14367 of 2009 in which the respondent no.3 was not made a party and no averment was taken that the offered site of the respondent no.3 was beyond 2 kms. from Harichandanpur on Naranpur-Brahmanipal Road and the same was not in accordance with the advertisement rather grounds were taken that under other headings, the appellant was entitled to get more marks and thus her position should have been above the respondent no.3. The respondent no.3 filed an intervention application which was allowed and the writ petition was disposed of on 12.08.2010. No such submission was also raised relating to distance factor of offered site of the respondent no.3. However, a Division Bench of this Court quashed the result sheet dated 19.09.2009 and directed the Selection Committee to reconsider the claim of the appellant as well as the other claimants and award the marks in conformity with the guidelines prescribed and to take a decision in the matter.

The second writ filed by the appellant was W.P.(C) No. 18768 of 2011 in which the respondent no.3 was made a party and challenge was made to the letter dated 24.05.2011 of HPCL in which after reconsidering the claim of the appellant as well as the other claimants as per the direction of this Court in W.P.(C) No. 14367 of 2009, the position of the respondent no.3 remained unchanged, however, the appellant became the third empanelled candidate. No averment was taken that the offered site of the respondent no.3 was beyond 2 kms. and the same was not in accordance with the advertisement. No such submission was also raised relating to distance factor of offered site of the respondent no.3 during argument. The writ petition was dismissed by the learned Single Judge vide order dated 14.12.2015.

The appellant preferred writ appeal bearing W.A. No.18 of 2016 challenging the order dated 14.12.2015 passed in W.P.(C) No.18768 of 2011. In the writ appeal, no averment was taken that the offered site of the respondent no.3 was beyond 2 kms. and the same was not in accordance with the advertisement. No such submission was also raised relating to distance factor of offered site of the respondent no.3 during argument. However, the writ appeal was allowed vide judgment and order dated 22.06.2016 on other grounds and the letter dated 24.05.2011 of HPCL as well as the earlier selection/merit list for award of dealership was quashed.

Even though in the earlier two writ petitions filed by the appellant, averment relating to the offered site of the respondent no.3 was beyond 2 kms. and that the same was not in accordance with the advertisement, was not

taken but for the first time in the third writ petition filed by the appellant i.e. W.P.(C) No. 569 of 2017 basing on the letter dated 15.11.2016 (Annexure-12) issued by the Executive Engineer, Ghatagaon (R & B) Division, the said plea was taken. It seems one Girija Nandan Mohanty wrote a letter on 15.11.2016 to the Executive Engineer to get clarification of distance of proposed site offered by the respondent no.3 for retail outlet to HPCL at Mangalpur and on the same day, the Executive Engineer promptly answered that considering Gandhi Chhak to be the zero based point of Harichandanpur, the distance to the offered site of respondent no.3 at Mangalpur was more than 2.00 kms. from Gandhi Chhak. The Kilometer stone installed nearby the proposed location also indicate Harichandanpur was at 4.00 kms. distance is correct. In the counter affidavit filed by the respondents nos.1 and 2, it is mentioned that the ground of distance has been abandoned by the appellant earlier. In Annexure-13 issued by Senior Regional Manager, HPCL, it is clearly mentioned that the land offered by the 1st empanelled candidate (respondent no.3) was verified and found to be within the stretch of advertised location. In the counter affidavit filed by the respondent no.3, it is mentioned that 4 km. milestone has been installed by the appellant and the Executive Engineer (R & B) for the purpose of issuance of Annexure-12. It is further stated in the counter affidavit that revenue authorities have reported that the distance of the proposed place of the respondent no.3 from the boundary of Harichandanpur is 83.33 chain i.e. 1652 meters and to that effect, the report of Revenue Inspector, Harichandanpur has been annexed as Annexure-B/3 to the counter affidavit.

It is the settled law that the High Court in exercise of its power under Article 226 of the Constitution of India normally should not enter into the serious disputed questions of facts and render a finding on those facts. In the case of **Popatrao Vyankatrao Patil -Vrs.- The State of Maharashtra reported in 2020 SCC OnLine SC 291**, it is held that even if there are disputed questions of fact which fall for consideration but if they do not require elaborate evidence to be adduced, the High Court is not precluded from entertaining a petition Under Article 226 of the Constitution. However, such a plenary power has to be exercised by the High Court in exceptional circumstances. The High Court would be justified in exercising such a power to the exclusion of other available remedies only when it finds that the action of the State or its instrumentality is arbitrary and unreasonable and, as such, violative of Article 14 of the Constitution of India.

Thus the plea of distance factor relating to the offered site of the respondent no.3 to be beyond 2 kms. was taken by the appellant for the first time in the third writ petition which could have been taken by her in the earlier two writ petitions. Moreover, on that aspect, the documents issued by two Government officials i.e. Executive Engineer and Revenue Inspector are also contradictory. The Senior Regional Manager, HPCL in Annexure-13 clearly mentioned that the land offered by the respondent no.3 was verified and found to be within the stretch of advertised location. Since the selection of dealership for retail outlets was done as per the guidelines mentioned in the information brochure of HPCL and the candidates were evaluated on various parameters i.e. land, finance, education, capability for business generation, age, experience, business acumen and personality and each time the respondent no.3 was found to be scoring more marks than the appellant, therefore, we find no flaw in the merit list prepared by the HPCL authorities as well as the letter dated 13.12.2016 vide Annexure-13 issued by Senior Regional Manager, HPCL.

13. In view of the foregoing discussions, we are of the humble view that the view taken by the learned Single Judge is reasonable and logical and there is no patent error on the face of the impugned order or any perversity therein and therefore, we are not inclined to interfere with the same. Accordingly, the writ appeal being devoid of merits, stands dismissed.

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2020 (II) ILR - CUT- 411

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

W.P.(C) NO. 14746 OF 2018

DUSMANTA KUMAR BEHERA ……..Petitioner

.V.

REGISTRAR, ORISSA HIGH COURT & ORS. ……..Opp. Parties

THE ODISHA DISTRICT AND SUBORDINATE COURTS' NON-JUDICIAL STAFF SERVICES (METHOD OF RECRUITMENT AND CONDITIONS OF SERVICE) RULES, 2008 - Rule 7 – Provisions under – Advertisement to fill up three posts of Junior Typists i.e. one reserved for Scheduled Caste (men) category, one reserved for SEBC (men) category and

another was kept as unreserved category – Merit list prepared for all successful candidates and category wise merit list was also prepared – Petitioner second in SEBC category merit list – The candidate stands at Sl. No. one in the merit list of SEBC category got the appointment – Petitioner claims he should have been given the unreserved post as he was meritorious than the person at serial number one of the list for general candidates – Whether such a claim can be accepted or is there any illegality in the selection process – Held, No – Reasons indicated.

> "*We are of the humble view that if the left out persons in the SEBC category merit list are considered under unreserved category, the persons whose names find place in the merit list of unreserved category will be seriously prejudiced and it would affect them as they compete strictly on the basis of the merit. Moreover, there would be no purpose in preparing such list under unreserved category. There is a purpose behind preparation of separate merit list for each of the reserved categories so also a separate list for the unreserved. One candidate in one of the reserved categories cannot encroach upon the other category merely because he was not selected on the basis of merit list prepared for his own category.*" *(Para 10)*

Case Laws Relied on and Referred to :-

1. A.I.R. 1993 S.C. 477 : Indra Sawhney .Vs. Union of India.
2. 2019 (9) SCC 276 : Pradeep Singh Dehal .Vs. State of Himachal Pradesh.
3. (1973) 1 SCC 216 : Hiralal Rattanlal .Vs. Sales Tax Officer.
4. (2012) 8 SCC 203 : Satyabrata Sahoo and Ors. .Vs. State of Orissa.

For Petitioner : Mr. Shashi Bhusan Jena, Satyajit Behera
Abhijit Mishra, Sebati Soren.
For Opp. Parties : Mr. Mruganka Sekhar Sahoo, Addl.Govt.Adv.

JUDGMENT Date of Judgment: 29.04.2020

S.K. SAHOO, J.

The petitioner Dusmanta Kumar Behera has filed this writ application with a prayer to direct the learned District Judge, Malkangiri (opposite party no.2) to issue order of appointment in his favour against unreserved category for the post of Junior Typist.

2. The case of the petitioner, in short, is that the opposite party no.2 issued an advertisement on 13.09.2017 to fill up three posts of Junior Typists, one reserved for Scheduled Caste (men) category; one reserved for SEBC (men) category and another was kept as unreserved category. In pursuance of such advertisement, the petitioner applied for that post under SEBC category. He participated in the selection process and performed well and the merit list

of all the successful candidates (both general and reserved categories) for those three posts according to the descending order secured was published in which the name of the petitioner was reflected at serial no.2.

It is the further case of the petitioner that in the category wise merit list of successful candidates for the post of Junior Typists, two names found place in Scheduled Caste category, seven names in SEBC category and four names against unreserved category. As per such merit list in SEBC category, the name of one Bivisan Sahu found place above all the seven candidates and name of the petitioner found place at number 2. Bivisan Sahu was overage but he got relaxation by virtue of SEBC quota and occupied the post which was reserved for SEBC category. It is the case of the petitioner that even though he belonged to SEBC category but since in the merit list of all the successful candidates (both general and reserved categories), his name finds place above all the candidates belonging to unreserved category, he should have been selected against such unreserved category.

It is the further case of the petitioner that that the person who secures higher marks has to be considered against unreserved category. The petitioner secured more marks and in the merit list, his name found place at serial no.2 and only because he belonged to SEBC category, he was not issued with an order of appointment, on the other hand the opposite party no.3 Abinash Mohapatra whose name found place at serial no.3 in such merit list and who belonged to unreserved category was issued with an order of appointment.

According to the petitioner, he belonged to SEBC category and secured more marks but the order of appointment was issued in favour of the opposite party no.3 who was directed to appear before the Registrar of the opposite party no.2 with the original documents and to give undertaking, which is not legally correct.

It is the further case of the petitioner that similar advertisement was issued by the learned District Judge, Kendrapara where three posts of Typists were advertised to be filled up and there the SEBC candidates those who have secured more marks have been selected under the unreserved category.

According to the petitioner, the opposite party no.2 has illegally taken a decision to debar the petitioner from appointment even though he secured more marks only because of the fact that he belonged to SEBC category and only one post was reserved for SEBC category which was given to Bivisan

Sahu. The action of the opposite parties in not selecting the petitioner against unreserved category even though he secured more marks than the opposite party no.3 is illegal and arbitrary.

3. While controverting the averments made in the writ petition, the opposite party no.2 in the counter affidavit has stated that the appointment order was issued in favour of Shri Bivisan Sahu (SEBC Candidate) for the post of Junior Typist basing on the basis of sub-rule (5) of Rule 7 of the Odisha District and Subordinate Courts' Non-Judicial Staff Services (Method of Recruitment and Conditions of Service) Rules, 2008 (hereafter '2008 Rules'). Similarly in accordance with the provisions of 2008 Rules, appointment order was issued in favour of the opposite party no.3 from the separate merit list for unreserved category candidate according to the descending order of total marks secured. Since only one post was vacant for SEBC Category, the petitioner was not issued with the appointment order as he had secured second position in merit list for SEBC category. It is further stated that the appointment process made by the District Judge, Kendrapara is not binding as the appointment of Group 'C' employees including Junior Typists under Malkangiri Judgeship was made in accordance with the prescribed Rules and moreover the contentions in regard to equality suffers from the vice of negative equality.

4. Rejoinder to the counter affidavit was filed on behalf of the petitioner stating, inter alia, that the opposite party no.2 has not conducted the selection as per law and it is a clear case of violation of principle decided by the Hon'ble Supreme Court as well as circular issued by the Welfare Department to all the departments of the State Government and with the oblique motive, the opposite party no.2 has debarred the meritorious candidate like the petitioner and appointed the opposite party no.3. It is stated that from the merit list for the post of Junior Typist of Judgeship of Sambalpur District for the same year, Scheduled Tribe candidate has been adjusted against unreserved category since he secured more marks than other unreserved category candidates.

5. While issuing notice to the opposite parties on 13.08.2018, this Court as an interim measure directed that the appointment, if any, to the post of Junior Typist, shall be subject to result of the writ application.

6. Mr. Shashi Bhusan Jena, learned counsel appearing for the petitioner emphatically contended that the petitioner belonged to SEBC category but he

had secured more marks than the opposite party no.3 and was placed above the opposite party no.3 in the merit list of all the successful candidates which was meant for both general and reserved categories. Even though the only post reserved for SEBC (men) category was given to one Bivisan Sahu who belonged to SEBC category as his name found place above all the candidates in the merit list but in the same merit list, the name of the petitioner finds place above all the candidates belonging to unreserved category and therefore, he should have been selected against such unreserved category. According to Mr. Jena, this is a glaring case of arbitrary selection whereby the petitioner securing more marks than unreserved category candidates has been deprived of getting an order of appointment. He relied upon a circular dated 15.03.1999 issued by the Welfare Department to all the departments of the State Government which relates to clarification regarding the participation of reserved categories candidates against the unreserved vacancies.

7. Mr. Mruganka Sekhar Sahoo, learned Addl. Govt. Advocate on the other hand contended that as per sub-rule (1) of Rule 7 of 2008 Rules, after receipt of applications for recruitment examination, career merit lists for general and reserved categories candidates according to the descending order of total of percentage of marks in H.S.C. examination and +2 examination were prepared. Thereafter considering the marks secured in the written test, one merit list for general candidates and separate merit list for each of the reserved categories were prepared and candidates in each category were called for practical test and the candidates selected in such practical test were called for viva voce test as per sub-rule (3) of Rule 7 of 2008 Rules. Finally, in accordance with the provisions of sub-rule (4) of Rule 7 of 2008 Rules, on the basis of marks secured in the written test, practical test and viva voce test, a merit list of all candidates (both general and reserved categories) was prepared and thereafter separate merit lists for general and reserved categories were prepared according to the descending order of total marks and with due regard to sub-rule (5) of Rule 7 of 2008 Rules, according to the descending order of total marks of each category mentioned in sub-rule (4), not only Bivisan Sahu but also opposite party no.3 who were in the top of the category wise merit list of SEBC and Unreserved respectively were selected for filing of the vacancy. He argued that since the only post vacant for SEBC Category was filled up by Bivisan Sahu, there was no scope for the petitioner who secured second position in merit list for SEBC category for getting selected. The name of the opposite party no.3 found place in top in the

category wise merit list for unreserved category and accordingly one post for such category was given to him and hence, there is no irregularity in the selection of candidates for the post of Junior Typists. Learned counsel for the State relied upon the decision rendered by a nine Judge Bench of the Hon'ble Supreme Court in the case of **Indra Sawhney -Vrs.- Union of India reported in A.I.R. 1993 S.C. 477** so also in the case of **Pradeep Singh Dehal -Vrs.- State of Himachal Pradesh reported in 2019 (9) Supreme Court Cases 276**.

8. We have carefully considered the submissions advanced by the learned counsel for the parties and perused the documents available on record. We find the following undisputed factual aspects from the entire scenario of the case:

(i) An advertisement was issued by the opposite party no.2 on 13.09.2017 to fill up three posts of Junior Typists i.e. one reserved for Scheduled Caste (men) category, one reserved for SEBC (men) category and another was kept as unreserved category;

(ii) The petitioner applied under SEBC category and he participated in the selection process and as per the merit list of successful candidates (both general and reserved categories) for that post, the name of the petitioner found place at serial no.2;

(iii) The name of one Bivisan Sahu who applied under SEBC category found place above all the candidates in the merit list referred to under (ii) and also in the category wise merit list of SEBC and he was selected for the post reserved for SEBC category;

(iv) The opposite party no.3 Abinash Mohapatra whose name found place at serial no.3 as per the aforesaid merit list referred to under (ii) but at serial no.1 in the category wise merit list of unreserved category was issued with an order of appointment;

(v) The petitioner's place though was above the opposite party no.3 in the merit list, but he was not selected as the only post reserved for SEBC (men) category went in favour of Bivisan Sahu.

9. The question that now crops up for consideration is whether any illegality has been committed in selecting the opposite party no.3 Abinash Mohapatra for the post of Junior Typist whose name found place at serial no.3 as per the merit list of successful candidates (both general and reserved categories) for the said post in preference to the petitioner whose name was at serial no.2 in the said merit list and whether the name of the petitioner could have been considered against unreserved category.

At this stage, it would be profitable to refer to the relevant sub-rules of Rule 7 of 2008 Rules which are extracted herein below:

> **7. Manner of Selection of Candidates**—(1) After receipt of applications for recruitment examination, career merit lists for general and reserved categories according to the descending order of total of percentage of marks in H.S.C. examination and +2 examination or their equivalent examinations shall be prepared.
>
> (2) From each category of career merit list, candidates upto 20 times of actual vacancy in each category shall be called to appear at the written test.
>
> (3) Considering the marks secured in the written test, one merit list for general candidates and separate merit list for each of the reserved categories shall be prepared and candidates up to ten times of vacancy in each category shall be called for computer science test (practical), short hand and type writing test, as the case may be, and the candidates selected in such practical selected in test shall be called for viva voce test.
>
> (4) On the basis of marks secured in the written test, practical test as provided in sub-rule (3) and the viva voce test, a merit list of all the candidates (both general and reserved categories) shall be prepared and thereafter separate merit lists for general and reserved categories shall be prepared according to the descending order of total marks.
>
> (5) Candidates according to the descending order of total marks of each category mentioned in sub-rule (4) shall be selected for filling of the vacancy.

Thus on a careful scrutiny of the aforesaid sub-rules of Rule 7, it appears that at first career merit lists are to be prepared separately for the general and for each of the reserved categories taking into account total of percentage of marks in H.S.C. examination and +2 examination or the equivalent examinations according to the descending order. On the basis of career merit list, candidates in each category are to be called to appear at the written test as provided in sub-rule (2). After the written test is conducted, considering the marks secured in such written test, one merit list for general candidates and separate merit lists for each of the reserved categories shall be prepared. On the basis of marks secured in such written test, candidates in each category are to be called to face the practical test as provided in sub-rule (3). The candidates selected in such practical test shall be called for viva voce test. After viva voce test, on the basis of marks secured in the written test, practical test and viva voce test, a merit list of all the candidates (both general and reserved categories) shall be prepared. Then separate merit lists for general and for each of the reserved categories shall be prepared according to the descending order of total marks and from that separate merit lists,

candidates for each category as per the descending order shall be selected for filling of the vacancy.

10. It is not in dispute that the petitioner, Bivisan Sahu and some others applied under SEBC category and they participated in the selection process and as per the merit list of successful candidates (both general and reserved categories) for that posts of Junior Typists, the name of Bivisan Sahu found place at serial no.1 and that of the petitioner found place at serial no.2. Similarly when category wise merit list of the SEBC category was prepared as provided in sub-rule (4) of Rule 7, names of seven persons found in it but the position of Bivisan Sahu and that of the petitioner remained unchanged. Bivisan Sahu was overage but getting relaxation by virtue of SEBC quota, he was selected for the only post which was reserved for SEBC category. Thus no more post under SEBC category was available for the petitioner.

In the case of **Indra Sawhney** (supra), the Hon'ble Supreme Court has held as follows:

> "…..It may well happen that some members belonging to, say Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

Following the decision rendered in the case of **Indra Sawhney** (supra), the Hon'ble Supreme Court in the case of **Pradeep Singh Dehal** (supra) held as follows:

> "14…..Every person is a general category candidate. The benefit of reservation is conferred to Scheduled Castes, Scheduled Tribes and OBC category candidates or such other category as is permissible under law. It is a consistent view of this Court starting from **Indra Sawhney** (supra) that if a reserved category candidate is in merit, he will occupy a general category seat…."

Even though Bivisan Sahu was in the top of the merit list of successful candidates (both general and reserved categories) for the posts of Junior Typists so also in the category wise merit list of the SEBC category but he did not get selected in the open competition field on the basis of his own merit but getting relaxation as provided under SEBC quota and therefore, he cannot be treated as open competition candidate. Once he takes away the only post reserved for the SEBC category, no more post under SEBC category was available for the petitioner. The rest of the persons left out in the SEBC category merit list cannot be considered under unreserved

category as for that category, a separate merit list as per sub-rule (4) of Rule 7 has been prepared and the only post kept unreserved has to go to one of the candidates of that list according to the descending order. Rule 7 is clear and there are no ambiguities in it to require departure from the Rule of literal construction. In **Hiralal Rattanlal -Vrs.- Sales Tax Officer reported in (1973) 1 Supreme Court Cases 216**, the Hon'ble Supreme Court observed as follows:

> "22.....In construing a statutory provision, the first and foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from the provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction are called into aid only when the legislative intent is not clear."

We are of the humble view that if the left out persons in the SEBC category merit list are considered under unreserved category, the persons whose names find place in the merit list of unreserved category will be seriously prejudiced and it would affect them as they compete strictly on the basis of the merit. Moreover, there would be no purpose in preparing such list under unreserved category. There is a purpose behind preparation of separate merit list for each of the reserved categories so also a separate list for the unreserved. One candidate in one of the reserved categories cannot encroach upon the other category merely because he was not selected on the basis of merit list prepared for his own category.

In the case of **Satyabrata Sahoo and Ors. -Vrs.- State of Orissa reported in (2012) 8 Supreme Court Cases 203**, when the appellants, who have appeared in the entrance examination for Postgraduate (Medical) Selection, 2012, Odisha challenged the validity of Clause 11.2 of the prospectus for selection of candidates for postgraduate (medical) courses in the government medical colleges of Odisha for the academic year 2012, as violative of Article 14 of the Constitution of India, the Hon'ble Court held that there can be no encroachment from one category to another and candidates of in-service category cannot encroach upon the open category, so also vice versa. While allowing the appeal and setting aside the judgment of the Division Bench as well as learned Single Judge of this Court, the Hon'ble Court directed the State of Odisha, the Medical Council of India and the respondents 1 to 4 therein to take urgent steps to rearrange the merit list and to fill up the seats of the direct category, excluding in-service candidates who got admission in the open category on the strength of weightage.

The notification of the Welfare Department dated 15.03.1999 annexed to the rejoinder affidavit filed by the petitioner dealt with the question, "whether the *unreserved vacancies* are reserved for a specified class of candidates" and the answer was given that, "the unreserved vacancies are not reserved for any general, S.C., S.T., O.B.C. or other specified class of candidates. This has to be filled up strictly on the basis of the 'select list' prepared by the Board of selection or the Departmental Promotion Committee, following the relevant recruitment rules".

Since the select list prepared in the present case is category wise merit list of successful candidates following Rule 7 of 2008 Rules and the selection of the opposite party no.3 for the post of Junior Typist from the unreserved category is on the basis of his top position in such category, we find no infirmity or irregularity in the same. The prayer of the petitioner to issue order of appointment in his favour against unreserved category is totally misconceived.

The grounds taken by the petitioner that in two of the districts i.e. Kendrapara and Sambalpur, in the similar posts of Junior Typists, reserved category candidates securing more marks have been adjusted against unreserved category are not sufficient to grant relief to the petitioner as it suffers from the vice of negative equality as averred in the counter affidavit. Article 14 of the Constitution does not envisage a negative equality. It does not countenance repetition of a wrong action to bring both wrongs at par. Since the happenings of those two districts in the matter of selection of Junior Typists are not challenged before us now, we refrain to make any observation in that respect.

11. In view of the foregoing discussions, we find no merit in the writ petition which is accordingly dismissed. The interim order dated 13.08.2018 stands vacated. No costs.

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2020 (II) ILR - CUT- 420

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

JAIL CRIMINAL APPEAL NO. 40 OF 2005

BANA MUNDA .....Appellant.

.V.

STATE OF ODISHA .....Respondent.

(A) CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code – Conviction based on sole eye witness – Duty of the appellate court – Held, as the prosecution has advanced and trial court has based the conviction upon the sole testimony of P.W.1, it is obligatory on the part of the appellate court to analyze the evidence independently.

(B) CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code – Conviction based on sole eye witness – Testimonies of three witnesses demonstrate that on the occurrence night the deceased was sleeping with her two sisters including P.W.2 in a room – P.W.2 had not seen the person who caused homicidal death of the deceased in the night – She was not declared hostile – The mother of the deceased who came to know about the incident on the next morning also had not ascertained anything from her daughters – The brother-informant who claims to have entered inside the room hearing shout of the deceased did not chose to ascertain anything from P.W.2 and other sister – In such a backdrop the illicit relationship of deceased with the accused which P.W.1 was apprehending to culminate into social ostracization, assumes significance – Reliance on the sole testimony of P.W.1, in such circumstances, would be a negation of prudence – The sole testimony of P.W.1, in our considered opinion, requires corroboration – P.W.2 does not corroborate P.W.1 – His unusual conduct in not asking anybody available inside the room, leaves enough room to suspect his motive – He is a wholly unreliable witness – Conviction set aside.

Case Laws Relied on and Referred to :-

1. 1996 (I) SCC 614 : Kartik Malhar Vs. State of Bihar.
2. A.I.R. (1957) S.C. 614 : Vadivelu Thevar Vs. The State of Madras.

For Appellant : Mrs. Sanjuktabala Das, U. R. Padhi & R. Khatun.
For Respondent : Sk. Zafarullaha, Addl. Standing Counsel.

JUDGMENT Date of Hearing & Judgment : 13.02.2020

DR. A. K. MISHRA, J.

In this appeal under the provision of Sec.383 Cr.P.C. the sole appellant has assailed his conviction U/s.302 of the Indian Penal Code (in short 'the I.P.C.') and sentence to undergo imprisonment for life by the learned Ad hoc Addl. Sessions Judge, (F.T.), Keonjhar in his judgment dtd.21.12.2004 passed in S.T. Case No.23/35 of 2003-04.

2. The case of the prosecution, in short, is that accused had illicit relationship with the deceased Dheda Mundani. On 11.10.2002 in the night Informant, the brother of the deceased slept in one room while deceased along with her other two sisters, including P.W.2 was sleeping in another room. As per informant, at about 9 P.M. the accused came and dealt axe blows and murdered the deceased. The informant raised alarm but he was threatened. Out of fear he could not inform the matter in the night. In the next day morning, he orally reported to police which was registered as Nayakote P.S. Case No.22 of 2002. The investigation was ensued. Inquest and post mortem was conducted. On 13.10.2002, accused was arrested and a blood stained axe was seized vide Ext. 4. The seized weapon of offence and other articles were sent for chemical examinations vide Ext.11. The opinion (Ext.12) was received to the effect that the iron axe had contained human blood, but no blood grouping was made. Similarly the Lungi and nail clipping of the accused were found to have not contained any blood. After completion of investigation charge sheet was submitted. Learned S.D.J.M., Keonjhar took cognizance of the offence and committed the case to the Court of Sessions. Accused faced trial for the charge under Section 302 I.P.C. The plea of defence was denial simplicitor.

3. In support of its case, prosecution examined 10 witnesses in all and exhibited 20 documents. The seized axe and saya were marked as M.O.I and M.O.II. Out of prosecution witnesses P.W.1 is the brother of the deceased who is the informant of the case and the sole eye witness to the occurrence. P.W.2 is the sister of deceased who was sleeping with the deceased in the same room. P.W.3 is the mother of the deceased. P.W.4, a co-villager, is a post occurrence witness. P.W.5 is a witness to inquest. P.W.6 and 7 are the scientific officer and photographer respectively. P.W.8 is the doctor who conducted post mortem. P.W.9 is the I.O. who has submitted charge-sheet and P.W.10 is the main investigating officer. Defence examined none.

4. Learned Additional Sessions Judge found that the death of the deceased was homicidal in nature and believing the testimony of the sole eye witness (P.W.1) informant, convicted and sentenced the accused in the above manner.

5. Learned counsel for the appellant Mrs. Sanjukta bala Das submitted that the sole eye witness P.W.1 is not reliable because the sister of the deceased (P.W.2) who was sleeping with the deceased in the same room on the occurrence night has not implicated th e accused to have committed

murder. The said witness being not declared hostile, there is no reason to disbelieve her. Learned counsel further submitted that as illicit relationship is alleged which has implication of social ostracization, the brother informant in such a circumstance, might have falsely roped the accused and in absence of corroboration his evidence should not be believed as wholly reliable and accused should be given benefit of doubt.

6. Learned Addl. Standing Counsel Mr. Zafarullah fairly admits that presence of P.W.2 in the room is not doubtful and even if she is not declared hostile, she can be ignored as murder is committed and P.W.1 has named the author of such crime.

7. Keeping the above contentions in view, we have carefully perused the materials on record. F.I.R. (Ext.1) was received on 12.10.2002 at 1 P.M. from P.W.1 for the alleged murder occurred in the previous night at 9 P.M. On 13.10.2002 the post mortem was conducted and doctor (P.W.8) found three cut injuries and one abrasion which were sufficient to cause death in ordinary course of nature. On 23.10.2002 P.W.8 gave opinion that the seized Axe (M.O.I) produced before him could be the weapon to cause such injuries. From these evidence, we have no hesitation to confirm that the death of deceased was homicidal in nature.

8. As the prosecution has advanced and trial court has based the conviction upon the sole testimony of P.W.1, it is the obligatory on the part of the appellate court to analyze the evidence independently.

P.W.1 testified that accused had an affair with the deceased. She used to stay in his (P.W.1's) house in a separate room. On the occurrence night, he was sleeping in a room while deceased along with his two sisters Mandoi Munda (P.W.2) and Kepidi Munda (not examined) was sleeping in another room. At about 6 P.M. accused visited their house and went to the room of the deceased. In the night hearing crying sound of deceased, he went that room and found accused inflicting blows with an axe. He admitted to have intervened but accused threatened for which he returned to his room out of fear. On the next day he informed the matter to his mother and villagers and also at police station. Later he has stated that by the time he reached the room of deceased, she was lying on the ground and by that time she was dead and two other sisters (Mandoi and Kepidi) were inside the room but he had not talked with them.

Taking a pause here, it is noteworthy that P.W.2 the sister of deceased who was inside the room in that night, as per P.W.1, has testified clearly that she along with Kepidi and deceased Deda were sleeping in that room and in the morning she found Deda was dead. She has also deposed that she was sleeping with the deceased since her childhood and usually they did not lock the room from inside.

The mother of the deceased (P.W.3) has stated that she had not enquired from P.W.2 and other daughter as to the cause of death of the deceased though informant told her that accused had killed the deceased.

8-A. The above testimonies of three witnesses demonstrate that on the occurrence night the deceased was sleeping with her two sisters including P.W.2 in a room. P.W.2 had not seen the person who caused homicidal death of the deceased in the night. She is not declared hostile. The mother of the deceased who came to know about the incident on the next morning also had not ascertained anything from her daughters. The brother – informant who claims to have entered inside the room hearing shout of the deceased did not chose to ascertain anything from P.W.2 and other sister. In such a backdrop the illicit relationship of deceased with the accused which P.W.1 was apprehending to culminate into social ostracization, assumes significance. Reliance on the sole testimony of P.W.1, in such circumstances, would be a negation of prudence.

The sole testimony of P.W.1, in our considered opinion, requires corroboration. P.W.2 does not corroborate P.W.1. His unusual conduct in not asking anybody available inside the room, leaves enough room to suspect his motive. He is a wholly unreliable witness.

In the decision reported in **1996 (I) SCC 614, Kartik Malhar Vrs. State of Bihar** their Lordships have categorically stated as follows:-

> "*On a conspectus of these decisions, it clearly comes out that there has been no departure from the principles laid down in Vadivelyu Thevar's case (supra) and, therefore, conviction can be recorded on the basis of the statement of single eye witness provided his credibility is not shaken by any adverse circumstances appearing on the record against him and the Court, at the same lime, is convinced that he is a truthful witness. The Court will not then insist on corroboration by any other eye witness particularly as the incident might have occurred at the time or place when there was no possibility of any other eye witness being present indeed, the Courts insist on the quality, and, not on the quantity of evidence."*

In the above decision Hon'ble Supreme Court while referring the decision of **Vadivelu Thevar Vrs. The State of Madras, A.I.R. (1957) S.C. 614** has quoted that "*even as the guilt of an accused may be proved by the testimony of a single witness, the innocence of the accused person may be established on the testimony of the single witness, even though a considerable number of witnesses may be forth coming to testify to the truth of the case for the prosecution*."

9. Bestowing our anxious thoughts to the evidence on record, we do not find any reason to disbelieve P.W.2, the sister of the deceased who was all along present in the room where deceased was sleeping and the said testimony is sufficient enough to create a doubt on the prosecution case and for that the conviction of the appellant U/s.302 I.P.C. and sentence there to is not sustainable in the eye of law.

In the result, the appeal is allowed. The conviction and sentence of the appellant vide judgment dtd.21.12.2004 passed by learned Ad hoc Addl. Sessions Judge (F.T.), Keonjhar in S.T. No.23/35 of 2003-04 is hereby set aside. The appellant Bana Munda be set at liberty forthwith if his detention is not required in any other case / cases. L.C.Rs. be returned forthwith.

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2020 (II) ILR - CUT- 425

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

JCRLA NO. 1 OF 2017

DUSMANTA SETHY …… ..Appellant

.V.

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code – Conviction based on sole eye witness – Medical evidence is contradictory to ocular evidence with regard to injuries – Forwarding report for forensic examination reveals that one 'Dauli' and one knife were sent for chemical examination – The said examination report has not been received – Effect of – Held, when the medical evidence is contradictory to the ocular testimony advanced by the sole eye-

witness, the non-production of seized weapon and the examination report as to whether that weapon had contained any blood stain is potential to make a dent in the credibility of sole eyewitness – In such circumstance, corroboration is essential to base conviction – Prosecution has failed to provide any corroboration from any other source – Conviction set aside.

Case Laws Relied on and Referred to :-

1. AIR (1957) SC 614 **:** Vadivelu Thevar Vs. The State of Madras.

For Appellant : Mr. Chittaranjan Sahu.

For Respondent : Mrs. Saswata Pattanaik (Addl.Govt. Adv.)

JUDGMENT Date of Hearing & Judgment: 13.02.2020

DR. A.K. MISHRA, J.

This is an appeal U/s.383 of the Cr.P.C. preferred by the appellant-convict against the conviction U/s.302 of the Indian Penal Code (in short 'the I.P.C.') and sentence to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- (Rupees Ten Thousand), in default to undergo rigorous imprisonment for 3 (three) years vide judgment passed in S.T. Case No.2/4 of 2006 dated 19.12.2006 passed by the learned Adhoc Addl. Sessions Judge, Champua, Keonjhar.

2. Prosecution case, in short, is that on 1.8.2005 at about 6 P.M. in village Roida Camp, the accused dealt 'Dauli' blows to the deceased causing bleeding injuries. The informant-son along with others on being informed took the deceased to hospital but he was declared dead. On that night written F.I.R. was lodged resulting registration of Barbil P.S. Case No.174 dated 2.8.2005. Investigation was ensued. The accused was found in the village. He was arrested with 'Dauli' and one knife. The inquest over the dead body was made. Post-mortem (vide Ext.6) was conducted by Dr. N. Mahunta, he was expired on 23.08.2005. P.W.8-Dr. A.K. Dash gave opinion that the injuries found could be caused by the seized "Dauli". The Investigating Officer had sent all those seized articles including that "Dauli" for Chemical Examination to S.F.S.L., Rasulgarh under Ext.13 but no report was exhibited. The statement of one independent witness-P.W.7 was recorded U/s.164 of the Cr.P.C. vide Ext-5 being sponsored by the Investigating Officer. After completion of investigation, P.W.9-Investigating Officer submitted charge-sheet. Basing upon which cognizance was taken by the learned JMFC, Barbil. The case was committed to the Court of Session. Accused faced trial for offence under Section 302 of the I.P.C.

In the trial, the accused took the plea of denial as well as insanity U/s. 84 of the IPC. The prosecution examined nine witnesses in all. Defence examined none. P.W.1 is the informant whose brother and mother are P.W.3 and P.W.6. P.W.4 is the witness to the seizure and inquest. P.W.5 is a witness to the seizure. P.W.2, a post-occurrence witness, is declared hostile. P.W.7 is an eye-witness. P.W.8 as stated above a Doctor who has not conducted post-mortem but proved the port-mortem report-Ext.6. P.W.9 is the Investigating Officer. The F.I.R., Inquest Report, Spot Map, statement U/s.164 of Cr.P.C. etc. are exhibited vide Exts.1 to 12. But what is not exhibited is the report of the Chemical Examination from S.F.S.L. The seized weapon of offence 'Dauli' was also not produced during trial.

Learned trial court concluded that the death of the deceased was homicidal in nature and the plea of insanity was not acceptable for want of medical evidence. He believed the eyewitness-P.W.7 and convicted and sentenced the accused supra.

3. Learned counsel for the appellant Mr. C. Sahu would buttress the following submissions:-

> i. The sole eye-witness-P.W.7 is not reliable as the medical evidence disclosing six incised injuries is contradictory to ocular evidence that the accused dealt three blows.
>
> ii. When the medical evidence is contradictory to the ocular testimony, the non-production of the seized weapon of offence and Chemical Examination Report creates doubt about the real perpetrator of the murder.
>
> iii. The conduct of the accused that he was wandering with a 'Dauli' and did not flee away after commission of crime is sufficient to hold that accused was an insane and is entitled to be given the benefit of doubt.

Learned Addl. Govt. Advocate, Mrs. S. Pattanaik does not dispute the fact that weapon of offence is not produced in the court. She fairly submits that for the discrepancy with the medical evidence with ocular testimonies, the ocular testimonies of P.W.7 should be given primacy and no interference is called for.

4. We carefully perused the materials on record. the case is based upon the evidence of the sole eye-witness-P.W.7. He has categorically stated that prior to the occurrence the accused was moving in front of the house on road by holding 'Dauli'. He requested him to hand over 'Dauli' as children were fearing. The accused told him that he would not assault anybody. By then the

deceased came on that way and accused obstructed him and dealt one blow to the backside of neck. The deceased fell down. Thereafter, the accused gave another two blows. While the deceased was lying on the ground being dead, the accused was moving there holding the 'Dauli' and thereafter one Durga Oram (not examined) came and called the accused towards the hotel. This witness has also disclosed that he was apprehending that as accused was mad previously and the accused had no dispute with anybody. He has admitted to have given statement U/s.164 of Cr.P.C. vide Ext.5.

If this evidence of sole eye-witness is compared with the medical evidence, it will be found that as per the post-mortem report-Ext.6, the Doctor found 7 injuries including 6 incised wounds. The other injury is one abrasion on the right shoulder. The post-mortem report was proved by Doctor-P.W.8, who has not conducted post-mortem but has given his opinion seeing the weapon offence 'Dauli' vide Ext.7 that all the injuries could be possible by that weapon. P.W.8 has stated that by the time he gave opinion, the weapon of offence was rusty and blood-stained.

Ext-12, the forwarding report for forensic examination reveals that one 'Dauli' and one knife were sent for chemical examination. The said examination report is not received. When the medical evidence is contradictory to the ocular testimony advanced by the sole eye-witness, the non-production of seized weapon and the examination report as to whether that weapon had contained any blood stain is potential to make a dent in the credibility of sole eyewitness. In such circumstance, corroboration is essential to base conviction. Prosecution has failed to provide any corroboration from any other source.

4-A. In **Vadivelu Thevar Vrs. The State of Madras**, *AIR (1957) SC 614*, the Hon'ble Supreme Court has observed as under:-

> "On a consideration of the relevant authorities and the provisions of the Evidence Act, the following propositions may be safely stated as firmly established:
>
> (1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outways the testimony of a number of other witnesses of indifferent character.
>
> (2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, tat corroboration should be insisted

upon for example, in the case of a child witness, or of a witness show evidence is that of an accomplice or of an analogues character.

(3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this a musch depends upon the judicial discretion of the Judge before whom the case comes.

In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the Court should insist upon plurality of witnesses, is much loo broadly stated. Section 134 of the Indian Evidence Act, has categorically laid it down that no particular number of witnesses shall, in any case, be required for the proof of any fact'. The Legislature determined, as long ago as 1872 presumably after due consideration of the pros and cons. That, it shall not be necessary for proof or disproof a fact, to call any particular number of witnesses."

This Court further observed as under:

"It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence where determination of guilty depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could e available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each cases and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused may be proved by the testimony of a single witness, the innocence of the accused person may be established on the testimony of the single witness, even though a considerable number of witnesses may be forth coming to testify to the truth of the case for the prosecution."

5. Now descending to facts when the sole eyewitness is not reliable, the absence of motive creates a doubt. Accused has not attempted to maintain secrecy, nor acted in a prearranged way.

The totality of the prosecution evidence reveals that the charge is not proved beyond reasonable doubt even though the accused is not given the benefit U/s.84 of the I.P.C. Because of this, we are unable to sustain the conviction and sentence passed.

In the result, the conviction of the appellant U/s.302 of the IPC and sentence passed thereon vide judgement dated 19.12.2006 by the learned Adhoc Addl. Sessions Judge (F.T.), Champua is set aside.

The appellant is set at liberty forthwith from jail unless he is required in any other case. Accordingly, the appeal is allowed.LCR be returned immediately to the lower court.

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2020 (II) ILR - CUT- 430

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

JAIL CRIMINAL APPEAL NO.151 OF 2004

RAGHU TUDU ……..Appellant

.V.

STATE OF ODISHA ……..Respondent

CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code, 1860 – Conviction – Out of three accused persons one convicted two acquitted – Conviction based on the testimony of sole eye witness, P.W 1, discovery of weapon of offence, i.e. knife which was stained with blood and also presence of blood of group 'B' in the napkin of the appellant – P.W. 1 stated that the accused was cutting the neck of his father by a knife but neither he has mentioned the said fact in the F.I.R. nor stated before the investigating officer – This being is a major contradiction makes the witness wholly unreliable – Weapon of offence was discovered on the disclosure statement made by the appellant while in police custody – The seizure witnesses and the witnesses to disclosure statement have turned hostile to the prosecution – Moreover, the knife was sent for chemical examination and it was found to have been stained with human blood but the blood grouping not made – Effect of – Held, this circumstance will also not help the case of the prosecution – The last circumstance appear in this case is that the napkin of accused was stained with human blood of 'B' group – The seizure witnesses have turned hostile to the prosecution – Moreover the deceased and the accused are brothers and there is every possibility that the blood group of the accused may be group 'B' – So in such a situation it was the duty of prosecution to determine the blood group of the accused in order to obviate any reasonable chance of the accused staining his napkin with his own blood – Conviction and sentence set aside. (Paras 8 & 9)

For Appellant : M/s. Bibhudhendra Dash, Sukanta Mishra, S. K. Mohanty and P. K. Mohanty.

For Respondent : Sk. Zafarullaha, Addl. Standing Counsel.

JUDGMENT Date of Hearing and Judgment : 20.02.2020

S. K. MISHRA, J.

In this appeal under the provision of Sec.383 Cr.P.C. the sole appellant has assailed his conviction U/s.302 of the Indian Penal Code (in short 'the I.P.C.') and sentence to undergo imprisonment for life and to pay a fine of Rs.1000/-, in default to suffer further S.I. for one month, by the learned Addl. Sessions Judge, Rairangpur in his judgment dtd.27.03.2004 passed in S.T. Case No.14/64 of 2003.

2. The case of the prosecution, in short, is that there was land dispute between the deceased – Gudura Tudu and his brother accused – Raghu Tudu. On 11.10.2002 at about 7 A.M. deceased went to plough his land which is nearby his house and he was ploughing it. At that time appellant Raghu and other two acquitted accused persons, namely Surdhan Tudu and Jagadish Tudu who are his sons, went in a group to the said land and the appellant Raghu killed the deceased by cutting his throat by a knife with the assistance of other two accused persons. The informant, who is son of the deceased heard cry of his father and rushed to the land and saw that appellant, holding a knife and the other two accused persons got up from the place where his father was lying and fled away towards the nearby forest. He raised hulla and some of the villagers gathered there. He informed the incident to them and went to Jharadihi Out Post and lodged F.I.R. being scribed by another person and the investigation commenced. During course of investigation police recovered the weapon of offence, i.e. knife on the information given by the appellant Raghu while in custody and also seized the wearing apparels of accused Raghu along with the knife and the wearing apparels of the deceased and sent those for chemical examination. The chemical examination report reveals presence of human blood of 'B' group on the wearing apparels of the deceased and in the napkin seized from the appellant Raghu. Human blood was also detected in the knife and banion of Raghu whose blood group could not be ascertained. After completion of investigation, charge-sheet was submitted against the appellant and two other accused persons U/s.302/34 I.P.C.

3. Defence took the plea of denial and false implication.

4. In order to prove its case prosecution examined 10 and proved 17 documents. P.W.1 is the informant, P.Ws.2, 3, 4 and 8 are the post occurrence witnesses, P.Ws.5 and 6 are police constables and witnesses to the seizure. P.W.7 is the O.I.C., Tiring Police Station who has partly investigated the case. P.W.9 is the I.O. and P.W.10 is the doctor who conducted post mortem examination over the dead body of the deceased. The seized knife is marked as M.O.I. Defence examined none.

5. Out of three accused persons, learned Addl. Sessions Judge has convicted only the appellant Raghu Tudu and acquitted other two accused persons Surdhan Tudu and Jagadish Tudu. In addition to the narration of eye witness – P.W.1, prosecution also relied upon discovery of weapon of offence, i.e. knife which was stained with blood and also presence of blood of group 'B' in the napkin of the appellant.

6. Learned counsel for the appellant submits that the version of the eye witness cannot be believed because of the major contradiction that has been brought out by the defence and for that the appeal should be allowed.

7. Heard the learned counsel for the parties and carefully gone through the record.

P.W.1 has stated that about a year back from the date of his deposition in the court, at about 7 A.M. his father had gone to plough their land which is near their house. Hearing cry of his father, he rushed near the spot and found the three accused persons were present there and his father was lying on the ground. The accused Raghu who happens to be his uncle was cutting the neck of his father by a knife. When he rushed to his father, they fled away from the spot. His father sustained bleeding injuries and died at the spot. He thereafter lodged a report before the O.I.C., Jharadihi Out Post and investigation of the case was taken up.

In his cross-examination this witness has denied the suggestion that neither he has mentioned in the F.I.R. nor stated before the investigating officer that when he went to the land he saw accused Raghu was cutting the neck of his father by a knife.

A cross reference to the evidence of P.W.9, the investigating officer has been confronted with the contradiction. At paragraph 6 P.W.9 has stated that P.W.1 has not stated before him that when he reached the land, he saw

accused Raghu was cutting the neck of his father by a knife. Further reference to the F.I.R. (Ext.1) further reveals that such assertion by the witness P.W.1 that accused Raghu was cutting the neck of the deceased does not find place. So this is a major contradiction which makes the witness wholly unreliable. In that view of the matter we cannot place reliance upon the evidence of P.W.1.

8. The second circumstance is that the weapon of offence has been discovered on the disclosure statement made by the appellant while in police custody. The seizure witnesses and the witnesses to disclosure statement have turned hostile to the prosecution. Moreover, the knife was sent for chemical examination and it was found to have been stained with human blood but the blood grouping could not be made. So in our opinion this circumstance will also not help the case of the prosecution, hence we discard this circumstance.

9. The last circumstance appear in this case is that the napkin of accused was stained with human blood of 'B' group. The seizure witnesses have turned hostile to the prosecution. Moreover the deceased and the accused were brothers and there is every possibility that the blood group of the accused may be group 'B'. So in such a situation it was the duty of prosecution to determine the blood group of the accused in order to obviate any reasonable chance of the accused staining his napkin with his own blood.

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

10. In the result, the appeal is allowed. The conviction and sentence of the appellant vide judgment dtd.27.03.2004 passed by the learned Addl. Sessions Judge, Rairangpur in S.T. Case No.14/64 of 2003 is hereby set aside. The appellant Raghu Tudu is acquitted of the charge. He be set at liberty forthwith if his detention is not required in any other case / cases. L.C.Rs. be returned forthwith.

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2020 (II) ILR - CUT- 434

DR. B.R.SARANGI, J.

W.P.(C) NO. 10919 OF 2016

BIDYUT MANJARI SETHI ……...Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ jurisdiction – Writ of certiorari – When and to whom can be issued? – Discussed.

***Halsbury's Laws of England**, (Fourth Edition) (2001 Re-issue) Vol.1(1) Para-123 have explained Certiorari (quashing order) is an order of the superior Court by which decisions of an inferior Court, tribunal, public authority or any other body of persons who are susceptible to judicial review may be quashed.The supervision of the superior Court exercised through writs or certiorari goes on two points. One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of certiorari could be demanded. Certiorari, under Article 226, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate Court is found to have acted (i) without jurisdiction by assuming jurisdiction where there exits none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice. In **Bharat Bank v. Employees of Bharat Bank**, AIR 1950 SC 188, the apex Court held that the object of the writ of certiorari is to keep the exercise of powers by inferior judicial and quasi-judicial tribunals within the limits of the jurisdiction assigned to them by law and to restrain from acting in excess of their authority. A Constitution Bench of seven learned judges in **Hari Vishnu v. Ahmad Ishaque,** AIR 1955 SC 223, laid down the following propositions as well settled and beyond dispute:*

"(1) Certiorari will be issued 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) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an 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. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well a right, and when the legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior Court were to rehear the case on the evidence, and substitute its own findings in certiorari."

In ***Nagendra Nath Bora v. Commr. of Hills Division,*** *AIR 1958 SC 398, 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 through of law, will not be sufficient to attract this extraordinary jurisdiction. In* ***State of Andhra v. Chitra Venkata Rao****, AIR 1975 SC 2151 : (1975) 2 SCC 557, the apex Court held that since the function of the superior Court in a proceeding for certiorari is supervisory and not appellate, the superior Court will not review in intra vires findings of the inferior tribunal, even if they are erroneous. In* ***Surya Dev Rai v. Ram Chander Rai****, (2003) 6 SCC 675 : AIR 2003 SC 3044, relying upon* ***T.C. Basappa v. T. Nagappa****, AIR 1954 SC 440;* ***Province of Bombay v. Khushaldas S. Advani,*** *AIR 1950 SC 222 and* ***Dwarka Nath v. ITO****, AIR 1996 SC 81, the apex Court held that a writ of certiorari is issued against the acts or proceedings of a judicial or quasi-judicial body conferred with power to determine questions affecting the rights of a subjects and obliged to act judicially. Since the writ of certiorari is directed against the acts, order or proceedings of the subordinate Courts, it can issue even if the lis is between two private parties.*

Case Laws Relied on and Referred to :-

1. AIR 1950 SC 188 : Bharat Bank .Vs. Employees of Bharat Bank.
2. AIR 1955 SC 223 : Hari Vishnu .Vs. Ahmad Ishaque.
3. AIR 1958 SC 398 : Nagendra Nath Bora .Vs. Commr. of Hills Division.
4. AIR 1975 SC 2151 : (1975) 2 SCC 557 : State of Andhra .Vs. Chitra Venkata Rao.
5. (2003) 6 SCC 675 : AIR 2003 SC 3044 : Surya Dev Rai .Vs. Ram Chander Rai.
6. AIR 1954 SC 440 : T.C. Basappa .Vs. T. Nagappa.
7. AIR 1950 SC 222 : Province of Bombay .Vs. Khushaldas S. Advani.
8. AIR 1996 SC 81 : Dwarka Nath .Vs. ITO.

For Petitioner : M/s. (Dr.) J.K. Lenka & P.K. Behera

For Opp. Parties : Mr. B.Senapati, Addl. Govt. Adv.
M/s. D.N. Mohapatra, (Smt.) I. Mohanty,
P.K. Nayak,S.N. Dash, P.K. Pasayat
& Pramaya Mohanty.

JUDGMENT Date of Hearing : 07.01.2020 : Date of Judgment:14.01.2020

DR. B.R. SARANGI, J.

The petitioner, by way of this writ petition, seeks to quash order dated 04.06.2016 at Annexure-15 passed by the Sub-Collector, Puri in AWW Misc. Appeal Case No. 88/2010 and declare that she is entitled to be appointed as Anganwadi Worker in respect of Alipada-2 Anganwadi Centre, as she belonged to ward no. 15 and had secured highest marks, with all consequential benefits.

2. The factual matrix of the case, in hand, is that the Child Development Project Officer (CDPO), Integrated Child Development Services (ICDS) Project, Kanas issued an advertisement on 26.03.2010 inviting applications from the eligible candidates for filling up of the post of Anganwadi Worker in additional Anganwadi Centre, namely, Alipada-2 Anganwadi Centre of ward no. 15 comprising from house of Antaryami Parida to house of Bhagirathi Parida, along with other Anganwadi Centers of Badal Grama Panchayat. Pursuant thereto, for Alipada-2 Anganwadi Center, the petitioner and opposite party no.7- Sima Sahoo applied. The list of eligible candidates was published on 16.04.2010 in Annexure-2 inviting objections. The list so prepared was made final, as no objection was received. Pursuant to such eligibility list prepared by the authority in Annexure-2 dated 16.04.2010, opposite party no.7 was selected.

2.1 Aggrieved by the above selection, the petitioner preferred AWW Misc. Appeal Case No. 88/2010 before the Sub-Collector, Puri. During its pendency, alleging inaction of the authority in disposal of the said appeal, the petitioner filed W.P.(C) No. 8270 of 2010, which was disposed of vide order dated 11.05.2010 directing the Sub-Collector, Puri to decide the grievance of the petitioner on merit. In pursuance thereof, the Sub-Collector rejected AWW Misc. Appeal No. 88 of 2010, vide order dated 16.09.2014, on the basis of the report of the Child Development Project Officer dated 26.07.2013 and joint report dated 01.03.2014 of the Tahasildar, Kanas and BDO, Kanas, by holding that the residence of the petitioner does not come under the operational area of Alipada-2 Anganwadi Centre. Consequentially, engagement order was issued in favour of opposite party no.7 on 15.10.2014.

2.2 Challenging order dated 16.09.2014 passed by the Sub-Collector, Puri in Annexure-5, the petitioner filed W.P.(C) No. 19469 of 2014 and this Court, vide order dated 02.11.2015, by holding that though in the joint enquiry report (as annexed to the counter affidavit filed on behalf of the opposite party-State) reference has been made regarding residential status of the petitioner, but no reference has been made regarding residential status of opposite party no.7, remitted back the matter to opposite party no.4-Sub-Collector, Puri to pass fresh order by adjudicating the issue relating to the residential status of the petitioner vis-à-vis opposite party no.7 by calling for a fresh report from the District Social Welfare, Puri, who would submit the same after proper verification of their residential status and, if required, by conducting spot verification, and to complete the entire exercise within six weeks. On being called upon, the District Social Welfare, Puri submitted a report stating that neither the house of the petitioner nor opposite party no.7 is coming under the jurisdiction of service area of Alipada-2 Anganwadi Centre, i.e. Ward No. 15, as per the notification for engagement of Anganwadi Worker and service area approved in BLCC meeting held on 31.12.2009. On the basis of such report, the order impugned was passed that the claim of the petitioner is not taken into consideration and the same is rejected as she does not come under Anganwadi Centre service area of ward no. 15 as per notification, and that the engagement order issued in favour of opposite party no.7 is set aside as she does not come under the service area of Alipada-2 Anganwadi Centre, and accordingly direction was issued to CDPO, Kanas to issue disengagement order in favour of opposite partyno.7 and report compliance. Hence this application.

3. Dr. J.K. Lenka, learned counsel for the petitioner contended that the petitioner belonged to ward no. 15 of Alipada village and her serial number is 255 and house number is 79, whereas opposite party no.7 married to one Prasanta Kumar Balilyar Singh, who belonged to ward no. 14 having house no. 24 and serial no. 127. Since petitioner belonged to ward no. 15, she is eligible to be considered for Alipada-2 Anganwadi Centre, as because her house exists within the operational area. He further contended that when the petitioner preferred an appeal challenging the selection of opposite party no.7 in AWW Misc. Appeal No. 88 of 2010 before the Sub-Collector, Puri, the CDPO submitted a report on 26.07.2013, enclosing the joint enquiry report prepared by the Tahasildar, Kanas and BDO, Kanas on 01.03.2014, stating therein that opposite party no.7 belonged to the service area but the petitioner does not, and that though the petitioner secured highest mark than opposite

party no.7, her candidature was rejected due to the fact that she is an outsider, and that since opposite party no.7 is the only candidate to be selected for the Alipada-2 Anganwadi Centre, she was selected by the authority. Such report is contrary to the advertisement issued by the CDPO, which indicates that Alipada-2 Anganwadi Centre is in ward no. 15, which comprises from the house of Antaryami Parida to that of Bhagirathi Parida. Therefore, on the basis of such report, when the Sub-Collector, Puri decided AWW Misc. Appeal No. 88 of 2010, vide order dated 16.09.2014, the same was challenged before this Court in W.P.(C) No. 19469 of 2014, which was disposed of directing the District Social Welfare, Puri to submit a fresh report by causing a spot enquiry relating to residential status of the petitioner vis-à-vis opposite party no.7. Accordingly a report was submitted by the District Social Welfare, Puri stating that house of the petitioner does not come under service area of Alipada-2 Anganwadi Centre and on the other hand the house of opposite party no.7 comes under Ward No. 14. Hence, the houses of both the candidates are not coming under the jurisdiction of service area of Alipada-2 Anganwadi Centre i.e. ward no. 15 as per the notification for engagement of Anganwadi Worker. It is contended that such report of the District Welfare Officer is contrary to the advertisement. On spot verification it is found that as per AWW engagement notification and BLCC proceedings the service area of Alipada-2 Anganwadi Centre comprises from "House of Antaryami Parida to house of Bhagirathi Parida of Ward No. 15", but it is not categorically mentioned with regard to father's name of the candidates. As per the BLCC proceeding and notification for engagement of Anganwadi Worker in Alipada-2 Anganwadi Centre, Sri Antaryami Parida, S/o Hata Parida and Bhagirathi Parida, S/o Antaryami Parida belonged to one family of ward no. 15, and another Bhagirathi Parida, S/o- Nimai Parida of village Alipada belonged to ward no. 14. Thereby, in respect of both the applicants, the finding of the Sub-Collector in the impugned order cannot sustain and is liable to be set aside.

4. Mr. B. Senapati, learned Addl. Government Advocate for the State contended that in pursuance of direction given by this Court, the District Social Welfare, Puri furnished a report and on that basis it was found by the Sub-Collector that neither the petitioner nor opposite party no.7 belonged to Alipada-2 Anganwadi Centre area, and accordingly rejected the appeal preferred by the petitioner and set aside the engagement order issued in favour of opposite party no.7, vide impugned order dated 04.06.2016 in Annexure-15. Thereby, no illegality or irregularity has been committed by the authority so as to cause interference of this Court in this proceeding.

5. Mr. P.K. Nayak, learned counsel for opposite party no.7 contended that pursuant to advertisement issued, opposite party no.7 and the petitioner applied for the post of Anganwadi Worker in respect of Alipada-2 Anganwadi Centre. On receipt of two applications, a list of applicants was published by the CDPO inviting objections. As no objections were received, the said list was made final, the authority proceeded with the process of selection and found that the petitioner does not belong to Anganwadi Centre area. Hence, opposite party no.7, being the only eligible candidate, was issued with engagement order. Thereby, the order impugned disengaging opposite party no.7 as Anganwadi Worker, on the ground that she does not belong to Anganwadi Centre area, cannot sustain in the eye of law. Therefore, opposite party no.7 seeks for quashing of the order dated 04.06.2016 in Annexure-15 by way of filing a separate writ petition bearing W.P.(C) No. 11361 of 2016, which has been heard along with this application.

6. This Court heard Dr. J.K. Lenka, learned counsel for the petitioner; Mr. B. Senapati, learned Addl. Government Advocate appearing for the State; and Mr. P.K. Nayak, learned counsel for opposite party no.7; and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. In course of hearing, only question boils down for consideration is whether both the candidates who had applied for the post of Anganwadi Worker in respect of Alipada-2 Anganwadi Centre belonged to the said Anganwadi Centre area as per the guidelines issued by the Government so as to be eligible for consideration for such engagement.

8. As per the advertisement issued in Annexure-1, so far as Alipada-2 Anganwadi Centre is concerned, it has been specifically mentioned that ward no. 15 starting from the house of Antaryami Parida to that of Bhagirathi Parida. In the said advertisement the father's name of the above persons have not been indicated. Admittedly, Alipada-2 Anganwadi Centre has been newly carved out. If the Anganwadi Centre area will be considered from the house of Antaryami Parida, S/o- Hata Parida to that of Bhagirathi Parida, S/o- Antaryami Parida, then the Anganwadi Centre area will be confined to one household having population of 4(four) in number belonging to ward no. 15 as per Grama Panchayat Voter List-2012 which does not fulfill population criteria for creation of an Anganwadi Centre. On perusal of th e Grama

Panchayt Voter List-2012, it is revealed that newly created Anganwadi Centre, i.e. Alipada-2 Anganwadi Centre satisfies population criteria, if Anganwadi Centre area stretches from house of Antaryami Parida, S/o- Hata Parida of ward no. 15 to that of Bhagirathi Parida, S/o- Nimai Parida of ward no. 14, as the population is more than four hundred. In the report of the District Social Welfare, Puri, which has been submitted in compliance of order dated 02.11.2015 passed in W.P.(C) No. 16469 of 2014 after causing spot verification, it has been mentioned as follows:

> *"As instructed by Sub-Collector, Puri vide memo no. 17435 dtd.30.11.2015, I visited Alipada-II AWC along with Smt. Aruna Kar, CDPO, Kanas & Babita Swain concerned sector Supervisor.*
>
> *On spot verification it is found that as per AWW engagement notification & BLCC proceedings the service area of Alipada-II is "House of Antaryami Parida to house of Bhagirathi Parida of Ward No. 15". But it is not categorically mentioned with father's name of the persons mentioned above. As noted in the BLCC & notification for engagement of AWW in Alipada-II, Sri Antaryami Parida, S/o- Hata Parida & Bhagirathi Parida, S/o- Antaryami Parida belongs to one family of Ward No. 15. Another Bhagirathi Parida, S/o- Nimei Parida of village Alipada belongs to Ward No. 14.*
>
> *The house of Bidyutmanjari Sethi does not come under service area of Alipa-II AWC and on the other hand the house of Sima Sahoo @ Baliarsing, W/o- Prasanta Baliarsingh comes under Ward No. 14. Hence, the house of both candidates i.e. Sima Sahoo & Bidyutmanjari Sethi are not coming under the jurisdiction of service area of Alipada-II AWC i.e. Ward No. 15 as per notification for engagement of AWW & service area approved in BLCC meeting held on 31.12.2009.*
>
> *The house of Sima Sahoo @ Baliarsingh, W/o- Prasanta Baliarsingh Opp.Party No.4 is within the area " house of Antaryami Parida, S/o- Hata Parida of Ward No. 15 to Bhagirathi Parida, S/o- Nimai Parida of Ward No. 14".*

In view of such report furnished by the District Social Welfare, Puri, the Sub-Collector, Puri has come to a definite finding that there was apparent error in carving out Anganwadi Centre area of Alipada-2 Anganwadi Centre, without mentioning father's name of Antaryami Parida and Bhagirathi Parida, and thereby held that notification made as per the BLCC proceeding in respect of Alipada-2 Anganwadi centre area is not sacrosanct rather defective which needs to be corrected after convening BLCC meeting afresh and the CDPO, Kanas was directed to convene BLCC meeting afresh within 15 days of receipt of that order in respect of Anganwadi Centre, Alipada-2 for determination of corrected Anganwadi Centre area. Such finding of the

Sub-Collector cannot and could not be disturbed, as the same is based on the report of the fact finding authority and on the basis of spot verification conducted by the competent authority in compliance of direction given by this Court.

9. ***Halsbury's Laws of England***, (Fourth Edition) (2001 Re-issue) Vol.1(1) Para-123 have explained Certiorari (quashing order) is an order of the superior Court by which decisions of an inferior Court, tribunal, public authority or any other body of persons who are susceptible to judicial review may be quashed.

The supervision of the superior Court exercised through writs or certiorari goes on two points. One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of certiorari could be demanded.

10. Certiorari, under Article 226, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate Court is found to have acted (i) without jurisdiction by assuming jurisdiction where there exits none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

11. In ***Bharat Bank v. Employees of Bharat Bank***, AIR 1950 SC 188, the apex Court held that the object of the writ of certiorari is to keep the exercise of powers by inferior judicial and quasi-judicial tribunals within the limits of the jurisdiction assigned to them by law and to restrain from acting in excess of their authority.

12. A Constitution Bench of seven learned judges in ***Hari Vishnu v. Ahmad Ishaque,*** AIR 1955 SC 223, laid down the following propositions as well settled and beyond dispute:

> *"(1) Certiorari will be issued 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) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an 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. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well a right, and when the legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior Court were to rehear the case on the evidence, and substitute its own findings in certiorari."

13. In ***Nagendra Nath Bora v. Commr. of Hills Division,*** AIR 1958 SC 398, 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 through of law, will not be sufficient to attract this extraordinary jurisdiction.

14. In ***State of Andhra v. Chitra Venkata Rao***, AIR 1975 SC 2151 : (1975) 2 SCC 557, the apex Court held that since the function of the superior Court in a proceeding for certiorari is supervisory and not appellate, the superior Court will not review in intra vires findings of the inferior tribunal, even if they are erroneous.

15. In ***Surya Dev Rai v. Ram Chander Rai***, (2003) 6 SCC 675 : AIR 2003 SC 3044, relying upon ***T.C. Basappa v. T. Nagappa***, AIR 1954 SC 440; ***Province of Bombay v. Khushaldas S. Advani,*** AIR 1950 SC 222 and ***Dwarka Nath v. ITO***, AIR 1996 SC 81, the apex Court held that a writ of certiorari is issued against the acts or proceedings of a judicial or quasi-judicial body conferred with power to determine questions affecting the rights of a subjects and obliged to act judicially. Since the writ of certiorari is directed against the acts, order or proceedings of the subordinate Courts, it can issue even if the lis is between two private parties.

16. Keeping in view the propositions of law, as discussed above, and applying the same to the present context, this Court finds that in the instant case the Sub-Collector in the impugned order dated 04.06.2016, having come to a definite conclusion that there was apparent error in carving out

Anganwadi Centre area of Alipada-2 Anganwadi Centre, without mentioning father's name of Antaryami Parida and Bhagirathi Parida, and that the notification made as per the BLCC proceeding in respect of Alipada-2 Anganwadi Centre area was not sacrosanct rather defective which needed to be corrected after convening BLCC meeting afresh, directed the CDPO, Kanas to convene BLCC meeting afresh within 15 days of receipt of that order for determination of the corrected Anganwadi Centre area and, consequentially, taking into consideration report of the District Social Welfare, Puri, the petitioner having not belonged to Anganwadi Centre Area of ward no.15 as per notification, rejected her claim, and simultaneously set aside the engagement order issued in favour of opposite partyno.7 and directed to disengage her forthwith, as she does not come under the service area of Alipada-2 Anganwadi Centre of ward no.15. Since both the petitioner and opposite party no.7 do not belong to Alipada-2 Anganwadi Centre area coming under ward no. 15, the Sub-Collector is justified in passing the order impugned by holding that both are not eligible for appointment of Anganwadi Worker in respect of Alipada-2 Anganwadi Centre of ward no.15. Thereby, there is no illegality or irregularity committed by the Sub-Collector, Puri so as to cause interference of this Court by way of this writ application.

17. The writ petition, having no merit, is hereby dismissed. No order to costs.

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DR. B. R. SARANGI, J.

W.P.(C) NO. 15884 OF 2015

REGIONAL TRANSPORT OFFICER, DHENKANAL ……Petitioner

.V.

ARUN KUMAR BEHERA & ORS. ……Opp. Parties

(A) THE CONSUMER PROTECTION ACT, 1986 – Sections 2(b), (c), (d), (g), (o) and Section 11 – Provisions under – Definition of 'Consumer' – Held, in order to satisfy the requirement of definition of "Consumer" as contemplated under Consumer Protection Act, 1986, there must be transaction for consideration under Section 2(1)(d)(i) of

the said Act. – The definition also contemplates pre-expenses of a completed transaction of a sale and purchase – Therefore, the prime consideration is whether the petitioner is a "consumer" within the meaning of Section 2(1)(d)(i) of the Consumer Protection Act so as to attract the provisions of the said Act, otherwise, the Act itself is not applicable – Consequence thereof, any order passed thereof is nullity in the eye of law – In view of the statutory provisions mentioned above, it is made clear that the Act is made to deal with the rights of the consumers wherein good or "services" have been defined under the said Act – Therefore, the forum created under the Consumer Protection Act cannot deal with the issue concerning the discharge of statutory functions by the statutory authorities.

(B) THE CONSUMER PROTECTION ACT, 1986 – Section 12 – Application claiming refund of road tax on the ground of non-plying of bus – Whether maintainable? – Held, No – Reasons indicated.

> *"Non-plying of bus, in spite of valid permit is a matter under the Motor Vehicle Act, 1988 and Rules framed there under. Granting of permit is a statutory function conferred upon the statutory authority under the said Act and Rules framed there under. Consequentially, if any tax has been deposited, in that case, the permit holder is obliged under law to deposit the same. Therefore, any person aggrieved by any omission or commission on the part of the permit granting authority can prefer appeal/revision before the specified authority under the statute. The M.V. Act is a self contained code and provides appealable and revisable forums under the statute. If for any reason, the petitioner could not be able to ply the vehicle, after having deposited tax for that purpose, and claimed for refund of the same, he has to approach the competent forum under the M.V. Act and Rules framed there under. The permit granting authority is not a service provider and, therefore, the person, who makes an application to the said authority for permit, is not a consumer. Refund of tax is governed by the provisions of Orissa Motor Vehicle Taxation Act, 1975 and Orissa Motor Vehicle Taxation Rules, 1976. Opposite party no.1 paid the tax in view of the statutory provisions governing the field. As such, granting of permit and collection of tax from motor vehicle are all statutory in nature and the said functions are not discharged for consideration. In view of the facts and circumstances, as well as proposition of law, as discussed above, this Court is of the considered view that the impugned order passed by the Consumer Disputes Redressal Forum, Dhenkanal in Consumer Complaint No.5 of 2008 under Annexure-2 dated 30.06.2009 and consequential initiation of proceeding in CD (Execution) No.14 of 2010 in Annexure-3 arising out of Consumer Complaint No.05 of 2008 cannot sustain in the eye of law, as the same are without jurisdiction and nullity. Thereby, the same are liable to be quashed and are hereby quashed."* *(Para 10)*

Case Laws Relied on and Referred to :-

1. AIR 1996 SC 839 : S.P. Goel .Vs. Collector of Stamps, Delhi.
2. (2013) 10 SCC 136 : Jagmittar Sain Bhagat .Vs. Director, Health Services, Haryana.
3. (2019) 9 SCC 83 : Punjab Urban Planning and Development Authority .Vs. Vidya Chetal
4. 2015 (II) OLR 963 : Pravat Kumar Mishra .Vs. State of Orissa.
5. 2009 AIR SCW 398 : Committee of Management .Vs. Vice Chencellor.
6. AIR 1999 SC 22 : Whirlpool Corporation .Vs. Registrar of Trade Marks, Mumbai.
7. (2003) 7 SCC 546 :Guruvayoor Devaswom managing Committee .Vs. C.K. Rajan.
8. 2015 (II) OLR 963 : Pravat Kumar Mishra .Vs. State of Orissa,

For Petitioner : M/s. B.K. Sharma & A.U. Senapati.

For Opp.Parties : None

JUDGMENT Date of Hearing & Judgment : 05.02.2020

DR. B.R.SARANGI, J.

The petitioner, being opposite party no.2 before District Consumer Disputes Redressal Forum, Dhenkanal, has filed this writ petition to quash the order dated 30.06.2009 passed in Consumer Complaint No.5 of 2008 by the District Consumer Disputes Redressal Forum under Annexure-2, by which direction has been given to refund the road tax which was collected thrice from opposite party no.1 for the same quarter. It is further directed to pay compensation of Rs.30,000/- to opposite party no.1 within 30 days from the date of order.

2. The factual matrix of the case, in hand, is that opposite party no.1, who was the complainant before the District Consumer Disputes Redressal Forum, was the registered owner of a Mini Bus having registration no.OR-06 B 1271 and was granted permit by State Transport Authority, Odisha, Cutack to ply the bus. The said permit was valid for 119 days starting from 16.01.2005 to 14.05.2005. But, opposite party no.1 could not ply his vehicle because of strong opposition from the existing and/or old permit holders of Dhenkanal Bus Owners Association on the route specified in the permit. Opposite party no.1 brought the said fact to the notice of the Collector, Superintendent of Police and RTO, Dhenkanal and because of intervention of the Superintendent of Police, at a belated stage, he could run the bus only for a period of 15 days out of the total period of 119 days. Before expiry of the road permit, opposite party no.1 applied for fresh permit before the RTO, Dhenkanal, as the bus in question was having sitting capacity of less than 25

persons. It is alleged that due to negligence on the part of the petitioner, opposite party no.1 could not ply his vehicle. The deficiency of service was brought to the notice of the District Consumer Disputes Redressal Forum, who in turn, vide order dated 30.06.2009 in Consumer Complaint Case No.05 of 2008, directed the petitioner to refund the road tax, which had been collected thrice from opposite party no.1 for the same quarter, and awarded compensation of Rs.30,000/- in favour of opposite party no.1 to be paid within 30 days from the date of order. Hence this application.

3. Mr. B.K. Sharma, learned counsel for the petitioner vehemently contended that the District Consumer Disputes Redressal Forum has no jurisdiction to entertain the application filed by opposite party no.1 alleging deficiency of service by the petitioner, and consequential award of compensation in the order impugned dated 30.06.2009 passed by the District Consumer Disputes Redressal Forum in Consumer Complaint No.5 of 2008 under Annexure-2 cannot sustain in the eye of law, particularly when the same is nullity and goes to the root of the matter. It is further contended that the impugned order dated 30.06.2009 with regard to refund of tax also cannot sustain in the eye of law, as the same is without jurisdiction and contrary to the statute governing the field.

To substantiate his contention, learned counsel for the petitioner has relied upon the judgments of the apex Court in the cases of ***S.P. Goel v. Collector of Stamps, Delhi***, AIR 1996 SC 839; ***Jagmittar Sain Bhagat v. Director, Health Services, Haryana***, (2013) 10 SCC 136; ***Punjab Urban Planning and Development Authority v. Vidya Chetal***, (2019) 9 SCC 83; as well as of this Court in ***Pravat Kumar Mishra v. State of Orissa***, 2015 (II) OLR 963.

4. While entertaining this application, question of maintainability was raised and this Court on 15.09.2015 passed order to the following effect:-

> *"Heard Mr. B. K. Sharma, learned counsel for the petitioner.*
>
> *The petitioner has filed this application assailing the order dated 30.06.2009 passed by the District Consumer Dispute Redressal Forum, Dhenkanal in Consumer Complaint No.5/2008 un der Annexure-2.*
>
> *Mr. B.K. Sharma, learned counsel for the petitioner submits that the petitioner received the notice of Consumer Dispute Execution Case No.14/2010 wherein it was directed to appear on 30.07.2015. He raises a preliminary question with regard*

to the maintainability of the Cons umer Complaint case. He submits that the District Consumer Disputes Redressal forum, Dhenkanal has no jurisdiction to entertain the application under Motor Vehicle Act in view of the judgm ent of the apex Court in S.P. Goel v. Collector of Stamps, Delhi, AIR 1996 SC 839 and Jagmitta r Sain Bhagat and others v. Director, Health Services, Haryana and others, (2013) 10 SCC 136. It is stated that the question of law can be raised at any point of time. If any order has bee n passed in Consumer Dispute Case in 2009 and against the order Execution case is pending in that view of the matter the question of jurisdiction can also be raised at any stage of the proceeding.

Issue notice to opposite party no.1 by Registered Post with A.D., requisites for which shall be filed by Monday (21.09.2015) fixing a short returnable date.

Misc. Case No.15226 of 2015

Issue notice and above.
Accept one set of process fee.

As an interim measure, there shall be stay of further proceeding in Consumer Dispute E xecution Case No.14/2010 pending before the District Consumer Disputes Redressal Forum, Dhenka nal till 14.10.2015. Urgent certified copy of this order be granted on proper application."

5. In compliance of the aforesaid order, the petitioner filed requisites for issuance of notice to opposite party no.1 by registered post with A.D., pursuant to which notice was issued to opposite party no.1 on 25.09.2015 fixing 14.10.2015 as date of appearance. As such, no notice was issued to opposite parties no.2 and 3, as they are proforma opposite parties in the matter. On 14.10.2015, though A.D. was not returned from opposite party no.1, this Court passed following orders:-

"Call this matter after Puja Holidays as prayed for.
Interim order passed earlier shall continue till 12.11.2015.

Registry to issue reminder to the postal authorities for obtaining A.D. from Opposite party no.1 in the meanwhile."

In the meantime, A.D. was returned from opposite party no.1 after valid service. Thereafter, this Court on 12.11.2015 passed order to the following effect:-

"Though A.D. has been returned from opposite party no.1 after valid service, none has entered appearance on his behalf. In any case, another opportunity is given to opposite party no.1 to participate in the proceeding. Put up this matter two weeks after. Interim order passed earlier shall continue till 26.11.2015."

Again on 26.11.2015, this Court passed order to the following effect:-

"W.P.(C). No. 15884 of 2015 26.11.2015 As prayed for on behalf of Mr. B.K. Sharma, learned counsel for the petitioner, call this matter one week after. Interim order passed earlier shall continue till 11.12.2015."

As Vakalatnama on behalf of opposite party no.1 was not filed, the interim order passed earlier was continued from time to time, and when the matter was listed on 11.12.2015, this Court passed order to the following effect:-

"This Court by order dated 15.09.2015 issued notice to opposite party no.1 by Registered Post with A.D. Though A.D. was back after valid service on 15.10.2015, none entered appearance for opposite party no.1 on 12.11.2015 and on the same day another opportunity was given to opposite party no.1 to participate in the proceeding. In spite of such opportunity, today when the matter is called, none also entered appearance for opposite party no.1. Mr. B.K. Sharma, learned Standing Counsel for the petitioner submits that perhaps petitioner no.1 is not appearing in view of the pleadings made in paragraph-M of the writ petition . Therefore, instead of awaiting the appearance opposite party no.1, the matter should be decided in accordance with law. Call this matter three weeks after. Interim order passed earlier shall continue till 13.01.2016."

In spite of opportunity being given to opposite party no.1, since nobody entered appearance, when the matter was listed on 13.01.2016, this Court passed order to the following effect:-

"In spite opportunity being given to opposite party no.1, he is not appearing in the matter till date. Mr. B.K. Sharma, learned Standing Counsel for the Transport Department states that h e will take fresh steps for service of notice on opposite party no.1 through substituted service of notice under Order 5, Rule-20 within a week, so that notice can be made sufficient as against opposite party no.1. He is permitted to do so. Interim order passed earlier shall continue till 03.02.2016."

Thereafter, when the matter was listed on 03.02.2016, this Court passed order to the following effect:-

"In compliance with the order dated 13.01.2016 Mr. B.K. Sharma, learned counsel for the petitioner files the paper publication in daily Samaj in Court today. On perusal of the same, it appears that the date has been fixed today. The said paper publication be kept on record. Call this matter two weeks after. Interim order passed earlier shall continue till 04.03.2016."

6. When the matter was listed today, i.e., 05.02.2020, in spite of notice being made sufficient as against opposite party no.1 by registered post with A.D. and thereafter by issuing paper publication under Order 5 Rule-20 of CPC, since none has entered appearance and in the meantime more than five

years have passed, this Court, applying the principles of doctrine of non-traverse, proceeded with the hearing of the matter on the basis of pleadings available on record.

7. The crux of the matter, which is to be considered by this Court is whether the District Consumer Disputes Redressal Forum has jurisdiction to pass order on the basis of the complaint lodged by opposite party no.1 before it under Section 12 of the Consumer Protection Act, 1986, which has been annexed as Annexure-1 to the writ petition, and on that basis the order dated 30.06.2009 in Consumer Complaint No.5 of 2008 and consequential order in C.D. Execution Case No.14 of 2010 can be passed or not.

8. For just and proper adjudication of the case, Section 2(b), (c), (d), (g), (o) and Section 11 of Consumer Protection Act, 1986 are extracted hereunder:

> *"2.(b) "**complainant**" means-*
>
> *(i) a consumer; or*
>
> *(ii) any voluntary consumer association registered under the Companies Act,1956 (1 of 1956) or under any other law for the time being in force; or*
>
> *(iii) the Central Government or any State Government;*
>
> *(iv) one or more consumers, where there are numerous consumers having the same interest;*
>
> *(v) in case of death of a consumer, his legal heir or representative, who or which makes a complaint;*
>
> *(c) "**complaint**" means any allegation in writing made by a complainant that*
>
> *(i) an unfair trade practice or a restrictive trade practice has been adopted by (any trader or service provider);*
>
> *(ii) the goods bought by him or agreed to be bought by him suffer from one or more defects;*
>
> *(iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;*
>
> *(iv) a trader or the service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price-*
>
> *(a) Fixed by or under any law for the time being in force;*
>
> *(b) displayed on the goods or any package containing such goods;*
>
> *(c) displayed on the price list exhibited by him by or under any law for the time being in force;*

(d) agreed between the parties;

(v) goods which will be hazardous to life and safety when used, are being-offered for sale to the public-

(A) in contravention of any standard relating to safety of such goods as required to be complied with, by or under any law for the time being in force;

(B) if the trader could have known with due diligence that the goods so offered are unsafe to the public;

(vi) services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by the service provider which such person could have known with due diligence to be injurious to life and safety; with a view to obtaining any relief provided by or under this Act; .

*(d) "**consumer**" means any person who-*

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person; (but does not include a person who avails of such services of any commercial purpose;

xxx xxx xxx

*(g) "**deficiency**" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;*

*(0) "**service**" means service of any description which is made available to potential (users and includes the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;*

xxx xxx xxx

*11. **Jurisdiction of the District Forum**.--(I) Subject to the other provisions of this Act, the District Forum shall have jurisdiction to entertain complaints where the*

value of the goods or services and the compensation, if any, claimed does not exceed rupees twenty lakhs.

(2) A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction,-

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain, or

(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office, or personally works for gain, provided that in such case either the permission of the District Forum is given, or the opposite parties who do not reside, or carry on business or have a branch office, or personally work for gain, as the case may be, acquiesce in such institution; or
(c) the cause of action, wholly or in part, arises."

9. In order to satisfy the requirement of definition of "Consumer" as contemplated under Consumer Protection Act, 1986, there must be transaction for consideration under Section 2(1)(d)(i) of the said Act. The definition also contemplates pre-expenses of a completed transaction of a sale and purchase. Therefore, the prime consideration is whether the petitioner is a "consumer" within the meaning of Section 2(1)(d)(i) of the Consumer Protection Act so as to attract the provisions of the said Act, otherwise, the Act itself is not applicable. Consequence thereof, any order passed thereof is nullity in the eye of law. In view of the statutory provisions mentioned above, it is made clear that the Act is made to deal with the rights of the consumers wherein good or "services" have been defined under the said Act. Therefore, the forum created under the Consumer Protection Act cannot deal with the issue concerning the discharge of statutory functions by the statutory authorities.

10. Non-plying of bus, in spite of valid permit is a matter under the Motor Vehicle Act, 1988 and Rules framed thereunder. Granting of permit is a statutory function conferred upon the statutory authority under the said Act and Rules framed thereunder. Consequentially, if any tax has been deposited, in that case, the permit holder is obliged under law to deposit the same. Therefore, any person aggrieved by any omission or commission on the part of the permit granting authority can prefer appeal/revision before the specified authority under the statute. The M.V. Act is a self contained code and provides appealable and revisable forums under the statute. If for any reason, the petitioner could not be able to ply the vehicle, after having

deposited tax for that purpose, and claimed for refund of the same, he has to approach the competent forum under the M.V. Act and Rules framed thereunder. The permit granting authority is not a service provider and, therefore, the person, who makes an application to the said authority for permit, is not a consumer. Refund of tax is governed by the provisions of Orissa Motor Vehicle Taxation Act, 1975 and Orissa Motor Vehicle Taxation Rules, 1976. Opposite party no.1 paid the tax in view of the statutory provisions governing the field. As such, granting of permit and collection of tax from motor vehicle are all statutory in nature and the said functions are not discharged for consideration.

11. In the case at hand, the existing operators filed Misc. Case No.24 of 2005 before the State Transport Authority regarding timing allotted to opposite party no.1. Thereafter, the State Transport Authority, after hearing the parties, issued NOC for issuance of permit to opposite party no.1. Then, opposite party no.1 applied for temporary permit before the petitioner, which was granted for 119 days starting from 16.01.2005 to 14.05.2005. If the statutory authority has acted in consonance with the provisions applicable to such authority, it cannot be said that the same will come within the meaning of the provisions contained under the provisions of Consumer Protection Act, 1986, nor can it be said that there was deficiency of service and, therefore, the Act is applicable to opposite party no.1.

12. As it appears, the Consumer Disputes Redressal Forum, Dhenkanal has lost sight of the provisions contained under Section 3 of the Consumer Protection Act, which is extracted hereunder:-

> *"3.* ***Act not in derogation of any other law****.- The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force."*

In view of the aforesaid provisions, it appears that Consumer Disputes Redressal Forum, Dhenkanal has passed the order in derogation of the provisions contained under the Motor Vehicle Act and Rules framed thereunder.

13. In the case of ***S.P. Goel*** mentioned supra, the apex Court considered the provisions contained under the Registration Act and Stamp Act vis-à-vis Consumer Protection Act and, while construing the provisions contained under Section 2(1)(d)(i) of the Consumer Protection Act, held that the person presenting documents for registration is not the consumer within the ambit of

the said Act. It is further held that the officers appointed under Registration Act and Stamp Act do not render any service within the meaning of the Act because they perform statutory duties which are at least quasi-judicial, consequentially, the Consumer Protection Act is not applicable to the authorities under the Registration Act and Stamp Act.

14. In ***Jagmittar Sain Bhagat*** mentioned supra, the apex Court held that transaction with State or its instrumentalities, the government servant is not covered by definition of "consumer" within the meaning of Section 2(1)(d), and, therefore, the application before the Consumer Disputes Redressal Forum is not maintainable. Accordingly, their Lordships further held that jurisdiction cannot be conferred upon a court or tribunal by acquiescence or waiver, if it otherwise does not have jurisdiction and the object of Consumer Protection Act, 1986 is to provide better protection of interest of consumers relating to goods, unfair trade practices, redressal against unscrupulous exploitation, right to consumer education etc.

15. In ***Vidya Chetal*** mentioned supra, the apex Court in paragraph-21 held as follows:

> "*21. At the cost of repetition, we may note that those exactions, like tax and cess, levied as a part of common burden or for a specific purpose, generally may not be amenable to the jurisdiction of the consumer forum. However, those statutory fees, levied in lieu of service provided, may in the usual course be subject matter of consumer forum's jurisdiction provided that there is a "deficiency in service", etc.*"

In view of the law discussed above, this Court is of the considered opinion that the provisions of the Consumer Protection Act are not applicable to the disputes of the present nature. Thereby, the order so passed by the Consumer Disputes Redressal Forum, Dhenkanal cannot sustain in the eye of law, as the same is without jurisdiction and nullity.

16. So far as maintainability of the writ petition as against the order passed by the District Consumer Disputes Redressal Forum is concerned, in ***Committee of Management v. Vice Chencellor***, 2009 AIR SCW 398, the apex Court in paragraph-21 held as follows:-

> "21. Furthermore, when an order has been passed by an authority without jurisdiction or in violation of the principles of natural justice, the superior courts shall not refuse to exercise their jurisdiction although there exists an alternative remedy."

In ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai***, AIR 1999 SC 22, the apex Court in paragraph-15 held as follows:

> "15. …… But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement or any of the Fundamental Rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged…."

Similar view has also been taken in ***Guruvayoor Devaswom managing Committee v. C.K. Rajan***, (2003) 7 SCC 546.

17. Referring to the aforementioned judgments of the apex Court, this Court, had also in ***Pravat Kumar Mishra v. State of Orissa***, 2015 (II) OLR 963, held that even if there is availability of alternative remedy, since the court had considered the matter having no jurisdiction, this Court has jurisdiction to entertain such application because it goes to the root of the matter.

18. In view of the facts and circumstances, as well as proposition of law, as discussed above, this Court is of the considered view that the impugned order passed by the Consumer Disputes Redressal Forum, Dhenkanal in Consumer Complaint No.5 of 2008 under Annexure-2 dated 30.06.2009 and consequential initiation of proceeding in CD (Execution) No.14 of 2010 in Annexure-3 arising out of Consumer Complaint No.05 of 2008 cannot sustain in the eye of law, as the same are without jurisdiction and nullity. Thereby, the same are liable to be quashed and are hereby quashed.

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

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2020 (II) ILR - CUT- 454

DR. B.R.SARANGI, J.

W.P.(C) NO. 6095 OF 2013

SUCHISMITA RAY .....Petitioner

.V.

COLLECTOR-CUM-C.E.O., ZILLA PARISHAD & ORS. .....Opp. Parties

SERVICE LAW – Appointment – Empanelment of the candidate in the select list – Whether confers any right on the candidate for claiming appointment on account of being so empanelled? – Held, No.

"The apex Court held time and again that the empanelment of the candidate in the select list confers no right on the candidates to appointment on account of being so empanelled. At the best it is a condition of eligibility for the purpose of appointment and by itself does not amount to selection nor does it create a vested right to be appointed unless the service rules provide to the contrary. Therefore, the claim made by the petitioner that her name finds place at the select list and thereby she is entitled to be appointed under physically handicapped untrained category, cannot sustain in view of the law laid down by the apex Court mentioned supra.

(Para 10)

Case Laws Relied on and Referred to :-

1. (1994) 1 SCC 126 : State of Bihar .Vs. The Secretariat Assistant successful Examinees' Union.
2. (2002) 4 SCC 726 : AIR 2002 SC 1885 Vinodan Vs. University of Calicut.
3. (1997) 6 SCC 584 : Syndicate Bank Vs. Shankar Paul.

For Petitioner : Mr. Akshaya Kumar Nayak

For Opp. Parties : Mr. B. Satpathy, Standing Counsel for School & Mass Education Department.

JUDGMENT Date of Hearing : 11.02.2020 : Date of Judgment: 18. 02.2020

DR. B.R. SARANGI, J.

The petitioner, who is a physically handicapped, by way of this writ petition, seeks to quash order dated 24.01.2012 passed by opposite party no.1- Collector-cum-CEO, Zilla Parishad, Cuttack in Annexure-5 series, and issue direction to opposite party no.1 to engage the petitioner as Sikhya Sahayak in compliance of order dated 30.07.2012 passed in W.P.(C) No. 8636 of 2011 in Annexure-6.

2. The factual matrix of the case, in brief, is that on 21.01.2011 an advertisement was published in Odia daily "The Samaj" inviting applications from the eligible candidates to fill up 344 nos. of posts of Sikshya Sahayak (64 nos. of TG Science, 70 nos. of TG Arts, 104 nos. of +2 Science with CT and 108 nos. of +2 Arts with CT) in the Cuttack Education Districts. In addition to the eligibility criteria, the advertisement specified that the physically handicapped candidates can apply for one of the posts. The petitioner, who passed both matriculation and +2 Arts in the 2nd division and belonged to Socially and Economically Backward Classes of the State,

having 50% physically handicapped as certified by the District Medical Board of Cuttack District, applied for the said post. Consequently, on consideration of the documents and verification thereof, basing on the marks secured by her in matriculation and +2 Arts examinations, her name was placed at serial no. 41/69/11754 of the merit list prepared by the District Project Officer, Cuttack. Instead of physically handicapped, as her name was placed in general category, she filed a representation on 25.09.2011 before the Collector-cum-CEO for placing her name in physically handicapped category, but there was no effect.

2.1 Consequentially, the petitioner filed W.P.(C) No. 28908 of 2011, which was disposed of vide order dated 02.12.2011 directing the Collector, Cuttack to consider and dispose of the application submitted by the petitioner on 25.09.2011 at Annexure-5 to the said writ petition within a period of one month of receipt of certified copy of that order along with a fresh copy of the representation. In compliance of order dated 02.12.2011 passed by this Court in W.P.(C) No. 28908 of 2011, the Collector, Cuttack, vide order dated 24.01.2012, disposed of representation of the petitioner by holding that she is not entitled to be engaged as Sikshya Sahayak, as a physically handicapped candidate, having +2 Arts untrained qualification. Although candidates belonging to physically challenged category, having training qualification, have been given engagement order, but the candidature of the petitioner and similarly qualified persons has been dropped from consideration as they are untrained.

2.2 Subsequently, petitioner appeared OTET Examination on 02.12.2012 as per policy decision of the Government. Though prior to her appearance in the OTET Examination, her name was reflected in the select list, no engagement order was issued. So, she filed a representation on 09.07.2012 to the Collector-cum-Chief Executive Officer, Zilla Parishad, Cuttack. As no action was taken thereon, the petitioner approached this Court by filing W.P.(C) No. 91 of 2013, which was disposed of, vide order dated 15.01.2013, directing the Collector to dispose of the representation filed by the petitioner as expeditiously as possible, preferably within a period of four weeks from the date of receipt of certified copy of that order. In compliance of order dated 15.01.2013 passed by this Court in W.P.(C) No. 91 of 2013, the Collector-cum-CEO, Zilla Parishad, Cuttack passed order rejecting the representation filed by the petitioner stating therein that the petitioner's candidature was not found suitable for engagement as Sikshya Sahayak, as

only trained applicants were considered for engagement under physically handicapped category leaving no scope for engagement of untrained applicants. Hence, this application.

3. Mr. A.K. Nayak, learned counsel for the petitioner contended that the petitioner, by way of this application, seeks to quash the orders dated 24.01.2012 and 04.03.2013 in Annexure-5 series, which have been passed in pursuance of orders dated 02.12.2011 and 15.01.2013 passed in W.P.(C) No. 28908 of 2011 and W.P.(C) No. 91 of 2013 respectively holding that under the physically handicapped category trained applicants were considered for engagement leaving no scope for engagement of untrained applicants. But, in view of order dated 30.07.2012 passed in W.P.(C) No. 8636 of 2011 in Annexure-6, the petitioner should have been given engagement as Sikshya Sahayak under physically handicapped category.

4. Mr. B. Satpathy, learned Standing Counsel for School and Mass Education Department contended that since the petitioner is an untrained physically handicapped candidate, the number of vacancies to be filled up by physically handicapped category candidates being 3% of the vacancies, she could not come under the zone of consideration, as trained physically handicapped candidates filled up those vacancies. Therefore, no illegality or irregularity has been committed by the authority in rejecting the claim of the petitioner.

5. This Court heard Mr. A.K. Nayak, learned counsel for the petitioner and Mr. B. Satpathy, learned Standing Counsel for School and Mass Education Department, and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. On careful consideration of the rival contentions of the parties and pleadings available on record, this Court finds, pursuant to the advertisement issued on 21.01.2011, the petitioner applied for engagement as Sikshya Sahayak, being an untrained physically handicapped candidate, in respect of Cuttack Education District. As per the advertisement, 106 posts were available for the candidates having +2 Arts with C.T. qualification. Out of those 106 posts, 3% were reserved for physically handicapped category candidates. As those 3% posts were filled up by trained physically handicapped candidates, the petitioner, who is admittedly an untrained

physically handicapped candidate, could not given engagement, though her name finds place in the merit list prepared by the authority at serial no. 41/69/1175. In other words, since those 3% posts which were reserved, were filled up by trained +2 Arts physically handicapped candidates, there was no scope for consideration of the case of untrained physically handicapped candidates.

7. The petitioner claims that she should be engaged as Sikshya Sahayak as per the order dated 30.07.2012 passed by this Court in W.P.(C) No. 8636 of 2011, which has been annexed as Annexure-6 to this writ petition. This Court, vide order dated 30.07.2012, passed the following order:-

"xxx xxx xxx

3. In view of the sworn statements filed by the Special Secretary to Government, School and Mass Education Department, this writ petition is disposed of with a direction to the State Government represented by School and Mass Education Department to adhere to the affidavit in question filed today in this writ petition by giving opportunity to the physically handicapped persons to fill up the posts of all categories in the next recruitment to the posts of Sikshya Sahayaks. The Government shall not insist the age qualification so far as this category is concerned as these 105 posts are the unfilled posts of 24,000/- posts of Sikshya Sahayaks advertised for the year 2010-11 and are carried forward for the future selection, as indicated in the affidavit and submit compliance report within six months. As and when the report is submitted, the registry is directed to bring it to the notice of this Court for further orders."

In the aforementioned order, this Court directed to fill up the posts of Sikshya Sahayak in physically handicapped category by carrying forward the vacancies to the next year. But fact remains, in the present case, there was no vacancy left pursuant to the advertisement. So there is no scope for consideration of the case of the petitioner, even applying the carry forwarded principle. As such, all the vacancies pursuant to advertisement for the year 2010-11 in the physically handicapped category had already been filled up. Thereby, the order dated 30.07.2012 so passed by this Court in W.P.(C) No. 8636 of 2011 is not applicable to the present context.

8. A claim has been made pursuant to Annexure-8, which was obtained under the Right to Information Act, 2005, that as many as 28 number of posts under physically handicapped category having been filed up, out of which 15 number of candidates were untrained, the case of the petitioner should not have been illegally rejected and she should not have been deprived of getting engagement as Sikshya Sahyak. Such an allegation cannot sustain in the eye

of law, in view of the fact that in the advertisement 2010-11 published on 21.01.2011 applications were invited for filling up of 106 posts under +2 Arts C.T. category under erstwhile Cuttack Education District. As such, in pursuance of prescribed reservation policies of the Government under O.R.V. Act, the said 106 posts were distributed in respect of different categories of candidates in the following manner :-

U.R	S.E.B.C.	S.C.	S.T.	P.H.		
				V.I.	H.I.	O.H.
34	27	17	24	2	1	1

As per the Annexure-8, information was received under the RTI Act with regard to engagement of Siksha Sahayak under physically handicapped category in respect of entire Cuttack Revenue District. There are as many as 4 education districts, namely, Athagarh, Banki, Cuttack and Salipur under the Revenue district of Cuttack. On perusal of such Annexure-8, out of 28 candidates named under the said list under physically handicapped category, the number of persons got engagement in respect of different education district under the revenue district of Cuttack as mentioned therein. 12 posts, include T.G. Science, T.G. Arts, +2 Science C.T. and +2 Arts CT. Therefore, as per the vacancies pursuant to advertisement +2 Arts CT category posts, under the said category in respect of General candidates was filled up by trained candidates. Since only one post was available for engagement as Sikshya Sahayak under +2 Arts C.T. Orthopedically Handicapped candidate and for filling up the said post a trained candidate namely Ms. Prinklin Parida was available. Therefore, her candidature was considered and she was engaged against the said post under +2 Arts C.T. category. As such, no further post is available under physically handicapped +2 Arts CT category. Therefore, the petitioner being an untrained applicant, her case could not be considered for engagement.

9. In the case of ***State of Bihar v. The Secretariat Assistant successful Examinees' Union,*** (1994) 1 SCC 126 the apex Court held as follows:

> *"The empanelment of the candidate in the select list confers no right on the candidates to appointment on account of being so empanelled. At the best it is a condition of eligibility for the purpose of appointment and by itself does not amount to selection nor does it create a vested right to be appointed unless the service rules provide to the contrary".*

Similar view has also been taken by the apex Court in ***Vinodan v. University of Calicut***, (2002) 4 SCC 726: AIR 2002 SC 1885 and in ***Syndicate Bank*** **v. Shankar Paul** (1997) 6 SCC 584.

10. The apex Court held time and again that the empanelment of the candidate in the select list confers no right on the candidates to appointment on account of being so empanelled. At the best it is a condition of eligibility for the purpose of appointment and by itself does not amount to selection nor does it create a vested right to be appointed unless the service rules provide to the contrary. Therefore, the claim made by the petitioner that her name finds place at the select list and thereby she is entitled to be appointed under physically handicapped untrained category, cannot sustain in view of the law laid down by the apex Court mentioned supra.

11. Considering from all angles, this Court does not find any merit in the writ petition, which is accordingly dismissed. No order to costs.

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2020 (II) ILR - CUT- 460

BISWANATH RATH, J.

W.P.(C) NO.1808 OF 2003

NIMAI CHARAN SAMANTARAY ……...Petitioner

.V.

CHAIRMAN-CUM-M.D, O.S.R.T.C, PARIBAHAN BHAWAN, BHUBANESWAR. ……Opp. Parties

SERVICE LAW – Disciplinary Proceeding – Whether can be initiated after superannuation? – Held, No – Law has been settled holding that no proceeding can be initiated after the superannuation of an employee unless there is any specific rule in that regard governing the employer or employee.

For Petitioner : Mr. A.K. Mishra, Mr. D.K.Panda, Mr.J. Sengupta, Mr. P.R.J. Dash & Mr. G. Sihan

For Opp Party : Mr. A.K.Mohanty (A)

JUDGMENT Date of Hearing & Judgment : 06.02.2020

BISWANATH RATH, J.

Heard Mr. G. Sinha, learned counsel for the petitioner and Mr.A.K.Mohanty (A), learned counsel for the opposite party.

2. This writ petition involves a challenge to the order passed by the Disciplinary Authority vide Annexure-7 thereby directing for realization of amount from the entitlement of the petitioner. The impugned order has been challenged on the sole premises that not only the proceeding was initiated after premature retirement of the petitioner but recovery has also been made after the superannuation of the petitioner on the basis of disciplinary proceeding admittedly initiated after superannuation of the petitioner. Referring to a judgment of this Court in disposal of W.P.(C) No.10638 of 2004, Sri Panda, learned counsel appearing for the petitioner requested this Court for extending the benefit of the disposed of writ petition to the case at hand.

3. Learned counsel for the opposite party on the other hand while objecting the claim of the petitioner submits that since the dispute involves recovery while the petitioner was in service, there is no prohibition in either initiating the proceeding after superannuation or implementation of any such order involving the disciplinary authority.

4. Considering the rival contentions of the parties, this Court finds that admittedly the disciplinary proceeding has been initiated after petitioner has been prematurely superannuated. Law has been settled holding that no proceeding can be initiated after the superannuation of an employee unless there is any specific rule in that regard governing the employer or employee. From the pleadings and submissions of the respective advocates, this Court finds opposite party is not in a position to demonstrate any provision involving the parties to undertake disciplinary proceeding after superannuation of the employee takes place. Further for the cessation of the employer and employee relationship after the premature superannuation of the petitioner, this Court is also of the view that no disciplinary proceeding can be initiated after the superannuation of an employee.

5. For the reasons indicated herein above and for the decision of this Court in W.P.(C) No.10638 of 2004 applies to the case of the petitioner at hand, this Court interfering in the impugned order at Annexure-7 sets aside the same. Writ petition accordingly succeeds. There shall be no order as to cost.

2020 (II) ILR - CUT- 462

P. PATNAIK, J.

W.P.(C) NO. 5584 OF 2009

BENUDHAR PANDA …….Petitioner

.V.

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

SERVICE LAW – Grant of pension as well as other retiral service benefits – Qualifying Period of 10 years to grant pension – Petitioner initially served as the Head Master from 24.07.1970 to 13.08.1984 and was made to resign from service by the Managing Committee – However again fresh order of appointment was issued on 10.05.1994 – Petitioner retired from service on 31.08.2003 – Pension denied due to shortfall of qualifying periods of service – Prayer to calculate the initial periods of services i.e from 24.07.1970 to 13.08.1984 towards service period – Prayer of the petitioner was not considered by the Authorities – Action of the Authority challenged – Held, the Opposite parties to count at least nine months for the past service so as to entitled the petitioner to avail pensionary and post retirement benefits as per the Odisha Civil Service Pension Rules,1992.

In view of the admitted factual position the petitioner has rendered service from 1970 till 1984 and the period from 13.08.1984 to 08.05.1994 has been spent on litigation and due to compelling circumstances, the petitioner had to accept the appointment vide Annexure-4 dated 09.05.1994 and the period of service rendered by the petitioner prior to 09.05.1994 has not been counted as continuity of service so as to get him the minimum pensionary benefit, the opposite parties ought to have considered at least the past service rendered by the petitioner to make up the shortfall in continuity of service so as to entitle him for pension for rendering 10 years of service i.e. if a period of nine months from the past service can be computed the service rendered by the petitioner till his retirement dated 31.08.2003 then that would make the petitioner eligible to receive the pensionary benefit so as to undo the injustice meted out to him by the authority in not producing the enquiry report which would have been a trump card on the part of the petitioner to stake his claim for past service for post retiral benefit. *(Para 13)*

Case Laws Relied on and Referred to :-

1. AIR 1983 SC 130 : D.S.Nakara Vs.Union of India.

For Petitioners : M/s.Jayant Kumar Rath, Sr. Adv.D.N.Rath, S.N.Rath & P.K.Rout.

For Opp. Parties : Standing Counsel, School and Mass Education Department.

JUDGMENT Date of Hearing : 26.02.2020 : Date of Judgment: 24.07.2020

P.PATNAIK, J.

In this writ application the petitioner has inter alia prayed for quashing of the order passed by the opposite party No.1 under Annexure-8 and also for a direction to the opposite parties to treat the period of absence of the petitioner as continuity of service of the petitioner for all purposes and to release the pension and other retiral benefits to the petitioner within a suitable period as deemed fit and proper in the facts and circumstances of the case.

2. The brief facts giving rise to filing of the instant writ application is that the petitioner was appointed as the Headmaster of Swapneswar M.E.School and joined the post on 01.07.1970. His appointment was approved by the Managing Committee vide Resolution dated 24.07.1970. The institution in which the petitioner was appointed was declared as an aided educational institution within the meaning of Section 3(b) of the Orissa Education Act, 1969. The petitioner was taken as the Direct Payment Staff of an aided M.E.School under the State Government and was paid regularly his salary component as has been provided for the post of Headmaster having trained Intermediate qualification. It is the case of the petitioner that since the petitioner disclosed the irregularities committed by the managing committee before the educational authorities, the petitioner was issued with a show cause notice by the Managing Committee in its letter dated 13.08.1984 to which the petitioner replied on the very same date and for that reason they forcibly took out a resignation from the petitioner by use of force. The said arbitrary action of the Managing Committee was brought to the notice of the educational authorities as well as the Police authorities on 19.08.1984 to protect him from the illegal action of the Managing Committee. When the petitioner could not get any protection, finding no way out approached this Court in O.J.C.No.462 of 1985 wherein this Court after hearing the parties directed the Director of Public Instructions (Schools) Orissa to consider the report of the District Inspector of Schools and all other relevant materials and to take a decision in the matter as to whether a resignation has been obtained from the petitioner voluntarily or under pressure and coercion by the Managing Committee. It is the further case of the petitioner that the Deputy Director of Elementary Education without referring the matter to opposite party no.2 passed an order rejecting the claim of the petitioner for regularization of his service and for grant of leave and directed the opposite party no.3 to give a posting order to the petitioner as the Headmaster in any non-Government Schools where the Rules of appointment of Headmaster in

aided Schools are not applicable. Pursuant to the order of this court in OJC No.462 of 1985 and the instructions of the opposite party no.2, opposite party No.4 vide memo no.3640 dated 09.05.1994 issued with an appointment order in favour of the petitioner as Assistant Teacher of Kacherigaon girls M.E.School in the existing vacancy in the scale of pay of Rs.950- 1500/-. It is needless to mention that Kacherigaon Girls M.E.School was an aided educational institution when the petitioner was appointed and still is continuing as an aided educational institution. When no action was taken on the representation and reminders of the petitioner, which were made to opposite party no.2, the petitioner approached this Court in O.J.C.No.3301 of 1995 wherein this Court vide order dated 12.09.2007 disposed of the writ application directing the petitioner to make a representation and further it was directed that if the petitioner would be entitled to any financial benefit, the opposite party no.1 may pass appropriate order for early payment of the same. Pursuant to the direction of this Court, the petitioner made a representation to opposite party no.1 disclosing the detailed injustice meted out to him and the opposite party no.1 passed an order and communicated the said order vide Memo no.21756 dated 05.11.2008 rejecting the claim of the petitioner, which is the subject matter of challenge in this writ petition.

3. Opposite party No.1 has filed counter affidavit to the averments made in the writ petition filed by the petitioner wherein the opposite party No.1 has stated that the prayer of the petitioner is completely alien to the facts of the case since the petitioner was given fresh appointment and pursuant to that fresh appointment he joined on 10.05.1994 and it is also stated in the counter that in view of the fresh appointment, the continuity of service of the petitioner from 13.08.1984 to 10.05.1994 is not sustainable in the eye of law. It is also submitted in the counter that pursuant to the order dated 24.11.1992 passed in OJC No.462 of 1985, the Director of Elementary Education, Orissa communicated to the District Inspector of Schools, Jajpur-II, opposite party No.3 to take necessary steps for employment the petitioner in the post of a Teacher according to his qualification in any aided School as and when vacancy arises. It is also stated in the counter affidavit that since the petitioner was in the employment of a private body, leave can be granted only by the Managing Committee and not by the District Inspector of Schools, Jajpur-II. Since the petitioner had not applied for leave from 13.04.1984 to the Managing Committee the question of regularization of service under Rule does not arise at all. It is also submitted in the counter affidavit by opposite party no.1 that there is no aided School under the jurisdiction of

District Inspector of Schools, Jajpur-II by the time the order dated 23.03.1993 was communicated. The Inspector of Schools, Jajpur Circle instructed the District Inspector of Schools, Jajpur-I to give posting to the petitioner as an Assistant Teacher in Kacherigaon Girls' M.E.School which was an aided M.E.School by that time. It is the case of the opposite party No.1 that the petitioner retired on 31.08.2003 after attaining the age of superannuation and since the petitioner was given fresh appointment on 10.05.1994, the period of pension is to be calculated from 10.05.1994 to 31.08.2003, the date of his superannuation and the total period of service rendered comes to 9 years 3 months and 22 days which is less than 10 years. It is also stated in the counter that as per the provisions of Orissa Civil Services Pension Rules, 1992 an employee is required to complete 10 years of qualifying service in order to be eligible for the benefits of pension and as the petitioner has not rendered the required years of service i.e., 10 years, so he is not entitled to get pensionary benefits. Though the petitioner was allowed to receive minimum pension from 01.09.2003 by the Inspector of Schools, Jajpur-I, but the Government in the department of School and Mass Education rejected the claim of the petitioner vide order dated 05.11.2008 on the ground that the petitioner was given fresh appointment on 09.05.1994. With regard to the claim of the petitioner for refixation of his pay in 1985, 1989 and 1993 Pay Revision Rules taking the petitioner as Trained Intermediate Teacher is not sustainable as because the Government has declined to reconsider the past service rendered by the petitioner in Swapneswar M.E.School, Kaimatia and at the same time the petitioner having not acquired any training qualification he cannot be paid the trained intermediate scale considering that the petitioner was appointed against a trained Matric post without having any training qualification.

4. Mr.J.K.Rath, learned senior Counsel in a bid to assail the impugned order under Annexure-8 submitted with vehemence that the petitioner, who was initially appointed as Headmaster of Swapneswar M.E.School, Kaimati, an aided educational institution and his appointment was approved by the D.I.of Schools in the year 1970 working for about 14 years as Headmaster, the petitioner due to threat to life, he was forced to tender his resignation on 13.08.1984 which was subsequently withdrawn on 19.08.1984. Since that period was not regularized the petitioner approached this Court in OJC No.462 of 1985 and the said writ application was disposed of on 24.11.1999 with a direction to D.P.I. Schools to consider the enquiry report and for passing of the final order and vide order 23.03.1993, the D.P.I. of Schools

directed the D.I. of Schools, Jajpur-II to employ the petitioner as a Teacher in an aided School and neither his leave can be granted by the educational authorities nor his service can be regularized. However vide order dated 09.05.1994 the petitioner was appointed as Assistant Teacher in Kacherigaon Girls M.E.School in the existing vacancy as evident from Annexure-4. Since the salary for the period from 13.08.1984 to 8.05.1994 was not paid to the petitioner, the petitioner filed a representation on 26.09.1994. Due to inaction of the opposite parties the petitioner had to approach this Court in OJC No.3301 if 1995 and the said writ application was disposed of vide order dated 12.09.2007 with the direction to file a representation Accordingly, the petitioner submitted a detailed representation on 07.10.2007 which has been rejected vide impugned order under Annexure-8 which is under challenge.

5. While reiterating the factual aspect, learned senior counsel submitted that the petitioner's previous service from 13.08.1994 to 10.05.1984 ought to have been considered as per the Orissa Rules, 1981 (Page 855) The learned counsel has also referred to Rule 3 of the Direct Payment Scheme Cadre provided in Rule 8(3) of the 1974 Rule. Learned counsel further submitted that the period from 01.07.1970 to 13.08.1984 ought to have been considered under rule 6(1) read with Section 8(1) of the Odisha Aided Educational Institutions' Employment Retiement Benefit Rules, 1981.

6. Learned senior counsel further submitted that the action of the authority amounts to gross laches and negligence as a result of which the petitioner despite the order dated 21.05.2009 the pension has not been released in favour of the petitioner for which the petitioner filed a contempt petition bearing CONTC No.1551 of 2009 for non-compliance of the order dated 21.05.2009. Therefore learned senior counsel strenuously urged that the period of service rendered by the petitioner at least from 13.08.1984 to 10.05.1994 is to be considered as continuity of service so as to entitle the petitioner to pensionary benefits and other post retiral benefit.

7. Mr.S.Samal, learned Standing Counsel for School and Mass Education department apart from reiterating the submissions made in the counter affidavit, has vociferously submitted that the petitioner had never challenged the order passed by opposite party no.3 dated 23.03.1993 under Annexure-2 nor the letter dated 14.06.1993 under Annexure-3. Therefore, the writ petition is liable to be dismissed on the doctrine of acquisance, waiver and estoppel. Learned Standing Counsel also referred to Rule-7 xxxxxxxx

8. From the conspectus of rivalised pleadings the versed question that remains to be determined as to whether the period of service rendered by the petitioner prior to his appointment dated 09.05.1994 can be considered for continuity of service so as to entitle him for financial benefit as well as the post retiral benefits in order to determine the aforesaid question, certain factual aspect needs to be highlighted.

9. Admittedly, this is the third round of litigation being fought by the petitioner. On perusal of service book of the petitioner under Annexure-1 there is no denying of the fact that the petitioner joined the service on 01.07.1970 or there is any dispute that pursuant to the order passed in OJC No.462 of 1985 order dated 24.11.1992 the direction was to the D.P.I of Schools to consider the enquiry report as to whether the petitioner resigned voluntarily or under pressure or coercion from the Managing Committee.

10. In order to shed light on the question of resignation and the subsequent enquiry the opposite parties vide order dated 16.03.2018 were directed to produce the enquiry report and despite several orders, the enquiry report was not produced. The enquiry conducted by the Inspector of Schools would have given a clear picture. Therefore, the enquiry report of the Inspector of Schools has never seen the light of the day.

11. Since the petitioner after rendering nine years three months 22 days of service attained the age of superannuation on 31.08.2003. Therefore, due to less than 10 years as per the provisions of Odisha Civil Service Pension Rules 1992 the petitioner has been deprived to get the pensionary benefit as disclosed from the counter affidavit.

12. Since the petitioner' entire past service from 13.08.1984 to 10.05.1994 is being obliterated on the spacious plea that the petitioner had accepted the appointment as Assistant Teacher as fresh candidate without any demur, his prayer for financial benefit for the period rendered from 13.08.1984 to 09.05.1994 has been negatived by the authority thereby depriving the petitioner to avail the minimum pension and post retiral benefit.

13. In view of the admitted factual position the petitioner has rendered service from 1970 till 1984 and the period from 13.08.1984 to 08.05.1994 has been spent on litigation and due to compelling circumstances, the petitioner had to accept the appointment vide Annexure-4 dated 09.05.1994 and the period of service rendered by the petitioner prior to 09.05.1994 has not been

counted as continuity of service so as to get him the minimum pensionary benefit, the opposite parties ought to have considered at least the past service rendered by the petitioner to make up the shortfall in continuity of service so as to entitle him for pension for rendering 10 years of service i.e. if a period of nine months from the past service can be computed the service rendered by the petitioner till his retirement dated 31.08.2003 then that would make the petitioner eligible to receive the pensionary benefit so as to undo the injustice meted out to him by the authority in not producing the enquiry report which would have been a trump card on the part of the petitioner to stake his claim for past service for post retiral benefit.

14. The view of this Court gets fortified in referring to decision/judgment dated 30.08.2018 passed by the Division Bench of this Court in W.P.(C) No.6267 of 2018 (State of Odisha and othersvrs.-Niranjan Biswal) wherein the decision of Tribunal in adding so much period of service from the G.P. Secretary service to that of the service of VLW to make them eligible to get pension has been sustained.

While dealing with counting of service to get minimum pension, this Court in OJC No.2147 of 1991 dated 24.03.1992 i.e., in the case of **Settlement Class IV Job Contract Employees Union, Balasore-Mayurbhanj District-vrs.State of Orissa and others**, at paragraph-10 of the judgment referred the decision rendered by the Constitutional Bench of the Apex Court of D.S.Nakara v.Union of India reported in **AIR 1983 SC 130** and quoted relevant portion of the said judgment to the following extent:-

> "antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer, not claimable as a right, and, therefore, no right to pension can be enforced through court, has been swept under the carpet……". In paragraph-26, the goals which a pension scheme seeks to subserve were noted. It was stated that a pension scheme consistent with the available resources must provide that the pensioner would be able to live (i) free from want, with decency, independence and self respect, and (ii) at a standard equivalent at the present retirement level. The Bench posed a question that the approach being adopted by it may merit the criticism that if a developing country like India cannot provide an employee while rendering service a living wage, how can one be assured of it in retirement. The question was answered by referring to the social philosophy adopted by us. In paragraph-31, this aspect of the matter was concluded by saying, inter alia, that pension is not an ex-gratia payment, but it is a payment for the past service rendered and it is a social welfare measure rendering socio-economic justice to those who in the heyday of their life ceaselessly toiled for the employer on an assurance that in their old age, they would not be left in lurch."

15. In the backdrop of the aforesaid facts the writ petition stands disposed of with a direction to the opposite parties to count at least nine months for the past service to the present service so as to entitle the petitioner to avail pensionary and post retirement benefits as per Odisha Civil Service Pension Rules, 1992. The opposite parties are directed to complete the above exercise as expeditiously as possible preferably within a period of three months from the date of receipt of the copy of the order.

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2020 (II) ILR - CUT- 469

S.K. PANIGRAHI, J.

CRLA NO. 71 OF 2020

DEBABRATA SAHOO @ MITHUN @ DEBAPRASAD SAHOO ..... Appellant

.V.

STATE OF ODISHA & ORS. .....Respondent

JUVENILE JUSTICE(CARE & PROTECTION OF CHILDREN) ACT,2015 – Section 94 r/w Rule 12(3) of Juvenile Justice Rule 2007 – Offence U/s.376 (2)(n) r/w Section 6 of POCSO Act – Rape of a Minor – Presumption & determination of age – Valid documents to determine the age – Held, school admission register/ matriculation certificate not only due to leaning of the Apex Court on this issue as discussed hereinabove but also due to the fact that same now raises a presumption in law, albeit rebuttable, by way of a deeming fiction in terms of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

From a conjoint reading of the aforesaid the principles as laid down by the Hon'ble Supreme Court dealing with a myriad factual backdrop although no straightjacket formula can be laid down. However, some common a thread that flows through with regard to the issue of age determination can be summarized as follows:-

> *(a) Medical opinion based medical examination like observing the bone structure etc or tests like the ossification test or radiological examination can at best be stated to be indicative of the range of the age. Such medical opinion leaves a margin of about 2 years on either side.*

(b) Reliance on medical opinion normally the last option that should be adopted by courts and only in the absence of any other documentary evidence.

(c) Credible documentary evidence will trump medical opinion

(d) The age determination of the accused as well as the victim can be done under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 in case of such an enquiry is directed by a competent court

(e) A reading of the aforesaid judgements indicates that by and large, the Hon'ble Supreme Court has been inclined to rely on the school certificate or matriculation certificate.

(f) Now, the procedure to arrive at the age in case of conflicting documents on record has be statutorily provided under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The said provision provides for a preferential regime where the school certificate or matriculation certificate has been accorded the highest preference. The same also creates a presumption as to the age by way of a deeming fiction.

Reverting to the facts of the case and applying the principles as discussed hereinabove. This court is inclined to go by the school admission register/ matriculation certificate not only due to leaning of the Apex Court on this issue as discussed hereinabove but also due to the fact that same now raises a presumption in law, albeit rebuttable, by way of a deeming fiction in terms of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. Thus, the age of the victim is taken to be 17 years 6 months and 21 days at the time of the offence, thereby prima facie attracting provisions of the Prevention of Children from Sexual Offences Act, 2012 as well as the other offences adumbrated in the FIR. In so far as the strenuous reliance of the Ld. counsel for the petitioner in the case of ***G. Achyut Kumar v. State of Odisha***[28] *is concerned the same will have no application in the facts of the case as there was no issue of minority of the complainant involved therein.* *(Paras 14 & 15)*

Case Laws Relied on and Referred to :-

1. (1965) 3 SCR 861 : Brij Mohan Singh .Vs. Priya Brat Narain Sinha.
2. (1982) 2 SCC 202 : Umesh Chandra .Vs. State of Rajasthan.
3. (1991) 2 SCC 379 : Dayachand .Vs. Sahib Singh.
4. (2006) 1 SCC 283 : Vishnu .Vs. State of Maharashtra.
5. 1988 Supp SCC 604 : Birad Mal Singhvi .Vs. Anand Purohit.
6. 1995 Supp (4) SCC : 419 Pradeep Kumar .Vs. State of U.P.
7. (1989) 3 SCC 1 : Bhoop Ram .Vs. State of U.P.
8. (1997) 8 SCC 720 : Bhola Bhagat .Vs. State of Bihar.
9. (2001) 5 SCC 714 : Ramdeo Chauhan .Vs. State of Assam.
10. (2006) 5 SCC 584 : Ravinder Singh Gorkhi .Vs. State of U.P.
11. (2008) 13 SCC 133 : Babloo Pasi .Vs. State of Jharkhand.

12. (2006) 9 SCC 428 : Jitendra Ram .Vs. State of Jharkhand.
13. (2008) 15 SCC 223 : Prakash Rai .Vs. State of Bihar.
14. (2009) 15 SCC 259 : Pawan .Vs. State of Uttaranchal.
15. (2009) 13 SCC 211 : Hari Ram .Vs. State of Rajasthan.
16. (2010) 3 SCC 235 : Raju .Vs. State of Haryana.
17. (2011) 13 SCC 751 : Shah Nawaz .Vs. State of U.P.
18. (2012) 5 SCC 201 : Om Prakash .Vs. State of Rajasthan.
19. (2012) 9 SCC 750 : Ashwani Kumar Saxena .Vs. State of M.P.
20. (2014) 12 SCC 332 : Kulai Ibrahim .Vs. State.
21. (2010) 1 SCC 742 : Sunil Vs. State of Haryana.
22. (2016) 1 SCC 696 : State of M.P. .Vs. Munna.
23. (2013) 7 SCC 263 : Jarnail Singh .Vs. State of Haryana.
24. (2015) 7 SCC 773 : State of M.P. .Vs. Anoop Singh.
25. (2013) 14 SCC 637 : Mahadeo .Vs. State of Maharashtra.
26. (2017) 3 SCC 32 : Sri Ganesh .Vs. State of T.N.
27. (2017) 2 SCC 210 : Mukarrab .Vs. State of U.P.
28. 2020 (1) OLR 979 : G. Achyut Kumar .Vs. State of Odisha.

For the Appellant : Mr. Satyabrata Pradhan, Mr Adhiraj Mohanty, S.S. Dash, M.R. Muduli, M.B. Smrutiranjan & A.K. Samal.
For the Respondent : Mr. P.K. Mohanty, Addl. Standing Counsel
For the Complainant : Mr. Soubhagya Swain.

JUDGMENT Date of Hearing : 2.07.2020 : Date of Judgment : 30.07.2020

S.K. PANIGRAHI, J.

1. The instant appeal has been filed by the Petitioner under Section-14-A of S.C and S.C (P.A) Act assailing the order dated 10.12.2019 passed by the learned Addl. Session Judge-Cum Special Judge, Keonjhar in Special Case No-83/2019 corresponding to Nayakote P.S Case No-34 of 2019 rejecting the bail application of the Petitioner for commission of offences under Section-376(2)(n)/313/506 of Indian Penal Code, 1860 read with Section-6 of POCSO Act read with Section-3(2)(v)(va) of SC and ST (P.A) Act under which the accused-petitioner was forwarded to judicial custody.

2. Shorn of other details reflected in the impugned order dated 10.12.2019, the accused-petitioner has been implicated in this case for commission of offences under Section-376(2)(n)/313/506 of Indian Penal Code, 1860 read with Section-6 of POCSO Act read with Section-3(2)(v)(va) of SC and ST (P.A) Act on the allegation of committing forcible sexual intercourse with victim/ minor girl of 17 years who was the daughter of the informant. Further, it was alleged that, the victim was pregnant and petitioner

caused miscarriage of the pregnancy of the minor victim by administering medicine. After lodging of the F.I.R on 5.10.2019 the petitioner was taken into custody on 27.11.2019.The accused subsequently filed an application seeking bail in which the victim also appeared and objected to the grant of bail on the ground that there is a possibility of harassment of the victim at the behest of the petitioner. The bail application of the petitioner was rejected by the court below vide its order dated 10.12.2019. The Addl. Session Judge-Cum Special Judge, Keonjhar taking into account the seized school admission register of the victim which shows the date of birth of the victim to be 17.03.2002 and the medical report of the victim revealing healed hymnal tears on the private part of the victim and also the statement of the victim under Section 161 of Criminal Procedure Code of India, 1973, it was observed that, since the investigation was in progress and a prima facia case was made out due to gravity of offences involved. There was a likelihood of absconding and influencing the prosecution witnesses.

3. Ld. Counsel for the Petitioner Shri Satyabrata Pradhan has made assorted submissions. He has submitted that in view of the case laws relied upon by him (which have been dealt hereunder) the Petitioner ought to be given the benefit of doubt. He placed releince on two documents with respect to the date of birth such as the Aadhar Card and the entry in the Anganwadi register which demonstrate that the victim was a major at the time of the commission of the alleged offences. The Ld. Counsel for the Petitioner has also relied on the provisions of the Juvenile Justice (Care and Protection of Children) Act,2000 and the rules framed thereunder. He also took this Court through the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015. He further contended that the offence as alleged in the instant case are not made out as there was a pre-existing history of love relationship between the parties. Lastly, he has submitted that since Aadhar Card as well as the Anganwadi Centre report both are prepared by public servants in the course of their official duty making them cogent and reliable proof of the age of the victim.

4. On the other hand, the contention of the Ld. Counsel for the State Shri P.K. Mohanty is that statement dated 7.10.2019 of the victim recorded under Section 164 of Code of Criminal Procedure, 1973 corroborates the medical examination report dated 16.10.2019 which showed healed hymnal tears on the private part of the victim. He further submits that the offence of rape is made out under the sixth category which provides that if a sexual act is

committed even with the consent of a victim under 18 years of age, same constitutes the offence of rape. In the instant case FIR was lodged on 5.10.2019 in respect of an offence which was continuing/on-going from a period of one year. The same is quite apparent from the written report of the father of the victim and corroborated by the statement of the victim. The date of birth of the victim is 17.03.2002 as per the school admission register and also the Board Certificate seized by the police both the date of birth coincides to be below 18 years at the time of occurrence giving rise to the complaint. The Ld. Counsel also relied upon the procedure to be adopted under the Juvenile Justice (Care and Protection of Children) Act, 2015 and rules framed thereunder for determination of age of the victim in rape cases. He further contended that Rule-12(3) of Juvenile Justice Rule-2007 as well as Section - 94 and Sub-section 2(i) of the Juvenile Justice Act, 2015 provide the procedure to be followed for determination of age.

5. Heard Ld. Counsel for the parties. The prosecution story as set out in the FIR is that the father of the victim lodged the FIR on 5.10.2019 stating that the petitioner had kept love relation with the daughter of informant. She was a student of intermediate college in Suakati College for more than one year and had caused her to get pregnant. It is also alleged that the petitioner promised to marry the daughter and kept a physical relationship with her. The informant stated that the victim discovered much to her horror that she had become pregnant. She informed the same to the Petitioner who then administered a pill causing abortion. After the same the petitioner had dumped the victim girl and absconded. On this allegation, investigation was taken up and finally on completion of investigation, charge sheet has been submitted. On being implicated in this case, petitioner was arrested and has been in custody since 27.11.2019.

6. The entire facts of the case are governed by multiple provisions of different legislations and the issue shall be dealt under those provisions distinctly at the time of trial. At present, the issue hinges on the date of birth controversy. As per the school admission register which gets reflected in the matriculation certificate, date of birth of the victim is 17.3.2002. Date of lodgement of the FIR is 10.2.2019, thus, till the date of lodging of the FIR the age of the victim is 17 years, 6 months and 21 days. But as per Aadhar card which has not been seized by the police, but has been produced by the petitioner before this Court, the date of birth is shown to be 18.7.2001 which makes the age as on the date of incident 18 years 2 months 18 days. Date of

birth as per Anganwadi Kendra Report is 10.1.2000 making the age on the date of the incident is 19 years 8 months and 25 days. The petitioner is in custody since 27.11.2019. In the mean time, the Victim has also filed an affidavit indicating the fact that both had love relationship and her age is more than 20 on the date of executing the affidavit. She further stated in the affidavit that due to some misunderstanding and miscommunication between them, her father had lodged the FIR against the petitioner but the said matter has been settled amicably. In view of these facts she did not want to proceed with the matter.

7. The statement of the victim dated 7.10.2019 under Section 164 of the Cr.P.C. reveals that the petitioner had established physical relationship with the victim perforce. Upon the victim getting pregnant, medicines were administered to her by the Petitioner to precipitate an abortion. Thereafter, the petitioner had fled away from his house and the victim confided in her sister-in-law who then took her and left her at the house of the petitioner. The victim therefore was compelled to stay there for a couple of days during that time the petitioner had absconded from his own house. This version of the victim is supported by the other prosecution witnesses who testified on the same lines. It therefore reveals that at the time of establishing physical relationship the petitioner had no intention of marrying the victim and he used her for physical gratification. The victim was thereafter examined on 16.10.2019 wherein the opinion of the doctor is that there is no evidence of forced intercourse, suggesting that the act was consensual. As per the report of the doctor and the version of the victim, the medical termination of pregnancy seems to have been done on 25.9.2019. All the aforesaid indicate that there was close and intimate physical relationship between the petitioner and the victim. The same was allegedly done with the promise of marriage. This version however has surprisingly changed before this court when the victim has filed an affidavit dated 4.3.2020 stating that the instant case has been amicably settled and had originally been lodged due to some miscommunication. It is shocking that the victim has resiled from her version regarding the incident. Counsel for the victim has also brought on record an affidavit filed before the Executive Magistrate, Keonjhar dated 28.2.2020 bringing on record the said compromise. Since, in the instant case, the victim has completely flinched from her original version, the possibility of browbeating by the family cannot be ruled out. Thus, the evidence on record has to be looked at by reading between the lines. There is definitely more than meeting of the eye.

8. During the course of the hearing, the Ld. Counsel for the parties relied upon three documents i.e. Matriculation Certificate, Aadhar card and Report of Anganwadi Kendra, all of which provided for conflicting dates of birth. Apparently, there were conflicting dates, an exercise is required to be done by this Court to ascertain as to where there are conflicting dates of birth available on record then which of the documents would be more credence-worthy.

9. Since the central issue, at this stage, in the present case revolves around the question of determination of age of the victim based on divergent ages as indicated by three documents. Such a determination will naturally have a bearing on the culpability of the Petitioner herein in respect of the offences as outlined in the FIR. It is also noticed that such an issue, indicating conflicting date of birth recurringly comes up before this Court. It may not be out of place here to mention that the role of the State in such legislations at hand is like *parens patriae*. There seems to be a lot of divergence as to the age of a minor person or child which spread across 11 legislations from 14 years of age to 25 years depending on the purpose of the legislation. However, in so far as the Juvenile Justice Act and the POCSO Act are concerned, the age of majority is fixed at above 18 years. Therefore, an exercise must be undertaken to bring a quietus to such an issue in light of some leading precedents of the Supreme Court of India.

10. In ***Brij Mohan Singh v. Priya Brat Narain Sinha***[1] the Hon'ble Supreme Court held that the reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it in the discharge of his official duty, the probability of its being truly and correctly recorded is high. On the other hand, it was held that the same probability is reduced to a minimum when the public servant himself is illiterate and has to depend on somebody else to make the entry. In such case the evidentiary value of the document in question under Section 35 of the Evidence Act varies according to the maker thereof. In the case of ***Umesh Chandra v. State of Rajasthan***[2] it was held that oral evidence in respect of age has no value which could necessarily be proved only through documentary evidence. The court herein disbelieved a horoscope and relied upon the records maintained by the school. In ***Dayachand v. Sahib Singh***[3]

(1) (1965) 3 SCR 861, (2) (1982) 2 SCC 202, (3) (1991) 2 SCC 379

the Hon'ble Court held that although the tendency of many to have lesser age recorded in school is well known and can be easily appreciated but cannot be accepted as the same was clearly in conflict with the medical evidence. Thus, in the said case medical evidencewhich observes the physical developments especially with regard to the bone structure formation opine a certain age which trumped the records in the school register. In the case of ***Vishnu v. State of Maharashtra***[4] the Hon'ble Apex Court has chosen to believe the date of birth as indicated in the birth register maintained by the Municipal Corporation and disregarded the date of birth as recorded by the school register. The reasoning to do so has been that the best evidence with regard to the age of the child is that of the parents of the child. It has further held that credence-worthy documentary evidence will prevail over expert witness of a doctor and even ossification test. In the case of ***Birad Mal Singhvi v. Anand Purohit***[5] it was has held that the entries regarding the date of birth contained in the school's register or Secondary School Examination have no probative value and that a person such as the parents of the child who have special knowledge in terms of Section 35 of the Evidence Act, with regard to the age of the child need to give evidence to that effect, in order to prove those documents which reflect the age. In the absence thereof such documents would be of no evidentiary value. In the case of ***Pradeep Kumar v. State of U.P.***[6] the court has relied upon the School certificate as well as the age indicated by medical examination as both of them were consistent and indicated the same age. In the case of ***Bhoop Ram v. State of U.P.***[7] the court disbelieved the medical opinion and instead chose to rely on the date of birth as occurring in the School certificate since the said document had not been disproved by any party and gave the accused the benefit of doubt. In the case of ***Bhola Bhagat v. State of Bihar***[8] the court held that since the object of such laws being socially oriented legislation and intended to be beneficial in nature. An obligation is cast on the court in such cases where a plea is raised with regard to the juvenility of the age of the accused to direct an enquiry to be held and seek a report in that regard. It further suggested that subordinate courts must be issued an administrative direction that whenever such a plea with regard to juvenility is raised. There being a doubt on the said question, it is incumbent upon the court to conduct an enquiry by giving the parties an opportunity to establish the respective claims in order to return a concrete finding with regard to the age. In ***Ramdeo Chauhan v. State of Assam***[9] it was held that in case the school register was not maintained by a public

(4) (2006) 1 SCC 283, (5) 1988 Supp SCC 604, (6) 1995 Supp (4) SCC 419, (7) (1989) 3 SCC 1, (8) (1997) 8 SCC 720, (9) (2001) 5 SCC 714

servant in discharge of his official duty, then such an entry would not have a binding evidentiary value. It also held that although medical opinion could not be said to be definitive but in cases where the court was grouping in the dark some amount of guidance could be sought from such an opinion and it could not be discarded altogether. In ***Ravinder Singh Gorkhi v. State of U.P.***[10] it was held that when a particular statute requires the age to be determined in a particular manner, no artificial division could be made between civil and criminal cases and a uniform standard of proof must be followed. The court must endeavor to strike a balance keeping in mind that a benevolent approach needs to be taken. In ***Babloo Pasi v. State of Jharkhand***[11] the court disbelieved the age reflecting in the voters list as no evidence was produced as to the materials based on which such an age had been entered into the said list. In ***Jitendra Ram v. State of Jharkhand***[12] dealing with the issue of juvenility under the Juvenile Justice Act it was held that in the absence of any concrete documentary evidence, it was incumbent upon the court to follow the procedure prescribed under the statute and obtain a medical opinion with regard to the age. In Jyoti ***Prakash Rai v. State of Bihar***[13] the court held that since the School certificate and the horoscope were found to be forged, the court had no other option but to rely on the medical opinion. However, while doing so, the court observed that medical opinion could not be taken to be conclusive but a margin of two years on either side had to be taken and that a better approach would be to take the average of the medical opinion issued by different medical opinions. In ***Pawan v. State of Uttaranchal*** [14] the court was disinclined to believe the school leaving certificate which had been obtained after the conviction. In ***Hari Ram v. State of Rajasthan***[15] the court took note of the various provisions of the Juvenile Justice Act and opined that in case of any ambiguity with regard to the age, Rule 12 framed under the Act had to be taken recourse to in order to arrive at the age. In ***Raju v. State of Haryana***[16] the court directed that the age determination be done as per the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and the rules framed thereunder. In ***Shah Nawaz v. State of U.P.***[17] the court held that Rule 12 categorically provides that the medical opinion from the medical board should only be sought only when the matriculation certificate or school certificate or a certificate issued by a corporation are not available. That being the provision under the rules the court ought not to have overlooked the same especially when such a document was available on record and was

(10) (2006) 5 SCC 584, (11) (2008) 13 SCC 133, (12) (2006) 9 SCC 428, (13) (2008) 15 SCC 223, (14) (2009) 15 SCC 259, (15) (2009) 13 SCC 211, (16) (2010) 3 SCC 235, (17) (2011) 13 SCC 751.

credence worthy. In ***Om Prakash v. State of Rajasthan***[18] in an exception the Hon'ble Apex Court found the school certificate to be unreliable and went by the medical opinion as the same was based on scientific medical tests like ossification and radiological examination in order to determine the age of the juvenile. In ***Ashwani Kumar Saxena v. State of M.P.***[19] the court relied on the admission register of the school as clinching evidence. The reasoning that the parents would have given a wrong date of birth was taken to be a specious plea and disbelieved. It was also held that the issue of the juvenility could be raised at any point in time or at any stage of the proceedings. A similar view was taken in the case of ***Kulai Ibrahim v. State***[20]

11. In ***Sunil v. State of Haryana***[21] in the absence of school leaving certificate and the basis on which the age was recorded in the school register not having been produced the court went by the age as opined by the report of the dentist who had conducted the examination. In ***State of M.P. v. Munna***[22] the court held that the X-ray report of the ossification test could not be believed as the doctor who conducted the examination and opined on the age was never examined and also noticing that in the absence of any other documentary evidence the age was not successfully established by the prosecution.

12. In ***Jarnail Singh v. State of Haryana,***[23] the court for the first time took a view that although Rule 12 deals with a child in conflict with law but by using the judicial tool of reading is held that the same could be extended to determine the age of the victim also. It is a landmark decision in the sense that for the first time the court took note that although there was the legislation in place to determine the age of the accused there was a vacuum with regard to the mode of determination of the age of the victim. Thus by necessary judicial construction it has been held authoritative leave that the same rule, i.e., Rule 12, would be applicable to determine the age of the victim as well. In ***State of M.P. v. Anoop Singh***[24] the court held that minor discrepancies existing amongst two documents is irrelevant as long as the other evidences on record point in a certain direction. In ***Mahadeo v. State of Maharashtra***[25] the court relied on a series of documents which indicated that the age was in a certain range based on the documents which were on record and credence worthy.

(18) (2012) 5 SCC 201, (19) (2012) 9 SCC 750, (20) (2014) 12 SCC 332, (21) (2010) 1 SCC 742, (22) (2016) 1 SCC 696, (23) (2013) 7 SCC 263, (24) (2015) 7 SCC 773, (25) (2013) 14 SCC 637.

13. In ***Sri Ganesh v. State of T.N.***[26] the court held that in the face of relevant documentary evidence there could be no medical examination to a certain the age and any such direction passed by any court would be unwarranted. The court while taking such a view discouraged because from directing any medical examination if there was credence worthy documentary evidence on record given the scheme of the Juvenile Justice Act after its amendment. In ***Mukarrab v. State of U.P.***[27] the court observed that in the absence of a birth certificate issued by the authority concerned the determination of age becomes a very difficult task providing a lot of discretion to the judges to pick and choose evidence. It was held that if two views were possible, the court should lean in favour of taking a beneficial approach. It further summarized the issue stating that:

> (i) That a claim of juvenility may be raised at any stage and even after the final disposal of the case. It does not matter whether such a claim has been raised before the courts below;
>
> (ii) For making a claim with regard to juvenility the claimant must produce a material which may prima facie satisfy the court that an enquiry into the question of age determination is necessary and the burden lies on the party claiming a certain age;
>
> (iii) Although it is difficult to state as to what documents would be sufficient to raise a presumption of juvenility/age but the documents referred to in Rules 12 shall definitely be sufficient for the prima facie satisfaction of the Court about the age necessitating a further enquiry as contemplated under Rule 7. The credibility of documents like school leaving certificate or board certificate would depend on the facts and circumstances of each case. Even documents like school leaving certificate, Mark sheet, medical report et cetera could be treated to be sufficient for directing an enquiry and verification of the age if such documents inspire the confidence of the court;
>
> (iv) An affidavit of the claimant or the parents or siblings or any relative in support of age shall not be sufficient justifying an enquiry to determine the age in the absence of any other documents; and
>
> (v) Whenever a plea of juvenility is raised the court should always be guided by the objective of the Juvenile Justice Act and be alive to the position that the beneficent provisions must not be defeated by a hyper-technical approach which would disentitle persons to get the benefit of the legislation. The presumption that parents tend to decrease the age of the child while making an entry in the school admission role needs to be discouraged and such a plea ought not to be given much value.

14. From a conjoint reading of the aforesaid the principles as laid down by the Hon'ble Supreme Court dealing with a myriad factual backdrop although no straightjacket formula can be laid down. However, some common a thread that flows through with regard to the issue of age determination can be summarized as follows:-

(26) (2017) 3 SCC 32, (27) (2017) 2 SCC 210.

(a) Medical opinion based medical examination like observing the bone structure etc or tests like the ossification test or radiological examination can at best be stated to be indicative of the range of the age. Such medical opinion leaves a margin of about 2 years on either side.

(b) Reliance on medical opinion normally the last option that should be adopted by courts and only in the absence of any other documentary evidence.

(c) Credible documentary evidence will trump medical opinion

(d) The age determination of the accused as well as the victim can be done under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 in case of such an enquiry is directed by a competent court

(e) A reading of the aforesaid judgements indicates that by and large, the Hon'ble Supreme Court has been inclined to rely on the school certificate or matriculation certificate.

(f) Now, the procedure to arrive at the age in case of conflicting documents on record has be statutorily provided under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The said provision provides for a preferential regime where the school certificate or matriculation certificate has been accorded the highest preference. The same also creates a presumption as to the age by way of a deeming fiction.

15. Reverting to the facts of the case and applying the principles as discussed hereinabove. This court is inclined to go by the school admission register/ matriculation certificate not only due to leaning of the Apex Court on this issue as discussed hereinabove but also due to the fact that same now raises a presumption in law, albeit rebuttable, by way of a deeming fiction in terms of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. Thus, the age of the victim is taken to be 17 years 6 months and 21 days at the time of the offence, thereby prima facie attracting provisions of the Prevention of Children from Sexual Offences Act, 2012 as well as the other offences adumbrated in the FIR. In so far as the strenuous reliance of the Ld. counsel for the petitioner in the case of ***G. Achyut Kumar v. State of Odisha***[28] is concerned the same will have no application in the facts of the case as there was no issue of minority of the complainant involved therein

16. Considering the aforesaid discussion, submissions made and taking into account a holistic view of the facts and circumstances of the case at hand, this Court is not inclined to entertain the instant appeal. Accordingly, the present appeal u/s 14-A of the S.C. and S.T. (P.A) Act filed on behalf of the accused/appellant stands rejected.

17. It is, however, clarified that the observations made hereinabove shall not prejudice the appellant in any way and the Trial shall proceed uninfluenced by any of the prima facie observations. The Ld. Trial court may do well to apply the law as discussed hereinabove in the event the issue of age comes up before it and be guided by the aforesaid observations.

(28) 2020 (1) OLR 979

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